

Internet Intermediaries and the Law Applicable to Intellectual Property Infringements

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Abstract: The coordination between territoriality restricted intellectual property rights and the potential global reach of Internet activities has been the focus of significant attention in recent years. The liability of Internet intermediaries offering potentially global services that may facilitate infringements of intellectual property rights by others in multiple countries poses a particular challenge in that regard.

At a substantive law level, significant differences remain between jurisdictions regarding secondary liability for intellectual property rights infringements and safe harbor provisions for Internet intermediaries. The present article discusses the conflict of laws aspects of the liability of Internet intermediaries in light of the recent international efforts to adopt soft law provisions on intellectual property and private international law.

Keywords: Intellectual Property, Internet, Intermediaries, Secondary Liability, Safe Harbors, Conflict of Laws.

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A. Introduction

1 The concept of Internet intermediaries is broad, comprising providers of many different activities, facilities and services that enable others to take full advantage of the Internet and information society services. Intermediaries provide access to communication networks, services related to the transmission of information in such networks, hosting services (including cloud-based services, social networking sites, auction sites, blogging sites and other platforms that enable users to post contents), hyperlinks and search engines, and more. To the extent that the activities, facilities and services provided by intermediaries may result in infringements of intellectual property (IP) and may especially support or facilitate infringements by others, the liability of Internet intermediaries, the determination

of under what circumstances they may be held liable in connection with the activities of the users of their services and the possibility to bring claims against the intermediaries themselves, has become a crucial issue for the protection of IP on the Internet. In this context the relevant activities enabling IP infringements may also include the distribution of tools such as software that may be used to carry out allegedly infringing activities in particular with regard to peer-to-peer file sharing or the circumvention of technical protection measures.

2 Current developments regarding IP infringement disputes in the Internet illustrate the importance of claims against intermediaries.¹ Even in situations in which intermediaries may not be held liable as direct nor secondary infringers they may be required by a court or authority to terminate or prevent an

infringement, and intermediaries may also play a decisive role in implementing procedures for the removal or disabling of access to infringing content.² In practice, IP rightholders may have a particular interest in bringing claims against Internet intermediaries. Among the reasons for such an interest are that intermediaries are in a position to block access to the damaging content,³ remove it from their services,⁴ and prevent the infringement in the future.⁵ Additionally, intermediaries have information that can locate direct infringers, in particular when such infringers are users of their services. If damages are sought by the rightholder, the fact that intermediaries usually have more financial means than individual users becomes very relevant, and it is much more cost efficient to sue an intermediary than a multiplicity of alleged individual infringers who may be scattered around the world.

- 3 In sharp contrast with the evolution of Internet law in most major industrialized countries that have adopted specific provisions regarding the (non) liability of Internet intermediaries, the position of intermediaries has not been the subject of a similar attention from the perspective of private international law.⁶ However, the activities and services of those intermediaries having a potentially global reach or impact pose particular challenges from the perspective of private international law.⁷ Therefore, this area seems of special interest when discussing how private international law should evolve in order to more efficiently adjudicate disputes arising out of situations involving the cross-border use of IP protected content. In this context the Committee of Intellectual Property and Private International Law of the International Law Association has singled out the particular interest of this topic. This paper focuses on choice of law considerations regarding alleged infringements carried out through the Internet and the position of intermediaries.

B. Comparative perspectives

- 4 From a substantive law perspective it is remarkable that significant differences exist concerning to what extent Internet intermediaries are to be held liable for the activities of third parties. Only some jurisdictions recognize secondary liability for IP rights infringement and even among those jurisdictions different approaches prevail as to the conditions to impose with such liability. Indeed, substantive law standards differ in this regard from country to country and significant uncertainty remains over international standards for secondary liability and the delimitation between direct and indirect infringement.⁸ Moreover, through the expansion of the Internet, many jurisdictions have witnessed the adoption of specific provisions regarding the immunity or limited liability of Internet intermediaries. In the

EU, Articles 12 to 15 of the Directive on electronic commerce basically establish that certain situations cannot give rise to intermediaries' liability since the main purpose of those provisions is to restrict the situations in which intermediaries may be held liable pursuant to the applicable national law.⁹ The two basic international models are the U.S. Digital Millennium Copyright Act (DMCA)¹⁰ and the EU Directive. Both encompass important similarities since the Directive used the DMCA as a reference on this issue.

- 5 It is noteworthy that these two basic regimes have influenced the adoption of similar provisions in a number of jurisdictions, and provisions on immunities for Internet intermediaries have even been included in free trade agreements' intellectual property chapters concluded by the US and the EU. However, many countries lack specific provisions on the liability of intermediaries,¹¹ and differences remain regarding the complex issue of secondary liability and safe harbor immunities even between jurisdictions that have rules that were partly based on common foundations.¹² Both the EU E-Commerce Directive and the U.S. DMCA are intended to exclude liability for intermediaries unless they have actual knowledge of facts or circumstances indicating illegal activity and failed to react. However, in the U.S., "safe harbor" provisions on intermediary liability do not have a horizontal nature,¹³ contrary to the situation in the EU where the rules cover both civil and criminal liability regardless of the subject matter concerned. Although the provisions of the DMCA and those of the E-Commerce Directive present significant similarities, substantive differences remain, in particular, due to the DMCA's more detailed provisions, such as those regarding the system of notice-and-takedown.
- 6 Additionally, this is an evolving subject in which a significant level of uncertainty remains in the interpretation of substantive law. For instance, technological evolution and transformation of business models have influenced a shift in some jurisdictions, favoring a more active-preventive approach.¹⁴ The areas most affected by such uncertainties include the application of the liability exemptions to linking sites and search engines, the level of knowledge to establish liability, whether certain services based on the distribution of user-generated content may require a certain level of prior monitoring or the interaction between the immunities and the obligations imposed on intermediaries under the various models for graduated response.¹⁵ In particular within the EU, further clarification seems to be required as to the activities and providers covered and the material conditions necessary to benefit from the exemptions set out in the E-Commerce Directive's Articles 12 to 14; the implementation of notice and take down procedures; and implications of Article 15 that prevents Member States from imposing a monitoring obligation of a general nature.¹⁶ This is

also an area in which the scope of enforcement of IP rights must especially be balanced against the protection of other fundamental rights, and hence basic values and policies that are part of national (or European) public policy may become determinative. The case law of the ECJ¹⁷ illustrates to what extent injunctions imposed on intermediaries – such as those resulting in preventive monitoring, content filtering or website blocking and those implementing models for graduated response that may restrict users access to the Internet¹⁸ – may infringe the fundamental freedom to conduct a business enjoyed by intermediaries and may also violate some fundamental rights of the users, namely their right to protection of their personal data¹⁹ and their freedom to receive or convey information.

- 7 In order to achieve a high level of simplification facilitating intermediaries to operate in a global marketplace and all other stakeholders to better protect their rights or avoid liabilities, a substantial legal approach based on an international consensus at the substantive level seems to guarantee the required level of simplification better than an approach that establishes common private international law rules.²⁰ A harmonized and predictable international legal framework would favor the development of global markets for the use of digital content. The increasing reliance by governments on intermediaries to ensure law enforcement online is an additional factor when advocating further international coordination to overcome the difficulties posed to intermediaries under multiple conflicting laws.²¹ Therefore the issue arises as to what extent the preferable option should be to draft model substantive law provisions, covering the elements of indirect Internet intermediary liability and the exceptions to such liability. The development of balanced, model substantive provisions could have a significant harmonizing effect at the international level in light of the absence of specific regulations in many countries and the need for further clarification in others (such as in connection with the E-Commerce Directive). In fact, efforts to develop international substantive standards by private organizations involving stakeholders started long ago.²²
- 8 However the interest and potential benefits of developing common substantive standards for secondary liability contrast sharply with the almost complete lack of progress in this field by the international organizations active in creating uniform provisions regarding intellectual property (such as WIPO and WTO) or electronic commerce (UNCITRAL).²³ Substantive harmonization concerning the liability of Internet intermediaries have been the focus of particular attention in the recent negotiations leading to the conclusion of the Anti-Counterfeiting Trade Agreement (ACTA).²⁴ The draft of the Agreement made public in April 2010²⁵ contained in Article 2.18 paragraph 3 two alternative texts on li-

ability limitations benefiting online service providers that were inspired by the basic features of the DMCA and the E-Commerce Directive, although not without some changes.²⁶ Nevertheless, the final text of the Agreement, even if remaining very much focused on fighting infringement in the digital environment, does not include liability exemption provisions for Internet intermediaries.

- 9 Given the particular difficulties posed by the creation of differing substantive international standards on secondary liability and the absence of international consensus as far as regulatory details are concerned, conflict of laws provisions should be of paramount importance when trying to improve predictability and legal certainty. Moreover, given the complexity of this subject, international harmonization of basic principles would not mean full unification of legal systems so applicable law issues will continue to play a significant role. Although international jurisdiction falls outside the scope of this paper, the increasing trend to allow the consolidation of multistate infringement claims before a single court²⁷ reinforces the practical importance of applicable law issues regarding Internet intermediaries. The extraterritorial effect of measures against intermediaries and the enforcement of such measures abroad are also of particular interest here. The use of ubiquitous media creates uncertainties as to the scope of actions against IP infringements, for example, concerning damages or the scope of injunctions ordering a party to desist. Coexistence in the Internet between different national IP rights can only be achieved if injunctions are limited within the scope of the jurisdiction of the rendering court and to what is necessary to exclude significant negative commercial effects on the territories covered by the infringed IP rights.

C. Applicable law to the liability of Internet intermediaries: general rule on indirect or secondary liability

- 10 From a comparative perspective, it has become generally accepted that the law applicable to indirect or secondary liability is the law that governs the main infringement. Potential liability of intermediaries linked to the activities of the users of their services, for instance with respect to the information stored in their servers and services, can be considered an issue concerning the determination of persons who may be held liable for acts performed by another person. In the EU, under the Rome II Regulation²⁸, the law applicable to a non-contractual obligation arising from an infringement of an IP right in accordance with Article 8(1) also governs the determination of persons who may be held liable for

acts performed by them - Article 15(a) - and liability for the acts of another person - Article 15(d).²⁹ Article 15 reflects a trend to favor the application of the same law to all issues related to a non-contractual obligation to promote legal certainty and uniformity, which are basic goals of EU instruments in the field of private international law. Therefore, with regard to a non-contractual obligation arising from an infringement of an IP right the law of the country for which protection is claimed is determinative to establish both direct and indirect or secondary liability under the Rome II regime.³⁰ In the absence of specific provisions, the law of the country for which protection is claimed applies to determine the liability of Internet service providers arising from an infringement of an intellectual property right including the limitations or exemptions from liability for Internet intermediaries.³¹ Furthermore, according to Article 15(d) Rome II Regulation the law applicable to the infringement governs “the measures which a court may take to prevent or terminate injury or damage” although “within the limits of powers conferred on the court by its procedural law.” Delimitation between the scope of application of the law applicable to the infringement and the procedural law of the *lex fori*³² may raise particular difficulties with regard to the measures that can be adopted against intermediaries.

- 11 In the U.S., a similar trend may be identified with regard to the law applicable to secondary liability as illustrated by the ALI Principles’ approach. Under § 301, the law that governs the determination of infringement not only establishes direct infringement but also determines to what extent activities facilitating infringement may be regarded as infringement.³³ Therefore, a court should apply the laws of each jurisdiction in which infringements are alleged – in conjunction with § 321, which applies to ubiquitous infringements - regardless of the fact that in some countries the relevant activities may be considered direct infringement, while in others they are considered secondary infringement.³⁴
- 12 Recourse to the *lex loci protectionis* to determine what law applies to the liability of Internet intermediaries may pose special difficulties particularly in those situations in which intermediaries offer their online services globally. The coordination between the system of territorially limited intellectual property rights and the ubiquitous reach of the Internet demands a reassessment of principles that may lead to the application of a multiplicity of national laws to Internet activities.³⁵ The *lex loci protectionis* rule leads usually to the distributive application of a plurality of laws with respect to activities performed through the Internet even if applied in light of the so-called principle of proportionality³⁶ to achieve a reasonable balance between the territoriality of IP rights and the Internet’s global reach. The law of each protecting country applies inasmuch as the activity al-

legedly infringes IP rights in its territory.³⁷ As a result of the Internet’s global reach, to the extent that from the design and functioning of a web site do not result that its addressees are limited to certain markets, the finding may prevail in many situations that the site produces substantial effects in a significant number of countries. Due to the contrast between the territorial fragmentation resulting from the *lex loci protectionis* approach and the global offering by many intermediaries of services provided to users in numerous countries around the world, a special risk has been identified that intermediaries may have to bear excessive legal uncertainties regarding their liability.³⁸

- 13 With a view to control legal risks, intermediaries may be forced to adapt their business models to reduce the exposure to liability in the light of the multiple applicable laws, for instance when assessing to what extent they have a duty to act to prevent or stop illegal activities, and whether they are required to implement prior filtering with respect to certain illegal contents in addition to notice and takedown procedures. Therefore, subjecting the liability of intermediaries to the laws of each country of protection has been criticized as a potential source of unfair and unpredictable results.³⁹ In this context the idea has been advocated of establishing a special choice of law rule providing an exception to the *lex loci protectionis* with regard to the provision of services that enable service recipients to carry out infringing activities but are clearly detached from the service provider, in particular, in cases in which a third party uses the services of Internet intermediaries to infringe IP.

D. The search for a single law: Article 3:604 CLIP Principles

- 14 Article 3:604 CLIP Principles introduces an innovative and detailed provision aimed at enabling the application of a single law in those situations. This approach is linked to the view that the traditional mosaic requiring intermediaries to adapt their global services to many different national laws may result in excessive territorialisation of the Internet and cause excessive costs to such intermediaries whose activities benefit from specific exemptions from liability at the substantive law level in many jurisdictions.⁴⁰ Furthermore, a so-called autonomous tort approach to determine the law applicable to secondary liability has been proposed as a means to better reflect the specific policies involved in the regulation of contributory infringement claims, such as the development of new business models and technological innovation.⁴¹ User privacy, access to information, and freedom of expression seem also of particular significance in this regard. The rationale for derogating the application of the

law of the protecting country in these situations is connected to the idea that since intermediaries may not be aware of the acts committed and the contents disseminated by the users of their global services, it may be inappropriate to subject their liability to the law of each protecting country in circumstances in which it could become excessively burdensome or even impossible for them to identify the requirements of all the laws that might apply.⁴² Application of one single law would provide a secure and stable legal framework to intermediaries offering neutral services at global scale. Article 3:604 CLIP Principles can be deemed as favoring, in principle, the position and interests of Internet intermediaries since it facilitates the efficient operation of their services to the extent that their activities would not be governed by a large number of different laws depending on the location of the main infringements. Nevertheless, the single applicable law by virtue of that provision may be the law of a State which is not particularly favorable to the interests of the intermediary involved. The search for legal certainty in this context is also intended to benefit persons seeking redress from intermediaries, since it favors the determination of the legal system that governs the intermediary's liability if proceedings are brought against the intermediary.⁴³

- 15 Although Article 3:604(1) CLIP Principles reaffirms the basic rule by establishing that “the law applicable to liability based upon acts or conduct that induce, contribute to or further an infringement is the same as the law applicable to that infringement”, under Article 3:604(2) one single law may be applied to certain types of secondary infringements in the case of providers of facilities or services “that are capable of being used for infringing and non-infringing purposes by a multitude of users without intervention of the person offering or rendering the facilities or services in relation to the individual acts resulting in infringement.” Only neutral and fully automated processes or services in which the provider exercises no control over the alleged direct infringer's specific activities are covered by this exceptional provision. Additionally, Article 3:604(3) establishes a unique minimum substantive standard. The single law determined in accordance with paragraph 2 is only applicable if it provides, at least, liability for failure to react in case of actual knowledge of a primary infringement or, in the case of a manifest infringement and liability, for active inducement. The exceptional provision of paragraph 2 leading to the application of a single law does not cover claims relating to information on the identity and the activities of primary infringers, since the inclusion of a specific rule on the law applicable to the intermediary liability should not undermine the possibility of proceeding against the direct infringer under the respective *lex loci protectionis*.⁴⁴

E. Concerns raised by a special single law approach with regard to intermediaries

- 16 Article 3:604 (1) CLIP Principles represents an innovation both with regard to current Private International Law within the EU and with respect to other proposals since the ALI Principles, the Transparency Project and the Joint Korean Japanese Principles have not created specific choice of law provisions for indirect or secondary liability or to address the law applicable to exclusions and limitations of intermediary liability. Given the truly innovative nature of Article 3:604(1) and the evolving nature of its subject matter, a number of issues seem to deserve special attention when discussing how to proceed with the creation of international standards on intermediary liability that deviate from the traditional *lex loci protectionis* principle.
- 17 The distinction between secondary or indirect liability and direct infringement may be uncertain in many situations since characterization of certain conducts – such as preparatory acts - as direct or contributory infringements may vary significantly among States.⁴⁵ Furthermore, under substantive law, secondary liability is in many jurisdictions inextricably linked to direct infringement. In these circumstances recourse to a specific conflict of laws provision restricted to the liability of intermediaries may result in the introduction of additional uncertainty and complexity when compared to the general criterion leading to the application of the *lex loci protectionis* both to direct and secondary liability. Such risk becomes particularly clear with regard to situations in which a defendant is sued both under direct and secondary liability. Moreover, a deviation from the general rule that the law applicable to the liability covers also the issue of determining who may be held liable and the extent of their liability may raise additional doubts if limited to IP infringements from the perspective of those jurisdictions having horizontal provisions – not limited to IP infringements - on the intermediary liability (such as Arts. 12 to 14 of the E-Commerce Directive).
- 18 A specific conflict of laws rule for intermediaries could also pose very complex characterization issues with regard to the determination of its beneficiaries. In particular, applicability of the specific rule established in Article 3:604(2) CLIP Principles is limited to situations in which intermediaries provide facilities or services that users use to infringe “without intervention of the person offering or rendering the facilities or services in relation to the individual acts resulting in infringement.” Classification of a situation as falling or not within that category may be particularly difficult and hence add complexity to how the choice of law rules function. The evolution of the Internet has led to a situation in which identifying cer-

tain providers as merely passive or neutral intermediaries – such as those covered by the mere conduit provision or the traditional ISPs acting as hosting providers – has become more complex particularly in the light of the boom of user-generated content sites and other innovative services.⁴⁶ From the substantive law perspective, it is noteworthy the difficulties found in practice to determine the extent that information society providers qualify as hosting providers covered by the liability limitation established in E-Commerce Directive's Article 14⁴⁷ and the national laws implementing that provision.⁴⁸ The need to carry out a similar delimitation task as a prerequisite to apply a special conflict of laws rule on intermediary liability seems to be a factor of complexity and uncertainty.

- 19 Additional difficulties may arise when establishing and applying connecting factors intended to determine a single applicable law to multistate infringements.⁴⁹ The connecting factor used in Article 3:604(2) CLIP Principles is intended to lead typically to the law having the closest connection with the infringement-enabling activities. It refers to the law of the State where the centre of gravity of the activities of the provider relating to those facilities or services is located. In order to determine where the "centre of gravity" of the service provider pleading for the application of one single law is located, Article 3:604(2) does not establish a closed list of factors but favors an approach that allows courts to consider all circumstances of the case. Such an approach seems respectful with the principle of proximity but may pose difficulties from the perspective of legal certainty and uniform application of the provision.
- 20 Although some intermediaries provide their services and facilities on a global scale it is not rare that even in those situations the possible liability of the intermediary or the possibility to require the intermediary to terminate or prevent an infringement appear closely connected to conducts of their users that only have an impact on a geographically limited area. For instance, users tend to make use of global hosting services – such as social networks – to post and make available contents that in practice may have substantial repercussion in a limited number of jurisdictions (not rarely, in only one) and in those circumstances non-application of the *lex loci protectionis* with regard to intermediary liability, even if the service used is provided at a global level, may raise special concerns. To assess possible risks the following situation may be considered.
- 21 In a user-generated content service site based in the U.S. a user uploads illegally some parts of a Danish film. A claim is brought before the Danish courts by the rightholder requiring the intermediary to remove the content. A significant number of users in Denmark have downloaded the film by using the service since it is very popular in Denmark. Although

the service is very popular also in sixty other countries no one in those other countries is interested in that film. A key issue to determine if the service provider may be held liable with respect to the infringement of copyright in Denmark is the standard of diligence applicable to establish if the provider is aware of the infringement (or had knowledge of the activity or information in the terms of Article 14 of the E-Commerce Directive). Additionally, under Article 14, the limitation of liability does not prevent courts from ordering the intermediary to remove the infringing content. In this context the question may arise: Should the Danish court in such a case disregard Danish law (*lex loci protectionis*) implementing Article 14 of the e-Commerce Directive and apply the law of the centre of gravity to determine the relevant standard of diligence applicable to that provider with respect to the copyright infringement in Denmark? It can be noted that the service is "very popular" in Denmark and the service provider benefits from it (because in practice Denmark will be a relevant market for his advertising services) and it is not rare that users use the service to post content addressed to Danish Internet users. In cases such as this, it can be argued that the appropriate approach would be to subject the liability of the intermediary and the possibility to adopt measures against him referred to Denmark not to the law of the country of the centre of gravity, but to Danish law (law of the country of protection) even if the service concerned is provided at a global level from the place where such centre of gravity is located.

- 22 The illustration shows that alleged IP infringements resulting from the use of intermediary services may produce significant effects only in a limited number of countries regardless of the global reach of the intermediary services used, such as the platform where the file is uploaded and made available to third parties by the alleged infringer. In these situations, the idea of subjecting intermediary liability, or in general secondary liability claims, to a law other than the law of the country of protection that governs the infringement seems hard to accept from the perspective of the affected country to the extent that it would exclude the liability of a person liable for the infringement under the law of protection, or it would exclude the possibility to order an intermediary to terminate or prevent an infringement even if he is subject to such orders under the law of protection in those situations where he is not directly liable under such law.⁵⁰

F. Significance of the special rules on the law applicable to so-called ubiquitous infringements

- 23 In the light of the content of both the ALI Principles and the CLIP Principles the interaction bet-

ween the specific provisions on secondary infringements and the rules on ubiquitous infringements deserves special attention in this context. Article 3:604(2) CLIP Principles have a similar structure to Article 3:603 CLIP Principles on ubiquitous infringement and both provisions share some goals although they may be influenced by different policy considerations. Both provisions allow courts to derogate the general *lex loci protectionis* rule in order to replace the application of a multitude of laws by the law of closest connection. However, they have different scopes since Article 3:604(2) also applies to conduct which is not ubiquitous in coherence with its intended aim of increasing legal certainty for service providers acting on an international (not necessarily ubiquitous) scale. Additionally, the specific provision on ubiquitous infringement of Article 3:603 has a restrictive scope of application since it only covers transmissions that arguably lead to infringement in each State where the signals by which the content is communicated can be received. In fact a common feature to all four projects formulating soft law principles on Intellectual Property and Private International Law in recent years is the proposal of a special conflict of laws rule for so-called ubiquitous infringements, but only the CLIP Principles envisage a specific conflict of laws rule on secondary liability. In particular, exceptional provisions making the application of a single law to IP infringements possible in certain ubiquitous situations are advocated by the ALI (§ 321), the European Max Planck CLIP Group (Article 3:603)⁵¹ and also by the Japanese Transparency Project (Article 302) and the Joint Japanese Korean Principles (Art. 306). All four proposals for a special conflict of laws provision for ubiquitous infringement are based on the idea that although such infringements are multinational, it is appropriate to single out one or several countries having the closest connection with the infringement in order to avoid the complexity resulting from the distributive application of the law of each country for which protection is claimed.

24 Indeed, § 321 ALI Principles includes certain exceptions to the normal application of the basic conflict of laws rules on IP infringements. Those basic rules are established in § 301, which is founded on territoriality and requires the competent court to apply the laws of each affected State to the part of the infringement that take place within each State's borders. As an exception, § 321 allows the competent court to apply in cases of ubiquitous infringements of IP rights only the law or laws of the State or States with close connections to the dispute. Additionally that provision lists several factors that may be relevant to determine the close connection: residence of the parties; the place where the parties' relationship is centered; the extent of the activities and the investment of the parties; and the principal markets toward which the parties directed their activities.⁵² The inclusion in the CLIP Principles of a special pro-

vision on the law applicable to secondary liability, in contrast with the situation in the ALI Principles, seems influenced by the fact that under the CLIP Principles the exceptional provision on ubiquitous infringement that allows courts to derogate from the general *lex loci protectionis* rule has a much more restrictive scope of application than the similar ALI Principles provision. Also, Article 306 of the Joint Japanese-Korean Principles that covers infringements that occur "in unspecified and multiple states" and Article 302(1) of the Transparency Proposal on ubiquitous infringements, have a broader scope of application than Article 3:603 CLIP Principles. Article 3:603 only applies if the alleged infringement itself is ubiquitous. For an infringement to qualify as ubiquitous it is required under Article 3:603 that the transmission of content through a ubiquitous medium such as the Internet must arguably lead to infringement in each State where the signals can be received. Such a strict understanding of the notion of ubiquitous infringement in the CLIP Principles reflects the option for a model more respectful to the territorial character of IP rights and the arguments against a hasty abandonment of territoriality.⁵³ Such an approach restricts in practice the application of Article 3:603 to copyright and related rights and only exceptionally to trademarks.⁵⁴ Hence many situations of multistate infringements covered by § 321(2) ALI Principles are left outside Article 3:603 CLIP Principles.

25 The factors used to determine the single applicable law in § 321(2) seem to be more flexible, less predictable and more in favor of the rightholder than the CLIP Principles. As already noted, the relevant provision of the ALI Principles that establish the country or countries with close connections to the dispute refers to the residence or business activities of both parties but also to the investment of the parties and the principal markets. By contrast, under Article 3:603(2), the location of the alleged infringer receives special attention as a relevant factor.⁵⁵ In practice, the tendency of courts to apply forum law may facilitate a finding that the law with the closest connection is forum law. Article 306 of the Joint Japanese-Korean Principles uses similar factors than those referred to in Article 3:603 to determine "the state that has the closest connection" with regard to infringements that occur "in unspecified and multiple states." The Japanese Transparency Proposal adopts a different approach to determine the single law applicable to ubiquitous infringement. According to Article 302(1), ubiquitous infringements "shall be the law of the place where the results of the exploitation of intellectual property are or are to be maximized," that is to be determined by regarding to the quantity of exploitation.⁵⁶

26 Even without the inclusion of a special provision that deals with the law applicable to secondary infringement or the position of Internet intermediaries, the

ALI Principles, as well as the Transparency Proposal and the Joint Japanese-Korean Principles may also lead to the application of a single law with regard to the secondary liability arising out of the multistate activities of Internet intermediaries. Application of a single law (or a small group of laws) to the activities of intermediaries may result from § 321 ALI Principles on ubiquitous infringement, which has a broader scope of application than the CLIP Principles' provision on ubiquitous infringement.⁵⁷ Notwithstanding this, concerns have been raised about the need to supplement the list of connecting factors contained in § 321 to better accommodate secondary infringement claims.⁵⁸ However this approach raises, in some aspects, similar concerns as those posed by Article 3:604(2) CLIP Principles, such as the possible uncertainties related to the interpretation of the connecting factor.⁵⁹ Regardless, the reference to "the State or States with close connections to the dispute" as a connecting factor in § 321 ALI Principles provides the opportunity to establish that the laws of more than one State are applicable. Such an approach could be appropriate to deal with activities carried out through the Internet that produce significant effects in a number of countries, to the extent that it allows for the distributive application of all those laws.

- 27 In sum, as far as the secondary or indirect liability of Internet intermediaries for IP infringements is concerned, the proposed model rules offer two different approaches. One is based on the adoption of a special conflict of laws rule with regard to the liability resulting from certain activities of those intermediaries. Such a rule leads to the application of a single law and avoids intermediaries being subject to a multitude of laws. The other approach seems more aligned with the traditional view that the law applicable to the infringement also governs the determination of the persons to be liable, both directly and indirectly, including secondary liability. Under such a model no special rule for intermediaries is proposed. However, under this second approach Internet intermediaries providing their services or facilities in many countries may also not be subject to the general *lex loci protectionis* principle and mosaic rule. Internet intermediaries are also subject to the provision on the law applicable to ubiquitous infringement that has a broad scope of application. This second approach is influenced by the broader derogation of the basic *lex loci protectionis* rule resulting from the ubiquitous infringements provision. The implementation of such a rule in future international or national legislative instruments may be controversial given the close connection between the *lex loci protectionis* rule and the principle of territoriality of IP rights and its implications for legal sovereignty.⁶⁰ On the other hand, the approach based on drafting a special choice-of-law provision with regard to intermediaries may raise doubts in connection with the rationale and additional uncertainties

linked with having recourse to different conflict of laws rules for primary and secondary liability. However, it could also generate concerns to the extent that it would amount to a broad derogation of the *lex loci protectionis* rule with respect to secondary liability for IP infringements.

- 28 The basic rationale underlying a special conflict of laws rule concerning secondary liability for Internet IP infringements is simplification. Its goal is to avoid the difficulties arising out of the simultaneous application of a plurality of laws to globally-provided services. In this context an assessment of the interaction between the global scope of certain services provided by intermediaries and the expansion of technologies that enable the adoption of reliable territorial restrictions⁶¹ and the implementation of territorially restricted injunctions seems to be of great practical importance. Geo-location of users is also of great relevance for Internet intermediaries to earn advertising revenues. Advertising is typically adapted to the place from where the user accesses the service. To the extent that global intermediaries may also adapt their services to comply with the different legal standards of the different territories (as illustrated, for instance, by the policies implemented by global microblogging sites that allow them to remove or block content only for specific jurisdictions), the idea that in connection with IP infringements *lex loci protectionis* should be especially abandoned with respect to the provision of intermediary services should perhaps be revisited, in particular in light of the idea that such services are used frequently to post and make available contents that in practice may have substantial repercussion in a limited number of jurisdictions (not rarely, only one). It seems that in those circumstances the burden of complying with local laws as a consequence of providing services offered to all those jurisdictions should not be overemphasized with regard to intermediaries to the extent that they have the means to implement technologies that enable territorial restrictions, and if needed they can design and provide a service to have substantial effects only in certain countries.

G. Conclusion

- 29 The liability of Internet intermediaries has been identified as an area that requires specific substantive laws as illustrated, among others, by the safe harbor provisions of the DMCA in the U.S. and the limitations of the E-Commerce Directive in the EU. However, in this area significant divergences remain between legal systems, and applicable law issues have become of great practical importance in particular when multistate infringement claims are consolidated before a single court. Given the multinational and even global scope of the activities of in-

intermediaries, concerns have been raised about the burden and unpredictability of subjecting the intermediary liability to the law of each country of protection, which results from the general approach that the law applicable to indirect or secondary liability is the law that governs the main infringement. Article 3:604(1) CLIP Principles contains an innovative provision derogating from such an approach in some cases to favor the application of a single law to the activities of Internet intermediaries. A number of issues concerning a provision like that could require further discussion on things such as the scope of the beneficiaries and the determination of the connecting factor that makes possible the application of a single law. Under the ALI and other sets of Principles, recourse to a single law with regard to Internet intermediaries can also be the result of the application of the specific provisions on ubiquitous infringement without abandoning the traditional view that the law applicable to the infringement also governs secondary liability. The assessment of the interaction between a specific provision on secondary infringements and the rules on ubiquitous infringements in the light of the applicability of the latter to the activities of intermediaries is necessary to determine if a new proposal would be appropriate and what approach should be taken among the possible alternatives. Beyond conflict of laws, another option to improve legal certainty would be the creation of model substantive law provisions in this field that could contribute to international harmonization in an area where such a development seems especially necessary. Nevertheless, experience shows that uniformity at a substantive law level is harder to achieve than in the field of private international law and that international harmonization covering some basic principles in this area would not mean full unification of legal systems, and hence the need to determine the applicable law would remain.

- 1 For instance, in the EU see ECJ Judgments of 23 March 2010, *Google France and Google*, C-236/08 to C-238/08 and 12 July 2011, *L'Oreal*, C-324/09; and in the U.S., see *Viacom International v. YouTube Inc* 2010 WL 2532404 (S.D.N.Y. June 23, 2010) and *Tiffany (NJ) Inc v. eBay*, 576 F. Supp. 2d 463, 484 (S.D.N.Y. 2008).
- 2 See Articles 12(3), 13(2) and 14(3) Directive 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) (OJ 2000 L 178, p. 1); and Article 8(3) Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ 2001 L 167, p. 10) ("Member States shall ensure that right holders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right"); and Article 11 Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (OJ 2004 L 157, p. 45).
- 3 For an example of an order imposing on an Internet service provider the adoption of certain technical means to block or attempt to block access by its customers to a website infringing copyright and "to any IP address or URL whose sole or predominant purpose is to enable or facilitate access to the website," see England and Wales High Court (Chancery Divi-

sion), *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch) (28 July 2011) and [2011] EWHC 2714 (Ch) (26 October 2011).

- 4 Concerning the liability of a search engine in connection with its duty to remove certain photographs that infringe IP rights, see in France *Arrêt n. 827 of 12 July 2012 Cour de cassation - Première chambre civile*, available at <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/827_12_23881.html>. Dismissing a lawsuit against Google for copyright infringement allegedly resulting from copies made in the functioning of the search engine, see in Spain Judgment of the *Tribunal Supremo* 172/2012, of 3 April 2012 (LA LEY JURIS: 4536122/2012).
- 5 Regarding the obligation of Google to prevent future infringements in case of clear rights infringements, see German Federal Supreme Court (2010) GRUR, 628 note 39 - *Vorschaubilder*.
- 6 R. Kojima, R. Shimanami and M. Nagata, "Applicable Law to Exploitation of Intellectual Property Rights in the Transparency Proposal," J. Basedow, T. Kono and A. Metzger (eds.), *Intellectual Property in the Global Arena - Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US*, Tübingen, Mohr Siebeck, 2010, pp. 179-228, at, pp. 196-198.
- 7 J.J. Fawcett and P. Torremans, *Intellectual Property and Private International Law*, 2nd ed., 2011, Oxford, OUP, p. 920.
- 8 L.J. Oswald, "International Issues in Secondary Liability for Intellectual Property Rights Infringement," *American Business Law Journal*, vol. 45, 2008, pp. 247-282, pp. 248-251.
- 9 See G. Spindler y M. Leistner, "Secondary Copyright Infringement - New Perspectives in Germany and Europe," *IIC*, vol. 37, 2006, pp. 788-821; M. Peguera Poch, *La exclusión de responsabilidad de los intermediarios en Internet*, Granada, Comares, 2007; and P.A. De Miguel Asensio, *Derecho privado de Internet*, 4th ed., 2012, Navarra, Civitas, pp. 224-230.
- 10 17 U.S.C. § 512 (2000).
- 11 And even among the industrialized countries; for instance, see R.H. Weber, "Internet Service Provider Liability The Swiss Perspective," *JIPITEC*, vol. 1, 2010, pp. 145-150.
- 12 For a comparative overview see the WIPO Study by D. Seng, "Comparative Analysis of the National Approaches to the Liability of Internet Intermediaries," <http://www.wipo.int/copyright/en/internet_intermediaries/index.html>.
- 13 In favour of a standardization of the existing "patchwork of safe harbors," see M.A. Lemley, "Rationalizing Internet Safe Harbors," 6 *J. on Telecomm. & High Tech. L.*, 2007-2008, pp. 101-119, p. 107.
- 14 J. De Beer and C.D. Clemmer, "Global Trends in Online Copyright Enforcement: A Non-Neutral Role for Network Intermediaries," 49 *Jurimetrics*, 2009, pp. 375-409.
- 15 See the WIPO Study by L. Edwards, "Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights," <http://www.wipo.int/export/sites/www/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf>, especially secs. III, IV and VII.
- 16 On how the regulatory uncertainty remains in the EU concerning the position of Internet intermediaries under the provisions of the E-Commerce Directive, see section 3.4, entitled "Need for further clarification on the intermediaries regime of the E-Commerce Directive," in Commission Staff Working Document, "Online services, including e-commerce, in the Single Market," accompanying the Communication from the Commission, "A coherent framework to boost confidence in the Digital Single Market of e-commerce and other online services," {COM(2011) 942}, {SEC(2011) 1640}, available at <http://ec.europa.eu/internal_market/e-commerce/docs/communication2012/SEC2011_1641_en.pdf>.
- 17 See ECJ Judgment of 24 November 2011, C-70/10, *Scarlet Extended* with regard to the position of Internet access provid-

- ers, and ECJ Judgment of 16 February 2012, C-360/10, *SABAM* in connection to providers of hosting service (in particular, an online social networking platform). See ECJ Judgment of 19 April 2012, C-461/10, *Bonnier Audio and others*.
- 18 On the problematic nature of those mechanisms from an EU data protection perspective, see “Opinion of the European Data Protection Supervisor on the proposal for a Council Decision on the Conclusion of the Anti-Counterfeiting Trade Agreement” of 24 April 2012, <<http://www.edps.europa.eu>>.
 - 19 In the UK finding that the graduated response system to fight copyright infringements in the Internet that the Digital Economy Act 2010 inserted into the Communications Act 2003 does not breach EU Data Protection Law, see Judgment of 6 March 2012 England and Wales Court of Appeal (Civil Division) *British Telecommunications Plc, R (on the application of) v, BPI (British Recorded Music Industry) Ltd & Ors* [2012] EWCA Civ 232.
 - 20 G. Dinwoodie, R. Dreyfuss and A. Kur, ‘The Law Applicable to Secondary Liability in Intellectual Property Cases,’ *Journal of International Law and Politics*, vol. 42, 2009, pp. 201-235, pp. 233-234.
 - 21 M. MacCarthy, “What Payment Intermediaries Are Doing About Online Liability and Why It Matters,” 25 *Berkeley Tech. L.J.*, 2010, pp. 1037-1120, at p. 1116.
 - 22 As a pioneer example, see Global Business Dialogue on Electronic Commerce, “Recommendations presented by the IPR Working Group on Notice and Takedown Procedures,” (September 2000), <<http://www.gbd-e.org>>.
 - 23 For instance, in contrast with the approach adopted by the EU Directive 2000/31 on electronic commerce, the instruments on electronic commerce adopted by UNCITRAL, such as the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts (that will enter into force on 1 March 2013 <<http://www.uncitral.org>>), do not address the liability of Internet intermediaries.
 - 24 The text of the Anti-Counterfeiting Trade Agreement initialled on 25 November 2010 between the European Union and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation and the United States of America may be found in the Proposal for a Council Decision on the conclusion of the Agreement of 24 June 2011, COM(2011) 380 final.
 - 25 The Draft of April 2010 is available at http://trade.ec.europa.eu/doclib/docs/2010/april/tradoc_146029.pdf.
 - 26 M. E. Kaminski, An Overview and the Evolution of the Anti-Counterfeiting Trade Agreement, 21 *Alb. L.J. Sci. & Tech.*, 2011, pp. 385-444., at pp. 438-440.
 - 27 This is a common feature of all four sets of principles on cross-border intellectual property litigation drafted in recent years: American Law Institute Principles Governing Jurisdiction, Choice of Law, and Judgments in Intellectual Property in Transnational Disputes, American Law Institute Publishers, St Paul, 2008 (ALI Principles); Principles on Conflict of laws in Intellectual Property prepared by the European Max Planck Group on Conflict of laws in Intellectual Property of 2011 (CLIP Principles) <www.cl-ip.eu>; Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property of 2009 (Japanese Transparency Proposal), included as Annex III to J. Basedow, T. Kono and A. Metzger (eds.), *Intellectual Property in the Global Arena*, Tübingen, Mohr Siebeck, 2010, pp. 394-402; and Principles of Private International Law on Intellectual Property Rights, Joint Proposal Drafted by Members of the Private International Law Association of Korea and Japan of 2010 (Joint Korean Japanese Principles), see *The Quarterly Review of Corporation Law and Society*, 2011, pp. 112-163.
 - 28 Regulation (EC) No 864/2007 of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ 2007 L 199, p. 40).
 - 29 Concerning the broad scope of Article 15(g) see A. Dickinson, *The Rome II Regulation (The Law Applicable to Non-contractual Obligations)*, Oxford, OUP, 2008, p. 587.
 - 30 See G. Spindler y M. Leistner, “Secondary...,” *cit.*, p.816; P.A. De Miguel Asensio, *Derecho...cit.*, pp. 270-273; A. Metzger, “Germany,” T. Kono (ed.), *Intellectual Property and Private International Law (Comparative Perspectives)*, Oxford, Hart, 2012, pp. 581-617, p. 611; N. Boschiero and B. Ubertazzi, “Italy,” T. Kono (ed.), *Intellectual cit.*, pp. 707-762, at p. 750; C. Wadlow, “United Kingdom” T. Kono (ed.), *Intellectual cit.*, pp. 1061-1102, pp.1091-1092 (noting that secondary liability based not on IP legislation but on general principles of law to the extent that it relates to an IP infringement seems to be also covered by Article 8.1 Rome II Regulation); and J.B. Nordemann, “Liability for Copyright Infringements on the Internet: Host Providers (Content Providers) – The German Approach” 2 (2011) *JIPITEC*, pp. 37-49, at p. 39. A similar approach prevails in cases in which courts have recourse to Article 5.2 of the Berne Convention as the relevant conflict rule establishing the *lex loci protectionis* principle. In this connection, on the application in France of the law of the country of protection on both the direct infringement and the liability of a search engine provider in connection with the alleged infringement of certain rights in photographs, see Arrêt n. 827 of 12 July 2012 (11-15.165 ; 11-15.188) - *Cour de cassation – Première chambre civile*, available at <http://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/827_12_23881.html>.
 - 31 J. Drexl, “Internationales Immaterialgüterrecht,” *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 5th ed, Bd. 11, Munich, C.H. Beck, 2010, pp. 1344-1491, at pp. 1448-1449.
 - 32 D. Moura Vicente, “La propriété intellectuelle en droit international privé,” *R. des C.*, vol. 335, 2008, pp. 105-504, at pp. 375-379.
 - 33 § 301 ALI Principles, comment h.
 - 34 See ALI Principles, Illustrative Overview in “Introductory Note to Part III.”
 - 35 See, e.g., A.P. Reindl, “Choosing Law in Cyberspace: Copyright Conflicts on Global Networks,” 19 *Mich. J. Int’l L.*, 1997-1998, pp. 799-871; and A. Ohly, “Choice of Law in the Digital Environment – Problems and Possible Solutions,” in J. Drexl and A. Kur (eds.), *Intellectual Property and Private International Law*, Oxford, Hart, 2005, pp. 241et seq.
 - 36 In line with the 2001 WIPO Joint Recommendation Concerning Provisions on the Protection of Marks, and Other Industrial Property Rights in Signs, on the Internet (<http://www.wipo.int/about-ip/en/development_iplaw/pub845.htm>), the mere accessibility of a website in a country does not support a finding that the site produces in that country the significant market impact required to find infringement as a result of the activities carried out through Internet, A. Kur “Die WIPO-Empfehlungen zur Benutzung von Marken im Internet,” *GRURInt*, 2001, pp. 961- 964.
 - 37 P. A. De Miguel Asensio, “The Private International Law of Intellectual Property and of Unfair Commercial Practices: Coherence or Divergence?,” S. Leible and A. Ohly (eds.), *Intellectual Property and Private International Law*, Tübingen, Mohr Siebeck, 2009, pp. 137-190, p. 178. See ECJ Judgment of 18 October 2012, C-173/11, *Football Dataco*, para. 39.
 - 38 G. Dinwoodie, R. Dreyfuss and A. Kur, ‘The Law Applicable...,’ *cit.*, pp. 205-209.
 - 39 Y. Nishitani, “Copyright Infringement on the Internet and Service Provider’s Liability – A Japanese Approach from a Comparative Perspective,” A. Schulz (ed.), *Legal Aspects of an E-Commerce Transaction*, Munich, 2006, pp. 41-53, pp. 52-53.

- 40 A. Kur, "Article 3:604 CLIP Principles," *Conflict of laws in Intellectual Property: The CLIP Principles and Commentary*, Oxford, OUP, forthcoming.
- 41 G. Dinwoodie, R. Dreyfuss and A. Kur, "The Law Applicable...," *cit.*, pp. 216-217.
- 42 R. Kojima, R. Shimanami and M. Nagata, "Applicable...," *cit.*, at p. 197.
- 43 A. Kur, "Article 3:604 CLIP Principles," *Conflict... cit.*, C17.
- 44 A. Kur, "Article 3:604 CLIP Principles," *Conflict... cit.*, C22.
- 45 L.J. Oswald, "International...," *cit.*, pp. 266-274.
- 46 L. Edwards, "The Fall and Rise of Intermediary Liability Online," L. Edwards and C. Waelde (eds.), *Law and the Internet*, 3rd ed., 2009, Oxford, Hart, pp. 47-88, at pp. 67-69.
- 47 For instance, see ECJ Judgment of 12 July 2011, C-324/09 *L'Oréal*, paras. 106-116.
- 48 With regard to the situation in Germany and Spain, see H. Hoffmann, "§ 10 TMG," G. Spindler/F. Schuster, *Recht der elektronischen Medien*, 2nd ed., Munich, C.H.Beck, 2011, pp. 1526-1536; and M. Peguera, "Internet Service Providers' Liability in Spain (Recent Case Law and Future Perspectives)," *JIPITEC*, vol. 1, 2010, pp. 151-171.
- 49 Discussing the recourse to the habitual residence of the intermediary as a connecting factor and the concern that intermediaries could intentionally locate their habitual residence in countries with a low level of protection, see R. Kojima, R. Shimanami and M. Nagata, "Applicable...," *cit.*, at p. 197. Such a concern is addressed in the CLIP Principles by introducing in Article 3:604(3) a common substantive threshold.
- 50 In fact in such situations application of the *lex loci protectionis* with regard to the Internet intermediary seems almost subconscious, see again in France *Arrêt n. 827 of 12 July 2012 Cour de cassation - Première chambre civile*.
- 51 For a detailed comparison between § 321 ALI Principles and Article 3:603 CLIP Principles, see R. Matulionytė, *Law Applicable to Copyright (A Comparison of the ALI and CLIP Proposals)*, Cheltenham, Edward Elgar, 2011, pp. 166-202.
- 52 Furthermore, § 321(2) allows a party to prove that with respect to particular States covered by the action, if the solution provided by any of those States' laws differs from that of the law applicable to the case as a whole given its close connection to the dispute, such difference shall be taken into account by the competent court when determining the scope of liability and remedies. A similar safeguard may be found in Article 3:603.
- 53 A. Metzger, "Applicable Law under the CLIP Principles: A Pragmatic Reevaluation of Territoriality," J. Basedow, T. Kono and A. Metzger (eds.), *Intellectual...cit.*, pp. 174-175; and E. Treppoz, "Un autre regard : étude comparée des Principes de l'American Law Institute et du Max Planck Institut sur le droit international privé et la propriété intellectuelle," *Droit international privé et propriété intellectuelle (Nouveau cadre Nouvelles stratégies)*, Rueil-Malmaison, Lamy, 2010, pp. 271-301, p. 299.
- 54 A. Kur, "Article 3:603 CLIP Principles," *Conflict... cit.*, C9.
- 55 According to Article 3:603(2) CLIP Principles "In determining which State has the closest connection with the infringement, the court shall take all the relevant factors into account, in particular the following:(a) the infringer's habitual residence;(b) the infringer's principal place of business;(c) the place where substantial activities in furtherance of the infringement in its entirety have been carried out;(d) the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety."
- 56 R. Kojima, R. Shimanami and M. Nagata, "Applicable...," *cit.*, at p. 197.
- 57 A. Kur and B. Ubertazzi, "The ALI Principles and the CLIP Project - a Comparison," in S. Bariatti (ed.), *Litigating Intellectual Property Rights Disputes Cross-Border: EU Regulations, ALI Principles, CLIP Project*, Milán, CEDAM, 2010, pp. 89-147, p. 127.
- 58 G. Dinwoodie, R. Dreyfuss and A. Kur, "The Law Applicable...," *cit.*, pp. 214-216.
- 59 D. Yokomizo, "Intellectual Property Infringement on the Internet and Conflict-of-laws," *AIPPI Journal*, May 2011, pp. 104-114, p. 109.
- 60 A. Kur, "Article 3:603 CLIP Principles," *Conflict... op. cit.*, C6.
- 61 M. Trimble Landova, "The Future of Cybertravel: Legal Implications of the Evasion of Geolocation," *22 Ford. Intell. Prop. Media & Ent. L.J.*, 2012, pp.567-657, p. 586.