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

Marketa Trimble
Samuel S. Lionel Professor of Intellectual Property Law
William S. Boyd School of Law, UNLV

IPSC
Stanford Law School
August 2016


---

**UNLV William S. Boyd School of Law**
<table>
<thead>
<tr>
<th>Questions</th>
<th>Christie’s Report</th>
<th>“Undetected Problems”</th>
</tr>
</thead>
<tbody>
<tr>
<td>What do existing cross-border online infringement cases tell us about the conflict-of-laws issues that arise in such cases?</td>
<td>What do U.S. copyright infringement cases tell us about existing or potential conflict-of-laws issues that arise or should have arisen in cases that involve online infringement?</td>
<td></td>
</tr>
<tr>
<td>Are any actions needed to improve enforcement in cross-border online infringement cases?</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Conclusions</td>
<td>Christie’s Report</td>
<td>“Undetected Problems”</td>
</tr>
<tr>
<td>-------------</td>
<td>------------------</td>
<td>-----------------------</td>
</tr>
<tr>
<td></td>
<td>Need for training activities, further research, and development of soft law.</td>
<td>Training activities, further research, and development of soft law are good, but not enough.</td>
</tr>
<tr>
<td></td>
<td>Need for development and coordination of conflict-of-laws rules, improvements in judicial cooperation, and streamlining of judicial proceedings in cross-border cases.</td>
<td></td>
</tr>
<tr>
<td>Methodology</td>
<td>Christie’s Report</td>
<td>“Undetected Problems”</td>
</tr>
<tr>
<td>----------------</td>
<td>-----------------------------------------------------------------------------------</td>
<td>--------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>(1) Population</td>
<td>Civil and criminal cases from 19 jurisdictions involving cross-border online infringements of IP rights.</td>
<td>Copyright infringement cases filed in U.S. federal district courts in 2013.</td>
</tr>
<tr>
<td>(2) Sample</td>
<td>A total of 56 cases; two to five cases per jurisdiction identified by (a) national experts, and (b) the WIPO Secretariat.</td>
<td>A random sample totaling 364 copyright infringement cases (9.2% of all copyright cases filed in 2013).</td>
</tr>
</tbody>
</table>

Two cases from the United States:
<table>
<thead>
<tr>
<th>Methodology</th>
<th>Christie’s Report</th>
<th>“Undetected Problems”</th>
</tr>
</thead>
<tbody>
<tr>
<td>(3) Problems</td>
<td>Both under- and over-inclusive.</td>
<td>Both under- and over-inclusive.</td>
</tr>
<tr>
<td></td>
<td>Global conclusions based on 19 jurisdictions.</td>
<td>Conclusions limited to the situation in the United States – a somewhat atypical jurisdiction in the global context.</td>
</tr>
<tr>
<td></td>
<td>A selection bias.</td>
<td>Potential distortion by a high number of cases filed by one particular plaintiff.</td>
</tr>
</tbody>
</table>
“Undetected Problems” Findings 1

Types of Copyright Cases
(2013 Random Sample)

- Non-infringement cases: 10
- Online infringement cases: 285
- Offline infringement cases: 69

UNLV William S. Boyd School of Law
“Undetected Problems” Findings 2

Online Copyright Infringement Cases, Types of Copies (2013 Random Sample)

- Online digital copies
- Other copies

257
28
“Undetected Problems” Findings 4

Online Copyright Infringement Cases, Domiciles of Plaintiffs (2013 Random Sample)

- United States: 265
- United Kingdom: 1
- South Africa: 5
- Germany: 1
- Japan: 1
- Australia: 3
- Canada: 8
- China: 1
**“Undetected Problems” Findings 5**

**Online Copyright Infringement Cases, Domiciles of Defendant(s) (2013 Random Sample)**

<table>
<thead>
<tr>
<th>Location</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>139</td>
</tr>
<tr>
<td>United States, United Kingdom, and Australia</td>
<td>1</td>
</tr>
<tr>
<td>United States and United Kingdom</td>
<td>1</td>
</tr>
<tr>
<td>Hong Kong</td>
<td>1</td>
</tr>
</tbody>
</table>
“Undetected Problems” Findings 7

Online Copyright Infringement Cases, ISPs Listed in Complaints
(2013 Random Sample)

- No ISP listed, 94
- BitTorrent, 180
- Automattic, 1
- Rapidgator.net, Extabit.com, and Filemonster.net, 1
- eBay, 3
- Amazon, 5
- YouTube, 1
But what about Malibu?

U.S. Copyright Cases, 2013
- 1,176 Copyright cases filed by other plaintiffs
- 2,789 Copyright cases filed by Malibu Media LLC

U.S. Copyright Cases, 2014
- 1,719 Copyright cases filed by other plaintiffs
- 2,576 Copyright cases filed by Malibu Media LLC

U.S. Copyright Cases, 2015
- 1,933 Copyright cases filed by other plaintiffs
- 3,175 Copyright cases filed by Malibu Media LLC
“Undetected Problems” Findings 8

Types of Copyright Cases (2013 Random Sample)

- Non-infringement cases: 10
- Online infringement cases: 285
- Offline infringement cases: 69

Online Copyright Infringement Cases, Types of Copyright Cases (2013 Random Sample without the Malibu Cases)

- Non-infringement cases: 10
- Online infringement cases: 162
- Offline infringement cases: 69
“Undetected Problems” Findings 9

Online Copyright Infringement Cases, Types of Copies (2013 Random Sample)

- Online digital copies: 257
- Other copies: 28

Online Copyright Infringement Cases, Types of Works Embodied in Online Digital Copies (2013 Random Sample Without the Malibu Cases)

- Online digital copies: 134
- Other copies: 28
“Undetected Problems” Findings 12

Online Copyright Infringement Cases, ISPs Listed in Complaints (2013 Random Sample)
- BitTorrent, 180
- Amazon, 5
- eBay, 3
- YouTube, 1
- Rapidgator.net, Extabit.com, and Filemonster.net, 1
- Automattic, 1
- No ISP listed, 94

Online Copyright Infringement Cases, ISPs Listed in Complaints (2013 Random Sample without the Malibu Cases)
- BitTorrent, 57
- Amazon, 5
- eBay, 3
- YouTube, 1
- Rapidgator.net, Extabit.com, and Filemonster.net, 1
- Automattic, 1
- No ISP listed, 94
“Undetected Problems” Analysis

- In the sample: few defendants were foreign domiciled, no choice-of-law or other conflict-of-laws questions presented.

- But:
  80.5% (70.1%) of all cases were **online infringement cases**.
  90.2% (82.7%) of online infringement cases involved **online digital copies**.
  63.2% (35.2%) of online copyright infringement cases involved the use of **BitTorrent**.
  74.7% (55.6%) of online infringement cases filed against John Doe defendants.

- Plus additional cases were identified in the population that did present conflict-of-laws issues.
<table>
<thead>
<tr>
<th>Conclusions</th>
<th>Christie’s Report</th>
<th>“Undetected Problems”</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Need for training activities, further research, and development of soft law.</td>
<td>Training activities, further research, and development of soft law are good, but not enough. Need for development and coordination of conflict-of-laws rules, improvements in judicial cooperation, and streamlining of judicial proceedings in cross-border cases.</td>
</tr>
</tbody>
</table>

**Cases not filed and issues not raised in courts might represent the greatest conflict-of-laws problems for IP enforcement.**
Undetected Conflict-of-Laws Problems in Cross-Border Online Copyright Infringement Cases

Marketa Trimble
Samuel S. Lionel Professor of Intellectual Property Law
William S. Boyd School of Law, UNLV

IPSC
Stanford Law School
August 2016
“Undetected Problems” Findings 3

Online Copyright Infringement Cases, Types of Works Embodied in Online Digital Copies (2013 Random Sample)

- Website (as listed in complaint): 2
- Software: 7
- Literary (w/o software): 13
- Pictorial/Graphic (w/o photos): 9
- Photo: 41
- Musical: 2
- Audiovisual (w/o films): 5
- Film: 182
### Online Copyright Infringement Cases, Types of Works Embodied in Online Digital Copies (2013 Random Sample)

<table>
<thead>
<tr>
<th>Type</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Website (as listed in complaint)</td>
<td>2</td>
</tr>
<tr>
<td>Software</td>
<td>7</td>
</tr>
<tr>
<td>Literary (w/o software)</td>
<td>13</td>
</tr>
<tr>
<td>Pictorial/Graphic (w/o photos)</td>
<td>9</td>
</tr>
<tr>
<td>Photo</td>
<td>41</td>
</tr>
<tr>
<td>Musical</td>
<td>2</td>
</tr>
<tr>
<td>Audiovisual (w/o films)</td>
<td>5</td>
</tr>
<tr>
<td>Film</td>
<td>182</td>
</tr>
</tbody>
</table>

### Online Copyright Infringement Cases, Types of Works Embodied in Online Digital Copies (2013 Random Sample without the Malibu Cases)

<table>
<thead>
<tr>
<th>Type</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Website (as listed in complaint)</td>
<td>2</td>
</tr>
<tr>
<td>Software</td>
<td>7</td>
</tr>
<tr>
<td>Literary (w/o software)</td>
<td>13</td>
</tr>
<tr>
<td>Pictorial/Graphic (w/o photos)</td>
<td>9</td>
</tr>
<tr>
<td>Photo</td>
<td>41</td>
</tr>
<tr>
<td>Musical</td>
<td>2</td>
</tr>
<tr>
<td>Audiovisual (w/o films)</td>
<td>5</td>
</tr>
<tr>
<td>Film</td>
<td>59</td>
</tr>
</tbody>
</table>
“Undetected Problems” Findings 6

Online Copyright Infringement Cases, John Doe Cases (2013 Random Sample)

- John Doe cases
- Non-John Doe cases

72 cases
213 cases
“Undetected Problems” Findings 11

Online Copyright Infringement Cases, John Doe Cases (2013 Random Sample)

- John Doe cases: 213
- Non-John Doe cases: 72

Online Copyright Infringement Cases, John Doe Cases (2013 Random Sample without the Malibu Cases)

- John Doe cases: 90
- Non-John Doe cases: 72
“TO AUTHOR: Great article! I would like to request that you provide more citations throughout the entire article. For the Figures, there are quite a few assertions and facts stated in the corresponding paragraphs explaining the graphs. Even though it seems like a lot of repetitive citations, [our Journal] likes the reader to be able to locate the authority in the event they would like to inquire further on their own, or fact check. Is it possible to include some citations to supporting authorities in these sections? Even if most of them end up being *Id.*, it still allows readers to know where the information is coming from. In addition, [our Journal] prefers to avoid using first person, there are only a few places where this happens, and if you would kindly re-word to avoid using first person, that would be appreciated.”