“Making Available”
Where does it occur?
What law Applies?

Jane C. Ginsburg
Columbia University School of Law
ALAI-USA

Scenario: Storage in Country A, Access in Country B

- Impetus: computing resources; “forum shopping” (applicable law shopping)
- Complications: Storage in multiple countries; country of access may lack significant relationship to accessing user (e.g. Pierre, French resident, visits Japan and accesses work while in hotel in Kyoto; Jane, US resident, takes train from France to Belgium, accesses work as train crosses border)

Localizing “Making Available”

- From (initiation): seat or residence of sender
- To (impact): seat or residence of recipient
- Which? Or Both? Points between as well?
- AG opinion Football Dataco v Sportradar (21 June 2012) (1996 Database directive “reutilization” right; but indistinguishable from 2001 Infosoc directive “making available” right, cf paras 39. 41)

Dispersal of place of act

- “Emission” v “ Reception” inappropriate for internet (paras 50, 55)
- 59. “‘re-utilisation’ is not usually a single act but the sequential succession of a number of acts which, having as their purpose the ‘making available’ of certain data via a networked and multi-polar communication medium, occur in that medium as a result of the actions of individuals located in different territories, the conclusion must be that the ‘place’ of the ‘re-utilisation’ is that of each of the acts needed to produce the result comprising the ‘re-utilisation’, that is to say, the ‘making available’ of the protected data.”

Here, there and everywhere

60. ”Consequently, . . . the act of re-utilisation under examination occurred as a result of a sequence of actions in a number of Member States and must be regarded as having taken place in each and every one of them.”

61: Server in Member State A; requesting user in Member State B: Act of reutilization (implicitly, making available) “takes place in both Member States”

So which country's law applies?

Relevant supranational PIL norms?

Lex loci delicti (commisi/damni) ; lex protectionis

Berne Convention 5.2 : Country « where » (for which?) protection claimed : destination/target of communication ? Source of communication? Both?

“Rome II”

Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)

Recital 26: Regarding infringements of intellectual property rights, the universally acknowledged principle of the lex loci protectionis should be preserved. For the purposes of this Regulation, the term ‘intellectual property rights’ should be interpreted as meaning, for instance, copyright, related rights, the sui generis right for the protection of databases and industrial property rights.

Art. 8 Infringement of Intellectual Property Rights

1. The law applicable to a non-contractual obligation arising from an infringement of an intellectual property right shall be the law of the country for which protection is claimed

Where is that? Problem of “délit complexe”

Resort to residual rule in art. 4

Article 4: General rule

1. Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.

Art. 4, exceptions to general rule

- 2. However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply.
- 3. Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply. . . .

ALAI national reports: country of initiation v. country of impact

- Belgium: *Copiepresse* (Brussels Court of Appeals, May 2011) law of country where harm impacts
- Croatia: PIL law art 28: either initiation or impact, wherever illicit (?)
- Finland (penal code): Finnish law if act directed toward national or resident of Finland
- France: caselaw inconsistent, but *SAIF v Google* (Paris Court of Appeals 26 Jan 2011) between country of initiation and of impact, most significant relationship applies, French users targeted
- Hungary (PIL law): lex protectionis (impact)
- Italy (*Pirate Bay* SCt 2009) country of download (impact)
- Japan (PIL law) impact unless unforeseeable
- Norway; Poland: Rome art. 8 (lex protectionis)
- US: (caselaw) US law applies to infringing acts impacting or occurring at least in part in US (including predicate act)

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ALI Principles (2008), art. 301: “the law of each State for which protection is sought”

Rationale: “The formulation ‘each country for which protection is sought’ is compatible with a market-oriented approach; it corresponds to the markets that plaintiff seeks to protect from infringements that are occurring (or threatened to occur) there.” **Commercial impact**

Examples for discussion

- Individual off-site storage: e.g. Dropbox – no "making available" because while storage *service* made available to public, availability of particular *works* remains private
- Centralized off-site storage: iCloud, etc. – making available from [Apple's seat] to customers wherever located/resident

Examples, continued

- “Shared” off-site storage: e.g. Megaupload – from Megaupload’s seat? From uploading users’ residences? To users wherever located/resident
- Off-shore streaming - From service’s seat to customers wherever located/resident.
- Off-shore collections of links to 3d party streaming or download sites (located in multiple other countries) Who is making available? Collector of links? Linked-to sites? [Annette Kur]