Summary

The presentation briefly introduces current problems related to the law applicable to copyright infringements and then examines whether these problems are properly addressed in the ALI and CLIP Proposals.

Status quo

The territoriality principle and the *lex loci protectionis* rule prevail as the main doctrines of law applicable to copyright infringements. However, they face numerous theoretical and practical problems.

It is broadly recognized that the territoriality principle is highly ambiguous – although it has been recognized as an underlying principle of copyright law\(^1\), it may have different meanings in different fields of law (e.g. public law or private international law) or in different jurisdictions; its scope is not clearly defined, and its justification and relevance, especially in the digital environment, have been strongly criticized\(^2\). Similarly, the *lex loci protectionis* rule is more problematic than it may seem from the first glance. It has no clear source at the international level\(^3\) and is rarely found in national statutes\(^4\). The Rome II Regulation has recently codified *lex loci protectionis* for intellectual property disputes in the EU\(^5\), however, its scope remains unclear\(^6\). It is also doubtful whether territoriality principle, as a substantive law principle, necessarily leads to the *lex loci protectionis*, as an applicable legal rule\(^7\). Furthermore, the delimitation of *lex loci protectionis* from other applicable law rules – especially from the *lex loci delicti* rule – is not clear either in doctrine or court practice\(^8\).

Even more importantly, the application of the *lex loci protectionis* rule, and the underlying territoriality principle, have been causing various problems in practice. In particular, they do not take into account the interests of right holders and users (potential infringers) in a sufficiently balanced manner across different media. In “traditional” offline infringement cases\(^9\), *lex loci protectionis* functions rea-
reasonably well. However, it hampers enforcement of multi-state *prima facie* (piracy) cases. At least theoretically, even in obvious multi-state infringement cases the infringement would need to be prosecuted separately under multiple national copyright laws\(^\text{10}\). Although stronger enforcement measures are being discussed on a multilateral level\(^\text{11}\), no measures in the field of international private law have been taken so far. Indeed, diverse extraterritorial practices have been developed in different countries. For instance, the so called “root copy” approach, developed by the US courts, allows applying US law for copies made in foreign country if the initial copy was illegally produced in the USA\(^\text{12}\). Such extraterritorial application of the US law has been subject to strong criticism both in the EU and the USA\(^\text{13}\).

In multi-state *broadcasting* cases, the so called Bogsch theory prevails in most countries. It allows an infringement to be found either under the law of the country where the broadcasting signal was emitted, or under the law of the country where it was received\(^\text{14}\). Although such a mosaic approach theoretically requires the right holders to enforce infringements under each law separately (the remedy is territorially limited), they are able to choose the most protective law to pursue the infringement. Furthermore, relief at national level may have significant extraterritorial effects. For instance, in the US *National Football League* case\(^\text{15}\), the contested broadcasting signals were emitted in the US but received exclusively in Canada (with minor overspill receptions in the USA). The US court granted the injunction and stopped the emission of signals under the US law, despite the fact that the reception was legal under Canadian law (“extraterritorial injunctions” problem). As another example, in the *Sender Felsberg/Legardère* case, the broadcasting signals were emitted in Germany but exclusively received by the public in France. Both the German Supreme Court\(^\text{16}\) and the European Court of Justice (ECJ)\(^\text{17}\) held that the fees were due under the law of both the emitting and receiving country. This case has demonstrated the danger of cumulative damages in copyright infringement cases, which arises if, under a strict territorial approach, damages are requested under each law separately.

As far as *Internet* infringements are concerned, the courts often do not discuss any private international law issues at all; they, at most, confine themselves to briefly referring to jurisdictional questions and simply apply forum law\(^\text{18}\). Still, one may argue that the *lex loci protectionis* and, specifically, the Bogsch theory, are implicitly applied in such cases\(^\text{19}\). The Bogsch theory is, however, even more problematic in online cases than in broadcasting. Right holders arguably have difficulties in separately enforcing worldwide infringements under the various, multiple laws. Similarly, users (potential infringers) are subjected to an unlimited number of laws. And in order to pursue a legitimate activity, Internet service providers (ISPs) too have to adhere to the law of each country where the content could be accessed. This obviously hampers the development of legitimate online services. A further problem is that the territorial remedies granted under the national laws often have even stronger extraterritorial effects than in broadcasting cases. A domestic injunction often leads to the overall abandonment of the online activity unless the infringer has technological and economic resources to delimit the service geographically\(^\text{20}\). The so called effect theory, as originally proposed for trademark infringements in the 2001 WIPO Recommendation\(^\text{21}\), has been gradually extended to copyright infringements. However, it has had little impact in limiting the number of potentially applicable laws; national courts still easily identify sufficient effects (or connections with) the forum and apply forum law\(^\text{22}\).
ALI and CLIP Proposals

These and other problems have been addressed in two recent proposals: the American Law Institute Principles on Jurisdiction, Applicable Law, and Recognition and Enforcement of Judgments in Intellectual Property (ALI Principles)\(^{23}\) and the Proposal of European Max Planck Group for should be Conflict of Laws and Intellectual Property (CLIP Proposal)\(^{24}\). Although the Proposals come from quite different legal traditions (ALI – a common law tradition, whereas CLIP – mainly a continental law tradition), they provide for rather similar rules for determining the law applicable to copyright infringements. They reestablish the *lex loci protectionis* rule and thereby maintain the territoriality principle (except of ubiquitous infringement); they propose quite similar ubiquitous infringement rules devoted to online infringements as well as limited party autonomy rules. CLIP adds the *de minimis* rule, which cannot be found in the ALI Principles. The main difference between the Proposals in regard to the applicable law issue is the initial ownership rule, which, however, cannot be discussed here due to limitations of space.

**Territoriality and lex loci protectionis**

First of all, both the ALI and CLIP Proposals suggest that both proprietary issues (e.g. existence, duration, limitations) and infringement-related issues (e.g. illegal conduct, remedies) are subject to the law of the state “for which protection is claimed”. The implementation of this, *lex loci protectionis*, rule in both Proposals are generally to be welcomed. It implicitly reestablishes the territoriality principle, which despite the changing technological, economic and social environment does not entirely lose its importance. States have a legitimate interest in enforcing their copyright laws (as a part of cultural, educational, information society and economic policies) in respect of conduct occurring or having effect in their territory. This interest can be limited only if and as far as it is needed to satisfy other interests – such as international trade policy or efficient enforcement of rights. Also, both Proposals for the first time introduce explicit exceptions to the territoriality principle – in respect of ubiquitous infringement, initial ownership (only ALI) and party autonomy. These are expected to help to overcome some problems raised by the territoriality principle. Furthermore, the explicit formulation of the *lex loci protectionis* rule and a clear definition of it is likely to provide more legal certainty and will help to delimit it from the *lex fori*\(^{25}\) as well as from the *lex loci delicti (commissii)* rules.

Even so, not all problems outlined in the earlier section of this paper have been solved. For instance, although the copyright piracy problem is being intensively discussed both on the EU and international political agenda, neither CLIP nor ALI propose any applicable law solutions for multi-state copyright piracy cases in a traditional offline environment. Furthermore, although the territoriality principle has been implicitly (CLIP) or explicitly (ALI)\(^{26}\) implemented in both Proposals, its implications and scope have not been defined. It is thus not clear if the implementation of the *lex loci protectionis* alone would help to prevent such controversial extra-territorial practices as the US root copy doctrine discussed above. In addition, the delimitation of *lex loci protectionis* from territoriality remains unclear in the ALI principles – whereas sec. 301 seems to implement *lex loci protectionis* (“for which protection is sought”), it is titled “territoriality”. At least in theory, it is suggested that territoriality should be distinguished from *lex loci protectionis*\(^{27}\). In practice, however, this distinction seems to be of little importance.
The CLIP Proposal provides for a so-called “de minimis” rule. This requires the court to find an infringement only if the defendant has substantially acted in that state or the activity had a substantial effect in or was directed at that state. No similar rule exists in the ALI Principles. The de minimis rule is intended to lead to the denial of infringement in situations where both the conduct and effects in the country are insubstantial. It has been inspired by the market effect rule as proposed in art. 2 of the 2001 WIPO Recommendation.

Generally, a market effect rule, if extended to both offline and online cases, could help to solve some problems discussed earlier. For instance, it could at least in some cases limit the number of applicable laws in copyright infringement cases online. It also might be useful in broadcasting cases. For instance, as far as the above mentioned National Football League case is concerned, the emission of a signal alone would not cause any direct market effects in the US market, thus, under the market effect rule, an infringement under US law would be denied. As another example, in the Lagardère case, the ECJ has already applied an approach similar to the market effect rule, though at the level of remedies rather than infringement. The ECJ found that the law of a country where no signals are received (i.e. there is no market effect) should still be applied; however, damages should be calculated on the basis of “value of use in trade” in each country. As there was no public reception (use) of signals in Germany, hardly any remuneration could be sought there. Finally, if an effect rule is defined strictly, it could be helpful in eliminating or at least limiting the US root copy doctrine. One could argue that since the copies made and distributed abroad do not directly affect the US market, an infringement under US law could not be found.

However, the de minimis rule in the CLIP Proposal differs from the general effect rule in several respects, which also affects its potential impact. Firstly, in contrast to the WIPO effect rule, the de minimis rule is likely to apply to Internet infringements only in exceptional cases, i.e. when the ubiquitous infringement rule does not cover them. Secondly, the de minimis rule contains an additional “substantial activity” element. That is, the infringement can be found not only when there is a substantial effect in the relevant country but also when there is a substantial activity there. This is likely to make the rule ineffective in the broadcasting cases mentioned earlier. For instance, in the National Football League case, the emission of a signal in the USA might well be treated as a substantial activity. If so, an infringement under US law would still be found despite the fact that the signals were received only in Canada and were legal under Canadian law. Also, it is doubtful that the de minimis rule in its current formulation could in any way restrict the application of the root copy doctrine. US courts could argue that the initial copy made in the US qualifies as sufficiently substantial conduct. Thus, although the effect rule was intended to solve the problems caused by the Bogsch theory, the current formulation of the de minimis rule is unlikely to meet these expectations. It in fact comes close to the Bogsch theory: both approaches allow an infringement to be found either in the country where the signal was emitted (place of substantial conduct) or received (place of substantial effect).

Thirdly, the de minimis rule contains a broadly formulated exception allowing courts to derogate from the de minimis rule “when reasonable under the circumstances of the case.” Its function is not clear – it enables courts to find the infringement even in cases where both the conduct and effects in the country are insubstantial. Arguably this could be used in cases where moral rights are infringed but no
market effects can be proven in the relevant country. In any case, the broad wording of the exception gives courts wide discretion in applying the rule. It is thus questionable if the *de minimis* rule in its current wording would have any positive effects in practice.

**Ubiquitous infringement rule**

Undoubtedly one of the most disputed issues within the ALI and the CLIP Groups was the law applicable to online infringements. Eventually, both groups came to very similar proposals. They subject an overall ubiquitous infringement to the law with the closest connection (ALI – “law or laws with the close connection”), which is determined on the basis of an exemplary list of flexible factors. The “retreat to territoriality” exception allows a party to prove the law of another country insofar as this provides for a different solution; this shall then be taken into account by the court when determining the remedies (hereinafter – a “retreat to territoriality” exception). The rule is applicable to conduct which occurs via ubiquitous media such as the Internet and which “arguably leads to infringement in every State in which the signals can be received.” That is, the ubiquitous infringement rule will be applied not to all copyright infringements online but only when both the conduct and the infringement are ubiquitous.

This rule may generally be welcomed as a compromise between the universal (single-law) and territorial (multiple-law) approaches. By enabling the application of a single law to multi-state infringements online it promotes the international commerce of copyrighted goods. At the same time, by allowing parties to retreat back to the territorial approach on the basis of the exception, it allows states to maintain their national copyright policies even online, at least so far as they are of interest for parties.

The rule is also advantageous for right holders. Firstly, they are able to acquire international remedies under a single applicable law. The dangers inherent in other rules following a single law approach – such as “forum shopping” by the infringer (by moving to the countries with lower protection) and eventual “race to the bottom” of the protection – have been avoided by the flexible closest connection rule. Not surprisingly, the ubiquitous infringement rule does not apply to the most sensible initial ownership and transferability issues, which are still subject to separate rules. It is uncertain how these exceptions to the ubiquitous infringement rule will be applied in practice. It remains to be seen whether the right holder will have to prove that he/she owns the rights for each country covered by the dispute, or the courts will instead find other more reasonable solutions (e.g. by applying some ownership presumption). As a second advantage for the right holders, the closest connection is determined by an exemplary list of broader or narrower factors. The flexible nature of the rules is likely to allow courts apply forum law in many cases (and it is the right holder who chooses the forum). The ALI Principles are even more favorable to the right holder, since the latter is only required to prove a “close” connection (rather than the “closest” connection required by CLIP); in addition, the ALI Principles contain more broadly formulated factors and all of them include consideration of the right holder. Thirdly, if a right holder considers that the closest connection rule is not sufficiently favorable to him/her, he/she may decide to prosecute the infringement territorially under the *lex loci protectionis* rule – ubiquitous infringements “may” but not “shall” be subject to the closest connection rule. Even though *lex loci protectionis* only allows the granting of state-limited remedies, this often leads to the overall abandonment of infringing conduct by the infringer. Fourth, the “retreat to territoriality” exception can also be used by the right holder. For instance, if some law other than the law with the closest connection grants more extensive remedies (e.g. statutory damages), he/she can
request these remedies at least for the territory of that particular country. On the other hand, the “retreat to territoriality” exception will primarily serve infringers’ interests, and if appealed to by the alleged infringer, may cause more complicated and prolonged enforcement proceedings for the right holder.

The interests of the user (alleged infringer), however, are barely taken into account by the ubiquitous infringement rule. Firstly, in order to legitimately act online, both commercial and private users need to know to which law their activities are subject. Here though, the closest connection rule, with a flexible list of factors, does not give an answer – users cannot identify in advance which country’s law their conduct will be subject to and they will thus have to further adhere to the laws of numerous countries. Secondly, as indicated above, the ubiquitous infringement rule seems not to cover uses which do not lead to obvious copyright infringements (e.g. where the use could arguably be covered by an exception in some countries); these infringements will remain subject to the lex loci protectionis rule. Since online service providers acting in good-faith most often pursue activities which are not obviously infringing, the ubiquitous infringement rule will not assist them in many cases. Thirdly, in practice, copyright infringement cases very often contain secondary (or contributory) liability issues. Right holders, for understandable reasons, prefer suing Internet service providers, which in most cases are mere intermediaries, instead of end users who directly carry out the infringements. However, none of the proposals currently regulate the issue of secondary liability. Although the ubiquitous infringement rule does not exclude secondary infringements, its application for these cases is unclear and problematic. It is accepted in most countries’ practice that secondary infringements are subject to the law regulating primary infringement. However, even if the ubiquitous infringement rule indicates a single law applicable to a given primary infringement, several primary infringements may occur simultaneously in different countries and, thus, the secondary infringement still be subject to numerous applicable laws. Finally, it is true that the “retreat to territoriality” exception would serve the interests of the users (alleged infringers) – they will be able to pray in aid another law which provide for more favorable solutions. On the other hand, it implies the shift of the burden of proof (as to the effect of the relevant law) from the right holder to users. Until now, at least in theory, the right holders had to prove that there is an infringement under the law of each county for which remedies are requested. Now it becomes a duty (more precise – a right) of the alleged infringer to demonstrate laws under which there is no or lesser infringement and/or liability. Although this shift of the proof burden might be justifiable in clear “piracy” cases (e.g. when the infringer acted in a “bad faith”), its suitability for “good faith” infringers is doubtful.

Overall, the ubiquitous infringement rule both in the ALI Principles and the CLIP Proposal is meant to primarily protect the interests of the right holders. The interests of “good faith” users intending to act legally or develop legitimate online services seem to have been largely left out of account.

**Party autonomy**

The final provision to be discussed here is the party autonomy principle in copyright infringement cases. ALI Principles allow parties to choose the law applicable in copyright infringement cases except in respect of proprietary issues such as existence, attributes, transferability, and duration of rights. The CLIP Proposal allows such choice of law only in respect of remedies for the infringement. Party autonomy in copyright infringement cases has been little practiced until now. One of the reasons could be its prohibition in some countries; such a prohibition has also been recently imple-
mented in the Rome II Regulation\textsuperscript{37}. The reason for the prohibition seems to be a strict approach to territoriality and a wish to pursue national copyright policies even in respect of infringement issues. For instance, it could be argued that the remedies (e.g. the availability of double damages) are a crucial element of the level of protection of intellectual property and therefore part of the national trade policy that cannot be derogated from by the contract\textsuperscript{38}. The other reason could be a little practical relevance of a contractual choice of law – it is seldom that, after a dispute arises, the parties would agree on applicable law\textsuperscript{49}. The extension of the party autonomy principle at least to some issues to copyright infringement cases, however, should be generally welcomed. If parties agree on the applicable law, it would lead to more expedient and efficient enforcement proceedings. Such a choice, however unlikely it might be, should not be excluded beforehand.

Party autonomy in both ALI and CLIP Proposals is, as indicated above, of a limited scope. However, it is doubtful whether it is reasonable to allow the agreement on applicable law to remedies (as allowed under CLIP) but not to all other infringement related issues (such as limitation on liability, etc.). The latter issues seem to be even of less importance for general copyright policy than remedies and thus have been rightly covered by party autonomy rule in the ALI Principles.

The other question is whether it would be reasonable to extend party autonomy to all issues, at least in ubiquitous infringement cases. The possibility to choose the applicable law in ubiquitous infringement cases would be especially useful in disputes between commercial parties where both the plaintiff and the defendant are interested in faster and more efficient proceedings with a single applicable law. The agreement on applicable law would help to avoid the risk of the other party complicating proceedings by raising a differing law under the “retreat to territoriality” exception. The closest connection rule, as proposed by both the ALI and CLIP Proposals, has already limited the territoriality principle in ubiquitous infringement cases. The agreement of parties on applicable law would in effect be very similar to the mutual decision not to apply the “retreat to territoriality” exception. The only essential difference would be that the ubiquitous infringement rule refers to the law having the closest connection, whereas here parties would be able to choose any law. However, if there are any territoriality interests hidden in the closest connection rule, these could be preserved by mandatory rules or public policy exceptions already available under both the ALI and CLIP Proposals\textsuperscript{50}. In addition, reassurance should be given that the interests of third parties are not affected by this choice.

**Conclusion and suggestions**

To sum up, the current situation of applicable law to copyright infringements is known to be problematic. Although the territoriality principle and the *lex loci protectionis* rule seem to be accepted in most countries’ practice, their definition, legal source, scope and delimitation from other rules and each other are often not clear. Even more important, their application to infringements occurring in different media (traditional offline, broadcasting and Internet infringements) does not meet the interests of participating parties (right holders and infringers) in a satisfactory and balanced way.

The ALI and CLIP Proposals partly address these problems, interestingly in a quite similar way. They reestablish the *lex loci protectionis* rule (and thereby implicitly preserve the territoriality principle) despite an ever more globalized economy. The need for more flexibility is met by adopting some exceptions to the territorial approach, mainly, the ubiquitous infringement rule and a party autonomy prin-
ciple in infringement cases. The CLIP Proposal contains an additional de minimis rule. Although these rules are generally to be welcomed, some issues are worth considering before merging ALI and CLIP projects, with their Asian counterparts, into a common international proposal. For instance, in order to ensure more efficient enforcement of multi-state infringements offline, the extension of a ubiquitous infringement rule to multi-state offline infringements should be considered. The de minimis rule could be re-drafted in order to address some extraterritorial practices in broadcasting and traditional offline cases (e.g. by eliminating a “substantial activity” element). The ubiquitous infringement rule needs to better take into account the interests of “good faith” infringers (e.g. by developing a default connecting factor, which would allow more legal foreseeability for users). Finally, the extension of the scope for party autonomy in infringement cases could be discussed, at least for ubiquitous infringement cases.

Endnotes:

1 See, e.g., ECJ case C-192/04 of 14 July 2005 Lagardère Active Broadcast v SPRE and GVL, ECR I-07199 para 46 (2005).
3 There is no agreement if it can be derived from art. 5(2) of the 1886 Berne Convention for the Protection of Literary and Artistic Works, cf. Schack, Haimo, Urheber- und Urhebervertragsrecht 400 et seq. (Mohr Siebeck 2007); Drexl, Josef, Europarecht und Urheberkollisionsrecht, in Ganea, Peter et al. (eds.), Urheberrecht. Gestern-Heute-Morgen 461-479, 463 (Verlag C.H. Beck 2001).
4 E.g. it is not explicitly implemented in German, French, UK or US statutory law.
6 It is not clear if it covers only infringement-related issues (illegal acts, remedies) or also propriety-related ones (existence, scope, duration, initial ownership, transferability): for a discussion see, e.g., Leistner, Matthias, The Law Applicable to Non-Contractual Obligations Arising from an Infringement of National or Community IP Rights, in Leible, Stefan & Ohly, Ans&g. (eds.), Intellectual Property and International Private Law (Mohr Siebeck 2009); Basedow, Jürgen & Metzger, Axel, Lex loci protectionis europea, in Trunk, A. et al. (eds.) Russia in the International Context: Private International Law, Cultural Heritage, Intellectual Property, Harmonization of laws. Festschrift fur Mark Moiseevic Boguslavskij 153, 162 (Berliner Wissenschafts-Verlag 2004).
8 Some seek to draw a clear distinction between the two rules, see Drexel, supra note 7, para. 12; others use the expressions “law of protecting country” and “law of the place where the infringement occurred” interchangeably, see Fawcett, James J. & Torremans, Paul, Intellectual Property and Private International Law 499, 501, 507 ff. (Clarendon Press 1998).
9 E.g. offline reproduction and distribution.
10 For instance, an infringer residing in Russia distributes, on a commercial scale, illegal copies in numerous countries in Europe and Asia – the infringement, as a general rule, should be prosecuted under the law of each country separately.
11 See Anti-Counterfeiting Trade Agreement (ACTA), adopted on 3 December 2010; the final text (awaiting ratification) is available on http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellec


14 The exception to it is a so called “emission theory” which has been implemented in art. 1(2)(b) of the Council Directive 93/83/EEC of 27 September 1993 on the Coordination of Certain Rules Concerning Copyright and Rights Related to Copyright Applicable to Satellite Broadcasting and Cable Retransmission (the satellite broadcasting is deemed to take place only the country where the signals are emitted).


16 See German Supreme Court decision of 7 November 2002 - I ZR 175/00 Sender Felsberg, GRUR Int. 470, 473 (2003); for comments see Welser, Marcus v., Zum Urheberkollisionsrecht bei grenzüberschreitenden Sendungen, 5 IPRax 440 (2003); Drexl, supra note 13, p. 441.

17 ECJ case C-192/04 of 14 July 2005 Lagardère Active Broadcast v SPRE) and GVL, ECR I-07199 (2005) (though, according to ECJ, the amount of royalties should correspond to the actual value of the use), for a comment see Metzger, Axel, Zum anwendbaren Urheberrecht bei grenzüberschreitendem Rundfunk, 3 IPRax 242 (2006).


19 The accessibility of a website in the forum is often seen by courts as a sufficient ground to apply forum law.

20 One of the first cases to discuss geographical delimitation problem was Paris Court of First Instance, 22 May 2000, available at www.juriscom.net – UEFJ et LICRA v Yahoo!; currently, geographically differentiated services are ever wider spread (e.g. YouTube, Google).


22 See, e.g., German Supreme Court decision of 21 September 2006 – 29 U 2119/06 Haftung von eBay als Mitstörer für Urheberrechtsverletzungen, JurPC Web-Dok. 124/2006, Abs. 41 (the court found that the connection to Germany is sufficient when the service “is in German language and directed to domestic commerce”).

European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP), Principles for Conflict of Laws in Intellectual Property, Third Preliminary Draft of 1 September 2010, available at <www.cl-ip.eu> [Accessed on 10 September 2010]. In the meetings on 19-20th November 2010 and 25-26th February 2011 the CLIP Group has adopted the final CLIP Proposal, however, at the time of submission of this paper, it has not yet been made available to the public.

Art. 5(2) of the Berne Convention provides “in which protection is claimed”; if read literary, it seems to refer to lex fori.

ALI sec. 301 mentions “territoriality” in the title.

Drexl, supra note 7, para. 13.

Art. 3:602 CLIP.

Interestingly, a similar market effect rule was suggested as a main rule for copyright infringements in early ALI drafts, however, it was later abandoned in favor of lex loci protectionis, see sec. 301(2) of Draft ALI Principles, in Jürgen Basedow et al. (eds.), Intellectual Property in the Conflicts of Laws 229-250 (Mohr Siebeck 2005).

See supra note 21.

See, e.g., German Supreme Court decision of 13 October 2004 – I ZR 163/02 Hotel Maritime, 5 GRUR Int 433 (2005) (no sufficient connection - nor trademark infringement - was found in Germany despite the fact that the website was in German and also served German customers).

ECJ case C-192/04 of 14 July 2005 Lagardère Active Broadcast v SPRE and GVL, ECR I-07199 (2005), para. 50.

For scope of the ubiquitous infringement rule see text below.

Art. 3:602(2) CLIP.

See supra note 21.

E.g. if online use is arguably legal in some countries (because the duration of protection is expired or the exceptions are applicable, etc.), the ubiquitous infringement rule will not be applied.

Such as the county of origin (or country of establishment) rule as implemented in art. 3 of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (‘Directive on electronic commerce’).

See supra note 21.


Sec. 302(2) (b) ALI.

Art. 3:605 CLIP.

E.g. it was prohibited in Germany, see German Supreme Court decision of 17 June 1992, GRUR 1992,
697 – ALF; but it has been allowed in Switzerland, see art. 110 (2) and art. 132 of International Private Law Statute of 1987.


49 Id., p. 177.

50 See secs. 313, 323 ALI; arts. 3:801, 3:802 CLIP.