



AIPPI World Congress
September 10 - 13, 2022



Role of the Territoriality Principle in Copyright

September 13, 2022

Speakers



Sara Ashby,
Moderator,
Partner, Wiggin LLP
(London)



Aimée Wolfson,
Executive VP of IP and
Deputy GC,
Sony Pictures Entertainment



Ben Sheffner,
SVP & Associate GC, Law &
Policy,
Motion Picture Association, Inc.



Eléonore Gaspar
Attorney-at-law,
Partner, DTMV (Paris)



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THE LOBSTER (2015)



2015 Cannes Film Festival, Jury Prize

2015 Academy Award Nomination, Best Original Screenplay

Director/Co-Writer/Co-Producer: Jorgos Lanthimos

Logline: In a dystopian near future, single people, according to the laws of The City, are taken to The Hotel, where they are obliged to find a romantic partner in 45 days or are transformed into beasts and sent off into The Woods.

Co-production involving producers from five countries:



€4.2 million Production Budget

Element Pictures – Ireland
Faliro House – Greece
Haut et Court -- France
Lemming Films -- Netherlands
Scarlet Films, in association with
Protagonist Pictures (Film4) -- UK



*Eurimages (Council of Europe's film fund)

36% of The Lobster's €4.2m budget was covered by territorial-based pre-sales



20% -- Sony Pictures Worldwide Acquisitions

4% -- French pay-TV platform Canal+

12% -- UK free-to-air film channel Film4

\$18m WW Theatrical Box Office



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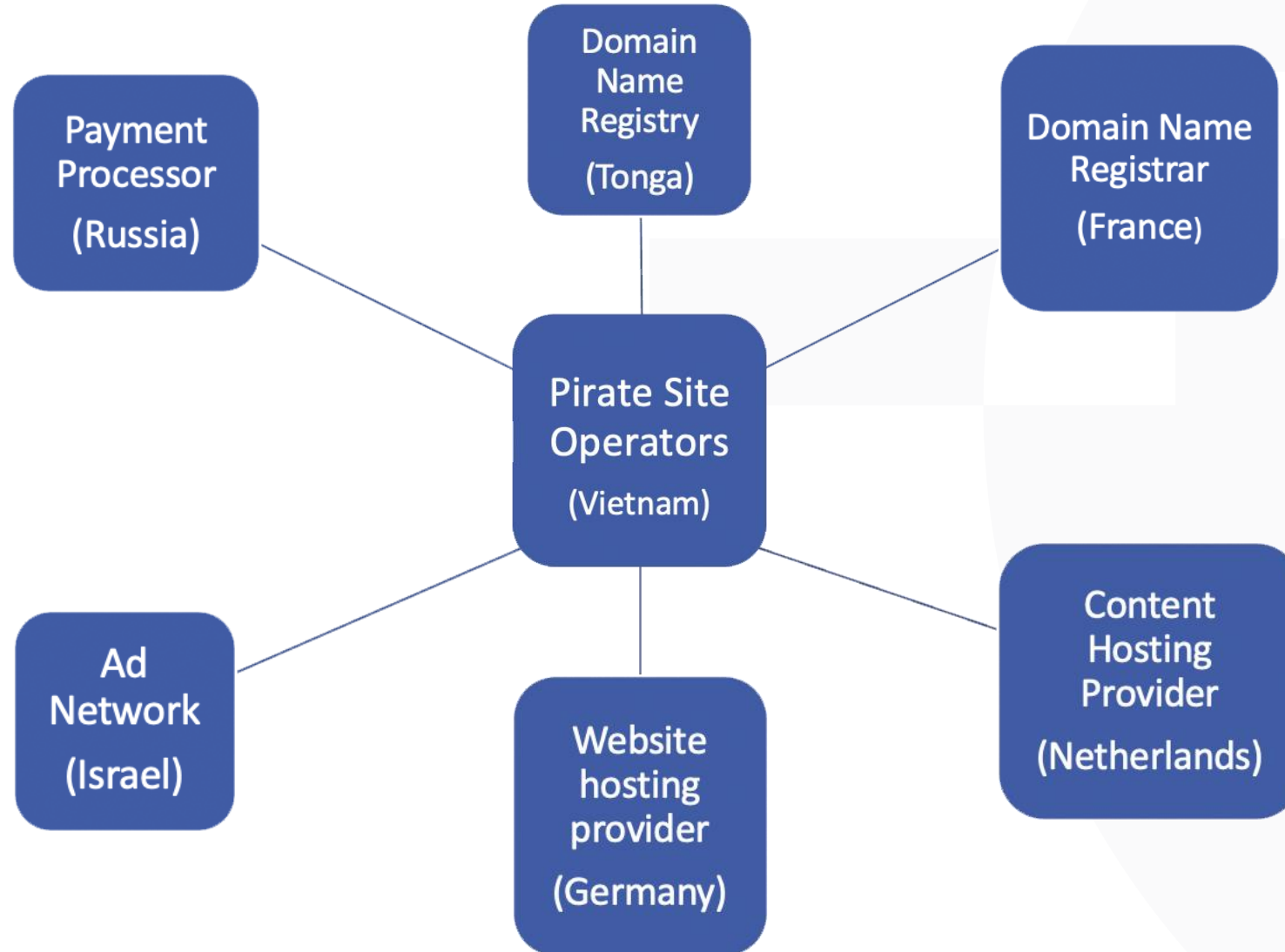
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Ben Sheffner

Senior Vice President & Associate
General Counsel, Law & Policy,
Motion Picture Association, Inc.



Piracy: A Global Problem



Piracy: The Global Challenge



Copyright respects borders...but

- The internet does not
- Pirates do not

Copyright Enforcement: The US Approach



Two-step analysis:

1. Does the court have jurisdiction over the defendant?
 - Requirement of US Constitution
2. Does US copyright law reach the defendant's activities?
 - Scope of copyright law

Jurisdiction: Highly Fact-Dependent



UMG Recordings, Inc. v. Kurbanov (4th Cir. 2020): YES Jurisdiction

- Transfers data with US users of the software
- Site operator supplies geolocation of its users to ad brokers so advertisers can target specific locations
- Registered DMCA agent with US Copyright Office
- Contracts with a US-based ad broker
- Registered domain names with GoDaddy (US)
- Contracts with Amazon Web Services (in US) to host “front end” portion of websites
- Website TOS specifies jurisdiction as Russia “and anywhere else [the user] can be found” (i.e. USA)

Jurisdiction: Highly Fact-Dependent



AMA Multimedia, LLC v. Wanat (9th Cir. 2020): NO Jurisdiction

- Advertising on site geolocated
- DNS servers in US
- Domains registered with GoDaddy (US)
- TOS that invoked protections of US law
- Registered DMCA agent

Territoriality on the Internet



Spanski Enterprises v. Telewizja Polska, SA (D.C. Cir. 2018)

- Spanski had exclusive rights to broadcast Polish shows in US
- TVP streamed shows into the US via its website
- Court: By streaming content to US viewers, TVP infringed US copyright law:
 - “Although it was in Poland that TV Polska uploaded and digitally formatted the fifty-one episodes, the infringing performances — and consequent violation of Spanski’s copyrights — occurred on the computer screens in the United States on which the episodes’ images were shown.”
 - “Accordingly, because the conduct relevant to the statute’s focus occurred in the United States, this case involves a permissible domestic application of the Copyright Act, even if other conduct occurred abroad.”

Global Enforcement: The Big Question



Can one country order a defendant to stop infringing globally?

Canada: Yes

- *Google Inc., v. Equustek Solutions Inc.* (Supreme Court of Canada 2017)
- “it is not equitable to deny [Equustek] the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally permissible.”

US: Not so fast



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Territorial jurisdiction



➤ **Brussel I bis Regulation**

- Article 4 : forum of the defendant's domicile
- Article 7.2 : where the harmful event occurred or may occur
- Article 8.1 : any for in which in which at least one defendant is domiciled

Territorial jurisdiction



➤ Extent of jurisdiction

- court of the place of establishment of the infringer: competence over all nationally distinct infringements / jurisdiction over the entire multi-territorial claim
- OR court of a State where the infringement occurs : jurisdiction only for the damage suffered in that State / only for the locally occurring damage
 - **The jurisdiction of the place where the damage occurs is limited to locally-occurring damage**
 - CJEU, March 7, 1995, *Fiona Shevill c/ Presse Alliance*, case C-68/93
 - CJEU, October 3, 2013, *Peter Pinckney*, case C-170/12
 - CJEU, January 22, 2015, *Hejduk*, case C-441/13
 - *French Supreme court, first civil chamber, July 16, 1997*

Territorial jurisdiction / Internet



Focalisation : The infringing content is intended specifically for a particular territory (for example, website intended for the French public with use of the French language)

Accessibility : The damage is located wherever the infringing content is accessible online (for purchase or viewing)

➤ **Accessibility is sufficient**

➤ CJEU October 25, 2011. *eDate Advertising GmbH*, case C-509/09 et C-161/10

➤ French Supreme court, first civil chamber, January 22, 2014, n°10-15.890 (under European law)

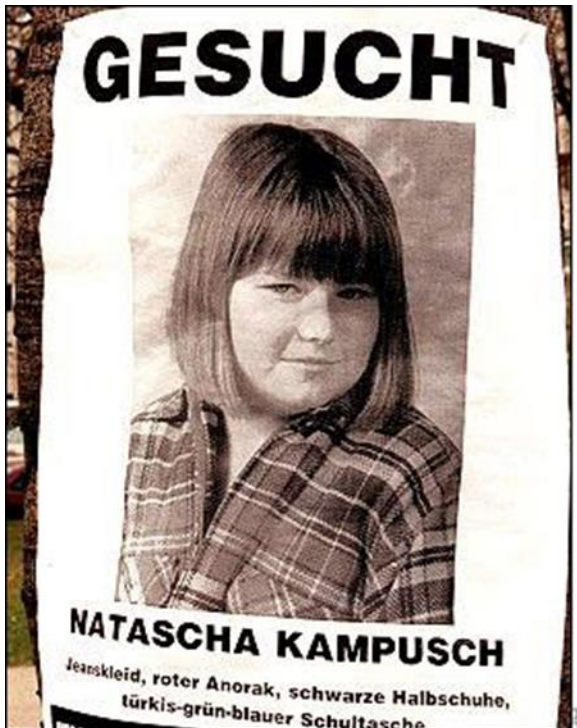
➤ French Supreme court, first civil chamber, October 18 2017, N°16-10.428 (under article 46 ccp)
= jurisdiction of the French judge as soon as the internet page is accessible in France

Does it help ?

Territorial Jurisdiction : multiple co defendants/connection



Brussels I Article 8.1



Painer, CJEU (Dec. 1, 2011, C-145/10)

- Pictures published in the press without the author's name and authorization, German / Austrian
- connection admitted if there is a risk of irreconcilable decisions for materially identical infringements carried out by distinct co-defendants
- Conditions : the same situation of fact and law and the risk of divergence in the outcome of the dispute
- = *A person may, where he is one of a number of defendants, be sued in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.*

Territorial jurisdiction : Connection



Jurisdiction in case of multiple defendants under Brussels I – Article 8.1

➤ CJEU, *Solvay*, July 12, 2012, C-616/10 :

- *It is for the national court to take into account, inter alia, the dual fact that, first, the defendants in the main proceeding are each separately accused of committing the same infringements with respect to the same products and, secondly, such infringements were committed in the same Member States, so that they adversely affect the same national parts.*

➤ French decision *Pucci*

(French Supreme court, February 26, 2013 n°11-27.139 & Paris Court of Appeal, February 12, 2021)

- The risk of irreconcilable judgments resulting from separate proceedings justifies that claims against different defendants be tried together.

Applicable law to non-contractual obligations



➤ Law applicable to the right

- Territorial nature
- **Rome II** Regulation No 864/2007, July 11, 2007, Article 8
 - The law applicable shall be the law of the country for which protection is claimed
 - (The law applicable for a community intellectual property right shall be the law of the country in which the act of infringement was committed)

Applicable law to non-contractual obligations (continued)



➤ Berne Convention Article 5

(1) Authors shall enjoy in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

= This provision treats foreigners in the same way as nationals as regards the protection of their works

= works which have a country of origin which is a Union country, benefit, in all other Union countries, from the same protection as the latter give to the works of their own nationals.

Applicable law to non-contractual obligations (continued)



➤ Berne Convention Article 5

(2) Enjoyment and exercise independent of the existence of protection in the country of origin

- Extent of protection and means of redress, governed exclusively by the laws of the country where protection is claimed
- = the law of the country in which protection is sought

Mosaic of territorial laws or unique law ?



- French old case law : Waterworld
- Theory of focalization: public targeted by the website / by the offers
 - CJEU *L'Oréal-Ebay* - July 11, 2011 for trademarks
 - CJEU *Football Dataco* - October 12, 2012
 - French Supreme Court September 2018 – *Pucci* case
 - CJEU, September 5, 2019, *AMS Neve*, Case C-172/18
 - CJEU December 21, 2021 for denigration

Applicable law to the infringement



○ Mosaic of laws

- **FRAGMENTATION OF APPLICABLE LAWS** = distributive application of several national laws

- Fragmentation of applicable laws according to the locations of the targeted public
- Each law being locally applicable on the basis of acts localized within its borders.

- **Possible other solution ?**

Applicable law as per article 5-2 of the Berne Convention –



What about authorship ?

Authorship governed by the **law of the country of origin** or by the **law of the country where the protection is claimed?**

➤ In France : old case law : Country of origin

ABC News, Supreme court, April 10, 2013 and Paris Court of Appeals (Oct. 5, 2018)

- **Reversal of the case law ?**
- **Application of Article 5-2 of the Berne Convention**
- **law of the country where the protection is claimed** (French law and not US law)
- But specific case with no agreement signed between the parties

Applicable law : moral rights

Asphalt Jungle, Supreme court, first civil chamber (May 28, 1991)



- Moral rights: imperative rule of international public policy
- Moral rights cannot be waived
- Colorization = Infringement of moral rights
- Even when work made for hire agreement
- Application of the law of the country where the protection is claimed for moral rights
- John Houston was considered to be the author

Choice of transmission law for satellite communications

➤ Cable Directive 93/83 applicable to satellite broadcasting and cable retransmission

- *The act of communication to the public by satellite occurs solely in the Member State where, under the control and responsibility of the broadcasting organization, the programme-carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.*
- = **The original law of distribution of the member state will apply / definition of the act of communication to the public by satellite**

Choice of transmission law for satellite communications (contd.)

- **Cable Directive II 2019/789 applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes**
 - The acts of communication [...]« be deemed occur solely in the Member State in which the broadcasting organisation has its principal establishment. »



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Territorial jurisdiction



Lucasfilm Limited v Ainsworth UK Supreme Court, 27 July 2011

Issue: Is it justiciable? Can the English court exercise jurisdiction in a claim against a person domiciled in the UK for infringement committed outside the EU (in the US) in breach of US copyright?

Yes, in a copyright case concerning ownership or infringement, provided there is a basis for *in personam* jurisdiction over the defendant (no decision whether the same would be the case if subsistence in issue, and no decision whether would be the case for registered rights).



Territorial jurisdiction

Lucasfilm Limited v Ainsworth UK Supreme Court, 27 July 2011

➤ *Forum non conveniens* - two stage test:

(1) The claimant must show that England is clearly the more appropriate forum than any other available foreign forum and hence the 'natural forum'.

Relevant factors include: convenience for the parties, the law governing the dispute, the place where the parties are resident.

(2) Even if England is not the appropriate forum, justice requires the case to be tried in England.

Relevant factors include: whether there is likely to be a fair trial in the foreign jurisdiction and the prospect of the claim succeeding in the foreign jurisdiction.



Performing Right Society Ltd v Qatar Airways Group
QCSC [2020] EWHC 1872
(Ch) (17 July 2020)





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Discussion and questions