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Commitments to Territoriality in International Copyright Scholarship

Graeme B. Dinwoodie, *Chicago-Kent College of Law*

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Graeme B. Dinwoodie¹

The Internet has forced us to reconsider the practical and normative value of territoriality as a dominant legal principle with a seriousness that we have not seen since the earliest days of the Berne Union. But international copyright law, and much private international law generally, remains committed to the principle in the face of internet-based challenges to its continued validity or practicality. In these remarks, I will explore the differing levels of that commitment in the choice of law context.

If one looks at the approach of scholars, courts and policymakers to the developing problems of choice of law in copyright infringement one might conceive of their approaches in terms of their different commitments to territoriality. Let me suggest four basic levels of commitment.

1. Regressive or Nationalistic Territoriality

Under this traditional view, national courts apply their own copyright law to events (alleged infringements) occurring in their own country, *and* do not entertain proceedings related to alleged infringements under other national laws. This second component of thought (the refusal to entertain cases arising under foreign copyright laws) flowed as much from a nationalistic view of the role of courts as from any position on territoriality of copyright. You might regard it as a territorial attitude toward adjudicative jurisdiction but is by no means a necessary component of a territorial approach to copyright. But this approach was followed in many countries for many years. In the United States, it found expression in statements that courts did not have subject-matter jurisdiction to hear cases involving alleged infringement abroad.

2. Reformed Territorialism

Recently, however, a group of courts and scholars have recognized that national courts should hear cases involving alleged infringement arising under foreign copyright laws. More specifically, these courts have been willing to adjudicate domestic and foreign claims in a single proceeding. These developments, supported by several commentators, have occurred both in the United States and in the European Union, and have given rise to what I call reformed territorialism.

Under this view, the *practical reality* of internationalization and the internet demands that multiple national claims be resolved in a single proceeding. But the *normative* claims of territoriality are sufficiently strong that this should still involve adjudication of conduct under each national law allegedly implicated. This normative argument may rest on a variety of premises: recognition that the nation-state is still an important (if not the primary) unit of political expression; a belief that culture and cultural policy are nationally rooted; and a stated respect for the value of diversity of laws, both because of different social and cultural conditions,

¹ Professor of Law, Norman & Edna Freehling Scholar, and Director, Program in Intellectual Property Law, Chicago-Kent College of Law. Comments can be directed to gdinwoodie@kentlaw.edu

but also because of the value of experimentation with different national laws before an international consensus develops.

Indeed, for some proponents of this approach, permitting the application of foreign copyright laws may be the best defense to their fear of universality. That is, the practical pressure to resolve disputes in a single proceeding in our global climate is such that, if this reformed approach is not adopted, alternative approaches that localize an entire international dispute in a single state and thus effectively extend that law universally will come to pass by virtue of necessity.

In the United States in the last four years several courts have begun to entertain actions where claims alleged under several foreign copyright law. Most notably, the approach was endorsed by the Court of Appeals for the Second Circuit in *Boosey & Hawkes v. Walt Disney*. In practical terms, given the current commitment of copyright law to the principle of territoriality, consolidated litigation is clearly a step in the right direction. *Boosey & Hawkes* is a good example: as a result of consolidated, there was a global settlement of claims under eighteen different foreign copyright laws. Separate adjudication of those claims would have been extremely wasteful.

But we need to adopt a proper perspective on the extent of this claim of practicality. It is easy to say that courts should entertain claims under eighteen different foreign laws, as the Second Circuit (an appellate court) instructed lower courts to do. It is another thing to *try* those cases. Indeed, although there are several cases since 1998 where multiple foreign claims have been permitted to proceed, none of these has gone to trial. Permitting the filing of the claims – and threatening trial – may increase pressure to settle claims globally. Actually trying multiple foreign claims may produce fewer practical advantages than first thought. Yet this concern is tempered by the reality that there are not truly 180 different foreign copyright laws. Copyright laws are not that divergent, and are increasingly less so because of international harmonization. Yet, recognizing the potential problems of adjudicating numerous national claims in a single proceeding is important in order fairly to compare this suggested approach with other alternatives at least from the practicality perspective.

3. Pragmatic Territorialism

The fact that this second approach may have fewer practical advantages than first apparent may counsel in favor of a third approach to territoriality, which I refer to as pragmatic territorialism.

Under this heading, I group courts and scholars seeking, through a variety of doctrinal rules, to apply their *own law* to all alleged acts of copyright infringement, notwithstanding that the allegedly infringing activities occur in an international or multinational space. These proponents elevate the practicality of a single proceeding *and*, importantly, a single *law* in their analysis.

In the United States, this theory finds readiest expression in doctrines that are variously called the “root copy” theory, the “predicate act theory” or the “nerve center theory. Under these theories, once U.S. copyright law is applied to an initial act within the United States, the U.S. courts may extend their reach (and, implicitly, the reach of U.S. law) to acts abroad.

Although I cast pragmatism or practicality as the motivating force here, I do not do so critically. Indeed, what I am calling practicality or pragmatism can easily be recast as a policy with normative underpinnings close to the heart of ALAI, namely, the effective enforcement of authors' rights on an international level. Moreover, the process of localizing an international dispute occurring in more than one country as fictionally occurring within a single county – or at least under a single law – is a traditional function of rules of private international law.

But one should be aware that this extends the copyright rules of a single state over a broad range of multinational claims that may implicate the competing interests of a number of other states. If followed in several countries, without any internationally-agreed rules of private international law regarding the courts that can properly entertain such disputes, this raises the prospect of a race to the courthouse. If copyright owners can seek universal solutions to their problems by forum shopping for a court that will provide favorable multinational relief, infringers can forum shop for copyright havens. (Although the practical force of this observation depends upon the nature of declaratory procedures; and infringers will shop more in establishing their business than in seeking adjudication of disputes). This approach to territoriality will work most effectively, therefore, when backed up by a treaty regulating jurisdiction and recognition and enforcement of judgements, a topic that will be addressed this afternoon.²

4. Internationalism

A final level of commitment to territoriality can be found in what might be termed an internationalist approach. Under this view, courts faced with an international copyright dispute should apply the proper or best law for an international dispute, which may or may not be a single national law. This obviously represents the most radical departure from territoriality (what Geoffrey Yu this morning called the “quantum jump” that might be necessary), though one with some parallels to the Uniform Domain Name Dispute Resolution Policy that will also be discussed this afternoon.

This internationalist philosophy can assume different concrete forms. For example, it could involve the common law development of rules applicable to international copyright disputes, which I have urged on US courts. Alternatively, it might be pursued through the negotiation of an international copyright code, as Adrian Sterling has advocated.

The internationalist approach would elevate importance of treaties and other sources of international copyright norms. But in this vision, treaties are not a constraint on national law; rather, they provide a source of international norms for national courts (or specialized tribunals, in Adrian's proposal) to apply in international disputes.

Of course, treaty standards were written as minimum standards, not as idealized norms. There is a danger of treaty misinterpretation, of viewing such standards as some sort of model law; that is not their function, at least as conceived when adopted. And if resort to treaty standards became the norm in national court interpretation, this might affect nature of lawmaking in multinational for a (such as WIPO) and generate pressure to develop “ideal” standards. (The work of WIPO

² I should note, parenthetically, that such a treaty would help support other approaches to territoriality, in particular reformed territoriality; but that too is for this afternoon's discussion).

Standing Committees, and the development of non-binding recommendations, might arguably be viewed in this light.)

This highlights the different use of treaty standards in private and public international litigation. And other scholars have suggested uses that are more conscious of that different role. For example, Jane Ginsburg has endorsed a cascade of choice of law rules in international copyright litigation, but would use the treaty standards as a baseline of acceptability before any national law were chosen.

Conclusion

But international rules are still not universal rules. We will still have to questions of *vertical* choice of law, namely, what is the range of circumstances in which national law should apply and when should international law apply. This is an active part of EU lawmaking, and will at some point confront the UDRP. Of course, this is not hugely different from the choice faced by the drafters of the original Berne Convention. But what that balance is might irrevocably be altered by our new digital and globalized society. And it will no doubt be affected by the level of commitment we have to territoriality as a guiding principle of international copyright law.