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Choice of Law in International Copyright: The Split of Authority Between the Second and Ninth Circuits Regarding Extraterritorial Application of the Copyright Act

Robert H. Thornburg

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CHOICE OF LAW IN INTERNATIONAL COPYRIGHT: THE SPLIT
OF AUTHORITY BETWEEN THE SECOND AND NINTH
CIRCUITS REGARDING EXTRATERRITORIAL APPLICATION
OF THE COPYRIGHT ACT

*Robert H. Thornburg**

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I. INTRODUCTION

Despite the coming of age of Internet dissemination of international works of authorship, and the general ease of obtaining a variety of international newspapers, records, and films, the current state of U.S. law in the field of ascertaining choice of law in copyright matters remains in an “isolationist position.”¹ As asserted in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, the “[c]hoice of law issues in international copyright cases have been largely ignored in the reported decisions and dealt with rather cursorily by most commentators.”² Despite deeper implications of foreign laws regarding international dissemination of domestic works of authorship, U.S. courts are now engaging in complex copyright choice of law analyses and are contemplating the application of

* Robert H. Thornburg is a Litigation Associate with the intellectual property law firm of Allen, Dyer, Doppelt, Milbrath & Gilchrist, P.A. in Orlando, Florida. Mr. Thornburg received his B.S. in Chemical Engineering, cum laude, from the University of Notre Dame (1999), his J.D., with honors, from the University of Florida (2002), and his L.L.M. in Intellectual Property Law, with honors, from The John Marshall Law School (2004). Mr. Thornburg was the Spring 2002 Editor-in-Chief of the *Journal of Technology Law & Policy*.

1. William Patry, *Choice of Law and International Copyright*, 48 AM J. COMP. L. 383, 385 (2000).

2. *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 88 (2d Cir. 1998).

foreign laws with little basis or knowledge of the underlying copyright policies implicated under such laws.³

Rather than adopt a differential policy of recognizing foreign intellectual property law systems, some domestic courts have evaded such direct acknowledgment of these pervading issues. They have done so to employ the easier approach of developing strategies to “limit the efficacy of foreign intellectual property laws in favor of extraterritorial application of domestic laws.”⁴ A fundamental precept in copyright law is that the Copyright Act has no extraterritorial application for actions outside the United States.⁵ Although this rule is almost uniform throughout domestic copyright jurisprudence, there is still some dispute among circuits regarding the extent of this limitation in applying U.S. copyright law to foreign acts.⁶ Specifically, there exists a split of authority regarding the extraterritorial reach of U.S. copyright law between the Second⁷ and Ninth Circuit⁸ Courts of Appeals. The rift stems from whether U.S. copyright law is implicated when a predicate act occurs within the United States regarding an otherwise completely international dissemination of an infringing work of authorship.

This Article outlines this apparent split of authority regarding the extent of applying domestic copyright law towards almost exclusively foreign activities. More importantly, this Article takes the position that this split of authority should be eliminated. This Article also denotes both the utter lack of uniformity and deference required when addressing foreign law and the important underlying foreign cultural differences in addressing choice of law in international copyright.

II. ASCERTAINING WHETHER U.S. COPYRIGHT LAW CONTROLS

The U.S. Supreme Court has routinely stated that “[i]t is a longstanding principle of American law ‘that legislation of Congress, unless a contrary

3. See Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMP. L. 429, 440-42 (2001).

4. Graeme W. Austin, *Valuing “Domestic Self-Determination” in International Intellectual Property Jurisprudence*, 77 CHI.-KENT. L. REV. 1155, 1168-69 (2002).

5. See MELVILLE B. NIMMER & DAVID NIMMER, *NIMMER ON COPYRIGHT*, § 17.02, at 17-19 (2004).

6. See Graeme W. Austin, *Domestic Laws and Foreign Rights: Choice of Law in Transnational Copyright Infringement Litigation*, 23 COLUM.-VLA J.L. & ARTS 1, 10 (1999).

7. See, e.g., *Update Art, Inc. v. Modiin Publ’g, Ltd.*, 843 F.2d 67 (2d Cir. 1998).

8. See, e.g., *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088 (9th Cir. 1994).

intent appears, is meant to apply only within the territorial jurisdiction of the United States.”⁹ In accordance with this principle, U.S. copyright laws generally have no application to extraterritorial infringement.¹⁰ In *United Dictionary Co. v. G. & C. Merriam Co.*, an opinion which predates the 1909 Copyright Act, Justice Holmes proclaimed this limitation upon acquisition, and later enforcement, of a U.S. copyright.¹¹ After passage of the 1909 Copyright Act, courts remained cautious in applying U.S. law to potentially infringing actions wholly occurring outside of U.S. borders.¹²

Despite the numerous changes made upon passage of the Copyright Act of 1976, Congress manifested no clear intent to change the preexisting extraterritoriality doctrine.¹³ The only apparent difference was Congress chose, in the 1976 Act, to expand one aspect of territorial application of U.S. Copyright by declaring that the unauthorized importation of copyrighted works constitutes infringement, even when such copies were lawfully made abroad.¹⁴ In making such a minor change, Congress demonstrated it was not inclined to overturn the predominant law stating infringing acts wholly outside the United States, without any importation within the country, are not actionable under the 1976 Act.¹⁵ Thus, the conventional rule under choice of law analysis has been that U.S. copyright law may only apply if there is a specific step or action within the United States affecting or causing a foreign infringement, traditionally actionable under the Copyright Act.

A. The Ninth Circuit: Limiting Application of U.S. Copyright Law Under Choice of Law

“. . . [I]f, and to the extent, a part of an ‘act’ of infringement occurs within the United States, then, although such act is completed in a foreign jurisdiction, those parties who contributed to the act within the United States may be rendered liable under American copyright law.”¹⁶ Under

9. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

10. *NIMMER & NIMMER*, *supra* note 5, § 12.04[A][3][b], at 12-92.

11. *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U.S. 260, 264-66 (1908).

12. *See, e.g., Capitol Records, Inc. v. Mercury Records Corp.*, 221 F.2d 657, 662 (2d Cir. 1955).

13. *See Subafilms*, 24 F.3d at 1096.

14. 17 U.S.C. § 602(a)(1976). The Copyright Act of 1909 did contain a similar provision that prohibited “the importation into the United States . . . of any piratical copies of any work copyrighted in the United States.” Copyright Act of 1909, 35 Stat. 1082, ch. 320, § 30.

15. *See Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 440 (1989).

16. *NIMMER & NIMMER*, *supra* note 5, § 17.02, at 17-19 to 17-20.

Peter Starr Productions Co. v. Twin Continental Films, Inc., the Ninth Circuit rule had traditionally been that, although “infringing actions that take place entirely outside the United States are not actionable” under the Copyright Act, an act of infringement within the United States properly is alleged where the illegal authorization of international exhibitions takes place in the United States.¹⁷ Thus, mere authorization within the United States to improperly copy completely, outside of U.S. borders, created subject matter jurisdiction under the Copyright Act.¹⁸

However, this precedent was essentially overruled by the Ninth Circuit in *Subafilms, Ltd. v. MGM-Pathé Communications, Co.*¹⁹ In *Subafilms*, defendant MGM/UA Communications authorized its subsidiary to distribute the Beatles’ infamous animated motion picture “Yellow Submarine,” despite being unsure whether its previous license allowed such action.²⁰ Plaintiff Subafilms brought suit against MGM/UA contending that both the foreign and domestic distribution of the home video constituted copyright infringement.²¹ Adopting the findings of a special master, the trial court held MGM/UA had infringed and awarded compensatory damages calculated based upon both foreign and domestic infringement.²²

On appeal, the Ninth Circuit addressed whether MGM/UA’s authorization within the United States of wholly foreign activities, regarding creating and disturbing copies of the film abroad, created subject matter jurisdiction under the Copyright Act.²³ First, the Ninth Circuit followed its recent pronouncement in *Lewis Galoob Toys, Inc. v. Nintendo of America, Inc.*,²⁴ asserting that, if a party authorizes an activity not proscribed by one of the five section 106 clauses, such party cannot be held liable as a copyright infringer.²⁵ Based upon the Copyright Act of 1976’s failure to expand the scope of enforcement beyond § 602(a)’s cause of action for importing an infringing work within the United States, the Ninth Circuit found congressional intent to limit the scope and applicability of the Copyright Act to essentially foreign acts.²⁶ Thus, the

17. *Peter Starr Prods. Co. v. Twin Cont’l Films, Inc.*, 783 F.2d 1440, 1442-43 (9th Cir. 1986).

18. *See id.*

19. *Subafilms*, 24 F.3d at 1099.

20. *Id.* at 1089.

21. *Id.*

22. *Id.* at 1089-90.

23. *Id.* at 1090.

24. 964 F.2d 965, 970 (9th Cir. 1992).

25. *Subafilms*, 24 F.3d at 1092.

26. *Id.* at 1094.

Ninth Circuit overruled the *Peter Starr* holding, under choice of law principles that mere authorization within the United States of entirely extraterritorial acts fails to implicate U.S. copyright law.²⁷

The Ninth Circuit placed further limits upon the extraterritorial scope of U.S. copyright law when it limited subject matter jurisdiction in *Creative Technology, Ltd. v. Aztech System PTE, Ltd.*, a case involving two foreign competitors both selling their copyrighted works within the United States.²⁸ In *Creative Technology*, both plaintiff and defendant designed, developed and manufactured computer sound cards in Singapore, which were later imported and sold within the United States.²⁹ Plaintiff Creative filed suit in the United States for infringement of its twelve copyright registrations, while defendant Aztech filed a declaratory relief action in Singapore under the Singapore Copyright Act.³⁰ Aztech then filed a motion to dismiss the U.S. action under the forum non-conveniens doctrine which the trial court granted.³¹

On appeal before the Ninth Circuit, the court centered its analysis on the policy of national treatment pronounced under both the Universal Copyright Convention and the Berne Convention. Under both treaties, national treatment affords the same protection to foreign and domestic copyright holders.³² The Ninth Circuit in relying upon *Subafilms* asserted that “the applicable law is the copyright law of the state in which the infringement occurred, not that of the state of which the author is a national or in which the work was first published.”³³ However, in ascertaining that adequate remedies existed under Singapore law, Singapore law was capable of granting Plaintiff Creative the relief it sought in the United States, both parties were companies operating under the laws of Singapore, and Singapore could apply U.S. Copyright law to Creative’s counterclaims in the Singapore action, the Ninth Circuit found that the Singapore court was the most appropriate forum.³⁴ Thus, the Ninth

27. *Id.* at 1099.

28. *Creative Tech., Ltd. v. Aztech Labs, Inc.*, 61 F.3d 696, 698-99 (9th Cir. 1995).

29. *Id.* at 699.

30. *Id.*

31. *Id.*

32. *Id.* at 700.

33. *Creative Tech.*, 61 F.3d at 700-01 (quoting *Subafilms, Ltd. v. MGM-Pathe Communications Co.*, 24 F.3d 1088, 1097 (9th Cir. 1994)); see also *NIMMER & NIMMER*, *supra* note 5, § 17.05, at 17-39.

34. *Creative Tech.*, 61 F.3d at 700-03.

Circuit affirmed the trial court's finding of forum non-conveniens and its refusal, under choice of law, to decide the dispute.³⁵

B. The Second Circuit Position: Extending Subject Matter Jurisdiction to Extraterritorial Acts Having an Adverse Effect to U.S. Copyright Interests

Under Second Circuit and District of Columbia Circuit law, many domestic courts, in ascertaining under choice of law whether they have subject matter jurisdiction to apply U.S. copyright laws, have begun to narrow the traditional extraterritorial limitation pronounced in the Ninth Circuit. The Circuit Court of the District of Columbia, in *Environmental Defense Fund, Inc. v. Massey*, asserted that the presumption against extraterritorial application of U.S. laws may be overcome if denying such application would "result in adverse effects within the United States."³⁶ A year later, the Ninth Circuit questioned the extent of *Massey* regarding extraterritorial copyright actions in *Subafilms v. MGM-Pathe Communications*, when it stated, "the *Massey* court did not state that extraterritoriality would be demanded in such circumstances."³⁷

Regardless, the Second Circuit, in *Update Art, Inc. v. Modiin Publishing, Ltd.*, pronounced in 1988 that extraterritorial application of U.S. copyright law is permissible "when the type of infringement permits further reproduction abroad."³⁸ The doctrinal foundation for *Update Art* was articulated fifty years earlier by the Second Circuit in *Sheldon v. Metro-Goldwyn Pictures Corp.*³⁹ The *Sheldon* court reasoned, if a defendant has made an unauthorized reproduction of a copyrighted work, the copyright owner acquires an equitable interest in the infringing work that "attache[s] to any profits from its exploitation, whether in the form of money remitted to the United States, or of increase in the value of shares of foreign companies held by the defendants."⁴⁰ The *Subafilms* court directly expressed that this theory for expanding the reach of the Copyright Act was not recognized in the Ninth Circuit.⁴¹ The Ninth Circuit has further commented that the idea of expanding U.S. law, under international

35. *Id.* at 704.

36. *Env'tl. Def. Fund, Inc. v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) (expanding extraterritorial actions in U.S. laws regarding the Sherman Act, Lanham Act, and domestic securities laws).

37. *Subafilms*, 24 F.3d at 1096.

38. *Update Art, Inc. v. Modiin Publ'g, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988).

39. 106 F.2d 45 (2d Cir. 1939), *aff'd*, 309 U.S. 390 (1940); see Austin, *supra* note 6, at 9.

40. *Sheldon*, 106 F.2d at 52; see Austin, *supra* note 6, at 9.

41. *Subafilms*, 24 F.3d at 1096.

copyright choice of law disputes, fails because it attempts to create an improper “equitable interest” under U.S. law for wholly created or copied foreign works.⁴²

In addition to *Update Art*, the Second Circuit also addressed in 1998, international copyright choice of law issues in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*⁴³ Most commentators assert the *Itar-Tass* court “offered one of the most detailed choice of law analyses seen in modern copyright cases.”⁴⁴ Because the majority of courts had largely ignored the important choice of law issues in international copyright cases, the Second Circuit sought to articulate a federal rule to govern choice of law in copyright cases.⁴⁵ Specifically, the Second Circuit applied a variation on the approach of the Second Restatement of Conflicts, giving primary weight in infringement matters to the *lex loci delicti*.⁴⁶ Despite the thoroughness of the Second Circuit’s reasoning, however, commentators have expressed some concern that digital distribution of copyrighted works could cause the *lex loci delicti* rule to fail in the Internet age.⁴⁷

In addition to its pronouncement on the issue of choice of law, the Second Circuit, in *Itar-Tass* sought to expound upon how to ascertain copyright ownership in the international forum.⁴⁸ The Second Circuit asserted the Berne Convention fails to settle issues of international ownership in copyright.⁴⁹ Rather, the Berne Convention “simply assures that if the law of the country of infringement applies to the scope of substantive copyright protection, that law will be applied uniformly to foreign and domestic authors.”⁵⁰ The Second Circuit found that as copyright is a form of property, choice of law should be based upon the law of the country with “the most significant relationship to the property and the parties.”⁵¹ While the nationality of authors and the place of first publication may support a choice of law for that country, the country of origin may not always claim that it is the appropriate country concerning ownership.⁵² Rather, the law of the country where the alleged infringement

42. *Id.* at 1093-94.

43. 153 F.3d 82 (2d Cir. 1998).

44. Dinwoodie, *supra* note 3, at 439.

45. *See id.*

46. *Id.* at 440.

47. *See id.*

48. *See Itar-Tass*, 153 F.3d at 91.

49. *Id.*

50. *Id.* at 89.

51. *Id.* at 90.

52. *Id.* at 90-91.

occurred governs the determination of whether the infringement has in fact occurred.⁵³

One year after the Second Circuit's pronouncement in *Update Art* and *Itar-Tass*, the Southern District of New York decided an international copyright case similar to *Subafilms*. In *Shaw v. Rizzoli International Publications, Inc.*,⁵⁴ an Italian-based defendant assembled and distributed, between 1995 and 1996, a catalog of Marilyn Monroe photographs entitled "Marilyn Monroe. The Life. The Myth." in both the United States and Italy.⁵⁵ Plaintiffs, a group of copyright holders of the original photographs, brought suit and moved for summary judgment on the issue of infringement, asserting that both the domestic and Italian disseminations were actionable under U.S. copyright law.⁵⁶ Defendant Rizzoli also moved for partial summary judgment, asserting that, despite the holding in *Update Art*, the Italian printing and distribution of the exhibition did not constitute subject matter under copyright law.⁵⁷

The district court stated that the Second Circuit still maintains the position that "copyright laws generally do not have extraterritorial application."⁵⁸ However, the court recognized the *Update Art* position that it need only find a single "predicate act in the United States" to apply U.S. copyright law to a dissemination made entirely outside the country.⁵⁹ The *Rizzoli* court asserted that, despite the *Update Art* single "predicate act" rule, the Italian version of defendant Rizzoli's publications were entirely compiled and printed in Italy by defendant.⁶⁰ Thus, the *Rizzoli* court found only the U.S. distribution of the work could constitute infringement under U.S. copyright law and granted the defendant's motion for partial summary judgment.⁶¹

Following the *Rizzoli* decision, which appeared to follow much of the Ninth Circuit reasoning in *Creative Technology*,⁶² the reasoning by the Southern District of New York in *Deston Songs LLC v. Wingspan Records*⁶³ demonstrates the clear rift between the circuits. In *Deston*, a

53. *Itar-Tass*, 153 F.3d at 91.

54. 1999 U.S. Dist. LEXIS 3233 (S.D.N.Y. Mar. 23, 1999).

55. *Id.* at *5-*6.

56. *Id.* at *6-*7.

57. *Id.* at *8.

58. *Id.* at *9 (quoting *Update Art, Inc. v. Modiin Publ'g, Ltd.*, 843 F.2d 67, 73 (2d Cir. 1988)).

59. *Rizzoli*, 1999 U.S. Dist. LEXIS 3233, at *9.

60. *Id.* at *10-*11.

61. *Id.* at *12.

62. *Creative Tech., Ltd. v. Aztech Sys. PTE, Ltd.*, 61 F.3d 696, 700-03 (9th Cir. 1995).

63. 2001 U.S. Dist. LEXIS 9763 (S.D.N.Y. July 12, 2001).

complicated copyright ownership chain began when Toronto-based composer Anslem Douglas, in early summer 1996, traveled to Port-of-Spain, Trinidad and visited music producer Carl Henderson to compose the initial version of "Who Let the Dogs Out?"⁶⁴ Henderson declined to produce the song, leading Douglas to collaborate with fellow Toronto-based composer Ossie Gurley at Gurley's studio in Toronto under the direction of New York producer Julian Williams.⁶⁵

In early 1998, Williams's U.S. record company released the song, indicating Douglas as the composer and Gurley as the arranger.⁶⁶ The song was distributed on a Caribbean music compilation, achieving only modest success in the Caribbean.⁶⁷ Because of the song's lack of commercial success, Douglas sold his rights to the song to Plaintiff Deston Songs. Deston then granted a license to a Bahamian pop group, The Baha Men, to sample then in the group's version of "Who Let the Dogs Out?"⁶⁸ This version became an overnight sensation in the late summer of 2000 and won a Grammy Award.⁶⁹ In October 2000, the New York producer of Gurley and Douglas' original version, Julian Williams, filed suit in Ontario Superior Court, asserting Gurley and Douglas assisted in developing the original chorus for the song and were not given proper credit regarding copyright ownership.⁷⁰ Plaintiff Deston then filed a declaratory judgment action, asserting that Williams had no right, title or interest in the song.⁷¹ Defendants moved to dismiss the U.S. action under the doctrine of forum non-conveniens.⁷²

The district court set out to ascertain, by applying a two-prong analysis, whether a U.S. court constituted the most appropriate forum.⁷³ The first prong is to examine whether an adequate alternative forum exists.⁷⁴ If so, then a court applies the second prong, balancing a series of factors reflecting the private interests of the parties and the public interests at stake, if any.⁷⁵ The trial court specified that the defendant, in asserting the

64. *Id.* at *2-*3.

65. *Id.* at *3-*4.

66. *Id.* at *5.

67. *Id.* at *4-*5.

68. *Deston*, 2001 U.S. Dist. LEXIS 9763, at *7.

69. *Id.*

70. *Id.* at *7-*8.

71. *Id.* at *1.

72. *Id.*

73. *Deston*, 2001 U.S. Dist. LEXIS 9763, at *10 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-07 (1947)).

74. *See Gilbert*, 330 U.S. at 506-07.

75. *See id.* at 508-09.

U.S. forum is inappropriate, has the burden to demonstrate the adequacy of an alternative forum.⁷⁶ The court then asserted that “the plaintiff’s choice of forum should rarely be disturbed.”⁷⁷ In finding that none of the community interests weighed against Deston’s choice of forum, the district court asserted, “[w]hen a lawsuit is based on events that occurred both at home and abroad, the fact that some of the acts took place outside of the United States is insufficient to overcome the presumptive deference to plaintiff’s choice of domestic forum.”⁷⁸

Since Deston was a copyright holder residing in New York City, the United States had a paramount interest in adjudicating the rights of such a resident copyright holder.⁷⁹ Furthermore, while the defendant sought to characterize the action as purely Canadian, because Canada was the place where the original recording and composition occurred, the district court pointed out only defendant Ossie Gurley was not an American citizen.⁸⁰ Thus, although the Canadian court was an appropriate forum to resolve the issues of ownership in the litigation, the Southern District refused to dismiss the case under the doctrine of forum non-conveniens.⁸¹

In *Films by Jove, Inc. v. Berov* another district court governed by Second Circuit precedent applied the above mentioned reasoning regarding choice of law.⁸² The district court ruled that, despite the fact numerous issues would have to be resolved by applying Russian copyright law, the United States was a more fair and appropriate forum to resolve issues of copyright ownership under international copyright law.⁸³ In *Berov*, plaintiffs Films by Jove and Soyuzmultfim brought an action for copyright infringement asserting rights against defendants Berov and Russian publishing group St. Petersburg Publishing House.⁸⁴ The suit addressed ownership rights in approximately fifteen hundred animated films created

76. *Deston*, 2001 U.S. Dist. LEXIS 9763, at *10-*11.

77. *Id.* at *11 (citing *Dirienzo v. Philip Servs. Corp.*, 232 F.3d 49, 57 (2d Cir. 2000)).

78. *Id.* at *14 (citing *Byrne v. British Broad. Corp.*, 132 F. Supp. 2d 229, 238 (S.D.N.Y. 2001)).

79. *Id.* at *14-*15 (citing *Jose Armando Bermudez v. Bermudez Int’l*, 2000 U.S. Dist. LEXIS 12354, at *15 (S.D.N.Y. Aug. 29, 2000) (asserting that “U.S. courts also have a strong interest in enforcing the nation’s copyright laws, as those laws are designed to protect authors creating works in this country and, indirectly, the consuming public.”)).

80. *Id.* at *16. Note that the original composer of “Who Let the Dogs Out?,” Anselm Douglas, was not a defendant in the U.S. copyright action before the Southern District of New York. *Id.* at *2.

81. *Deston*, 2001 U.S. Dist. LEXIS 9763, at *9.

82. 250 F. Supp. 2d 156 (E.D.N.Y. 2003).

83. *Id.* at 192.

84. *Id.* at 158.

by Soyuzmultfilm, a former Soviet state–owned film studio.⁸⁵ The district court previously granted summary judgment on the issue of ownership in favor of plaintiffs.⁸⁶

On reconsideration, the issue before the trial court was whether a domestic U.S. court could ascertain ownership of copyright by applying Russian law.⁸⁷ First, the district court essentially stated that based upon several affidavits before it, many of the Russian expert opinions addressing the legal constructs for Russian copyright ownership were unduly influenced, giving little credence to a previous court proceeding.⁸⁸ Second, the district court provided a highly detailed account of the progeny of Russian copyright ownership, from the time the Soviet state expropriated ownership from the Russian Orthodox Church until approximately 1989, when Russian law permitted certain forms of copyright, leasing rights to allow more private dissemination for such works.⁸⁹ Defendants asserted that such leasing rights failed to confer any ownership rights, but rather that the Soviet state continued to wholly own any copyright interests in the works, which defendants had succeeded to.⁹⁰ The district court held that, despite all but one party being Russian citizens or entities, it had the ability to interpret Russian law.⁹¹ The district court found that the lease right granted to plaintiffs caused a sufficient ownership right in the animated films to accord copyright to those entities.⁹²

As shown by the prior line of cases, the Second Circuit and its lower trial courts have greatly expanded the extraterritorial jurisdiction not only to apply U.S. domestic copyright law, but also to engage, under choice of law, in interpreting a foreign country's copyright laws.

III. CONCLUSION

The apparent split of authority between the Second and Ninth Circuits regarding the expansiveness of the general rule limiting extraterritorial application of copyright law further denotes that domestic courts remain

85. *Id.*

86. *Id.*

87. *Berov*, 250 F. Supp. 2d at 158-59.

88. *Id.* at 159.

89. *Id.* at 160-161.

90. *Id.* at 163.

91. *Id.* at 217.

92. *Berov*, 250 F. Supp. 2d at 217.

in an "isolationist position."⁹³ In expanding the extraterritorial reach of U.S. copyright law and attempting, in many instances to interpret foreign copyright law rather than simply dismissing the case under forum non-conveniens, the Second Circuit and its district courts have risked undermining the inherent ability of foreign courts to address ownership rights under the unique cultural and potential folk rights existing in their respective countries. In contrast, the Ninth Circuit's more restrictive application of domestic copyright law, towards essentially foreign distribution of domestic works of authorship generally ignores the potential for such copies to have an indirect economic effect on U.S. interests in such works. However, the fundamental rule that the Copyright Act has no extraterritorial application for actions outside the United States still prevades.⁹⁴

It remains burdensome to require federal courts to face the arduous task of hiring foreign law experts and researching the nuances of a foreign country's copyright laws, especially when such laws have been largely unused or totalitarian.⁹⁵ However, the technology of the Internet has essentially created international dissemination of copyrighted works whose ownership is arguably governed by the country of the initial distribution. Therefore, it is likely that federal courts will more frequently be required to address such issues. Such frequency, however, only emphasizes the growing need for guidance on the issues of how to address ownership in the international context and of what guidelines a court should follow in deciding whether it should entertain international disputes.

Despite the Berne Convention's assertion that all countries should accord national treatment towards foreign entities seeking copyright protection, the treaty fails to provide any guidelines on the issue of choice of law in international copyright disputes. Considering the largely isolationist view of U.S. copyright law, and the apparent split of authority, perhaps seeking international guidance through the World Trade Organization would be the most appropriate course of action, apart from the more immediate but limited ability of a U.S. Supreme Court case to resolve this apparent rift.

93. Patry, *supra* note 1, at 384.

94. See NIMMER & NIMMER, *supra* note 5, § 17.02, at 17-19.

95. See, e.g., *Berov*, 250 F. Supp. 2d at 156.