


2016

Undetected Conflict-of-Laws Problems in Cross-Border Online Copyright Infringement Cases

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UNDETECTED CONFLICT-OF-LAWS PROBLEMS IN CROSS-BORDER ONLINE COPYRIGHT INFRINGEMENT CASES

*Marketa Trimble**

ABSTRACT

This article provides and analyzes data on copyright infringement cases filed in U.S. federal district courts in 2013; it focuses on infringement cases involving activity on the internet and discusses actual and potential conflict-of-laws issues that the cases raised or could have raised. The article complements the report entitled Private International Law Issues in Online Intellectual Property Infringement Disputes with Cross-Border Elements: An Analysis of National Approaches (the “Report”), which was published by the World Intellectual Property Organization in September 2015. In the Report its author, Professor Andrew F. Christie, discusses his empirical findings about the intersection of intellectual property (“IP”) law and conflict of laws and concludes that training activities, further research, and development of soft law would be the optimal means to address conflict-of-laws issues associated with cross-border IP infringements. This article arrives at a different conclusion: while training activities, further research, and the development of soft law may raise awareness of the issues, they will not solve the core problems that IP rights holders face when they strive to protect their rights against infringements on the internet. Development and coordination of conflict-of-laws rules, improvements in judicial cooperation, and streamlining of judicial proceedings in cross-border cases will be indispensable for addressing the issues effectively.

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INTRODUCTION

In September 2015 the World Intellectual Property Organization (“WIPO”) published a report entitled *Private International Law Issues in Online Intellectual Property Infringement Disputes with Cross-Border Elements: An Analysis of National Approaches* (the “Report”).¹ WIPO’s publication of the Report, authored by Professor Andrew F. Christie of the Melbourne Law School, arises out of WIPO’s interest in the intersection of intellectual property (“IP”) law and conflict of laws (private international law). WIPO has previously explored the intersection,² and now WIPO may benefit from the background work of several academic projects that have studied the intersection in depth since WIPO last explored the intersection.³

This article complements Professor Christie’s Report by providing additional empirical data concerning the intersection of the two fields. The article is based on an original empirical study (the “Study”) conducted to address a different set of questions from the set of questions addressed in the Report. While the Report sought to identify the typical features of cross-border online IP infringement cases,⁴ the Study’s aim was to provide a picture of the copyright infringement litigation landscape in the United States and identify potential undetected conflict-of-laws problems in the landscape.

Based on an analysis of the statistics produced by the Study, this article arrives at conclusions that are different from the conclusions in the Report; additionally, the article concludes that empirical studies that rely on existing court cases, such as those in the Report and in this Study, tend to underreport conflict-of-laws problems that IP rights holders face when they encounter online infringements of their rights.

¹ Andrew F. Christie, *Private International Law Issues in Online Intellectual Property Infringement Disputes with Cross-Border Elements*, WIPO, 2015, http://www.wipo.int/edocs/pubdocs/en/wipo_rep_rfip_2015_1.pdf (last visited Jan. 19, 2016).

² E.g., WIPO Forum on Private International Law and Intellectual Property, January 30 – 31, 2001, *see* documents at http://www.wipo.int/meetings/en/details.jsp?meeting_id=4243 (last visited Feb. 12, 2016).

³ AM. LAW INST., *INTELLECTUAL PROP.: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES* (2008); *CONFLICT OF LAWS IN INTELLECTUAL PROPERTY: THE CLIP PRINCIPLES AND COMMENTARY* (2013); TRANSPARENCY OF JAPANESE LAW PROJECT, *TRANSPARENCY PROPOSAL ON JURISDICTION, CHOICE OF LAW, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN INTELLECTUAL PROPERTY* (2009), *available at* <http://www.tomeika.jur.kyushu-u.ac.jp/ip/pdf/Transparency%20RULES%20%202009%20Nov1.pdf>; KOREAN PRIVATE INT’L LAW ASSOC., *PRINCIPLES ON INTERNATIONAL INTELLECTUAL PROPERTY LITIGATION* (2010) (on file with the author).

⁴ Report, pp. 4 and 19.

The intersection of IP law and conflict of laws sometimes seems to be underestimated or overlooked by the academic literature, although it has not been neglected as much as some commentators have suggested.⁵ One reason that the intersection has not been at the center of more academic attention is that it is unclear how often the two fields actually intersect and how consequential any issues are that may arise when the two fields do intersect. IP rights are territorially defined, and in most instances the law recognizes IP rights as national rights (rights established by national laws) or regional rights (rights established by regional groupings, such as the European Union), and the law recognizes the rights as extending only as far as the prescriptive jurisdiction of the country or the regional grouping that grants or recognizes the rights.⁶

IP rights, because they have territorial limits, do not seem to be likely candidates for generating conflict-of-laws problems; the rights exist within a jurisdiction and thus, it would seem, can be infringed only within the jurisdiction. Yet a number of authors have shown that complex issues may and do arise at the intersection of the two fields;⁷ the issues concern not only infringements of IP rights⁸ but also the scope of the IP rights, their initial and subsequent ownership, and other aspects of the rights.⁹ Nevertheless, the territorial limits of IP rights might lead one to believe that such issues, though complex and fascinating for both academia and practice, might arise rarely in practice, notwithstanding the increasing flow of goods and services across national borders and thus the greater potential for cross-border IP law disputes.

When and what kind of conflict-of-laws issues arise in litigation may be

⁵ STIG STRÖMHOLM, *COPYRIGHT AND THE CONFLICT OF LAWS* (Carl Heymanns Verlag, 2010), p. 60 (“In spite of that oft complained scarcity of major contributions to the meeting of intellectual property and private international law, a complete study of modern legal writing on this topic would demand a very substantial chapter.” *Id.*). For an early study on the intersection see CARL LUDWIG VON BAR, *THEORIE UND PRAXIS DES INTERNATIONALEN PRIVATRECHTS* (Hahn’sche Buchhandlung, Hannover, 1889), Volume Two, pp. 231 – 291.

⁶ PAUL GOLDSTEIN & BERNT HUGENHOLTZ, *INTERNATIONAL COPYRIGHT: PRINCIPLES, LAW, AND PRACTICE* 99 (2013). On the difference between the territorial scope of the right as defined by national law and the actual effective territorial scope of the right see Marketa Trimble, *Advancing National Intellectual Property Policies in a Transnational Context*, 74 MD. L. REV. 203 (2015).

⁷ *E.g.*, Paul Edward Geller, *Conflicts of Laws in Cyberspace: Rethinking International Copyright*, 20 COLUM.-VLA J.L. & ARTS 571 (1996); JAMES J. FAWCETT, PAUL TORREMAN, *INTELLECTUAL PROPERTY AND PRIVATE INTERNATIONAL LAW* (1998); Jane C. Ginsburg, *The Private International Law of Copyright in an Era of Technological Change*, *Recueil des Cours*, Hague Academy of International Law, Volume 273, 1999, pp. 239-406.

⁸ *E.g.*, *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994), *en banc*; *NTP, Inc. v. Research In Motion, Ltd.*, 418 F.3d 1282 (Fed. Cir. 2005).

⁹ *E.g.*, *Itar-Tass Russian News Agency v. Russian Kurier Inc.*, 153 F.3d 82 (2d Cir. 1998); *Fundación Gala–Salvador Dalí v. ADAGP*, ECJ, C–518/08, 2010.

subject to debate, and Professor Christie's Report aims to shed some light on the debate. The question is what the frequency of occurrence of a phenomenon in litigation tells us about the phenomenon. Even if a phenomenon arises rarely in litigation, the rarity of the occurrence does not necessarily mean that there is no need for policy and law to address the phenomenon; phenomena that occur rarely may have significant implications that require policy and/or legislative action, and the lack of a phenomenon in litigation may still warn of larger problems.

It is understandable that a problem would rank lower on a list of priorities for policy and/or legislative action if the problem arises rarely and its results seem to be less consequential. To determine whether the intersection of IP law and conflict of laws should appear on a list of priorities, and if so, how high it should rank, policy makers at both the national and international levels will benefit from empirical information about the frequency, magnitude, and impact of issues that arise at the intersection. However, few studies provide such information; the academic projects mentioned above, though they analyze in great depth the intersection and the problems that it generates,¹⁰ do not include any quantitative or representative data. Despite the substantial increase in recent years in empirical, including quantitative, studies on IP law that now cover a variety of aspects of IP law,¹¹ apparently only two quantitative studies address the intersection.¹²

The lack of quantitative empirical conflict-of-laws studies does not surprise conflict-of-laws experts: the conflict-of-laws field has traditionally suffered from a lack of quantitative data, and relatively few empirical studies exist on conflict of laws.¹³ The dearth of quantitative studies is understandable because of the difficulty of obtaining comprehensive datasets that provide a sufficient basis for quantitative research. Conflict-of-laws issues typically arise in courts of first instance, and many of the issues may not progress to appellate courts, meaning that researchers must use data from

¹⁰ See particularly AM. LAW INST., INTELLECTUAL PROP., *supra* note 3, and THE CLIP PRINCIPLES, *supra* note 3.

¹¹ See, e.g., statistical studies concerning patent law listed in Marketa Trimble, *Foreigners in U.S. Patent Litigation: An Empirical Study of Patent Cases Filed in Nine U.S. Federal District Courts in 2004, 2009, and 2012*, 17 VANDERBILT J. ENT. & TECH. L. 175 (2015).

¹² See Marketa Trimble, *When Foreigners Infringe Patents: An Empirical Look at the Involvement of Foreign Defendants in Patent Litigation in the U.S.*, 27 SANTA CLARA COMP. & HIGH TECH. L.J. 499 (2011); Trimble, *Foreigners*, *supra* note 11.

¹³ William M. Richman & William L. Reynolds, *Prologomenon to an Empirical Restatement of Conflicts*, 75 INDIANA L.J. 417 (2000); Louise Weinberg, *Theory Wars in the Conflict of Laws*, 103 MICH. L. REV. 1631 (2005); Hillel Y Levin, *What Do We Really Know about the American Choice-of-Law Revolution?*, 60 STAN. L. REV. 247 (2007); Marcus S. Quintanilla & Christopher A. Whytock, *The New Multipolarity in Transnational Litigation: Foreign Courts, Foreign Judgments, and Foreign Law*, 18 SW. J. INT'L L. 31 (2011).

lower courts, which typically have less accessible data than appellate courts.

Even in the United States, where complete case file databases exist that include files from some first-instance courts, empirical research on conflict-of-laws issues is time-consuming because of a lack of relevant coding. This limitation applies even to the Lex Machina database that consists of all IP cases filed in U.S. federal district courts,¹⁴ while the database codes for a number of variables, research on conflict-of-laws issues requires additional coding.

The Study that is presented in this article complements the Report with empirical information on copyright cases involving online infringements that were filed in U.S. federal district courts in 2013. This information is a useful complement to the Report because the Report included only two U.S. cases,¹⁵ which the Report considered “reasonably representative of cases concerning cross-border online IP infringement”¹⁶ in the United States. The Report did not state that the cases were statistically representative, but readers could mistakenly draw conclusions about all cross-border online IP infringement cases in the United States that might not be accurate if the two cases are not a representative sample of the population of such U.S. cross-border online IP infringement cases.¹⁷

To shed additional light on U.S. online IP infringement cases, the Study analyzed a random sample from all copyright cases filed in U.S. federal district courts in 2013,¹⁸ and focused on variables that suggest actual or potential conflict-of-laws issues. Potential conflict-of-laws issues are “undetected” conflict-of-laws issues and are worth studying precisely because the parties did *not* raise them in litigation. The fact that the parties did not raise the issues does not prove that the issues did not exist, or that the current state of conflict-of-laws rules dissuaded the parties from raising the issues; however, any undetected issues in the litigation case files might suggest that the parties did not realize the existence of the issues, or purposefully bypassed certain issues in litigation possibly because conflict-of-laws rules did not adequately address the issues. Purposeful omission of

¹⁴ Lex Machina, <https://lexmachina.com/>.

¹⁵ *Zippo Manufacturing Co v. Zippo Dot Com, Inc.*, 952 F.Supp. 1119 (W.D.Pa. 1997); *Best Odds Corp. v. iBus Media Ltd.*, No. 13-2008, slip op., D. Nev. May 15, 2014; Report, Annex 2, p. 3.

¹⁶ Report, p. 7. (“[T]here is no reason to believe that the cases from the reviewed jurisdictions are not reasonably representative of cases concerning cross-border online IP infringement in those jurisdictions, even if they do not comprise the population of such cases.” *Id.*).

¹⁷ Because of the methodology used to select the two cases, it is possible that the cases are not a representative sample of the population of U.S. cross-border online IP infringement cases. See *infra* notes 31 – 33 and the accompanying text.

¹⁸ See *infra* Part I for a discussion of the methodology employed in the Study.

such issues might be an indication of a need to revise the rules.

The Study complements the Report by providing another empirical piece to the puzzle of cross-border IP cases. It is important to collect additional data about cross-border IP cases because future initiatives—whether by WIPO, the Hague Conference on Private International Law,¹⁹ or individual countries—should arise from empirical information about the state of cross-border IP enforcement.

This article argues that the enforcement problems that IP rights holders face, and not the frequency with which conflict-of-laws issues do or do not arise in existing court cases, should guide policy makers' steps at the intersection of IP laws and conflict of laws. IP rights holder problems may or may not be reflected in cases that rights holders have filed in courts, so issues raised in such cases are not always reliable indicators of the problems. Cases *not* filed and issues *not* raised in courts might represent the greatest conflict-of-laws problems for IP enforcement. The question is whether conflict-of-laws problems can be addressed by training activities, further research, and development of soft law, as the Report proposes.²⁰ This article argues that a solution for the problems will require additional actions beyond training activities and development of soft law.

I. METHODOLOGY

This Part explains the methodology that the Study utilized. Because the Study complements the Report but employs a different methodology, it is helpful for this Part to discuss the differences between the methodologies of the Study and the Report. The discussion will point out the different choices in methodologies that were necessitated by the different questions that the authors sought to answer; it will also highlight the reasons for which the findings of the Study differ from the findings of the Report.

The Report and the Study both analyze court cases involving online infringements. The Study's focus on online infringements does not suggest that any proposals for legislative or other actions should distinguish between online and offline IP infringement cases; it is debatable whether separate solutions would be useful.²¹ However, as the Report states, "online

¹⁹ Hague Conference on Private International Law, <https://www.hcch.net/> (last visited Feb. 15, 2016).

²⁰ Report, pp. 29 – 30.

²¹ Although rights holders may utilize non-judicial forms of enforcement for online infringements (such as the DMCA notice and takedown system), the existence of these forms of enforcement does not eliminate the need for the availability of effective judicial enforcement. 17 U.S.C. 512. The statistics presented in Parts II and III suggest that online copyright infringements appear in courts even more frequently than do offline infringements. See *infra* Parts II and III.

infringement ... is arguably the most challenging scenario for application of [private international law] rules to [intellectual property],”²² thus implying that the online infringement scenario deserves particular emphasis. The academic initiatives concerning the intersection of IP law and conflict of laws have concluded that there is a need for special provisions on “ubiquitous infringement,”²³ which suggests an understanding among the academics involved in the initiatives that online infringements require special attention.

The Study, unlike the Report, focuses only on the civil litigation of copyright cases. The Report included both civil and criminal cases involving infringements of various IP rights,²⁴ although only 5% of the cases in the Report were criminal cases.²⁵ Copyright claims appeared in 38% of all Report cases,²⁶ and the two U.S. cases included in the Report were both civil cases involving trademarks.²⁷ Selecting civil cases involving only copyright claims meant that the Study could accomplish several objectives: analyze a random sample from a large, well-defined, and accessible population of civil cases; focus on cases involving the same type of IP rights and claims of a mostly identical nature (copyright infringement claims); allow for a consistent coding of case documents; and result in an analysis that could reflect specific circumstances of the particular area of law and practice at the time the cases were filed.

The territorial and temporal coverages of the Report and the Study also differ. The Report covered “19 jurisdictions (18 countries and the European Union)”²⁸ over a multi-year period, while the Study is limited to cases filed in U.S. federal district courts in the 2013 calendar year. The focus on the United States is useful for the Study because it allows an exploration of the situation in one jurisdiction in greater depth than possible in the Report. Of course the focus on one jurisdiction also creates limitations because the Study’s analysis of only the United States prevents the Study from drawing

²² Report, p. 4.

²³ *E.g.*, AM. LAW INST., INTELLECTUAL PROP., *supra* note 3, pp. 153 ff.; THE CLIP PRINCIPLES, *supra* note 3, pp. 314 ff. The proposals do not limit “ubiquitous infringements” to infringements on the Internet; other infringements may also qualify as “ubiquitous infringements.” THE CLIP PRINCIPLES, *supra* note 3, p. 316.

²⁴ Report, p. 8.

²⁵ Report, p. 11. Of the 56 cases covered by the Report, only three were criminal cases. Report, p. 12.

²⁶ From the total of 56 cases studied in the Report, 21 involved “[c]opyright and related rights.” Report, p. 8, Table 1. Both of the U.S. cases included in the Report (*see supra* note 15) sample were trademark cases.

²⁷ *See supra* note 15.

²⁸ Report, p. 6. The 19 jurisdictions included the United States, to which the Report refers as a single jurisdiction. Out of the 56 cases covered by the Report, 21 cases involved “[i]nfringement of a copyright or a related right (inc. a database right).” Report, p. 8, Table 1.

conclusions applicable globally or even for a group of countries. The Report specifically included information from a diverse group of jurisdictions, the aim being that the Report would draw conclusions with universal – or at least larger than national – implications.²⁹

Not only did the Study choose a single country, but it chose a country that is very likely not representative of most other countries; in the context of online infringement cases, the United States might present an atypical, or at least not a prototypical, jurisdiction in the global context. A number of features might make U.S. online infringement cases unique, or at least different, from cases in most other countries: robust exportation of copyrighted works, a high concentration of internet service providers (“ISPs”), widespread access to and use of the internet, a relatively easy access to courts, and arguably parties’ willingness, if not eagerness, to litigate.³⁰

The Study’s data collection method also differed from that of the Report. The Report studied 56 court decisions concerning cross-border online infringements³¹ which the Report collected in two ways: First, decisions were collected from experts from 25 countries who were “asked to provide leading court judgments (between three to five cases) in [the expert’s] country, involving private international law aspects in online intellectual property (IP) infringement disputes with cross-border elements.”³² Second, “the WIPO Secretariat identified court judgments dealing with [private international law] issues in cross-border online IP infringement from ... the Court of Justice of the European Union, and the national courts in France, the UK and the US.”³³ The 80 decisions collected in the two ways yielded 56 decisions after the author of the Report excluded 24 decisions that did not comply with the parameters of the Report.³⁴

The Study cast a narrower jurisdictional net by selecting cases only from the United States and a wider case net by selecting cases that were not limited *ex ante* to cases “involving private international law aspects in online intellectual property (IP) infringement disputes with cross-border elements.”³⁵ The Study’s sample of 364 copyright cases (the “sample”) represents 9.2% percent of all 3,965 copyright cases that were filed in the U.S. federal district courts in 2013 (the “population”).³⁶ The population was

²⁹ Report, p. 4.

³⁰ Some parties might not be eager to “litigate” but only to file cases to force a settlement. See the discussion *infra* in Part III.

³¹ Report, p. 4.

³² Report, p. 5 (internal quotation omitted).

³³ Report, p. 5.

³⁴ Report, p. 6.

³⁵ *Supra* note 32.

³⁶ The population was established as it was listed in Lex Machina on January 15, 2016.

identified from the Lex Machina database,³⁷ which includes all IP cases filed in the U.S. federal district courts in recent years and provides access to case docket documents. The year 2013 was selected because of the high percentage of cases that were concluded by January 2016 when the Study was commenced. According to Lex Machina, 3,836 of the 3,965 cases filed in 2013 were terminated by January 15, 2016 (the date on which the population was defined for the purposes of the Study), or 96.7% of all copyright cases filed in U.S. federal district courts in 2013.

The Study sample was selected randomly from the population; initially, 396 cases were selected, but during the initial coding 32 cases were eliminated because of a lack of case documents in the file, leaving a sample of 364 cases. Coding was based primarily on information included in the latest versions of complaints, which in some cases was the first amended complaint and in a few instances the second amended complaint. Cases were defined as they were docketed by the courts, meaning that a case treated as a single case by a court was treated as a single case in the sample, whether it was filed by one or multiple plaintiffs against one or multiple defendants, and whether it included multiple claims and/or one or more counterclaims. For the purposes of the Study, cases filed as declaratory judgment actions were coded as non-infringement actions, even if a counterclaim was filed that included an infringement claim.

The fact that the Study reviewed all cases filed, irrespective of whether or not they led to a court decision, also makes the Study population different from the population of the Report, which studied only cases based on court decisions. Including all cases filed may lead to an over-reporting of the issues addressed in the Study because some lawsuits might be frivolous and dismissed, or they might be otherwise concluded without a court ever addressing the merits or other issues in the cases. Contrariwise, relying on court decisions alone may result in an underreporting of issues because some or even many cases that never proceed to a court decision may in fact evidence the issues that are at the center of interest of the Study.

II. EMPIRICAL FINDINGS

This Part summarizes the statistical findings produced by the Study. The statistics below are purely descriptive and are not offered to prove causal effects between variables. Nevertheless, the statistics provide important information about copyright cases in the United States—information on which the analysis in Part IV of this article relies.

After randomly selecting the sample of copyright cases from the cases

³⁷ Lex Machina, <https://lexmachina.com/> (last visited Feb. 12, 2016).

filed in 2013 in U.S. federal district courts, I first identified infringement and non-infringement cases from the sample and then determined which of the infringement cases were online infringement cases. An “infringement case” was defined as a case in which the latest version of the complaint included at least one claim of copyright infringement. An “online infringement case” was defined as a case in which the latest version of the complaint alleged that some or all of the copyright infringing activity occurred on the internet. Figure 1 summarizes the findings in this step.

Of the 364 cases in the sample, 354 cases (or 97.3% of the cases in the sample) included at least one claim of copyright infringement, which was either the sole claim or one of several claims raised by the plaintiff or plaintiffs. Of the ten cases coded as “non-infringement cases,” one case, for example, was filed for a “declaration of noninfringement or invalidity” of copyright (along with additional claims);³⁸ another “non-infringement case” involved a claim under the provisions of the U.S. Copyright Act on anti-circumvention of technological measures designed to protect access to copyrighted works.³⁹ In yet another of the ten cases, the defendant counterclaimed for copyright infringement,⁴⁰ but for the purposes of the Study only the 354 cases filed with at least one plaintiff claiming copyright infringement were treated as copyright infringement cases.

Of the 354 copyright infringement cases, 285 cases (80.5% of the copyright infringement cases) concerned copyright infringement through acts committed on the internet (“online infringement cases”); the remaining 69 copyright infringement cases (19.5% of the copyright infringement cases) involved offline activities (“offline infringement cases”). Examples of offline infringement cases were 16 cases in the sample that Broadcast Music Inc. (BMI) filed together with other plaintiffs against owners of venues that infringed copyrights to various musical works by publicly performing the works in their venues without permission or a license.⁴¹

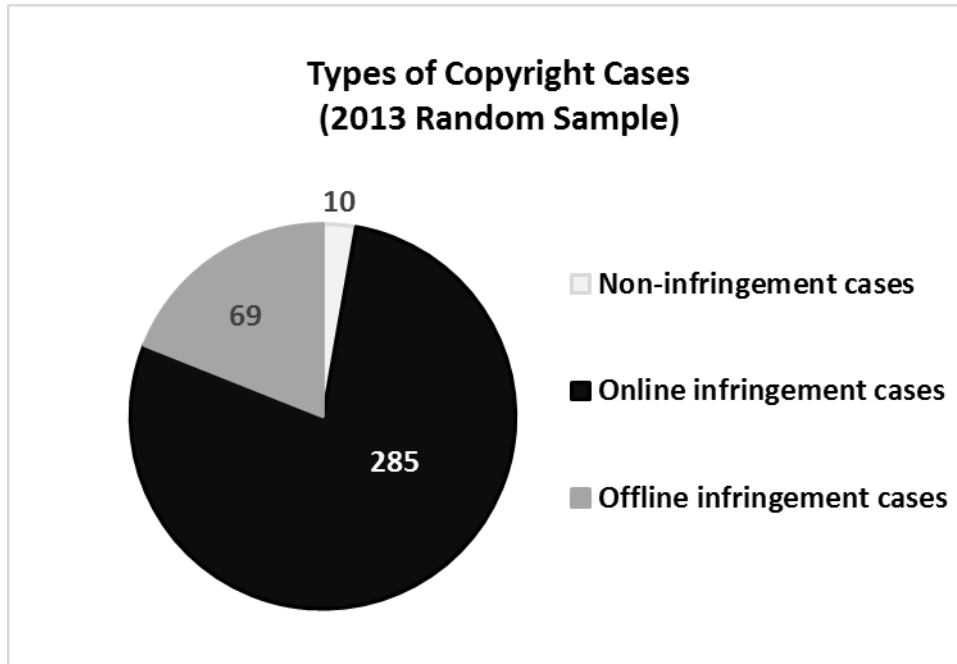
³⁸ Energy Clearinghouse, LLC v. EnergyNet.com, Inc., 4:13-cv-00599-C, N.D.Tex.

³⁹ 17 U.S.C. 1201; Cadence Design Systems Inc v. Berkeley Design Automation Inc, 4:13-cv-01539-YGR, N.D.Ca. No claim of copyright infringement accompanied the claim under section 1201 of the U.S. Copyright Act.

⁴⁰ Olivers Apparel, LLC v. Purdum et al, 4:13-cv-05284-DMR, N.D. Cal.

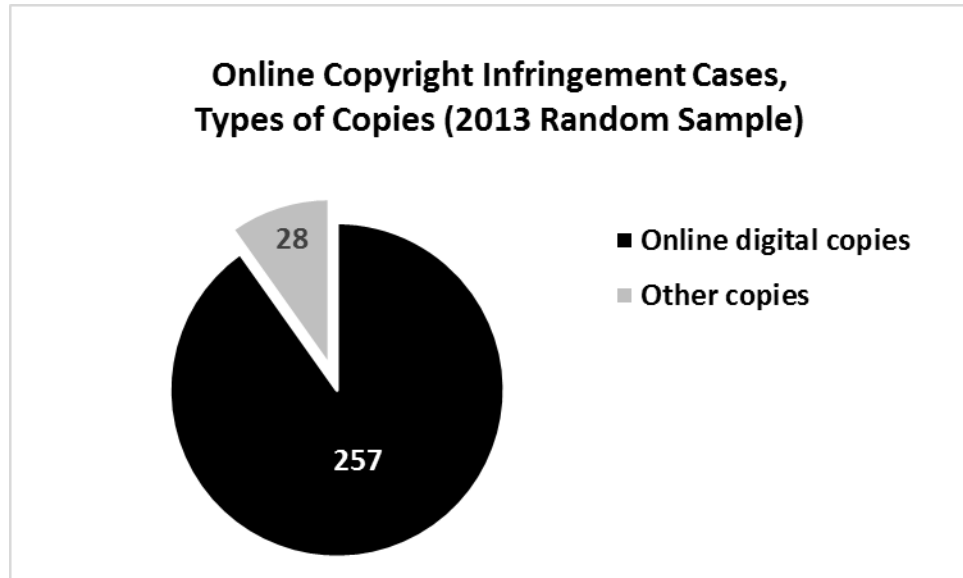
⁴¹ *E.g.*, Broadcast Music, Inc. et al v. Murphy’s Beef & Ale, Inc. et al, 2:13-cv-03778-JLS, E.D.Pa.

Figure 1



Next, the types of copies involved in online infringement cases were evaluated. Of the 285 online infringement cases, 257 cases involved digital copies (such as a digital file of a film) that were transferred via the internet (via the BitTorrent protocol, for example); Figure 2 refers to these copies as “online digital copies” to distinguish them from other copies, including other digital copies that are embodied in a physical medium (such as a film on a DVD) and transferred through offline means (such as shipped by postal mail once ordered online). Therefore, 90.2% of online infringement cases in the sample concerned infringements of copyrighted works in digital format that were transferred via the internet.

Figure 2

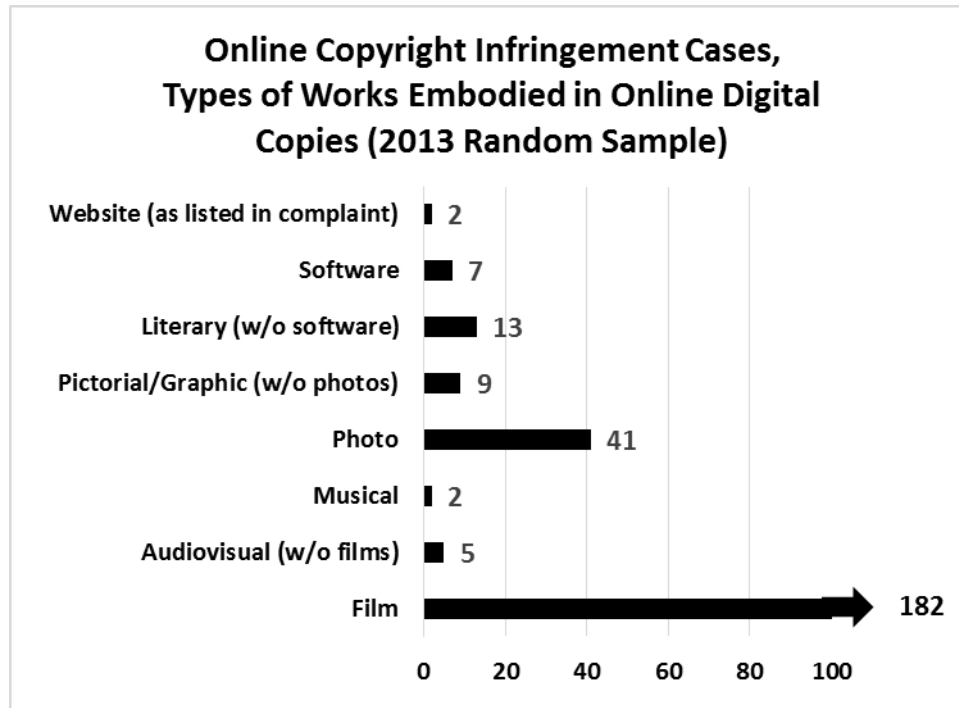


The cases that concerned online digital copies involved different types of works protected by copyright. Figure 3 provides an overview of these types of works. Some works were easier than others to fit into the section 102(a) categories of works of the U.S. Copyright Act (e.g., literary works, musical works);⁴² difficult works to categorize were works described vaguely in the complaints (e.g., a “website”).⁴³ In some instances a subcategory of a section 102(a) category of work is purposefully listed separately in Figure 3 (e.g., photographs as a subcategory of pictorial and graphic works) because the subcategory might be of particular interest (e.g., software as a subcategory of literary works). The number of cases in Figure 3 is higher than the 257 cases involving online digital copies in Figure 2 because some of the 257 cases involved more than one type of copyrighted work.

⁴² 17 U.S.C. 102(a).

⁴³ A “website” may include various types of works; it may be a compilation.

Figure 3



As for the parties involved in online infringement cases, Figure 4 shows, by country, the numbers of cases filed by a plaintiff or plaintiffs domiciled in that country. Domicile is defined for the purposes of the Study as the place of residence, incorporation, or permanent place of business of a person or entity. No online infringement cases in the sample involved plaintiffs from more than one country; when a case involved multiple plaintiffs, the plaintiffs were always domiciled in a single country (and multiple-plaintiff cases were counted as one case in calculating the numbers in Figure 4). Cases filed by plaintiffs domiciled in two of the three non-U.S. foreign countries in Figure 4 that are represented by more than one case (South Africa and Australia), were filed by the same plaintiffs.⁴⁴

⁴⁴ In South Africa the plaintiff was Zambesia Film (Pty) Ltd. (five cases); in Australia the plaintiff was Bait Productions Pty Ltd. (three cases).

Figure 4

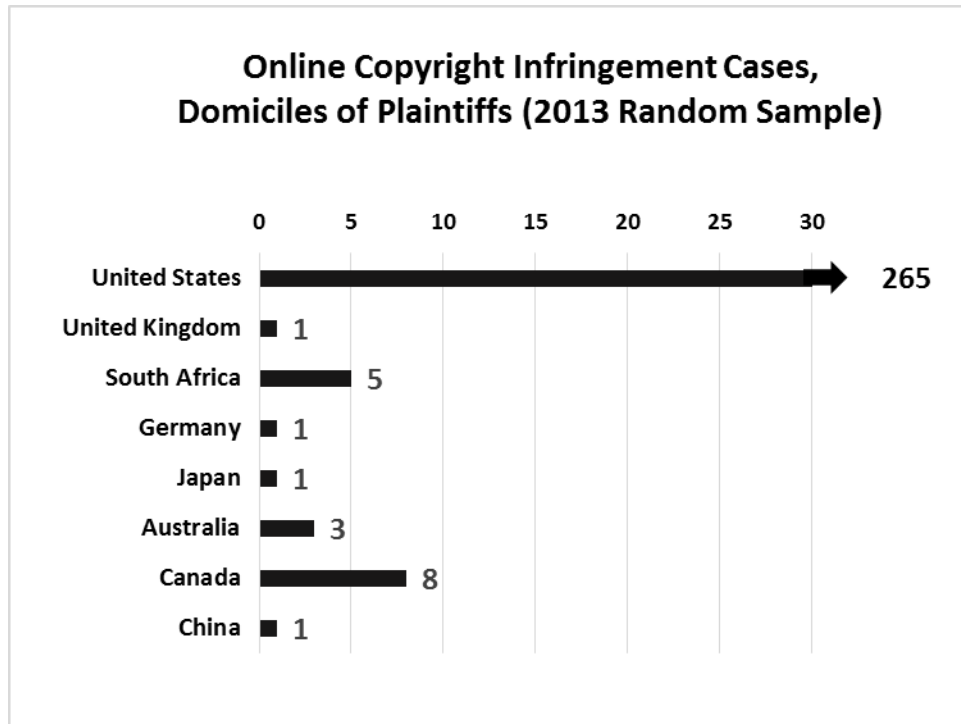


Figure 5 summarizes information regarding the domiciles of the defendants who were sued in the online infringement cases in the sample. Because only two cases involved defendants from multiple countries, Figure 5 lists these two cases separately with the list of the countries of defendants' domiciles. The number of cases in Figure 5 (142) is lower than the number of online infringement cases (285) because a number of cases were filed against "John Doe" defendants—defendants typically identified only by the internet protocol address ("IP address") of a device on which the defendant(s) acted.⁴⁵ Although the IP addresses were localized to the district where the lawsuits were filed against the defendant(s), it is not possible to state or assume that these cases were filed against a U.S.-domiciled defendant or defendants. The devices could have been used by parties not domiciled in the United States, including, for example, parties circumventing geolocation by utilizing IP addresses that do not correspond to the parties' actual physical

⁴⁵ In the context of the cases in the sample, "John Doe preserves the plaintiff's claim by standing in for an unknown defendant while the plaintiff tries to determine the defendant's actual name." Carol M. Rice, *Meet John Doe: It Is Time for Federal Civil Procedure to Recognize John Doe Parties*, 57 U. PITT. L. REV. 883, 885 (1996).

location at the time they connect to the internet.⁴⁶

Figure 5

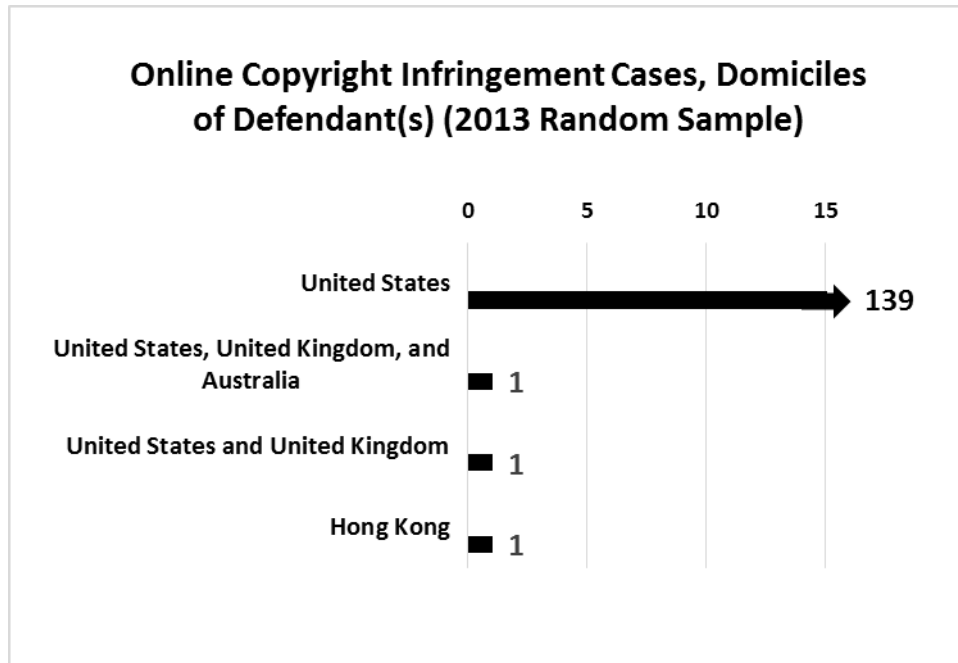


Figure 6 shows the number of cases that were initially filed against John Doe defendants. Of the 285 online infringement cases, 213 were originally filed against a John Doe defendant, or against multiple defendants of which at least one defendant was a John Doe. The 213 cases are 74.7 % of the online infringement cases in the sample. If a defendant was later identified and named in an amended complaint in the same case, the domicile of that defendant is accounted for in Figure 5, meaning that such cases appear in both Figure 5 (for the domicile of the subsequently identified defendant) and Figure 6 (for the initial John Doe defendant).

⁴⁶ For an explanation of “circumvention of geolocation” see, e.g., James A. Muir & Paul C. Van Oorschot, *Internet Geolocation: Evasion and Counterevasion*, ACM COMPUTING SURVEYS, Dec. 2009, at 4:1; Marketa Trimble, *Future of Cybertravel: Legal Implications of the Evasion of Geolocation*, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 567 (2012). This article leaves aside the problem of attribution of acts on the internet to particular persons. See generally, for example, Derek E. Bambauer, *Conundrum*, 96 MINN. L. REV. 584 (2011).

Figure 6

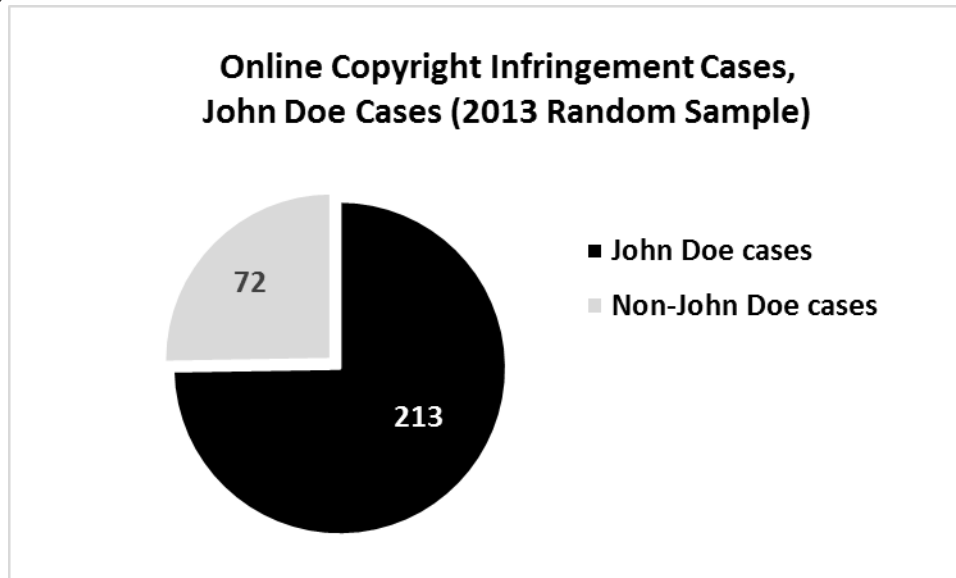
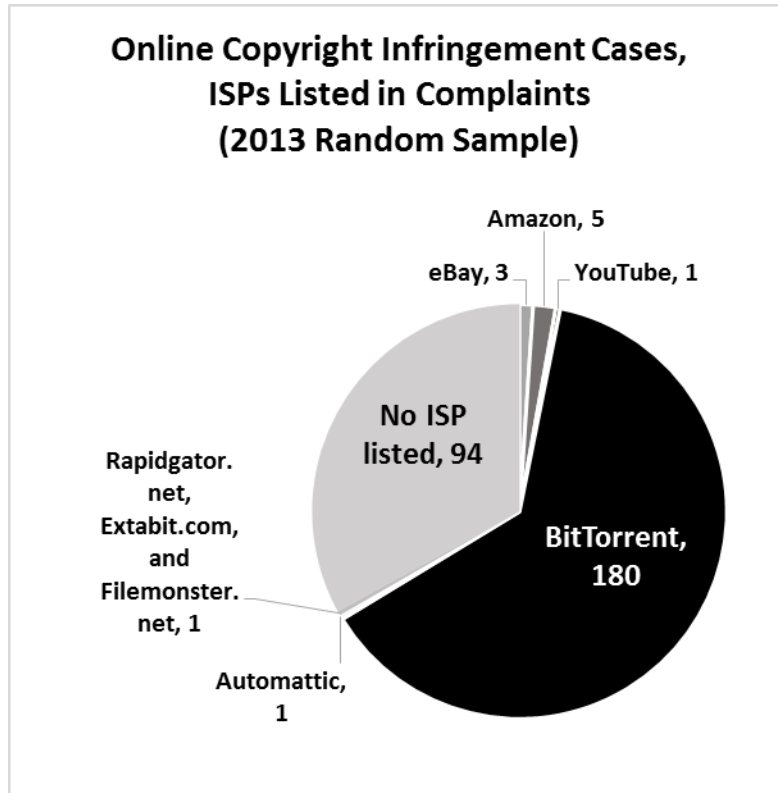


Figure 7 summarizes information about internet service providers (“ISPs”) who were mentioned in the complaints.⁴⁷ For the purposes of the statistics, the BitTorrent protocol is listed as an ISP. None of the ISPs listed in Figure 7 were sued as defendants or co-defendants in the cases in the sample; the ISPs were only mentioned as the means by which the defendants committed their allegedly infringing activity. The cases in Figure 7 that are classified as involving ISPs are not necessarily all the cases in which defendants utilized the services of ISPs; in the other online infringement cases, ISPs might also have been involved, but if they were, the plaintiffs made no mention of them in the complaints. As is apparent from Figure 7, more than half of the online infringement cases in the sample (63.2%) were filed against defendants who allegedly engaged in peer-to-peer sharing of copyrighted works via the BitTorrent protocol.

⁴⁷ The designation “ISP” is used loosely in the Study; because the entities were sued in the cases, it is unclear whether they would, in a particular case, qualify for the designation based on section 512 of the U.S. Copyright Act. 17 U.S.C. 512.

Figure 7



III. ADJUSTED FINDINGS—THE UNITED STATES WITHOUT MALIBU

The statistical picture reported in Part II would be incomplete without one important caveat. Of the 364 cases in the sample, 123 cases were filed by a single plaintiff, Malibu Media LLC (“Malibu”), and all of the cases filed by Malibu (the “Malibu cases”) were online infringement cases. This means that 33.8% of all the copyright cases in the sample and 43.2% of all the online infringement cases in the sample were Malibu cases. The high representation of Malibu cases in the sample is not surprising, given the number of Malibu cases in the population; according to Lex Machina, Malibu filed 1,176 of the 3,965 copyright cases filed in the U.S. federal district courts in 2013, meaning that Malibu cases constituted 29.7% of the population. The high number of Malibu cases repeated in the following years; according to Lex Machina, Malibu filed 40% of all copyright cases in U.S. federal district courts in 2014

and 37.8% of all copyright cases in 2015.⁴⁸ The high number of cases filed by a single plaintiff requires an assessment of the possible distortions to the statistical picture that the Study presents.

Arguably, the Malibu cases are a special group of cases. A number of commentators have accused Malibu of being a copyright troll⁴⁹—an entity that uses its intellectual property to extract money from alleged infringers through means that some consider overtly aggressive, unethical, and/or predatory. Some commentators identify misbehavior in Malibu’s using the nature of its copyrighted works to extract money from alleged infringers through the threat of embarrassment. Malibu sues defendants who allegedly shared its adult films without permission or a license from Malibu, thus possibly infringing Malibu’s copyright in the films. Often the defendants are identified only by their IP addresses and therefore sued as John Does. Once Malibu discovers a defendant’s identity it tries to persuade the defendant to settle—presumably as an alternative to a much less appealing option of being exposed as a sharer of adult films in an amended complaint that may eventually become publicly accessible.

The question arises as to how the cases filed by this entity should be treated in the Study sample. The Malibu cases may be viewed as outliers—cases that would not have been filed but for Malibu’s alleged “business model” of filing lawsuits to exert pressure on the alleged infringers. Or, the Malibu cases might be considered to be a group of legitimate cases filed by a particularly vigilant copyright owner who, as opposed to many other copyright owners, has chosen to enforce its rights against those who infringe its copyrights by sharing its copyrighted works online.

There may be good arguments for retaining the Malibu cases in the population and the sample; however, in anticipation of arguments that may be raised against the inclusion of the Malibu cases, I present in this Part information about the cases in the sample *without* the Malibu cases and later refer to the statistics “without Malibu” in my analysis in Part IV.

Figure 8 covers the 241 copyright cases in the sample that were not filed by Malibu⁵⁰ and shows that, as compared with Figure 1, which provided the

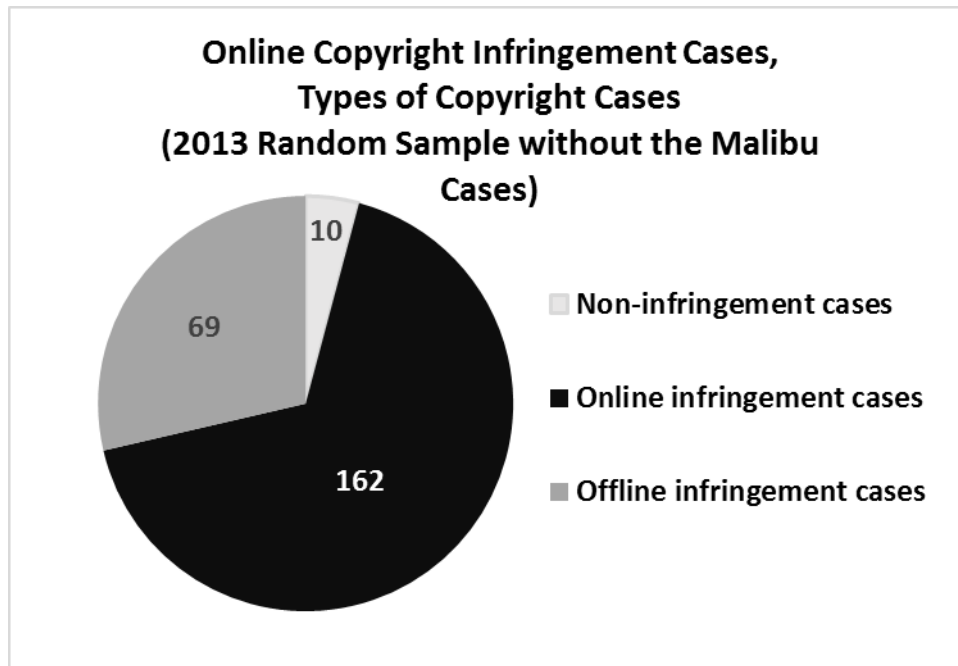
⁴⁸ According to Lex Machina as of February 12, 2016, Malibu filed 1,719 cases in 2014 and 1,933 cases in 2015. The total numbers of copyright cases filed in those years in the U.S. federal district courts were 4,295 and 5,108, respectively.

⁴⁹ *EFF Calls for Court Sanctions for Copyright Troll’s Public Humiliation Tactic*, Electronic Frontier Foundation, <https://www.eff.org/cases/malibu-media> (last visited Feb. 12, 2016); Gabe Friedman, *The Biggest Filer of Copyright Lawsuits? This Erotica Web Site*, *The New Yorker*, May 14, 2014, <http://www.newyorker.com/business/currency/the-biggest-filer-of-copyright-lawsuits-this-erotica-web-site> (last visited Feb. 12, 2016).

⁵⁰ The population of copyright cases filed in the U.S. federal district courts in 2013 minus the Malibu cases was 2,789 cases. The sample of 241 cases therefore represents 8.6% of the population without the Malibu cases.

same information for the entire sample including the Malibu cases, the sole change in the numbers of cases in the three categories (non-infringement cases, online infringement cases, and offline infringement cases) is in the category of online infringement cases, which are 123 fewer cases because all 123 cases filed by Malibu were online infringement cases. While 80.7% of the copyright infringement cases in the sample were online infringement cases when the Malibu cases were included,⁵¹ 70.1% of the copyright infringement cases in the sample were online infringement cases when the Malibu cases were excluded (162 of the 231 copyright infringement cases without Malibu were online infringement cases).

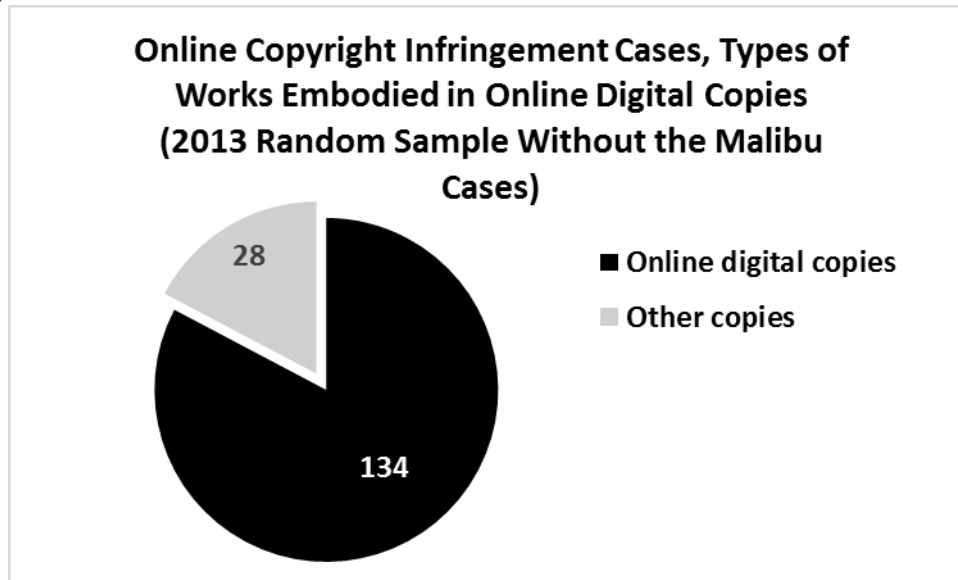
Figure 8



In Figure 9 the nature of the infringements that Malibu complained of and the types of copies involved in these infringements have predictable effects when the Malibu cases are excluded from the sample and Figure 9 is compared with Figure 2. In Figure 2, 90.2% of online infringement cases involved online digital copies (257 out of 285 cases). Without the Malibu cases, 82.7% of online infringement cases involved online digital copies (134 out of 162 cases).

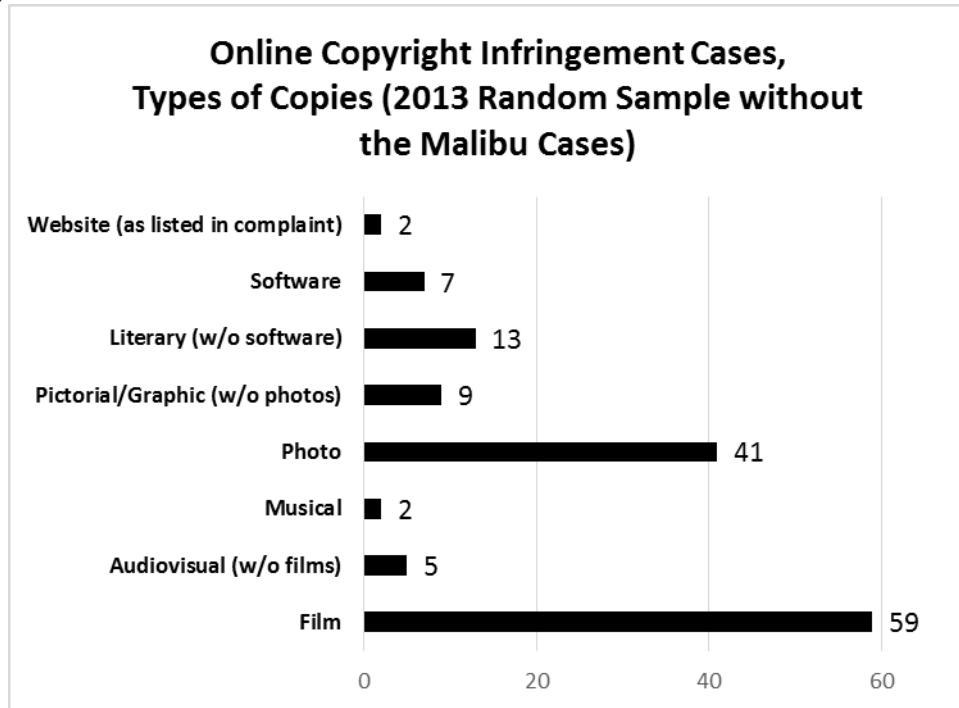
⁵¹ These were 285 online infringement cases out of 353 copyright infringement cases. See Figure 1 above.

Figure 9



In Figure 10 the representation of protectable subject matter also changes when the Malibu cases are excluded from the sample. All of the Malibu cases involved films, and while the cases involving films in Figure 10 still represent the highest number of cases in the sample, they no longer outnumber the total number of cases involving online digital copies of other protectable subject matters, as was the case in Figure 3, which included the Malibu cases.

Figure 10



The picture in Figure 11 also changes substantially without the Malibu cases. When the numbers in Figure 11 are compared with the numbers in Figure 6, which included the Malibu cases, the percentage of John Doe cases drops by 19.1%. With the Malibu cases included in the sample, cases filed against John Does were 74.7% of online infringement cases (213 out of 285 cases in Figure 6); without the Malibu cases included in the sample, cases filed against John Does were 55.6% of online infringement cases (90 out of 162 cases in Figure 11).

Figure 11

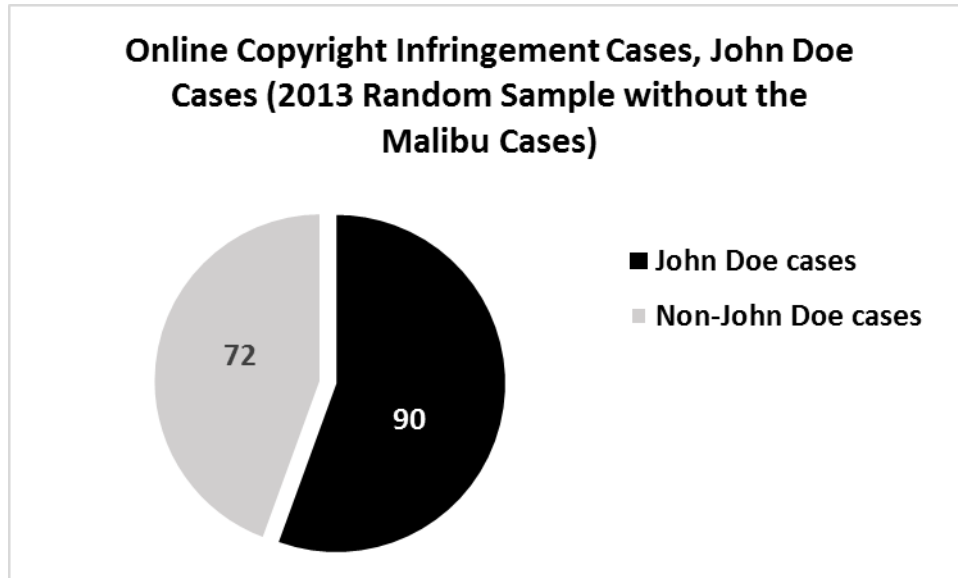
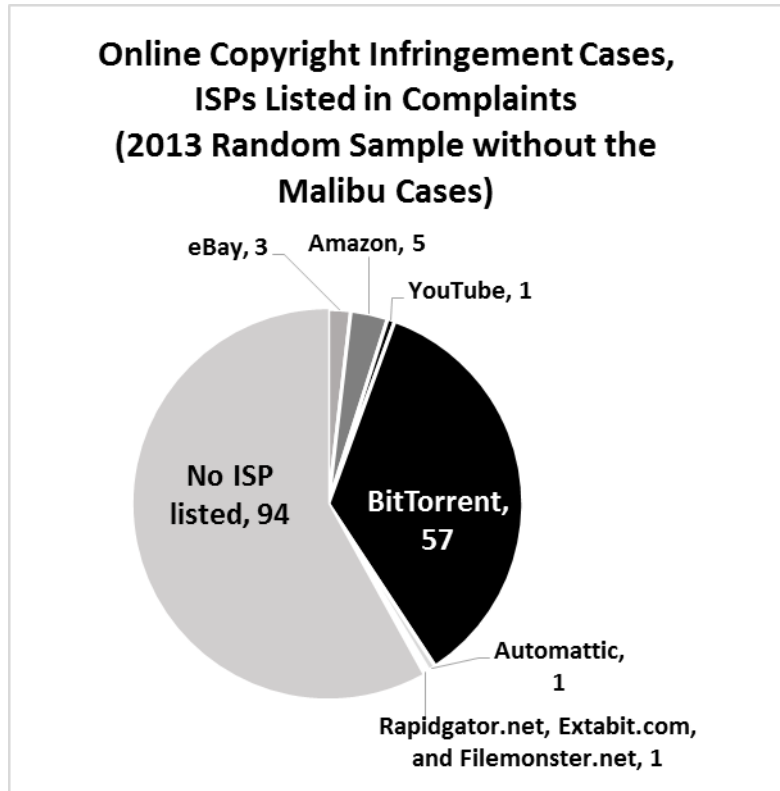


Figure 12 is substantially different from Figure 7 (which reported ISPs listed in complaints filed in online infringement cases and listed BitTorrent as an ISP for purposes of this Study) because all the Malibu cases listed BitTorrent as the protocol used by the defendants to allegedly infringe Malibu's copyright. With the Malibu cases, 63.2% of online infringement cases involved the use of BitTorrent (180 out of 285 cases); without the Malibu cases 35.2% of online infringement cases involved the use of BitTorrent (57 out of 162 cases).

Figure 12



It is not possible to assess from statistical data Malibu’s primary reason for filing lawsuits. However, the types of dispositions reached in the cases reveal some characteristics of the suits: Of the 123 cases filed by Malibu that were included in the sample, two concluded in default judgments, 119 are coded by Lex Machina as “likely settlement,” and two were coded as dismissed. The data for the non-Malibu online infringement cases in the sample show slightly more—but still not many—non-settlement outcomes: Of the 162 non-Malibu online infringement cases in the sample, one was decided in favor of the plaintiff by summary judgment, one was decided in favor of the plaintiff in a trial, 15 were concluded by default judgment, 10 were concluded by consent judgment, 109 were coded by Lex Machina as “likely settlement,” 19 were coded as dismissed, one case was transferred, and six cases were ongoing as of January 15, 2016.

Two additional statistics might indicate that Malibu was able to exert greater pressure on defendants in settlement negotiations than other plaintiffs could, on average: the smaller numbers of documents in the case dockets and the shorter duration of the Malibu cases. The closed Malibu cases averaged

16 documents per case docket, while the closed non-Malibu cases in the sample averaged 35 documents per case docket. The closed Malibu cases lasted a shorter time on average than the closed non-Malibu cases: the average duration of the closed Malibu cases was 155 days, while the average duration of the closed non-Malibu cases was 272 days. Fewer documents in the case docket and a shorter time to the closing of the case suggest a faster route to settlement and, perhaps, more pressure on the Malibu defendants to settle the cases—a result that is not surprising given defendants’ possible discomfort with being publicly associated with the particular works at issue.

The statistics in this Part cannot form a basis to conclude that Malibu should or should not be called a “copyright troll.” The statistics also leave unclear the proper manner in which the Malibu cases should be treated by the Study. Nevertheless, the statistics in this Part reveal that even with the lower percentages of some of the observed variables in the sample after the Malibu cases are excluded from the sample, most of the percentages remain high. The analysis in the following Part refers to statistics from both the sample with the Malibu cases and the sample without the Malibu cases.

IV. ANALYSIS

Initially it may seem that the data reported in Parts II and III shed little light on online copyright infringement cases and conflict-of-laws problems that arise in such cases. In the cases in the sample, few defendants were foreign domiciled,⁵² and therefore the potential for questions of international jurisdiction to arise was minimal. All of the online infringement cases in the sample included claims of copyright infringement based on U.S. law; none of the cases involved claims of copyright infringement based on foreign-country law⁵³ or allegations of effects caused in foreign countries⁵⁴—claims and allegations that would have generated choice-of-law questions concerning the law applicable to infringement.⁵⁵ In two cases in the sample

⁵² See *supra* Figure 5. In the language of the Report this would be the category in which “at least one of the parties is domiciled outside local jurisdiction.” The Report identified 48 such cases. Report, p. 9, Table 3.

⁵³ In the language of the Report this would be the category of “IPR ... located outside local jurisdiction.” The Report identified seven such cases. Report, p. 9, Table 3. Cf. Report, p. 11 (“A very large majority (89%) of the evaluated cases concerned local IPRs.” *Id.*).

⁵⁴ In the language of the Report these would be the category “act[s] giving rise to infringement occurred outside local jurisdiction” and the category of “damage outside local jurisdiction.” The Report identified 49 cases of the first category and four cases of the second category. Report, p. 9, Table 3.

⁵⁵ Additional choice-of-law questions could arise concerning the initial and subsequent ownership of copyright and other issues. Cf. Report, p. 11 (“Almost all (93%) of the evaluated cases were concerned with local damage only.” *Id.*).

plaintiffs mentioned effects in foreign countries in their complaints; however, these cases were terminated before it became clear whether the plaintiffs intended to base on their allegations any claims under foreign laws or claims for extraterritorial remedies under U.S. law.⁵⁶

If an analysis of the sample could be interpreted to suggest a conclusion, the suggestion would be that the copyright owners in the sample faced conflict-of-laws problems only on rare occasions: only one case in the sample presented a conflict-of-laws problem—a collateral estoppel issue that involved an earlier judgment by a foreign court.⁵⁷ However, a conclusion that copyright owners rarely encounter conflict-of-laws challenges would be highly misleading because the conclusion would ignore any undetected conflict-of-laws problems to which the statistics presented above might point.

A high percentage of the copyright infringement cases in the sample were online infringement cases; these cases constituted 80.5% of all the copyright infringement cases in the sample⁵⁸ (and 70.1% when the Malibu cases were excluded from the sample).⁵⁹ Acts of infringement committed on the internet have the potential to cause effects that are territorially unlimited unless the infringer—or a service the infringer uses for committing the acts—limits the territory where the effects might be felt.

In cases of acts that concern physical goods (which are not transmitted via the internet), territorial limitations are likely to be more common because of the restrictions that the seller (the alleged infringer) often imposes with respect to shipping. Other market partitioning tools, such as different electric

⁵⁶ *Ellis et al. v. Pearson Education, Inc.*, 2:13-cv-03320, D.N.J.; *Fortune Star Media Ltd. v. Echelon Studios Inc.*, 2:13-cv-06634, C.D.Ca. For extraterritorial remedies under U.S. copyright law *see* *Los Angeles News Service v. Reuters Television International, Limited*, 340 F.3d 926 (9th Cir. 2003).

⁵⁷ *Beijing Zhongyi ZhongBiao Electronic Information Technology Co. Ltd. v. Microsoft Corporation et al.*, 2:13-cv-01300, W.D.Wash., docket document 81, pp. 6-8.

⁵⁸ *See* Figure 1 above.

⁵⁹ *See* Figure 8 above. Because online infringements offer right holders the possibility of using the extra-judicial DMCA notice and takedown process under 17 U.S.C. 512, it might appear odd that more court cases are filed that involve online infringements than cases that involve offline infringements. The high percentage of online infringement cases indicates that the DMCA notice and takedown process does not eliminate the need for judicial enforcement in online infringements. Three factors are in play: First, remedies under the notice and takedown process are limited to a particular type of injunction (17 U.S.C. 512(j)), meaning that other remedies must be pursued in court; second, contested infringements proceed to a court (following a counter-notification by an alleged infringer; 17 U.S.C. 512(g)); and third, other strategic considerations might prompt a right owner to turn to judicial enforcement instead of filing a section 512 notice – among these reasons is the desire to halt the infringer’s activity without having to monitor any repeated infringement activity by the infringer under new online identities. For another reason *see* Marketa Trimble, *Setting Foot on Enemy Ground: Cease and Desist Letters, DMCA Notifications, and Personal Jurisdiction in Declaratory Judgment Actions*, 50 IDEA 777 (2010).

plugs or warranty limitations that apply only to a certain territory, may also contribute to territorial limitations on distributions of physical goods.⁶⁰

In the cases of goods that do not require a physical transfer but may be transferred via the internet (the “online digital copies” in Figures 2 and 9 above), territorial restrictions may exist if the infringer—or a service that the infringer uses to act on the internet—employs a geoblocking tool to prevent users from accessing the content at issue if users connect to the internet from outside a defined territory.⁶¹ It is not yet settled in law—in any country in the world—what an internet actor must do to meet any legal obligation to limit access to content from or from outside a defined territory;⁶² the scale of actions potentially required from an actor might range, at the low end, from including a notice to users on a website, to, on the high end, employing sophisticated geoblocking software with a high reliability of localizing and blocking users. Of course, even the most sophisticated tools are subject to potential circumvention by experienced users, who continue to find more sophisticated tools to evade geoblocking.⁶³

It seems logical to assume that acts involving online digital copies of copyrighted works—digital copies that are transferred via the internet—are likely to have a territorially unrestricted reach and therefore have effects in multiple countries. Online digital copies were at issue in 90.2% of the online copyright infringement cases in the sample⁶⁴ (82.7% when the Malibu cases were excluded from the sample),⁶⁵ and represented 72.6% of all copyright infringement cases in the sample (58% when the Malibu cases were excluded from the sample).⁶⁶ Users of the BitTorrent protocol are particularly unlikely

⁶⁰ Shipments of physical goods also open the possibility for enforcement through border measures imposed by customs officials. However, the effectiveness of border measures is limited when shipments are made in small consignments because customs typically do not have the resources to check enough consignments to enforce the measures effectively.

⁶¹ For a discussion of geoblocking *see, e.g.*, Dan Jerker B. Svantesson, *Geo-Location Technologies and Other Means of Placing Borders on the —Borderless Internet*, 23 J. MARSHALL J. COMPUTER & INFO. L. 101 (2004); Trimble, *The Future of Cybertravel*, *supra* note 46. In some countries, government censorship measures may also result in geographical limitations on the accessibility of Internet content.

⁶² For a discussion of standards for geoblocking and legal compliance *see* Marketa Trimble, *Geoblocking and Evasion of Geoblocking – Technical Standards and the Law*, in *GEOBLOCKING AND GLOBAL VIDEO CULTURE* 54 (Ramon Lobato & James Meese eds., Institute of Network Cultures, Amsterdam, 2016), <http://networkcultures.org/blog/publication/no-18-geoblocking-and-global-video-culture/> (last visited Feb. 15, 2016).

⁶³ For a discussion of the possible legal implications of the circumvention of geoblocking *see* Trimble, *The Future of Cybertravel*, *supra* note 46.

⁶⁴ *See* Figure 2 above.

⁶⁵ *See* Figure 9 above.

⁶⁶ There were 257 cases involving online digital copies in the 354 copyright infringement cases in the sample with the Malibu cases, and 134 cases involving online digital copies in

to territorially limit access to the content that they make available peer-to-peer; in the sample, 63.2% of the online copyright infringement cases⁶⁷ and 50.8% of all copyright infringement cases involved the use of BitTorrent (35.2% and 24.7% respectively when the Malibu cases were excluded from the sample).⁶⁸

There might be various reasons why plaintiffs in the sample did not, and why plaintiffs still do not, include claims of copyright infringements in other countries, under foreign-country law, when they encounter acts of infringements of their copyrights online, without territorial restrictions, that are likely to cause effects in multiple countries and potentially infringe their rights in multiple countries. U.S. law should not prevent plaintiffs from bringing claims against U.S.-domiciled defendants for infringements under foreign countries' copyright laws; a U.S. court has general jurisdiction over a U.S.-domiciled defendant, which allows the court to adjudicate a case against a U.S.-domiciled defendant even if that case involves a transitory cause of action, and at least some U.S. courts recognize copyright infringements under foreign-country law as transitory causes of action.⁶⁹ In the Study sample, most of the online copyright infringement cases against known defendants (139 cases, or 97.9% of the online copyright infringement cases in the sample that were filed against known defendants, and 39.3% of the copyright infringement cases in the sample) were filed against defendants domiciled in the United States—defendants over whom U.S. courts have general jurisdiction.⁷⁰

Even when claims that arise under the laws of multiple countries may formally be consolidated and litigated in one proceeding, in one country, it is a costly practice for plaintiffs to litigate infringements under the copyright laws of multiple countries. Plaintiffs must plead or otherwise give notice of foreign law;⁷¹ they may have to produce expert witnesses to testify on foreign law;⁷² they must present evidence proving infringement under foreign law;⁷³

the 231 copyright infringement cases in the sample without the Malibu cases.

⁶⁷ See Figure 7 above.

⁶⁸ There were 180 cases involving BitTorrent in the 354 copyright infringement cases in the sample with the Malibu cases, and 57 cases involving BitTorrent in the 231 copyright infringement cases in the sample without the Malibu cases.

⁶⁹ *E.g.*, London Film Productions Ltd. v. Intercontinental Communications, Inc., 580 F.Supp. 47 (SDNY 1984).

⁷⁰ In the two cases filed against multiple defendants each case involved at least one defendant domiciled in the United States. See Figure 5 above.

⁷¹ Fed. R. Civ. P. 44.1 ("The court's determination [of foreign law] must be treated as a ruling on a question of law." *Id.*). See also RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 125 (6th ed. 2010).

⁷² See Quintanilla & Whytock, *supra* note 13, pp. 40 ff.

⁷³ WEINTRAUB, *supra* note 71, 126.

and they must prove damages that they wish to recover under foreign law.⁷⁴ These steps add costs and time to the enforcement process—costs and time that may be contrary to a plaintiff’s goals and even beyond the plaintiff’s means.⁷⁵

The statistics of defendants’ domiciles show that plaintiffs in the sample rarely sued foreign defendants in U.S. courts for copyright infringement. Even the cases originally filed against John Doe defendants, which were 74.7% of the online copyright infringement cases in the sample⁷⁶ (55.6% when the Malibu cases were excluded from the sample),⁷⁷ might have eventually named U.S.-domiciled persons as defendants once the identity of the defendants was discovered; additionally, and regardless of the facts later revealed in discovery, the plaintiffs initially had to file the cases in U.S. courts because the IP addresses in the cases were U.S. IP addresses. The statistics of defendants’ domiciles do not necessarily mean that foreign-domiciled parties never infringe copyright in the United States; rather, the statistics may suggest the reluctance of copyright owners to rely on long-arm jurisdiction in online infringement cases. Any reluctance is understandable if one considers the difficulties that subsequent recognition and enforcement of a U.S. judgment abroad may cause.⁷⁸

The low frequency of the appearance of conflict-of-laws issues in the sample is indicative of a similar low frequency in the rest of the population; a targeted search of the copyright cases filed in U.S. federal district courts in 2013 that were not included in the sample reveals that conflict-of-laws issues do appear in this remaining population, but infrequently.⁷⁹ There are cases in the population that raise questions of personal jurisdiction over foreign-

⁷⁴ Marketa Trimble, *The Multiplicity of Copyright Laws on the Internet*, 25 FORDHAM INTELL. PROP., MEDIA & ENTERTAINMENT L. REV. 339 (2015).

⁷⁵ These reasons may also explain the Report’s finding that “[c]ases with both local and foreign actions usually concerned a local IPR...” Report, p. 10. Plaintiffs also refrain from relying on foreign law because they want to keep their cases in U.S. courts: “Instead of applying foreign law, U.S. courts typically adopt one of two strategies. First, courts reject the application of foreign law and apply U.S. law to transnational facts. Second, especially in cases involving a foreign plaintiff, U.S. courts dismiss the case in favor of another adequate foreign forum.” Donald Earl Childress III, *Rethinking Legal Globalization: The Case of Transnational Personal Jurisdiction*, 54 WM. & MARY L. REV. 1489, 1493-1494 (2013).

⁷⁶ See Figure 6 above.

⁷⁷ See Figure 11 above.

⁷⁸ E.g., *Lucasfilm Ltd. v. Ainsworth*, [2009] EWCA Civ. 1328; *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, [2011] 3 WLR 487 (U.K. Supreme Court, 2011). See also Samuel P. Baumgartner, *Understanding the Obstacles to the Recognition and Enforcement of U.S. Judgments Abroad*, 45 N.Y.U.J. INT’L L. & POL. 965, 977-978 (2013).

⁷⁹ It was the low frequency with which these issues arose in the population that caused the cases not to be more represented in the sample, given the size of the sample.

domiciled defendants;⁸⁰ of subject matter jurisdiction over claims based on foreign laws;⁸¹ of choice of venue;⁸² of choice of applicable law,⁸³ including claims of infringements under U.S. and other, foreign-country copyright laws;⁸⁴ of availability of extraterritorial remedies;⁸⁵ of applying the doctrine of forum non conveniens;⁸⁶ of res judicata arising because of a foreign court decision;⁸⁷ and of pleading foreign law.⁸⁸ A future project should focus on

⁸⁰ AESP, Inc. et al. v. Signamax, LLC, 1:13-cv-01089, E.D.Va., docket document 22, December 9, 2013; Out Fit 7 Limited et al. v. Nanjing oooo3D Information Technology, Co, Ltd, 3:13-cv-20463, S.D.Fla., docket document 26, October 30, 2013; ElcomSoft, Ltd. v. Passcovery Co. Ltd. et al., 2:13-cv-00018, E.D.Va., docket document 29, July 31, 2013; Mygard International Partnership v. Johnson, 3:13-cv-03750, N.D.Cal., docket document 33, September 11, 2014.

⁸¹ Lickerish Inc. v. Alpha Media Group et al., 2:13-cv-00377, C.D.Cal., docket document 24, October 30, 2013; Global Digital Media LLC v. Greg Plitt et al., 8:13-cv-01691, C.D.Cal., docket document 22, March 27, 2014.

⁸² Derma Pen v. 4EverYoung Limited et al., 2:13-cv-00729, D.Utah, docket document 115, April 28, 2014.

⁸³ Josi W. Konski v. Danish Film Directors et al., 2:13-cv-02383, C.D.Cal., docket document 56, April 14, 2014; Derma Pen v. 4EverYoung Limited et al., 2:13-cv-00729, D.Utah, docket document 115, April 28, 2014.

⁸⁴ Kluens Photography Ltd. v. Asking Alexandria Limited Liability Company et al., 2:13-cv-09077, C.D.Cal., docket document 9, January 24, 2014 (claims i.a. under U.S., U.K., and Canadian copyright laws); Victor Elias Photograph LLC v. VFM Leonardo, Inc. et al., 2:13-cv-04617, C.D.Cal., docket document 1, June 25, 2013 (claims i.a. under U.S., U.K., and Canadian copyright laws); Lickerish Inc. v. Alpha Media Group et al., 2:13-cv-00377, C.D.Cal., docket document 24, October 30, 2013 (claims i.a. under U.S., U.K., and Canadian copyright laws); Iconic Images, LLC v. Corbis Corporation et al., 8:13-cv-01951, C.D.Cal., docket document 31, July 11, 2014 (claims i.a. under U.S., U.K., and Israeli copyright laws); Havel et al. v. Honda Motor Co Ltd et al., 4:13-cv-01291, S.D.Tex., docket document 1, May 3, 2013 (claims i.a. under U.S. and U.K. copyright laws); X17 Inc. v. Fanpop Inc. et al., 2:13-cv-01734, C.D.Cal., docket document 1, March 11, 2013 (claims i.a. under U.S. and U.K. copyright laws); Aeromanagement Inc. v. Sukhoi Civil Aircraft Company et al., 1:13-cv-05097, S.D.N.Y., docket document 1, July 22, 2013 (the plaintiff “asserts any and all analogous rights it holds under foreign law;” *id.*, p. 8); Ferrera et al. v. Baiocchi et al., 3:13-cv-02505, N.D.Cal., docket document 22, November 15, 2013 (including a claim of “Infringement In Foreign Countries Under The Berne Convention;” *id.*, p. 40).

⁸⁵ Brandenburg et al. v. Pearson Education, Inc., 2:13-cv-03319, D.N.J., docket document 16, October 3, 2013; Nicklin et al. v. Pearson Education, Inc., 2:13-cv-03176, D.N.J., docket document 16, October 3, 2013; Lanting v. Pearson Education, Inc., 2:13-cv-03318, D.N.J., docket document 16, October 3, 2013. For the possibility of extraterritorial remedies under U.S. copyright law *see* Los Angeles News Service v. Reuters Television International, Limited, 340 F.3d 926 (9th Cir. 2003).

⁸⁶ ElcomSoft, Ltd. v. Passcovery Co. Ltd. et al., 2:13-cv-00018, E.D.Va., docket document 29, July 31, 2013

⁸⁷ De Fontbrune v. Wofsy et al., 3:13-cv-05957, N.D.Cal., docket document 11, January 21, 2014.

⁸⁸ HighBridge Company, LLC v. AudioGo Ltd. et al., 0:13-cv-00609, D.Minn., docket document 20, June 28, 2013.

cases that have raised conflict-of-laws issues and explore the reasons for which the parties raised the issues in the cases.

CONCLUSIONS

Statistics provide valuable information by showing not only the presence but also the absence of phenomena in a population. The absence of phenomena may point to problems that result in an ignorance or avoidance of the phenomena—problems that would go undetected if statistics were evaluated only on phenomena present in the statistics. The fact that a random sample of copyright infringement cases shows only one instance of conflict-of-laws issues that have been raised by the parties does not mean that parties encounter no or very little conflict-of-laws-related problems when they strive to enforce their copyrights in online infringement scenarios.

The high percentage of online copyright infringement cases in the sample, and particularly online copyright infringement cases involving online digital copies, suggests that many plaintiffs face infringements that span multiple countries. That the plaintiffs in these cases file lawsuits in their home country only against domestically-domiciled defendants with claims under domestic copyright law might be the result of barriers that make it impractical to file lawsuits against foreign defendants, and against domestic defendants for claims based on foreign-country law. The absence of conflict-of-laws issues in the cases might not be a reflection of free choice made by a party but rather the result of practical limitations of civil litigation as it currently exists.

The Report proposes that WIPO's future activities at the intersection of IP law and conflict of laws consist of "various educative activities and further research;" the Report also suggests that WIPO contribute "soft law" to "harmonize ... national law principles on what constitutes IP infringement in the online environment."⁸⁹ The question is whether these activities can solve the online infringement problem if copyright owners face infringements on the internet that very likely have effects in multiple countries but the owners find that they must forfeit their remedies in most countries in favor of a more efficient proceeding in a single country based only on the law of that country.

As I have pointed out in this and in an earlier article,⁹⁰ practical issues, such as the need to prove damages under foreign-country law, might be the primary limitation on the territorial scope of parties' copyright enforcement actions. The training of attorneys and judges may raise awareness of the possibilities for litigating cross-border cases but it will not make cross-border litigation any less complicated or less costly for parties—they still must assemble evidence of foreign infringements and damages and present that

⁸⁹ Report, p. 3.

⁹⁰ Trimble, *The Multiplicity*, *supra* note 74.

evidence in court. Soft law would also not seem to ease copyright owners' predicaments in these scenarios.

Some may conclude that the practical barriers to cross-border enforcement are in fact beneficial (as I suggested in an earlier article)⁹¹ because the barriers result in a desirable under-enforcement of copyright in the internet environment; in fact, a design that counts on strategic under-enforcement is one possible legislative choice. However, if the opposite conclusion is drawn—that under-enforcement actually undermines copyright protection, lowers the value of copyrights, and interferes with the goals of the copyright system—then a consideration of actions to improve enforceability in cross-border online infringement scenarios would be appropriate.

Addressing the conflict-of-laws problems that arise in cross-border litigation scenarios would be only one step in the improvement of enforceability; the practical barriers to cross-border enforcement must be addressed as well, with some of the remedying measures including matters such as a uniform standard for notice and takedown regimes, coupled with harmonized standards for safe harbors for internet service providers (which would need to be adjusted in light of the latest technological advances),⁹² improved access to evidence, and other forms of judicial cooperation. Using the internet, which itself causes the greatest concerns about barriers to cross-border enforcement, to enhance judicial cooperation, improve service of process and access to evidence, and facilitate cross-border judicial proceedings seems to be the logical solution for lowering at least some of those barriers.

While notice and takedown regimes and other technology-based means of addressing copyright infringements on the internet will continue to play an important role in enforcement, these regimes and other forms of enforcement will not be able to supplant judicial enforcement completely. The undetected conflict-of-laws problems suggest that currently effective judicial enforcement is out of reach for many right holders in cross-border cases.

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⁹¹ See Trimble, *The Multiplicity*, *supra* note 74, p. 403 (noting that the practical barriers to enforcement in the online environment might in fact contribute to a lowering of legal uncertainty).

⁹² See, e.g., Salil Mehra & Marketa Trimble, *Secondary Liability, ISP Immunity, and Incumbent Entrenchment*, 62 AM. J. COMP. L. 685 (2014).