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The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World

Jane C. Ginsburg
Columbia Law School, jane.ginsburg@law.columbia.edu

ESSAYS

THE CYBERIAN CAPTIVITY OF COPYRIGHT: TERRITORIALITY AND AUTHORS' RIGHTS IN A NETWORKED WORLD*

Jane C. Ginsburg†

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INTRODUCTION

Let me start with two items of received wisdom: 1) Copyright is territorially-based;[1] 2) Cyberspace is not. But copyrighted works circulate in cyberspace. What does that mean for their protection? I have not labeled this essay "The Cyberian Captivity of Copyright," just because the title is alliterative and fittingly portentious for an

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† Morton L. Janklow Professor of Literary and Artistic Property Law, Columbia University School of Law. Thanks to Prof. Graeme Dinwoodie, Prof. Henry Monaghan, Prof. Leo Raskind, Prof. Robert Bone, and to Andrew Thompson, Columbia Law School, Class of 1999.

1. *See, e.g.*, PAUL GOLDSTEIN, COPYRIGHT §§ 16.0-16.2 (2d ed. & Supp. 1998).

inaugural lecture. Rather, like the "Babylonian Captivity" of the papacy in Avignon that the title recalls, it suggests a displacement of an international institution. This need not mean, however, that the displacement is a Bad Thing – after all, the French probably have a more favorable view of the Avignon sojourn than might others. (Similarly, as a Danish law professor testily informed me, the events provoking the fifth-century collapse of the Western Roman Empire that we in the U.S. learned to call the "Barbarian Invasions," Northern Europeans name the "Great Migrations.") It generally depends on whether one analyzes the issue from the point of view of the displacer or the displacee.

In this essay, the point of view I wish to take is that of authors who create or disseminate works over digital networks. I believe that their situation reflects both perspectives. Like the Avignon popes and the fifth century Roman emperors, authors might be considered displaced persons, because others might cast their works into the digital Empyrean, disconnected from physical points of attachment to any particular jurisdiction. But, like the Germanic tribes that crossed the Rhine River late in December 406, at least some authors might also be considered the displacers, because they choose to exploit the newly-found technological irrelevance of national borders. For example, in the analog world, selecting the country of first publication was a momentous choice, because it grounded the work in that country's legal system.[2] By contrast, however, today's authors can disseminate works through websites, or mount their own websites on servers whose nationality they may neither know nor care about. Today's authors may choose to use the Net to publish their works instantaneously in every country where users have Internet access.

The central issue is this: For authors, what are the consequences of this displacement of copyright exploitation from a legal regime rooted in a territorially bounded analog world, towards a reality situated in a ubiquitous digital world? Can one still identify a work's nationality, and does that matter? What about copyright ownership? Infringement? To a greater or lesser extent, every one of these concepts has been grounded on principles of territoriality. But if authors and their works are no longer territorially tethered, can changes in the fundamental legal conceptions of existing regimes for

2. *See, e.g.*, Jane C. Ginsburg & Pierre Sirinelli, *Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy*, 15 COLUM.-VLA J.L. & ARTS 135 (1991) (discussing differing treatment of authors of motion pictures under French and U.S. law).

the protection of authors be far behind? On the other hand, since cyberspace is not yet its own jurisdiction, future regimes must still derive their authority from territorial sovereigns. How then, does one project onto supra-national exploitations national substantive norms?

Consider the following hypothetical, inspired by a real controversy.[3] Fred, a publisher from a country we shall call Freedonia (with due credit to the Marx Brothers), produces a webpage, emanating from a server in that country. The webpage features photographs taken by American and foreign authors. In some cases, the images on the Freedonian site come from analog-published magazine photographs that the Freedonian entrepreneur has scanned and uploaded, without the authors' permission. In other cases, the Freedonian entrepreneur has, once again without authorial permission, downloaded the images from other websites The photographers now claim that the Freedonian publisher has violated U.S. copyright law by making copies of the photos available to U.S. users via the website.

This scenario raises many problems. This essay will consider four of them. First, with respect to those photographs first disclosed on websites, where are they "published"? What is (or are) their "country (or countries) of origin"? Fixing the country of origin is relevant to determining whether the works are protectable under U.S. copyright law.

Second, identifying the work's country of origin also is relevant to the question of copyright ownership. For example, the copyright law of the country of origin might tell us whether the copyright owners of the photographs are the photographers, or if the copyright owner is instead the magazine or website publisher. Thus, even if the *works* were protected in the U.S., the question still remains whether the *photographers* have any rights to assert.

Third, with respect to the issue of infringement, what country's copyright law applies? Is the response, the law of each country in which the public can receive the website? This approach, while it

3. The events inspiring the hypothetical concern the unauthorized scanning and uploading to a cybercafe's website of *Le Grand Secret*, a banned biography of the late French President Mittérand. The events were reported at the time by the French press. *See* Michel Alberganti & Hervé Morin, *Internet Contourne la Censure du Livre du Docteur Gubler*, LE MONDE, Jan. 25, 1996, at 1; Paul-André Tavoillot, *Le Droit de l'Internet Existe Personne ne l'a Rencontré*, LA TRIBUNE, Jan. 25, 1996, at 6; David Dufresne, *Besançon, Site Sismique*, LE CAHIER MULTIMEDIA DE LIBÉRATION, Jan. 26, 1996, at I-II. *See also* Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032, 1034-35 (S.D.N.Y. 1996) (concerning an Italian website that made "Playmen" magazine available for worldwide downloading).

respects conventional notions of territoriality, also carries cumbersome consequences: it might mean that a court must apply the laws of every country in the world from which Internet access may be had. We will therefore inquire into alternative principles to designate legislative competence over infringements.[4]

Fourth, and finally, let us shift focus from infringement to licensing. Principles of territoriality would again suggest that a copyright exploiter who seeks to clear rights for use on the Internet must obtain rights for each potential country of receipt. But here again, the implementation of that principle seems excessively unwieldy. We will therefore explore the alternative of confining legislative competence to the country from which the work is made available.[5]

ARE FOREIGN AUTHORS PROTECTED IN THE U.S.?

Recall that Fred the Freedonian collected the photographs from two kinds of sources, print magazines, and the Internet. We shall assume that the photographs that Fred downloaded were first disclosed over the Internet. Whether the print and digital media photographs are protected in the U.S. is easier to answer than who is the proper copyright claimant. Works by non-U.S. authors that are first published outside the U.S. will be protected, and treated as if they were U.S. works, if any of the following three criteria apply: 1) the country of first publication is a member of a multilateral treaty of which the U.S. is a member; 2) that country otherwise enjoys copyright relations with the U.S.; or, 3) the author is a national or domiciliary of such a country.[6] Assuming that the photographers are nationals or domiciliaries of one of the 131 countries that are party to

4. A significant additional issue concerns the question of whether the U.S., or any other national forum, would have jurisdiction to hear the full geographical scope of copyright infringement claims against a foreign defendant, such as our Freedonian, who has made a work available in every country of the world, but who neither resides in, nor has made the work available from the forum, for example by sending it to a webpage hosted by a U.S. server. For present purposes, I will confine the inquiry to downloads received (or receivable) in the U.S. For a more extensive analysis of this question, see, for example, Jane Ginsburg & Myriam Gauthier, *The Celestial Jukebox and Earthbound Courts: Judicial Competence in the European Union and the United States over Copyright Infringements in Cyberspace*, in 173 REVUE INTERNATIONALE DU DROIT D'AUTEUR 61 (1997).

5. Inquiry into the liability of the service providers that host or provide access to Fred's webpage is beyond the scope of this Essay. For analysis of the liability of online service providers under the Digital Millennium Copyright Act, and its implications for foreign authors and website operators, *see* Jane C. Ginsburg, *News from the U.S., Part I*, in 179 REVUE INTERNATIONALE DU DROIT D'AUTEUR 143 (1999).

6. *See* 17 U.S.C. § 104 (1994).

the Berne Convention,[7] the photos will be protected, regardless of their place of first publication.[8] Moreover, when a work is published via the Internet, one might conclude that the work is simultaneously "first" published in every country in the world, including in the U.S. In that case, the work would be considered a U.S. work, and its protection under U.S. law would be assured — or assured to the extent that U.S. law applies, and can offer meaningful protection. Even if, however, U.S. law applies to determine that the foreign-originated photographs benefit from the protection of the U.S. copyright laws, we still need to determine whether the photographers themselves are the proper claimants. And in order to make that determination, we need to identify the law that is competent to govern initial copyright ownership. The Second Circuit, in the first federal appellate decision to squarely confront the question of what law applies to determine copyright ownership, held that U.S. courts should consult the law of the country having the most significant relationship to the creation and publication of the foreign work.[9] Applying this rule, if the photographers are copyright owners under the law of that country, then their copyright ownership in the U.S. should be recognized as well.

Traditionally, the country with the most significant relationship to the work would be the country of first publication.[10] With respect to the magazines, that country should be easy to ascertain. But, with respect to the Internet sources, identifying the country of first publication is not so simple a matter. For example, "publication" traditionally meant distribution of copies to the public.[11] Accordingly, when a work is first disclosed over the Internet, should one therefore look to the country where the public first received copies? Such a place might be difficult to establish. Moreover, that

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7. *See Contracting Parties of Treaties Administered by WIPO: Berne Convention for the Protection of Literary and Artistic Works* (visited March 15, 1999) <http://www.wipo.org/eng/ratific/e-berne.htm> for a list of current signatories to the Berne Convention.

8. *See* Berne Convention for the Protection of Literary and Artistic Works, art. 3.1(a), June 4, 1986, Hein's No. KAV 2245, Temp. State Dep't No. 99-27, at 40.

9. *See* Itar-Tass Russian News Agency v. Russian Kurier, Inc., 153 F.3d 82, 90 (2d Cir. 1998) (looking to the law of the country with the most significant relationship to the work to determine initial copyright ownership; in that case, that country was the country of the work's first publication).

10. *See* Berne Convention, *supra* note 8, at art. 5.4 (stating country of first publication is deemed "country of origin").

11. *See, e.g.*, 17 U.S.C. § 101 (1994) (definition of publication); Berne Convention, *supra* note 8, at art. 3.3 (definition of "published works").

location may well be arbitrary, since the country of first receipt could depend, for example, on nothing more than the recipients' relative modem speeds. Perhaps, then, one should look to the country or countries from which the authors uploaded the work to their websites. This approach too, however, might be completely arbitrary, because one may upload a work from anywhere, including a country one is just passing through. The work therefore may have no meaningful connection to the country of upload.

What then of the country or countries in which are localized the websites and servers from which the photographs first became available to the public? This could be a relevant criterion, if the uploading author selected the website or server because of qualities relevant to its geographical location. In such a case, the author would have chosen to associate the work with a particular jurisdiction. If, however, as may often be the case, the author is unaware of or indifferent to the territory in which the server is located, the place of the server will have no particular significance for the work. This may often be the case when the author posts the work to her own webpage. In that case, the country with the most significant relationship to the work may be the country of the author's residence. By contrast, however, when the author posts to a third-party webpage, the third party may assume a role analogous to that of a traditional publisher. If so, the country in which the webpage is localized might be considered the country of the photograph's origin. That country might be the country where the server is located, but instead it might also be the country of the residence or principal place of business of the webpage operator.

Let us focus on a concrete example, by returning to Fred the Freedonian, and his website. Suppose that the photographs featured on Fred's site include images by the renowned French photojournalist Henriette Bresson-Cartier. Suppose further that she is employed by an Internet photo magazine called Magma, whose principal place of business is located in a country we shall call Pontevedro, with due acknowledgment to Franz Lehar's *The Merry Widow*. Magma's website, however, is not located on a Pontevedran server. Rather, because of the superior capacity U.S. online service providers offer, the Magma webpage resides on the server of the (fictional) U.S. service provider, Pangaea. Under these circumstances, which is the country with the most significant relationship to Bresson-Cartier's photos? The answer matters, because that country's law will determine who is the copyright owner. Under U.S. law's "works made for hire" doctrine, the copyright in works created by employees

belongs automatically to the employer.[12] Consequently, if U.S. law applied, Magma would be the copyright owner; Bresson-Cartier would have no standing to sue Fred the Freedonian. French law, by contrast, does not attribute copyright ownership to the employer. The publisher of a "collective work," such as a magazine, owns the copyright in the collective work, but not in the separate contributions; although the contributors are not permitted to exploit their contributions in a way that competes with the exploitation of the works as a whole.[13] If French law applied, therefore, either or both Magma and Bresson-Cartier might be proper plaintiffs, depending on whether Fred the Freedonian's copying was limited to single images, or captured some of the collective aspects of Magma's magazine. Under Pontevedran law, we will postulate that authors retain full copyright ownership of their works regardless of their employment status, and that there is no special provision for collective works. That would mean that only Bresson-Cartier would have a claim against Fred.

Based on the principles outlined earlier, I believe the country with the most significant relationship to the work is Pontevedro, home to Bresson-Cartier's employer-publisher. Admittedly, the U.S. has a link to the work, since Bresson-Cartier's publisher deliberately selected a U.S.-based server because of its superior technical capacity. Nonetheless, the more significant relationship would seem to be the one between the work's creator and the party who commissions and arranges for the disclosure of the work, in this case, Magma. To draw on an analog world analogy, the location of the printing plant is not usually taken into consideration in identifying either the place of a work's "publication" or the country with the most significant relationship to the work. Hence, an American "coffee table" book may well be printed in Italy, where the quality and cost of color printing may compete favorably against the services of U.S. printers, but the book itself does not assume an Italian nationality as a result. The balance of significant contacts might be different were Bresson-Cartier a freelance photographer who had no particular relationship with the website publisher. In that case, the law of the author's residence might better apply.

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12. *See* 17 U.S.C. § 101 (1994) (definition of work made for hire); *id.* at § 201(a).

13. CODE DE LA PROPRIETE INTELLECTUELLE, art. L.-113-5 (Fr.), *translated in* COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1991-1995); Paris Ct. App., Decision of April 18, 1991, in 153 REVUE INTERNATIONALE DU DROIT D'AUTEUR 166 (1992).

WHAT LAW APPLIES?

If Pontevedran law applies to determine copyright ownership and standing to sue, then Henriette Bresson-Cartier may initiate an infringement action in the U.S. Fred the Freedonian would be subject to the jurisdiction of the U.S. courts because copies of Bresson-Cartier's works are accessible in the U.S. via Fred's website.[14] What national law will apply to the copyright infringement claim? At first blush, one might conclude that U.S. law applies, because the court's jurisdiction turns on copies that can be received in the U.S. Assuming, however, that the court also had jurisdiction over Fred regarding infringement claims concerning copies received outside the U.S., what law would apply to those claims? Logically, the law of each jurisdiction in which the photographs can be downloaded would apply. But, this result, albeit consistent with the principle of territoriality, produces such a plethora of laws, that one might fear dismissal of the foreign-law claims — and maybe even the U.S. law claim — on grounds of *forum non conveniens*, especially if the plaintiff and defendant are non-U.S. parties. (A few years ago, a majority of a Ninth Circuit panel resorted to this kind of litigation insularity in *Creative Technologies v. Aztech Systems.*[15]) It might be simpler if only the law of the country from which the infringement originated applied. But what if it turns out that Freedonia is to copyright law what the Cayman Islands are to tax law? We do not want to formulate a choice of law rule that will encourage Internet entrepreneurs to migrate to "copyright havens."[16]

As a variation on this theme, we might presume that the law of the point of departure applied, but allow the plaintiff to invoke the laws of the places of receipt, in the event that the former turned out to be a copyright haven.[17] Where the defendant's law offers a sufficient level of protection, the copyright owner may prefer to invoke that law, both because it makes the court's task simpler (particularly if the forum is also defendant's), and also because, in some cases, that law

14. With respect to the standing of other photographers whose works Fred the Freedonian has posted to its website, it would be necessary to identify the countries whose law will determine copyright ownership.

15. Creative Techs., Ltd. v. Aztech Sys. PTE, Ltd., 61 F.3d 696 (9th Cir. 1995) (dismissing for *forum non conveniens* because both plaintiff and defendant were Singaporean).

16. *See* European Commission, Proposal for a Council Directive concerning cable and satellite transmissions, Explanatory Memorandum, COM (91)276 final at 4.

17. *Cf.* Andreas Reindl, *Choosing Law in Cyberspace: Copyright Conflicts on Global Networks*, 19 MICH. J. INT'L. L. 799 (1998) (proposing alternatives to the law of the point of departure).

may in fact be *more* protective than the law of some of the countries of receipt. This last feature makes this proposal attractive to copyright plaintiffs. However, is it fair to copyright defendants? One might argue that defendants have, in effect, already engaged in applicable-law-shopping, by locating their residences or business operations in a particular country. If a defendant wished to be subject to a weaker law, it could have moved to that country. So it cannot be unfair to subject a defendant to the worldwide application of a law that was of its own choosing.[18]

On the other hand, this approach abandons the basic premise of territoriality that underlies international copyright law.[19] It disregards the interest that individual sovereign nations may have in seeing that their laws apply to infringements that can be localized on their territories. Effective enforcement of the author's rights presumes that the author *enjoys* those rights in each territory for which enforcement is sought, but authors may enjoy more rights in some territories than in others.

The territoriality objection also renders problematic another alternative choice of law rule, one that would look to the law of the country with the most significant relationship to the work.[20] If we are only dealing with Henriette Bresson-Cartier's claim in her freelance photographs, this approach would have the considerable practical appeal of simplifying the action, so that only the law, in this case, of the author's residence applies. On the other hand, if there are many plaintiff authors (or publishers), this approach will not simplify matters. Moreover, even limiting the claim to Henriette's, this approach does effectively allow French copyright law to rule the world — a result to be applauded, or deplored, depending on whether or not one is a Francophile. More seriously, because this approach turns the law of the author's or publisher's residence into the law that determines defendant's liability for the entire world, it may promote a different kind of migration — of authors, and particularly publishers, to the most copyright-protective jurisdictions. Just as courts will be reluctant to apply a law that offers inadequate protection, so some courts, particularly in the U.S., will hesitate to apply a law that does

18. A possible unintended consequence of this argument is to hasten flight to copyright havens.

19. *See* Berne Convention, *supra* note 8, at art. 5.2.

20. A special commission of the French *Conseil d'Etat* has recently advanced this proposal. *See* FRANCE, CONSEIL D'ETAT, INTERNET ET LES RÉSEAUX NUMÉRIQUES 150-52 (1998).

not recognize exceptions to copyright along the lines of our "fair use" doctrine.[21]

If defendant's law is too lax, and plaintiff's law too unforgiving, perhaps we need to reconsider resort to the laws of the countries of receipt. One way to alleviate the complexity of distributive application of the laws of the countries of receipt of infringing communications might be to presume that the laws of all these countries have assimilated the minimum standards of protection commanded by the Berne Convention and TRIPs accord,[22] and leave proof to the contrary to the defendant.[23] In effect, the forum (assuming it is a Berne or WTO country) would apply its own copyright law to adjudicate the infringement claim, on the theory that its domestic law implements the substantive provisions of these treaties. Through its adoption of the treaties, the forum's law thus becomes a kind of supranational copyright law,[24] subject to demonstration that in particular countries the standard is less (or more) protective. In order to avoid divergences among jurisdictions, the forum might also interpret its own law in light of other national courts' interpretations of their substantive obligations under the Berne Convention.[25] In either event, the court would then apply the national law(s) at issue to determine whether an infringement occurred in that particular territory, and if so, what should be the remedy.[26] Applying

21. *Compare* 17 U.S.C. § 107 (1994) (open-ended criteria) *with* CODE DE LA PROPRIETE INTELLECTUELLE, art. L.-122-5 (Fr.), *translated in* COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1991-1995) (closed list of exceptions to protection).

22. General Agreement on Tariffs and Trade – Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, 33 I.L.M. 81 (1994). April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instrument — Results of the Uruguay Round, vol. 321, 33 I.L.M. 81 (1994).

23. *Cf.* Pearce v. Ove Arup Partnership Ltd. [1997] L.R. 293 (Ch.) (presuming similarity of Dutch copyright law with English copyright law); RICHARD FENTIMAN, FOREIGN LAW: PLEADING AND PROOF 147-53 (1998) (discussing English courts' presumption that the content of foreign law is the same as that of English law).

24. This approach has attracted both adherents and detractors among U.S. judges confronting similar problems of a multiplicity of applicable laws in the context of mass tort litigation. *Compare In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 708-13 (E.D.N.Y. 1984) (finding it not necessary to apply presumption regarding the content of foreign law since the court instead determined that the states whose laws were at issue would apply a "national consensus" law to the mass tort claim at issue), *with In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300-02 (7th Cir. 1995) (finding district court exceeded discretion in proposing to apply an amalgamated common law standard to determine negligence in a 50-state class action suit).

25. *Cf.* Air France v. Sacks, 470 U.S. 392, 399-400 (1985) (interpreting Warsaw Convention in light of, *inter alia*, French court's interpretations).

26. *See, e.g.*, Louknitsky v. Louknitsky, 266 P.2d 910, 911 (Cal. App. 1954); Leary v.

this approach to Henriette's claim against Fred, if Henriette sues in the U.S., the court should apply U.S. law to determine worldwide infringement, subject to a showing by Fred that in some jurisdictions, no violation would be held to occur.

FROM INFRINGEMENT TO LICENSING

The analysis so far suggests that, far from being held captive in a lawless Cyberia, international copyright in the digital age will remain territorially grounded, although that grounding will be alleviated by some supranational norms that transcend national boundaries. But so far we have considered the problems of Fred, the Freedonian website operator, and Henriette Bresson-Cartier, the photographer, only from the point of view of copyright infringement. Let us suppose instead that Fred seeks a license from Henriette so that he may post her photographs with authorization. Let us also suppose that Henriette no longer owns worldwide rights to all of her photographs. For more recent works, we will assume that Magma has acquired a world-wide exclusive Internet distribution license, and is not inclined to sublicense Fred. So Fred turns to Henriette's older works. We will suppose that, back in the analog days, Henriette engaged in territorial licensing, granting North American publication rights to one publisher, European rights to another, and so on across the continents. From whom must Fred obtain Internet rights to the photographs?

A first question is whether Henriette's contracts with print publishers would be interpreted to extend to new modes of exploitation, such as digital media. The answer will turn on the domestic law that governs the contract, as well as the precision (or lack of it) of the contract's terms. In some jurisdictions, the copyright law prohibits grants of rights in modes of exploitation unknown at the time of contracting;[27] in others, these grants are permitted, so long as the contract explicitly covers them;[28] in still others, courts confronted with grants that are ambiguous as to their scope interpret the contracts

Gledhill, 84 A.2d 725, 728-29 (N.J. 1951). *But cf.* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 819-23 (1985) (declining to apply Kansas law when Kansas had little connection to either the plaintiffs or the suit's subject matter); Castano v. American Tobacco Co., 84 F.3d 734, 740-44 (5th Cir. 1996) (decertifying multistate class action because the district court failed adequately to analyze possible variations in state law).

27. *See, e.g.*, German Copyright Act of September 9, 1965 [*Urheberrechtsgesetz*] (published in *Bundesgesetzblatt*, I, p. 1273, No. 51, of September 16, 1965), *translated in* 1 COPYRIGHT 251 (1965), art. 31(4).

28. *See, e.g.*, CODE DE LA PROPRIETE INTELLECTUELLE, art. L.-131-6 (Fr.), *translated in* COPYRIGHT LAWS AND TREATIES OF THE WORLD (Supp. 1991-1995).

by applying a presumption that, depending on the jurisdiction, places the burden either on the grantor to withhold rights,[29] or on the grantee specifically to obtain them.[30] Fred may end up negotiating with Henriette for some territories, and with her grantee publishers for others.

Does Fred have to obtain rights from all holders of territorial rights in Henriette's photographs if he wishes to make the photographs available over the Internet? Arguably, it might be sufficient to clear rights in the country from which a digital dissemination emanates. The cumbersomeness of an obligation to obtain rights for all countries in which the dissemination can be received spurred adoption of a simplified rule in the European Union regarding satellite transmissions.[31] Since many countries may come within the "footprint" of the satellite signal, the European Commission determined that the act of uplink would be the copyright-triggering act: so long as the satellite broadcaster cleared rights in the country of uplink, then receipt of the signal in other European Union countries would not infringe the copyright owner's public performance rights in those countries.[32]

From the point of view of website operators, there is much to be said for this kind of one-stop worldwide rights clearing. Clearing rights only in the country of upload makes it possible to ignore the copyright laws of the countries of download. One might call this the "Wernher von Braun approach to Internet licensing." (For the uninitiates, Tom Lehrer sang, "Once the rocket goes up, who cares where it comes down — 'that's not my department!' says Wernher von Braun."[33]) Lest one accuse the European Union of flippant disregard of the consequences of an uplink-based rule, however, note that the European Commission also provided that the "amount of the payment for the rights acquired" should take into account "all aspects of the broadcast, such as the actual audience, the potential audience and the language version."[34] That is, even though the *terms* of the satellite transmission license need conform only to the law of the

29. *See, e.g.*, Boosey & Hawkes Music Publishers v. Walt Disney Co., 145 F.3d 481, 488 (2d Cir. 1998).

30. *See, e.g.*, Cohen v. Paramount Pictures Corp., 845 F.2d 851 (9th Cir. 1988).

31. *See* Council Directive 93/83, 1993 O.J. (L 248), [hereinafter *Satellite Directive*], *available in* LEXIS, Intlaw Library, ECLAW File.

32. *See id*, recitals 14 & 15; art. 1.2(a)(b).

33. TOM LEHRER, *Wernher von Braun* on THAT WAS THE YEAR THAT WAS (Reprise Records 1965).

34. *See Satellite Directive, supra* note 31, at recital 17.

country of uplink, since that is the country from which the "act of communication to the public" occurs, the *price* of the license should be based upon the actual and potential public for the work, not only in the country from which the signal goes up, but also in the countries in which it comes down.

This does not mean that the Wernher von Braun approach is problem-free. There are at least two significant concerns. First, where the transmission "goes up" may be a problem, if the point of departure is a copyright haven. In the Internet context, what *is* the point of departure? The place where the server is located, or the place where the website operator has its residence or headquarters? Under the Satellite Directive, the copyright-engaging act occurs in the physical place of uplink.[35] But if this place is located outside the European Union, and it does not provide for adequate protection, and the uplinking organization has its headquarters in the European Union, then the Satellite Directive prefers the intellectual to the physical location of the place of the uplink: the Directive provides that the location of the headquarters will trump offshore siting of the physical equipment of uplinking.[36]

Applying these principles to the Internet, the "act of communication to the public" would occur where the server is located, unless this turns out to be a copyright haven. In that case, one would look to the law of the country of the website operator's residence/principal place of business. If neither of these countries maintain an acceptable level of protection, it may then be necessary to fall back on rights clearance for every country of receipt.[37] Since the transaction costs of country-by-country rights clearance are likely to be formidable, the law-abiding website operator has an incentive either to disseminate from a server located in a copyright-respecting country, or to locate its business in such a country.

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35. *See id.* at art. 1.2(b).

36. *See id.* at art. 1(d)(ii). The act of communication to the public is "deemed to have occurred in the Member State in which the broadcasting organization has its principal establishment." *Id.*

37. Alternatively, the licensor might subject the license agreement to the law of the author's residence. This law has a connection with the work, but not with the act of digital dissemination, which would be attached to either, or both, the place of departure, or of receipt, of the communication. Analytically, the designation of the place of departure characterizes the copyright-implicating act as occurring "where it goes up," rather than "where it comes down." Even if it seems problematic to abstract from the places of receipt, at least the point of departure has a relationship (if not an exclusive one) with the act of communication to the public. The author's residence does not.

Returning to our hypothetical, suppose that Fred became dissatisfied with his Freedonian service provider, and switched to the U.S.-based Pangaea. Under the approach just outlined, the law under which rights should be cleared would be the law of the U.S., where the server is located. U.S. copyright law may be more author-protective than Freedonia's, but that drawback might be offset by the superior computing capacity available in the U.S. If Fred stays with a Freedonian service provider, then Freedonian law, if adequate, will frame the terms of the license, but the license price will still need to reflect worldwide use. Of course, if Freedonian law, or Fred's price, are inadequate, Henriette Bresson-Cartier or her territorial licensees will not want to license Fred.

The second problem with the Wernher von Braun approach is that it may make sense only when territorial rights have not already been allocated. With respect to prior territorial grants, application of the law of the uplink could divest Henriette's prior licensees of their acquired rights.[38] It therefore appears that Fred must obtain licenses from all prior territorial grantees, unless Fred is willing and able to set up his website to deny access to users from territories for which he has not acquired the rights.[39] The same would apply to any other prior holders of territorial rights. For example, if Fred has acquired rights for the whole world, other than the U.S., then the U.S. licensee must limit access to its site to U.S. users.

This should not mean that Fred's website must reside on a server outside the U.S. In this case, commercial reality, as well as the doctrine of territoriality, undermine the European Union shortcut of presumptively deeming the country of origin of the communication as the only country in which a copyright-triggering act occurs. Rather, the opposite characterization should apply: so long as Fred's users are located outside the U.S., it should not matter that they view or obtain images of Henriette's work by means of a server located in the U.S. In the context of prior grants, the Wernher von Braun approach should be rejected, it should not matter where the distribution comes *from*, but rather, where it is going *to*.

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38. *See Satellite Directive*, *supra* note 31, at recital 18 (recognizing that "application of the country-of-origin principle contained in this Directive could pose a problem with regard to existing contracts"); *see also id.* at art. 7.2 (agreements in force as of the Directive's effective date will not be subject to the Directive until January 1, 2000, if the agreement was due to expire after that date).

39. *Cf.* Playboy Enters., Inc. v. Chuckleberry Publ'g, Inc., 939 F. Supp. 1032 (S.D.N.Y. 1996) (requiring Italian website operator to deny access to U.S. viewers of "Playmen").

CONCLUSION

In a world of digital communications, copyright remains rather earthbound. So long as substantive differences persist between national laws allocating copyright ownership, it will be necessary to fix a territorial origin for the work: identifying the initial copyright owner in the country of the work's origin (the country with which the work has the most significant relationship) is, and should remain, the prerequisite to determining who is a proper copyright claimant anywhere in the world. Similarly, so long as countries differ in their definition of the scope of protection, assessments of copyright infringement will continue to be encased in a territorial mosaic.

By contrast, when copyright owners seek to license rights for Internet exploitation, the territorial tether relaxes. When a work is not subject to prior territorial grants of rights, no conflicting claims should hamper authors' ability to authorize worldwide Internet exploitation. Nor does it seem inappropriate to subject that authorization to the law of the single country of upload, at least when that country affords a meaningful level of copyright protection. As a practical matter, the parties will not ignore "where it comes down," since the price of the license will reflect the value of the exploitation in all countries of receipt.

So copyright is not, or not yet, the captive of Cyberia, mainly because copyright retains a strong sense of place, and Cyberspace is not a "place." That said, the Internet certainly is *dis*placing many aspects of international copyright, by accentuating an earlier trend to simplify copyright analysis from a plethora of places to, where possible, a single one. But that single place may vary depending on whether one is seeking to find out who the copyright owner is, or whether her work has been infringed, or how to go about clearing rights in it.