Modern challenges to Lex Loci Protectionis: A need for change?

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INTRODUCTION

1. Millions of art pieces, songs, pictures, stories, and blogs are posted each day. You can easily compose a piece of music in collaboration with someone in another continent, then post it for the world to see. Each one of these creations represents an original copyrighted work. Due to increasing globalisation and in no small part thanks to the internet, these works are more accessible today than they have ever been. The labour for these works is also more frequently divided between multiple people, particularly in multinational companies. In cases of infringements to copyright where multiple actors from many diverse legal systems are involved, it can be difficult to determine which copyright law should be applied.

2. The *lex loci protectionis (lex protectionis)* provides an answer to the applicable law question in copyright disputes. Following the *lex protectionis,* "the law of the country for whose territory protection is sought" would apply.[1] In other words, the place where protection is claimed, determines the law that will be applied.

3. While the *lex protectionis* appears to be a solution to the problem, it is more complicated than that. The *lex protectionis* does indeed answer an important IPR question, but also brings complications along with it. Situations can occur where parties in several countries are harmed by the same copyright infringement,[2] and so protection could be claimed in multiple legal systems. In such cases, which law should the judge apply? Should every law be applied, or

[1] M. VAN EECHOUD, *Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis,* Kluwer International Law, 2003, 30.
[2] M.-C. JANSSENS, "International disputes involving intellectual property rights : how to take the hurdles of jurisdiction and applicable law" in *Belgian reports at the Congress of Washington of the International Academy of Comparative Law,* Brussel, Bruylant, 2011, (611) 649.

only a particular one? How tenable is the *lex protectionis* in a time where more and more copyrights are shared across multiple borders?

4. I will start this paper by laying out the main sources governing the applicable law problem in Belgian courts. I will focus exclusively on the applicable law in *non-contractual* obligations, which is governed in the EU by the Rome II-Regulation[3]. The other sources I will discuss are the Berne Convention and the Belgian Code of International Private Law (CIPR). I will also explain how the *lex protectionis* came to be the chosen rule for copyright infringement cases and what the arguments for it are (*Chapter 1.1.*).

Secondly, I will discuss the problems that arise in the application of this rule. The main problem is that shared copyrights across borders can make it difficult to narrow down the number of countries that have their law applied (*Chapter 1.2. and 1.3.*). Having described these problems, I will then describe the current solutions to them (*Chapter 2*).

Finally, I will give an evaluation of the situation from the viewpoint of different academics and experts in the field. I will describe certain alternatives and give my own view on their viability as solutions to this problem (*Chapter 3*).

1. SITUATING THE PROBLEM

1.1. LEX LOCI PROTECTIONIS

5. Applying the correct law to an international dispute is a sensitive issue. Many countries have their own approach to intellectual property[4] and would thus be inclined to want to have their own rules applied in situations that involve them.

The Berne Convention was a compromise at a time when the law on international intellectual property was governed by a patchwork of bilateral treaties[5]. Some scholars and European courts place the origin of the *lex protectionis* in the principle of national treatment in art 5(1) Berne Convention 1979,[6] which grants protection in countries *other* than the country of origin.[7] Article 5(2) states that the law of the country *where protection is claimed*, should be applied to copyright infringement cases in Member State courts[8]. Most

[3] Art. 1.1 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations, *OJ L* 199, 31.7.2007, p. 40–49 (Rome II).
[4] M.-C. JANSSENS, *Inleiding tot de Intellectuele Rechten*, Leuven, Acco, 2020-2021, 21-25.
[5] M. VAN EECHOUD, *Choice, supra* fn 1, 58.
[6] B.M.W., REBERO VAN HOUTERT, *Jurisdiction in cross-border copyright infringement cases: rethinking the approach of the Court of Justice of the European Union,* Maastricht, ProefschriftMaken, 2020, *https://doi.org/10.26481/dis.20201027bh*, 88.
[7] Art. 5(1) Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886, as revised at Stockholm on July 14, 1967 828 *UNTS* 221, *BS* 10 November 1999 (Berne Convention).
[8] Art. 5(2) Berne Convention.

scholars and judges seem to accept the *lex protectionis* or 'territoriality principle' as the correct interpretation of this article[9]. This means that the place where protection is claimed, determines the law that will be applied.[10]

However, because of this need for compromise, the Convention was primarily composed of modest provisions and minimum substantive rights[11]. It has not always been obvious whether the *lex protectionis* or the *lex loci delicti* (i.e. the law of the country where the infringement was committed)[12] should be applied.[13]

6. Many years after the Convention, discussions began for an EU Regulation that would govern non-contractual obligations. During these discussions, the question of intellectual property disputes was one of intense debate[14]. Two main options were discussed: The first was to exclude intellectual property rights from the scope of the Regulation, as the general applicable law rule did not fit intellectual property law.[15] The second was to create a special rule, which was ultimately the approach they took.[16]

With the Rome II Regulation, the Union legislator wished to put an end to the disputes that arose from the Berne Convention. Recital 26 of the Regulation states that the *lex protectionis* must be preserved,[17] as many of the contributions to the Commission's consultations called upon this universally recognised principle.[18]

Building upon i.a. the Bern Convention for the Protection of Literary and Artistic Works of 1886 and the Paris Convention for the Protection of Industrial Property of 1883,[19] the Regulation would further support this rule. Based on all these reasons, it seems to be mainly tradition and custom that led to the *lex protectionis* being chosen.

Although custom was a driving factor behind this choice, the *lex protectionis* certainly does have its strengths. As the Commission said, the 'territorial principle' would enable each country to apply its own law to a

[9] M.-C. JANSSENS, "International disputes", *supra* fn 2, 621-622.
[10] M. VAN EECHOUD, *Choice, supra* fn 1, 30.
[11] *Ibid*, 60.
[12] T. KRUGER en J. VERHELLEN, *Internationaal privaatrecht. De essentie*, Brugge, die Keure, 2021, 474.
[13] M. VAN EECHOUD, *Choice, supra* fn 1, 96.
[14] Proposal (Comm.) for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("ROME II"), 22 July 2003, COM(2003)427 final - 2003/0168 (COD), 20.
[15] *Ibid.*
[16] *Ibid.*
[17] Recital 26 Rome II.
[18] Proposal (Comm.) for a regulation, *supra* fn 14, 20.
[19] Proposal (Comm.) for a regulation, *supra* fn 14, 20.

copyright infringement.[20] This solution would confirm the independence of the rights held in each country.[21]

Article 8 of the Regulation states that the "the law of the country *for which* protection is claimed" shall apply to intellectual property infringements[22]. This change in wording from 'where' to 'for which' reaffirms the idea of the *lex protectionis* as the right rule to apply and was intended to resolve the confusion resulting from the Berne Convention's article 5(2).[23]

7. Under Rome II, the *lex protectionis* applies even if it is the law of a country other than a Member State[24]. While there was some criticism on this universal application, the Commission justified it on the basis that it was necessary for the proper functioning of the Community market and to not aid litigants within the Community.[25] The core idea behind this rule is to protect the author, whether they are from a Member State or not. To that end, it would be wrong to limit the scope of protection to just Member State laws. We do not want European transgressors to have an advantage over authors in third countries. Even so, the question of whether or not the EU had the competence to regulate conflicts of applicable law involving third countries, was a fairly contentious issue.[26] In any case, the ICJ also supports the *lex protectionis* for international copyright conflicts.[27]

8. Finally, the CIPR confirms the *lex protectionis* in Belgian national law.[28] This was possibly added to finally put an end to the conflict of applied law by Belgian courts.[29] Although, once again, from the wording of the Senate when preparing this provision, it seemed to be picked more out of a sense of tradition instead of giving careful consideration.[30] They simply refer to the 'classic territoriality principle'.[31] The Senate did, however, acknowledge certain problems that could arise from the *lex protectionis* (*infra* nr. 19).

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[20] *Ibid.*
[21] *Ibid.*
[22] Art. 8 Rome II.
[23] E. FIORDALISI, "The Tangled Web: Cross-Border Conflicts of Copyright Law in the Age of Internet Sharing", *Loyola University Chicago International Law Review* 2015, Vol. 12, 208.
[24] Art. 3 Rome II; X, Study on the Rome II Regulation (EC) 864/2007 on the law applicable to noncontractual obligations JUST/2019/JCOO_FW_CIVI_0167, 424.
[25] G-P. CALLIES (ed.), *Rome Regulations: Commentary*, Kluwer International Law, 2015, 490.
[26] *Ibid*, 492.
[27] ICJ 1st of September 2021, ECLI:NL:RBDHA:2021:9630, *https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2021:9630#_300f3d89-be73-4668-9c50-94117a015b84* .
[28] Art. 93 CIPR.
[29] M.-C. JANSSENS, "International disputes", *supra* fn 2, 651.
[30] Wetsvoorstel houdende het Wetboek van internationaal privaatrecht, *Parl.St.* Senaat 2003, nr. 3 - 27/1, 118.
[31] *Ibid.*

9. So, the *lex protectionis* seems to be the generally agreed upon solution to the applicable law question. Backed by a *loi uniforme* like the Rome Regulation, it should promote legal certainty[32] and protect authors within and outside Member States. It is based on the idea of equal treatment of foreign citizens and EU citizens,[33] to give right holders the ability to apply their own countries' rules wherever they may be. The *lex protectionis* is applied in nearly 180 countries.[34]

In short, the main arguments for the *lex protectionis* are the territorial nature of copyrights,[35] the fact that other countries (though not all)[36] apply the *lex protectionis*, a sense of tradition and custom, protection of foreign authors, and legal certainty for both authors and information users.

As I see it, the *lex protectionis* strikes a fair balance in bilateral copyright disputes. The right holders get to choose where they seek protection and thus which law is applied to their case. But it is also not too arbitrary, so the alleged infringer can reasonably predict the applicable law and defend themselves.

10. At this point in the analysis, it could seem like the debate is over. Many international organisations support the *lex protectionis* as the correct and fair solution to the applicable law question. However, problems arise in cases of multinational infringements. When companies have offices spread globally and artists in different countries working together online, many authors can help create a single copyrighted work. If such a copyright is infringed, would the *lex protectionis* apply? How can we apply the law of the country for which protection is sought if the authors are spread out among multiple countries?

1.2. HYPOTHETICAL CASE

11. 11. I will start my research by examining how this problem would be solved in practice. I will illustrate this issue with a hypothetical case:

Belgian company A makes computer games. Company B is a French computer games company with offices in many different countries (B1, B2, B3, ...). An employee from A copies a figure of an employee from B1 in Quebec. This Canadian employee had designed this figure in collaboration with an employee from B2 in France. A is then summoned to a Belgian court. Since it is a jointly held copyright between B1 and B2, which law would apply?

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[32] G-P. CALLIES (ed.), *Rome Regulations, supra* fn 25, 493.
[33] Opinion of the European Economic and Social Committee, 2 June 2004, JO C/2004/241/1, nr. 5.6.
[34] P. DE VAREILLES-SOMMIERES, "Rationale of the Exclusion of Choice of Law by the Parties in Articles 6(4) and 8(3) of Rome II Regulation", *Oslo Law Review* 2019, (62) 65.
[35] B.M.W., REBERO VAN HOUTERT, *Jurisdiction, supra* fn 6, 88.
[36] *Ibid, 89.*

1.3. ISSUES IN APPLICATION

12. This example is relatively simple compared to collaborative works that can sometimes span many countries, but it illustrates my point. It can be become very difficult to know which law should apply in these cases. If we apply the *lex protectionis*, then the copyright laws of Canada *and* France would have to be applied in a Belgian court.[37]

This could be complicated enough, but what about a situation where even more countries are involved? Would the court apply the law of every country? What if there is a conflict between the laws of two countries? With the growth of the internet and of multinational companies, this could escalate to the point where dozens of countries could come into the equation. Such situations would lead to even more uncertainty surrounding the applicable law.[38]

13. The 'mosaic approach' is where a judge chooses to apply all the different laws that fall under the *lex protectionis*.[39] Aside from being extremely complex, the danger of applying all the laws at once is that the strictest rules in favour of the plaintiff can become dominant.[40] If two different legal systems contradict each other on a given rule protecting their copyright, and protection is sought in both legal systems, the judge will have to decide whether one country loses some of its protection, or another is forced to provide stricter protection than they are accustomed to. Since the *lex protectionis* is generally meant to protect authors from all countries involved (*supra* nr. 9), judges will be more inclined to offer the most protection.[41] It would either be this, or complicate matters even more by trying to find the perfect balance that will please all. This puts the user of information at a potentially disproportionate disadvantage, while it is not even obvious to some authors whether the copyright owner should be advantaged in the first place.[42] The whole aim behind the *lex protectionis* is to strike a more fair balance between different interests (*supra* nr. 9).

14. It is also problematic with regards to injunctive relief.[43] An injunction is an order of the court towards a party to refrain from doing a certain act, in this case a copyright infringement.[44] In our hypothetical case it would be passable, but in general it could be difficult to apply the law of one country to a case and demand that an action ceases in another country. This is an issue of enforcement, which

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[37] G-P. CALLIES (ed.), *Rome Regulations, supra* fn 25, 634.
[38] R. TRYGGVADOTTIR, *European Libraries and the Internet Copyright and Extended Collective Licences*, Antwerp, Intersentia, 2018, 280
[39] M. VAN EECHOUD, *Choice, supra* fn 1, 222.
[40] *Ibid,* 223.
[41] *Ibid.*
[42] *Ibid.*
[43] G-P. CALLIES (ed.), *Rome Regulations, supra* fn 25, 634.
[44] P. JUSTINE and P. TORREMANS, *European Intellectual Property law*, ed. 2, 2019, Oxford, Oxford university press, 558.

I will not be discussing here. But it is worth pointing out that this problem can arise[45].

2. CURRENT SOLUTION

15. Is there currently a way for judges to solve this problem? There is little Belgian case law available on IP infringements.[46] However, diverse guidelines from organizations such as the International Law Association (ILA) give advice on how a judge could determine what to do.[47] The concept that pops up the most is that the laws of the countries with a 'close connection' to the case should apply.[48] This is similar to the rule in article 4(3) Rome II, which functions as an escape clause if the general *lex loci damni* rule cannot be applied.[49]

Many courts in the USA similarly apply the Restatement (Second) of Conflict of Laws of 1969 which contains seven factors to find the laws with the 'most significant relationship' to the case.[50] Essential to approaches such as these is that the number of applicable laws will be limited using certain criteria.[51]

16. The guidelines of the ILA are an example. When protection is pleaded in multiple countries, the relevant factors to determine the applicable law(s) include[52]**:**

A. the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety;
B. the parties' habitual residences or principal places of business;
C. the place where substantial activities in furthering the infringement have been carried out.

Furthermore, guideline 26(2) of the ILA's Kyoto Guidelines allows any party to argue that the State other than one with an especially close connection has different laws on the matter and can ask that they be applied.[53]

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[45] M. VAN EECHOUD, *Choice, supra* fn 1, 71.
[46] M. P. SENDER, *Cross-border Enforcement of Patent Rights: an Analysis of the Interface Between Intellectual Property and Private International Law,* Oxford, Oxford university press, 2002, nr. 5.148.
[47] ILA Committee on Intellectual Property and Private International Law, *Guidelines on Intellectual Property and Private International Law* (Kyoto Guidelines), *https://www.jipitec.eu/issues/jipitec-12-1-2021/5252* (visited 11 November 2021).
[48] B.M.W., REBERO VAN HOUTERT, *Jurisdiction, supra* fn 6, 219.
[49] Recital 18 Rome II.
[50] B.M.W., REBERO VAN HOUTERT, *Jurisdiction, supra* fn 6, 89.
[51] M. VAN EECHOUD, *Choice, supra* fn 1, 43-44.
[52] Kyoto Guidelines, *supra* fn 47.
[53] M.-E. ANCEL (eds.), *International Law Association's Guidelines on Intellectual Property and Private International Law: Applicable Law*, *https://www.jipitec.eu/issues/jipitec-12-1-2021/5247* (visited 11 November 2021) (Kyoto Guidelines: Applicable Law).

17. While the exact criteria will vary, the concept shared by different principles and guidelines is to filter out incidental areas of infringement and determine which state(s) are especially relevant. However, this approach remains fairly unclear to me. It is hard to predict how a Belgian court would determine which countries have close connections to any given case. It is also hard to establish to what degree different laws would apply even if it is narrowed down to just a few applicable laws. In addition, these guidelines and principles are non-binding,[54] and so further feed the legal uncertainty surrounding these cases.

Furthermore, we could still easily have situations where five, six, or even more different laws need to be applied. Between multinational companies and especially online, a work can be shared by many authors. Who can then say that one country should be excluded and that the author in that country should not receive the protection that the *lex protectionis* is supposed to provide? The idea behind shared copyrights is that even with a small contribution, you have the right to protection.[55] Plus, as stated above, part of the *lex protectionis'* inception came from the idea that foreign authors must be treated equally to EU citizens in this regard (*supra* nr. 9). Thus, even with the close connection practice, the *lex protectionis* shows its limitations.

3. CRITICISMS AND ALTERNATIVES

18. As discussed, the *lex protectionis* is meant to provide legal certainty for copyright holders and protect them in case of a breach (*supra* nr. 9). This should incentivise publication of creative works and deter infringements in foreign countries. Furthermore, it defends countries for which protection is sought, who usually have their own rules on copyright which they find important (*supra* nr. 5).

However, the *lex protectionis* was not satisfactory to all. Some experts are still not convinced that the *lex protectionis* was the correct rule for the Rome II Regulation to support.[56] Since before the Regulation there was talk of a 'single law approach' (*infra* nr. 20),[57] and some scholars were in favour of a more personal approach to the applicable law rule.[58] For some, it is also not obvious that the right holder should be so advantaged over users of information (*supra* nr. 13).[59]

Where the rule falls especially short, however, is in cases such as the one laid out above (*supra* nr. 11 and 12). Even if there is currently a way to get

[54] X, *Guideline*, https://www.eumonitor.eu/9353000/1/j9vvik7m1c3gyxp/vh7dou1h8az4.
[55] M.-C. JANSSENS, *Inleiding, supra* fn 4, 33.
[56] M. VAN EECHOUD, *Choice, supra* fn 1.
[57] *Ibid*, 171.
[58] *Ibid*.
[59] *Ibid*, 223.

around it with the 'close connection' interpretation by judges, it is very questionable whether the *lex protectionis* is the best rule to apply to multinational or ubiquitous infringement cases.

19. It also seemed to me while studying the Rome II *travaux* that the *lex protectionis* was mainly chosen out of a sense of tradition and there was little discussion about whether it was the best one (*supra* nr 9). There are some supporting arguments, and the rule was generally accepted in Member States,[60] but this remains fairly limited.

As said before (*supra* nr. 8) the Belgian Senate also seemed to predominantly choose the *lex protectionis* out of a sense of custom and practice. This further emphasises the idea that the *lex protectionis* may be a dated concept that does not fit as easily in modern times. The Senate does refer to article 19 CIPR where laws of countries with only a minor connection to the case may be excluded by the judge.[61] And when making the CIPR, the Senate acknowledged the problem of multiple laws being applied to a particular case.[62] However, it found that this was a problem that needed to be solved at an international level.[63]

So, the *lex protectionis* seems to be old-fashioned and dated. It has its place, certainly in bilateral copyright disputes (*supra* nr. 9). But it is untenable in complex multinational copyright infringements. The situations that can arise are unfair for information users, and can lead to a lack of legal certainty for all parties. I will finish this paper by laying out a few alternatives put forward by various scholars.

3.1. SINGLE LAW APPROACH

20. As the name would suggest, with a single law approach only a specific country's law would apply based on certain criteria. Many feel it could be better to have only a single governing law apply to these cases.[64]

The content of the single law approach differs slightly between different authors.[65] But essentially most advocate for a '*closest* connection rule', with criteria such as principal place of business, habitual residence of the infringer, place of residence of the injured party, or place of use.[66] Only the law with the closest connection to the case would apply.[67]

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[60] Opinion, *supra* fn 33, nr. 5.6.
[61] *Ibid.*
[62] Wetsvoorstel houdende het Wetboek van internationaal privaatrecht, *Parl.St.* Senaat 2003, nr. 3 - 27/1, 118.
[63] *Ibid.*
[64] M. VAN EECHOUD, *Choice, supra* fn 1, 178-192.
[65] M. VAN EECHOUD, *Choice, supra* fn 1, 214.
[66] *Ibid*, 215-221.
[67] B.M.W., REBERO VAN HOUTERT, *Jurisdiction, supra* fn 6, 239.

It is clear that the single law approach requires a similar process to the one laid out in the various guidelines (*supra* nr. 16), but more restrictive. The judge would have to determine one single applicable law based on a few criteria.

21. A single law approach promotes legal certainty and protects the economic value of the copyright as a result.[68] If, as in our example, there is no contractual agreement, the judge will have to make a decision taking into account all relevant factors. However, similar problems as laid out above (*supra* nr 17) arise. It could be impossible to exclude certain countries, and thus disadvantage certain authors. By applying this rule, the judge will be forced to discriminate between every author except for one, effectively rendering claims in their own countries useless. Every issue that the 'close connection' rule brings, would be amplified here. While a single law approach seems like a potential alternative, it may be quite difficult to apply in practice.

3.2. LEX ORIGINIS

22. Copyrights have a strong moral right component. There are arguments to be made as to whether copyright law should be guided by the universality principle.[69] The law of the country of origin (*lex originis*) could then be applied.[70] In other words, the law of the country of first publication[71] would govern copyright disputes. Or, if it has not been published, the law of the author's personal status[72]. Some countries already partially follow the *lex originis* and many authors are in favour of it.[73] Article 5 of the Berne Convention lays out the country-of-origin rule, with primacy given to Member States over third countries.[74]

23. This rule could solve a lot of issues and the Commission did indeed propose it.[75] However, the *lex originis* also has its downsides. There could be multiple points of origin, it could lead to forum shopping, and some right holders might have to go to a foreign court to adjudicate the dispute.[76] Also, it could lead to a situation where most copyrights are published in the countries with the most protection for authors, although this argument could be made against the *lex protectionis* as well.

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[68] Kyoto Guidelines: Applicable Law, *supra* fn 53.
[69] G-P. CALLIES (ed.), *Rome Regulations, supra* fn 25, 628.
[70] *Ibid.*
[71] K. ROOX, "Intellectuele eigendom in het nieuwe wetboek I.P.R.", *http://docplayer.nl/7233547-Intellectuele-eigendom-in-het-nieuwe-wetboek-i-p-r-kristof-roox-advocaat-crowell-moring.html*, 7.
[72] *Ibid.*
[73] G-P. CALLIES (ed.), *Rome Regulations, supra* fn 25, 628; X, Study on the Rome II Regulation (EC) 864/2007 on the law applicable to noncontractual obligations JUST/2019/JCOO_FW_CIVI_0167, 301.
[74] Art. 5(4) Berne Convention.
[75] R. TRYGGVADOTTIR, *European Libraries*, *supra* fn 38, 284-286.
[76] *Ibid.*

24. Despite these points, however, it seems to me that it may be a preferred way to solve these complicated applicable law questions and could lead to more legal certainty, especially on the internet. It could also be a fairer balance between the right holder and the user of information. The right holder would not have too much control over which law applies, and the user would be able to predict which law would apply and thus defend themselves better. Furthermore, the copyrights of the country of origin would be protected, which is important for its national identity (*supra* nr 5). Most importantly, it would solve the untenable situation discussed above (*supra* nr. 12) by only applying a single law in a way that is predictable and acceptable. While there are negatives to the *lex originis*, it is my view that they are far outweighed by the positives in multinational copyright disputes.

3.3. GLOBAL HARMONIZATION

25. The Information Infrastructure Task Force (IITF) acknowledged that copyright laws may need to be harmonized.[77] This would create a uniform level of protection for copyrights among various different legal systems worldwide.[78] Some authors also discuss the possibility of a centralized liability system and a supervisory body to enforce it.[79] The concept of harmonizing copyright laws is compelling, but is unlikely to happen any time soon. Copyright law is still a fairly territorial issue (*supra* nr. 5). Although, perhaps a treaty could be useful in the future.

26. In the meantime, it could be worth moving towards more harmonization. After all, Rome II does not apply in the USA.[80] Some scholars have suggested the American Law Institute Principles (ALI Principles) be expanded to Europe[81]. The ALI Principles are non-binding standards to adjudicate transnational commercial disputes.[82] They are broader than Rome II, most notably in the fact that parties can choose which law will apply if they can agree on it.[83] The Ubiquitous Infringement Exception in section 321[84] is essentially the closest connection rule. These Principles could be paired with the *lex loci rei sitae*

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[77] B. A. LEHMAN, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights*, United States Information Infrastructure Task Force, 1994, 148.
[78] *Ibid.*
[79] R. TRYGGVADOTTIR, *European Libraries*, *supra* fn 38, 282
[80] E. FIORDALISI, "The Tangled Web", *supra* fn 23, 209.
[81] E. FIORDALISI, "The Tangled Web", *supra* fn 23, 534-536.
[82] ALI, *ALI / UNIDROIT Principles of Transnational Civil Procedure*, 2006, https://www.unidroit.org/instruments/civil-procedure/ali-unidroit-principles.
[83] E. FIORDALISI, "The Tangled Web", *supra* fn 23, 210-212.
[84] The American Law Institute, *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*, 2008, https://wipolex.wipo.int/en/text/500351.

approach, where judges apply the law that provides the most protection to the author.[85]

Personally, however, I think these Principles would bring many of the same problems. They would indeed lead to more harmonization, since the Rome II is not applicable in the USA. But other than that, similar arise. What if there are multiple authors in different countries? Furthermore, as said above (*supra* nr. 13) we do not want to disproportionately advantage the right holders over information users

3.4. CHOICE OF LAW

27. In Rome II, we could remove the rule that prevents parties from consensually derogating from the *lex protectionis.*[86] This article 8(3) was not in the Commissions original proposal, and only appears later in the Council's response[87]. This seemed to be added to avoid complexity in incidental questions arising from the party's choice-of-law[88] and since international conventions on this subject did not provide a choice-of-law option to parties, the EU legislator decided to prohibit it[89]. This choice is questionable, however. One could still argue that it might be better to give the parties the power to decide, perhaps out of a list of countries with a close connection.

To avoid these agreements going too far or interfering which other conventions, the judge could examine whether the parties are acting in line with article 26 Rome II, which excludes law whose application would be manifestly incompatible with public policy.[90] Parties could then choose which law would apply to their dispute, even in non-contractual obligations, but only insofar as it is compatible with this article[91]. As a result, the parties could contractually derogate from the *lex protectionis* while still remaining under the authority of an EU instrument.[92]

If necessary, we could also add restraints such as a list of countries with a close connection that parties must choose from. Putting some of the choice into the parties' hands could help the acceptability of the judge's decision and provide more predictability and thus legal certainty.

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[85] E. FIORDALISI, "The Tangled Web", *supra* fn 23, 210-212.
[86] Art. 8(3) Rome II.
[87] Statement of the Council's Reasons with a view to the adoption of a Regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations, 25 September 2006, 2003/0168 (COD).
[88] P. DE VAREILLES-SOMMIERES, "Rationale", *supra* fn 34, 66.
[89] *Ibid.*
[90] Art. 26 Rome II.
[91] R. TRYGGVADOTTIR, *European Libraries*, *supra* fn 38, 310.
[92] *Ibid.*

CONCLUSION

The *lex protectionis* rule provides an answer to the question of applicable law in the case of international copyright infringements. Under this rule, the law of the country for which protection is sought, will apply. It was present in the Berne Convention, albeit rather vaguely formulated. The EU Rome II Regulation (Rome II), which governs non-contractual obligations, confirmed the rule. The question of applicable law in cases of intellectual property infringements was subject to intense debate during the Commission's consultation period. The *lex protectionis* is said to provide legal certainty and sufficiently protect copyright holders. It was also reaffirmed in the Belgian CIPR.

However, the *lex protectionis* becomes increasingly difficult to apply in cases of shared copyrights across borders. Such copyrights are more and more prevalent due to the growth of multinational companies and of the internet. The law of multiple countries could be applied to an infringement dispute. This could lead to legal uncertainty and a weaker protection for copyright holders. Furthermore, looking at the legislative procedure of Rome II, it seems that the *lex protectionis* was mostly selected because of the territorial nature of copyrights and due to tradition. One could argue that it does not fit as well in the modern world where copyrights are increasingly spread among multiple companies and countries. It is also not obvious that authors should be so advantaged over information users, particularly on the internet.

So how do courts currently solve the problem of protection being sought in multiple countries? Based on various guidelines and principles, it is possible for judges to narrow down the number of laws that could be applied to a given case. The most commonly recurring concept is the 'close connection' interpretation where judges apply the law of the countries that are closely connected to the case. They would use criteria such as habitual residence of the parties or the place where substantial harm was caused.

Although these criteria could help solve the issue, they are quite vague and non-binding. There is still legal uncertainty surrounding the application of the *lex protectionis*. Through my own research, it also seems that the *lex protectionis* was chosen largely for traditional reasons, and due to the fact that it was in use in many (though not all) Member States. It seems to be outdated and its practical application limited. The *lex protectionis* is a solution to the applicable law question, but may not be the best one for the modern international landscape.

For this reason, alternatives to the current system have been put forward by various authors. First of all, there is a 'single law approach', which would see one single law applied to every case, based on certain criteria. Most commonly put forward is the law of the country with the 'closest connection' to the case. This would be done with similar criteria to the 'close connection' interpretation but would narrow the options down to one single law. However,

the problem of legal uncertainty remains. It would be very difficult for the judge to determine, and even harder for the parties to predict the applicable law. For instance, in the case of shared copyrights among different states, how could the judge objectively choose a single law that should apply?

Another alternative solution is to harmonize the applicable law rules. Some authors discuss the possibility of a centralized liability system and a supervisory body to enforce it, while others talk about similar principles as laid out in Rome II, but through application of the ALI Principles. The concept of harmonizing the applicable law rules is compelling, but unlikely to happen very soon. Copyright laws are still quite territorial, and countries would be reluctant to sign a treaty that harmonizes them. However, a treaty could potentially be useful in the future.

There are two options that seem the most viable to me. Firstly, we could remove the prohibition in article 8(3) Rome II and allow parties to decide on a certain applicable law. The reasons why article 8(3) was added are questionable. If needs be, we could add restraints such as a list of countries with a close connection that parties must choose from. Putting some of the choice into the parties' hands could help the acceptability of the judge's decision and provide more predictability and thus legal certainty.

Alternatively, we could use the *lex originis* as the applicable law rule in these scenarios. In the case of copyright infringements, the law of the country of first publication would govern the disputes. There would still be problems: There could be multiple points of origin, it could lead to forum shopping, there are lots of different rules when using a work in one country, and some right holders might have to go to a foreign court to adjudicate the dispute. Despite these though, it may be a preferred way to solve these complicated applicable law questions and could lead to more legal certainty. It could also strike a fairer balance between the right holder and the user of information. The copyrights of the country of origin would be protected, which is important for its national identity. Most importantly, it would solve the untenable situation of many applicable laws, by only applying a single law in a way that is predictable and acceptable.

There is currently no perfect solution to the issue of applicable law in the case of copyright infringements. Every solution has its downsides. But when it comes to the current landscape, it is questionable whether the *lex protectionis* should still be supported to the extent that it currently is. It has been retained mainly due to its 'universal recognition'. The copyright climate, however, has changed over time. It might be time for legislators to examine other options which strike a fairer balance and fit the specific challenges of the modern world.