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## From *Itar-Tass* to Films by *Jove*: The Conflict of Laws Resolution in International Copyright

Anna Tydniouk

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# **FROM *ITAR-TASS* TO *FILMS BY JOVE*: THE CONFLICT OF LAWS REVOLUTION IN INTERNATIONAL COPYRIGHT**

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## INTRODUCTION

The modern world is characterized by an unprecedented amount of contact among sovereign states. “Growth in international activity and dramatic technological changes have greatly increased the frequency with which national legal systems must interact.”<sup>1</sup> This intensified interaction has, in turn, resulted in a surge in disputes involving various aspects of private international law.<sup>2</sup>

Copyright law is an area of private law which easily assumes this kind of international character<sup>3</sup> because its subject matter effortlessly crosses geographical borders.<sup>4</sup> This trait has been augmented by the development of the Internet and communication technologies.<sup>5</sup> Scholars point out several important factors contributing to the ever-increasing importance of copyright law in the international arena. First, technological development allows a user easy worldwide access to copyrighted works to a degree unthinkable before.<sup>6</sup> Second, the Internet threatens the traditional territorial principle of copyright law.<sup>7</sup> Finally, copyright law has acquired outstanding importance as a result of the “shift of emphasis from manufactured goods to ideas, infor-

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1. Andrew T. Guzman, *Choice of Law: New Foundations*, 90 GEO. L. J. 883, 884 (2002) [hereinafter Guzman, *Choice of Law*].

2. Mathias Reimann, *A New Restatement-For the International Age*, 75 IND. L.J. 575, 579 (2000) (pointing out that “the number of international disputes has grown continuously in the last few decades”).

3. Marshall Leaffer, *International Copyright from an American Perspective*, 43 ARK. L. REV. 373, 373 (1990) (noting that “the international dimension of copyright law grows in importance each day”).

4. Matt Jackson, *Harmony or Discord? The Pressure Toward Conformity in International Copyright*, 43 IDEA 607, 629 (2003); Leaffer, *supra* note 3, at 373.

5. Curtis A. Bradley, *Extraterritorial Application of U.S. Intellectual Property Law: Principal Paper: Territorial Intellectual Property Rights in an Age of Globalism*, 37 VA. J. INT’L L. 503, 584 (1997).

6. Leaffer, *supra* note 3, at 373.

7. *Id.* See also Paul Edward Geller, *Conflicts of Law in Cyberspace: International Copyright in a Digitally Networked World*, in 4 INFORMATION LAW SERIES, THE FUTURE OF COPYRIGHT IN A DIGITAL ENVIRONMENT 27, 28 (P. Bernt Hugenholtz ed., 1996) (pointing out that “[d]igital media allow transmitters and receivers to switch roles interactively, and to be linked among themselves in fluid and variegated patterns, potentially affecting both creation and dissemination at any and all points in increasingly global networks”).

mation, and images – the subject matter of intellectual property....”<sup>8</sup>

These factors exacerbate old legal problems and may even create new ones in international copyright disputes.<sup>9</sup> One cluster of traditional problems that has gained new importance is that of conflict of laws questions surrounding both initial copyright ownership and transfer of rights.<sup>10</sup>

Problems regarding ownership and transfer of rights have been compounded by the growing transparency of national borders,<sup>11</sup> the shift from industrial to information markets<sup>12</sup> and burgeoning participation of copyrighted works in international commerce.<sup>13</sup>

These changes have, in turn, put unbearable pressure on the traditional interpretation of the principle of national treatment enshrined in the Berne Convention for the Protection of Literary and Artistic Works.<sup>14</sup> According to the conventional understanding of national treatment, the law of a protecting country should determine all the issues of copyright, including ownership.<sup>15</sup> This approach also comports with the related principle of territoriality because it regards copyright as consisting of sepa-

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8. Samuel K. Murumba, *Globalizing Intellectual Property: Linkage and the Challenge of a Justice-Constituency*, 19 U. PA. J. INT'L ECON. L. 435, 435 (1998).

9. Peter Nicolas, *The Use of Preclusion Doctrine, Antisuit Injunctions, and Forum Non Conveniens Dismissals in Transnational Intellectual Property Litigation*, 40 VA. J. INT'L L. 331, 334 (1999).

10. See generally PAUL GOLDSTEIN, *INTERNATIONAL COPYRIGHT* 104 (2001); Jane C. Ginsburg, *Ownership of Electronic Rights and the Private International Law of Copyright*, 22 COLUM.-VLA J.L. & ARTS 165, 169–70 (1998) [hereinafter Ginsburg, *Ownership*].

11. Geller, *supra* note 7, at 28.

12. See Lorin Brennan, *Financing Intellectual Property Under Revised Article 9: National and International Conflicts*, HASTINGS COMM. & ENT. L. J. 313, 316 (2001); Jackson, *supra* note 4, at 628.

13. See Monica E. Antezana, *The European Union Internet Copyright Directive as Even More than it Envisions: Toward a Supra-EU Harmonization of Copyright Policy and Theory*, 26 B.C. INT'L & COMP. L. REV. 415, 440 (2003); Jackson, *supra* note 4, at 627.

14. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, 828 U.N.T.S. 221 (Paris revision, July 24, 1971) [hereinafter Berne Convention].

15. See STEPHEN M. STEWART, *INTERNATIONAL COPYRIGHT AND NEIGHBORING RIGHTS* 38–39 (2d ed. 1989); EUGEN ULMER, *INTELLECTUAL PROPERTY RIGHTS AND THE CONFLICT OF LAWS* 11 (1978).

rate sets of rights for each sovereign state.<sup>16</sup> But the disparate copyright regimes envisioned by this conventional understanding hinder the uniform worldwide exploitation of a literary work.<sup>17</sup> It is for this reason that the United States Court of Appeals for the Second Circuit in *Itar-Tass v. Russian Kurier, Inc.* rejected this conventional interpretation of national treatment.<sup>18</sup> The court found that the national treatment principle did not contain a choice of law provision<sup>19</sup> and held that ownership of a copyright should be determined by the law of the country with the most substantial relationship to the work.<sup>20</sup> By rejecting the uniform application of the law of a protecting country, *Itar-Tass* imported the modern conflict of laws analysis into the world of copyright law, which, until that point, had completely ignored conflict of laws issues.<sup>21</sup> Such an approach has the virtue of establishing a single root of title to copyrighted works, thus facilitating their distribution and exploitation.<sup>22</sup> It is also more flexible than the traditional approach.

However, its application creates a number of serious problems: the fact that a general conflict of laws approach eludes predictability; the difficulties associated with interpreting foreign laws and determining what degree of deference should be given to a foreign judiciary; and obstacles to enforcing decisions. In *Films by Jove v. Berov* (“*Films by Jove II*”), the United States District Court for the Eastern District of New York, attempting

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16. Jane C. Ginsburg, *International Copyright: From a “Bundle” of National Copyright Laws to a Supranational Code?*, 47 J. COPYRIGHT SOC’Y U.S.A. 265, 284, 289 (2000) [hereinafter Ginsburg, *International Copyright*].

17. See Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 AM. J. COMP. L. 429, 438–39 (2001) [hereinafter Dinwoodie, *International Intellectual Property*]; Ginsburg, *International Copyright*, *supra* note 16, at 284, 289.

18. *Itar-Tass Russian News Agency v. Russian Kurier*, 153 F.3d 82, 89–91 (2d Cir. 1998).

19. *Id.* at 89. See also Ginsburg, *Ownership*, *supra* note 10, at 168–69; William Patry, *Choice of Law and International Copyright*, 48 AM. J. COMP. L. 383, 404 (2000) [hereinafter Patry, *Choice of Law*]; GOLDSTEIN, *supra* note 10, at 102–04.

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

21. Dinwoodie, *International Intellectual Property*, *supra* note 17, at 438–40.

22. GOLDSTEIN, *supra* note 10, at 104; Ginsburg, *Ownership*, *supra* note 10, at 169–70.

to apply *Itar-Tass*, was confronted with many of these same problems.<sup>23</sup>

A universal copyright regime would resolve these problems, but thus far it has remained an unattainable goal.<sup>24</sup> In the meantime, scholars have developed two principle methods of ameliorating the difficulties: the Dreyfuss-Ginsburg procedural approach,<sup>25</sup> and the substantive approach suggested by Graeme Dinwoodie.<sup>26</sup>

This Note's principal thesis is that, by themselves, these salutary attempts to deal with a pressing problem are inadequate unless supplemented by the establishment of supranational equitable principles. The establishment of a supranational body of equitable principles would be a step towards universal copyright law, and would be easier to achieve because it would not cause interference with sensitive policies underlying national copyright regimes. Once established, the universal law of equity could help to protect third parties and good-faith purchasers in transnational copyright transactions, thus facilitating worldwide exploitation and distribution of copyrighted works.

Part I looks at the traditional approach of copyright law to conflict of laws problems under the Berne principle of national treatment. Part II discusses the parallel universe of the conflict of laws doctrine, which has undergone a revolutionary shift from the territorial approach of the First Restatement<sup>27</sup> to the

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23. *Films by Jove, Inc. v. Berov*, 154 F. Supp. 2d 432 (E.D.N.Y. 2001) [hereinafter *Films by Jove I*]; *Films by Jove, Inc. v. Berov*, 250 F. Supp. 2d 156 (E.D.N.Y. 2003) [hereinafter *Films by Jove II*].

24. See Graeme W. Austin, *Valuing "Domestic Self-Determination" in International Intellectual Property Jurisprudence*, 77 CHI.-KENT. L. REV. 1155, 1211 (2002) (commenting on "the need and ability for individual nations to do some things differently in the intellectual property sphere").

25. See generally Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 CHI.-KENT. L. REV. 1065 (2002).

26. See generally Graeme B. Dinwoodie, *A New Copyright Order: Why National Courts Should Create Global Norms*, 149 U. PA. L. REV. 469 (2000) [hereinafter *Dinwoodie, A New Copyright Order*]; Graeme B. Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001) [hereinafter *Dinwoodie, The Development*].

27. See generally RESTATEMENT (FIRST) OF CONFLICT OF LAWS (1934).

modern functional analysis.<sup>28</sup> Part III focuses on the rejection of territorial interpretation of the national treatment doctrine and acceptance of the modern conflict of laws doctrine by the United States Court of Appeals for the Second Circuit in *Itar-Tass*. Part IV discusses the problems involved in the application of the modern conflict of laws doctrine to the issue of copyright ownership and transfer of rights. These problems are clearly demonstrated by the decisions of the United States District Court for the Eastern District of New York in *Films by Jove I and II*<sup>29</sup> applying the *Itar-Tass* holding to a more complicated set of facts. Finally, Part V suggests that many of these problems can be solved by the application of supranational equitable principles, in particular the doctrine of apparent authority, aimed at providing certainty and security in commercial transactions.

#### I. CONFLICT OF LAWS IN THE BERNE CONVENTION PRINCIPLE OF NATIONAL TREATMENT

The Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”) is one of the most influential copyright treaties in the world.<sup>30</sup> First established in 1886, in Berne, Switzerland,<sup>31</sup> this Convention is now administered by the World Intellectual Property Organization (“WIPO”), an intergovernmental organization created under the auspices of the United Nations.<sup>32</sup> Until March 1, 1989, “the United States was the only major western country not a member” of the Berne

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28. See generally CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (1963) [hereinafter CURRIE, SELECTED ESSAYS]; William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 9–10 (1963); DAVID CAVERS, THE CHOICE OF LAW PROCESS 22–23 (1965); Arthur Von Mehren, *Recent Trends in Choice-of-Law Methodology*, 60 CORNELL L. REV. 927, 938 (1975).

29. *Films by Jove I*, 154 F. Supp. 2d 432; *Films by Jove II*, 250 F. Supp. 2d 156.

30. Stephen Fraser, *The Copyright Battle: Emerging International Rules and Roadblocks on the Global Information Infrastructure*, 15 J. MARSHALL J. COMPUTER & INFO. L. 759, 762.

31. Peter Burger, *The Berne Convention: Its History and Key Role in the Future*, 3 J.L. & TECH. 1, 7 (1998).

32. World Intellectual Property Organization (“WIPO”) Website, at <http://www.wipo.org/about-wipo/en/gib.htm> (last visited Feb. 20, 2004).



Convention<sup>33</sup> that at that time encompassed some 85 nations, including America's major trading partners.<sup>34</sup> China joined WIPO in 1992<sup>35</sup> and Russia followed suit in 1995.<sup>36</sup>

*A. National Treatment as a Compromise Between Universal Copyright and National Policies*

Article I of the Berne Convention unambiguously states that “[t]he countries to which this Convention applies constitute a Union for the protection of the rights of authors in their literary and artistic works.”<sup>37</sup> The leading authority on the Convention, Professor Sam Ricketson, notes that “the expression ‘author’ is left unidentified, although it occurs with great frequency throughout the substantive provisions of the Convention.”<sup>38</sup> This is because the main focus of the Berne Convention was not so much on *authorship* as on the *protection* given to authors.<sup>39</sup>

Since the very inception of the Berne Convention, two distinct approaches to the protection of authors' rights “have vied for primacy.”<sup>40</sup> These principles are “the non discrimination principle of national treatment” which “preserves the integrity of domestic legislation,” and the principle of universal copyright norms, which “guarantee[s] international uniformity and predictability.”<sup>41</sup> At the diplomatic conference of 1884, one of the preparatory stages to the Berne Convention,<sup>42</sup> the German delegation declared itself a “strong supporter of universal codification,”<sup>43</sup> proposing the following question to the Conference:

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33. MARSHALL LEAFFER, INTERNATIONAL TREATIES ON INTELLECTUAL PROPERTY 357 (2d ed. 1997).

34. MARSHALL LEAFFER, UNDERSTANDING COPYRIGHT LAW 513 (1999) [hereinafter UNDERSTANDING COPYRIGHT LAW].

35. Connie Neigel, *Piracy in Russia and China: A Different U.S. Reaction*, 63 LAW & CONTEMP. PROB. 179, 193 (2000).

36. *Id.*

37. Berne Convention, *supra* note 14, art. 1. *See also* Burger, *supra* note 31, at 16 (pointing out that this focus on the protection of authors indicated the Continental European influence).

38. SAM RICKETSON, THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS: 1886-1986 158 (1987).

39. *Id.* at 39.

40. Ginsburg, *International Copyright*, *supra* note 16, at 267.

41. *Id.* at 267.

42. RICKETSON, *supra* note 38, at 58.

43. *Id.* at 59.

Instead of concluding a convention based on the principle of national treatment, would it not be preferable to aim for a codification, in the framework of a convention, regulating in a uniform manner for the whole projected Union, and in the framework of a convention, the totality of dispositions relating to the protection of copyright?<sup>44</sup>

The French, Swedish and Swiss delegations did not approve of this initiative “in the light of the many differences in national copyright law which still existed.”<sup>45</sup> Instead, the parties accepted a compromise motion of the Swiss Government which stated:

Whereas, desirable as may be a universal codification of the principles which regulate the protection of the rights of authors, in view of the differences in existing laws and conventions, it is to be feared that such a project would postpone for a long time the conclusion of a general understanding....<sup>46</sup>

Although the agreed upon approach “institutes national treatment,” it also tries to avoid local underprotection by creating a floor of minimum substantive standards that member countries must adopt.<sup>47</sup> Both tenets are embodied in Article 5(1) of the Convention which states that:

Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now and or may hereafter grant to their nationals, as well as the rights specifically granted by this Convention.<sup>48</sup>

The principle of national treatment requires member states to afford copyright owners from other Berne countries the same protection as that accorded to their own citizens.<sup>49</sup>

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44. RICKETSON, *supra* note 38, at 59.

45. *Id.*

46. *Id.*

47. Ginsburg, *International Copyright*, *supra* note 16, at 267.

48. Berne Convention, *supra* note 14, art. 5(1).

49. 2 WILLIAM PATRY, *COPYRIGHT LAW AND PRACTICE* 1273 (1994).

*B. The Traditional Territorial Approach to National Treatment*

Traditionally, the principle of national treatment was understood as a territorial approach, dictating that the law of a protecting country applies to all issues in international copyright disputes.<sup>50</sup> A prominent European scholar, Eugen Ulmer, specifically states that “the question of who is the first owner of copyright is also decided in accordance with the law of the country where protection is claimed.”<sup>51</sup> Although there is some ambiguity as to whether a protecting country should be interpreted as a forum country or a country of infringement,<sup>52</sup> most scholars believe a protecting country to be a forum country.<sup>53</sup> This preference for the forum law is premised upon the greater comfort that courts feel in applying their own law as opposed to foreign law;<sup>54</sup> this comfort is expected, in turn, to improve the quality of judgments<sup>55</sup> and to guarantee more certainty.<sup>56</sup> An additional benefit of this approach is that owners of rights are not affected by confiscation or exploitation measures in the country of the work’s origin whenever these measures are invalid in the protecting countries; for instance, “where a publisher had been expropriated in East Germany, the West German courts held that his reproduction and distribution rights in the Federal Republic are not affected.”<sup>57</sup>

The principle of national treatment was reinforced by the Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPs”) in 1994.<sup>58</sup> Although TRIPs relies mainly on the

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50. Edward J. Ellis, *National Treatment under the Berne Convention and the Doctrine of Forum Non Conveniens*, 36 IDEA 327, 331 (1996).

51. ULMER, *supra* note 15, at 11.

52. RICKETSON, *supra* note 38, at 226 (commenting that “it remains an open question under the Convention” whether a protecting country should be interpreted as a forum country or a country where an infringing act occurred, although in most cases they will be the same).

53. STEWART, *supra* note 15, at 37 (pointing out that the Berne Convention in its principle of national treatment accepted “broadly speaking *lex fori*”).

54. STEWART, *supra* note 15, at 37.

55. *Id.*

56. *Id.*

57. *Id.* at 39.

58. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments-Results of the Uruguay Round

Berne Convention principles,<sup>59</sup> its protection of copyright goes further than Berne.<sup>60</sup> The primary significance of TRIPs is “the extension of the enforcement mechanism of the [World Trade Organization (“WTO”)] to intellectual property obligations.”<sup>61</sup> An important aspect of the TRIPs Agreement was treating copyright as “a trade issue rather than an information policy issue.”<sup>62</sup> For instance, “[t]he ultimate decision of developing countries to consent to TRIPs was not motivated by a belief that greater protection for [Intellectual Property]” was in their interest; it was prompted, instead, “by a desire to obtain concessions in other areas.”<sup>63</sup>

Scholars agree that dispute resolution based on TRIPs and the WTO framework evidences the beginning of the formation of uniform international copyright law.<sup>64</sup> Nevertheless, although TRIPs strengthens and broadens copyright protection somewhat, it preserves the dichotomy between international and domestic laws by creating a floor — not a ceiling — for the copyright protection member states are obligated to enact into their domestic laws. Consequently, it retains the national treatment principle that “private litigation would be resolved by the application of national law.”<sup>65</sup>

## II. THE CONFLICT OF LAWS REVOLUTION IN CONTRACT AND TORT LAW

International copyright law has long escaped the reach of the general conflict of laws analysis because it adhered to the conventional interpretation of the national treatment doctrine, according to which, “the courts in the state where infringement occurs nearly always apply their own national law.”<sup>66</sup> Copyright

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vol. 31, 33 I.L.M. 1197 (1994). See also Ruth Okediji, *TRIPS Dispute Settlement and the Sources of (International) Copyright Law*, 49 J. COPYRIGHT SOC'Y U.S.A. 585, 585 (2001).

59. *Id.* at 598.

60. LEAFFER, UNDERSTANDING COPYRIGHT LAW, *supra* note 34, at 539 (characterizing TRIPs as a “Berne plus’ approach to protection”).

61. Okediji, *supra* note 58, at 634.

62. Jackson, *supra* note 4, at 635.

63. Andrew T. Guzman, *International Antitrust and the WTO*, 43 VA. J. INT'L L. 933, 950 (2003) [hereinafter Guzman, *International Antitrust*].

64. See Okediji, *supra* note 58, at 634–35; Jackson, *supra* note 4, at 622.

65. Dinwoodie, *The Development*, *supra* note 26, at 777.

66. STEWART, *supra* note 15, at 39.

law, thus, remained territorial and isolated from the parallel conflict of laws revolution that had taken place in tort and contract cases<sup>67</sup> where the rigid territorial approach was displaced by various forms of “interest analysis.”<sup>68</sup>

*A. Beale's Territorial Approach of "Vested Rights"*

The traditional territorial approach in the American conflict of laws doctrine had been represented by Joseph Beale,<sup>69</sup> a reporter for Restatement (First) of Conflict of Laws.<sup>70</sup> His doctrine of “vested rights” was based “on a view that every state has exclusive jurisdiction over its territory.”<sup>71</sup> Beale stated that “a right having been created by the appropriate law, the recognition of its existence should follow everywhere.”<sup>72</sup> However, although Beale’s approach was very influential and enjoyed support among scholars and the courts when pronounced, it came under widespread criticism, in the 1950s and 1960s, for its inflexibility and arbitrariness in the choice of the moment when rights vested and, consequently, the jurisdiction, under which rights have vested. According to Beale’s general principle, “[r]ights were considered to have vested in the jurisdiction where the last act necessary to complete the cause of action occurred.”<sup>73</sup> For instance, in the case of torts, the rigid rule dictated that the jurisdiction where the rights of the parties vested was the place of the wrong;<sup>74</sup> in contracts, the place of the contract formation.<sup>75</sup> Needless to say, such a rule often brought arbitrary and unjust results.<sup>76</sup>

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67. Kurt Siehr, *Revolution and Evolution in Conflicts Law*, 60 LA. L. REV. 1353, 1353 (2000).

68. See generally CURRIE, SELECTED ESSAYS, *supra* note 28; Baxter, *supra* note 28; CAVERS, *supra* note 28.

69. See generally JOSEPH BEALE, TREATISE ON THE CONFLICT OF LAWS (1935). See also Perry Dane, *Vested Rights, "Vestedness," and Choice of Law*, 96 YALE L.J. 1191, 1194 (1987).

70. Guzman, *Choice of Law*, *supra* note 1, at 890.

71. *Id.*

72. JAMES A. MARTIN, PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 5 (1980) (citing JOSEPH BEALE, THE SUMMARY ON THE CONFLICT OF LAWS).

73. Guzman, *Choice of Law*, *supra* note 1, at 891.

74. RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 377 (1934).

75. *Id.* § 332.

76. See, e.g., *Alabama Great Southern R.R. Co. v. Carroll*, 97 Ala. 126 (1892) (where the court of Alabama denied compensation to an injured em-

*B. A Revolution in the Conflict of Laws Analysis*

## 1. Currie's Interest Analysis: True and False Conflicts

The main critic of Beale's territorial approach in the 1950s and 1960s was Brainerd Currie.<sup>77</sup> Currie developed "an interest analysis" by arguing that: "[w]hen a court is asked to apply the law of a foreign state different from the law of the forum, it should inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies."<sup>78</sup> Currie divided conflicts of laws into two main groups: false conflicts and true conflicts.<sup>79</sup> In a "false conflict" case, the interests of the respective states do not conflict,<sup>80</sup> so "[if] the court finds that one state has an interest in the application of its policy in the circumstances of the case and the other has none, it should apply the law of the only interested state."<sup>81</sup> Unfortunately, the situation becomes much more complicated where a "true conflict" between states' interests exists. In that case, Currie argued that "where several states have different policies, and also legitimate interests in the application of their policies, a court is in no position to 'weigh' the competing interests, or evaluate their relative merits, and choose between them accordingly."<sup>82</sup> Therefore, in true conflicts, he recommends the use of the law of the forum: "[i]f...the court finds that a conflict

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ployee of a defendant railroad having applied the law of Mississippi as a place of injury, although both the plaintiff and the defendant were residents of Alabama, the law of which would have allowed the recovery).

77. Dane, *supra* note 69, at 1201.

78. Brainerd Currie, *Comments on Babcock v. Jackson*, 63 COLUM. L. REV. 1233, 1242 (1963) *reprinted in* B. CURRIE, *SELECTED ESSAYS ON CONFLICT OF LAWS* (1963) [hereinafter Currie, *Comments*].

79. Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. CHI. L. REV. 227, 251-52 (1958), *reprinted in* *SELECTED ESSAYS ON CONFLICT OF LAWS* (1963) [hereinafter Currie, *Married Women's Contracts*]. *See also* MARTIN, *supra* note 72, at 85 (noting that Currie's most important contribution to the choice of law doctrine was his theory of false conflicts).

80. Currie, *Married Women's Contracts*, *supra* note 79, at 251-52. *See also* *Tooker v. Lopez*, 24 N.Y.2d 569, 301 (1969) for a good example of the application of an interest analysis to a "false conflict".

81. Currie, *Comments*, *supra* note 78, at 1242.

82. Brainerd Currie, *Notes on Methods and Objectives in the Conflicts of Laws*, 1959 DUKE L.J. 171, 176 (1959).

between the legitimate interests of the two states is unavoidable, it should apply the law of the forum.”<sup>83</sup>

Although Currie’s approach to false conflicts is accepted by the majority of courts and commentators today,<sup>84</sup> his treatment of true conflicts has often been considered too parochial. It has been rejected by many scholars<sup>85</sup> who criticize it for discriminating unfairly against nonresidents,<sup>86</sup> encouraging forum shopping,<sup>87</sup> and making it impossible to know in advance what law will be applied.<sup>88</sup> Additionally, critics argue that a preference for the forum law does not give proper consideration to “a whole range of policies and values...relating to effective and harmonious intercourse and relations between and among communities....”<sup>89</sup>

## 2. Alternative Solutions to “True Conflicts”

In response to the above critique, alternative solutions for the “true conflicts” approach were suggested. Professor William Baxter, for instance, developed a comparative impairment doctrine which stated that: “normative resolution of real conflicts cases is possible where one of the assertedly applicable rules is more pertinent to the case than the competing rule.”<sup>90</sup> In contracts, another approach emerged advocating the validity of the contract.<sup>91</sup> According to this principle, in a dispute between parties with equal bargaining power, a contract should be upheld as valid if it is valid under any law which the parties could have reasonably taken into account.<sup>92</sup>

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83. Currie, *Comments*, *supra* note 78, at 1242–43.

84. MARTIN, *supra* note 72, at 85.

85. Alfred Hill, *The Judicial Function in Choice of Law*, 85 COLUM. L. REV. 1585, 1592–93 (1985).

86. Douglas Laycock, *Equal Citizens of Equal and Territorial States*, 92 COLUM. L. REV. 249, 276 (1992).

87. Baxter, *supra* note 28, at 9–10.

88. CAVERS, *supra* note 28, at 22–23.

89. Mehren, *supra* note 28, at 938. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971).

90. Baxter, *supra* note 28, at 9–10.

91. *See generally* ALBERT A. EHRENZWEIG, A TREATISE ON CONFLICT OF LAWS (1962). *See also* ALBERT A. EHRENZWEIG, PRIVATE INTERNATIONAL LAW (1967).

92. *Id.*

### 3. The Restatement (Second) of the Conflict of Laws

Widespread dissatisfaction with the territorial approach of the First Restatement continued and eventually prompted the American Law Institute's Restatement (Second) of the Law of Conflict of Laws.<sup>93</sup> Professor Willis Reese, a reporter for the Second Restatement, signaled that "conflict of laws is in a state of flux,"<sup>94</sup> and pointed out that "wide differences presently exist with respect to underlying objectives and values."<sup>95</sup> He then suggested that the Second Restatement "reflects contemporary trends and cross currents respecting choice of law."<sup>96</sup>

The Second Restatement is built around the "the concept of locating the state with the 'the most significant relationship' to the parties and the occurrence or transaction giving rise to a lawsuit, and then applying that state's law."<sup>97</sup> This principle is behind all black-letter rules of the Second Restatement, cast in the form of presumptions, which are rebuttable by the general principles stated at the beginning of both chapters on torts and contracts.<sup>98</sup> In turn, these general principles have to be "read in the light of the choice-influencing principles of section 6,"<sup>99</sup> which is open-ended and policy-oriented,<sup>100</sup> and reads as follows:

- 1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- 2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
  - a) the needs of the interstate and international systems,
  - b) the relevant policies of the forum,
  - c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

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93. MARTIN, *supra* note 72, at 38.

94. Willis Reese, *Conflict of Laws and the Restatement Second*, 28 L. & CONTEMP. PROB. 679, 680 (1963).

95. *Id.*

96. Mehren, *supra* note 28, at 964.

97. Harold P. Southerland, *A Plea for the Proper Use of the Second Restatement of Conflict of Laws*, 27 VT. L. REV. 1, 8 (2002).

98. *Id.* at 8.

99. *Id.* at 9.

100. *Id.* at 8.



- d) the protection of justified expectations,
- e) the basic policies underlying the particular field of law,
- f) certainty, predictability and uniformity of result, and
- g) ease in the determination and application of the law to be applied.<sup>101</sup>

Although the Second Restatement has been favorably received by judges, most academics have sharply criticized it,<sup>102</sup> pointing out that its “unprincipled eclecticism has done little to strengthen the intellectual underpinnings of our discipline.”<sup>103</sup>

In sum, the Second Restatement is a true reflection of the continued flux in conflict of laws analysis. Discussing the idea of creating the Third Restatement, a prominent scholar has summarized the current situation in conflict of laws by stating: “We simply cannot agree.”<sup>104</sup> This state of flux is deepened by a noticeable shift from a state perspective to an individual perspective<sup>105</sup> and from a domestic perspective to international one.<sup>106</sup>

### III. THE CONFLICT OF LAWS REVOLUTION IN INTERNATIONAL COPYRIGHT

#### A. *Conflict of Laws Issues Under the Traditional Interpretation of the National Treatment Doctrine*

Having rejected the territorial interpretation of national treatment, copyright law has inherited all the flexibility, but also the confusion, of the modern “interest analysis.” Until recently, run of the mill international copyright controversies have not contained any difficult choice of law issues, and the principal copyright treatises hardly needed to give more than a passing discussion of conflict of laws issues.<sup>107</sup> The same is true

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101. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971).

102. DAVID CURRIE, HERMA HILL KAY, LARRY KRAMER, CONFLICT OF LAWS 222 (2001).

103. Friedrich K. Juenger, *A Third Conflict Restatement?*, 75 IND. L.J. 403, 405 (2000).

104. Aaron D. Twerski, *One Size Does Not Fit All*, 75 IND. L.J. 667, 667 (2000).

105. See generally Guzman, *Choice of Law*, *supra* note 1.

106. See Reimann, *supra* note 2, at 576; Juenger, *supra* note 103, at 414.

107. Dinwoodie, *International Intellectual Property*, *supra* note 17, at 429.

of the major conflict of laws treatises, which have reciprocally tended to give intellectual property short shrift.<sup>108</sup>

This lack of interest from the perspective of U.S. conflicts scholars is explained by the fact that “the domestic multistate dispute has prevailed as the model for primary judicial and scholarly attention to conflicts issues in the United States.”<sup>109</sup> Copyright controversies did not present any serious issues in multistate domestic disputes because of preemptive federal legislation.<sup>110</sup> On the other hand, in international copyright cases, it was assumed that the Berne Convention principle of national treatment, interpreted as a territorial approach, led to the proposition that the law of the forum was the applicable law.<sup>111</sup>

### *B. Rejection of the Traditional Interpretation*

#### 1. Need for Uniform Marketability of Title

Globalization has dramatically changed all that. “Increased global exploitation of copyrighted works and trademarked products has...forced courts and scholars to reconsider the apparent simplicity of choice of law questions in intellectual property cases.”<sup>112</sup> This change of attitude was specifically influenced by two main factors: the difficulty in locating the exact territory where a copyrighted work originated or was disseminated;<sup>113</sup> and the importance, for the sake of efficient world-wide exploitation of copyrighted works, of having a single copyright that can be enforced throughout the world.<sup>114</sup>

Efficient worldwide dissemination of copyright is closely tied up with the question of predictability and certainty. In his work on copyright, Paul Goldstein states that “[o]f all the criteria against which a choice of law rule is to be measured, none is more salient than the predictability that promotes certainty in copyright transactions.”<sup>115</sup> In the issue of ownership, “transna-

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108. *Id.*

109. *Id.* at 431.

110. Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified at 17 U.S.C. 101-803 (2000)).

111. STEWART, *supra* note 15, at 38–39.

112. Dinwoodie, *International Intellectual Property*, *supra* note 17, at 438.

113. Geller, *supra* note 7, at 28.

114. Patry, *Choice of Law*, *supra* note 19, at 392.

115. GOLDSTEIN, *supra* note 10, at 101.

tional certainty...may best be served by a rule that establishes a single root of title for copyright in a work, possibly in the work's country of origin."<sup>116</sup> This point of view is supported by other scholars advocating the work's source country (country of first publication, or domicile, or nationality of the author) as determining "who is the initial title holder"<sup>117</sup> because "that choice of law rule ensures that the work will not change owners by operation of law each time the work crosses an international boundary."<sup>118</sup>

## 2. A New Era for the Conflict of Laws in International Copyright Disputes: *Itar-Tass v. Kurier*

The United States Court of Appeals for the Second Circuit in *Itar-Tass* accepted the source country approach by holding that, in international copyright disputes, the issue of ownership should be governed by the law of the work's country of origin.<sup>119</sup>

The case involved a copyright infringement suit by several Russian newspapers and the Itar-Tass news agency against a Russian-language newspaper published in New York. The plaintiffs complained that the defendant had copied materials from their newspapers. Since the copying was obvious and undisguised, the only issue of note in the case was the plaintiffs' standing to bring the action which, in turn, depended on ownership of the copyright. It was a momentous issue, which required the Second Circuit, for the very first time, to deal with copyright ownership in the context of conflict of laws.<sup>120</sup> Judge Newman concluded that the Berne Convention principle of national treatment does not contain choice of law rules.<sup>121</sup> Then the court proceeded to "fill in the interstices...by developing federal common law on the conflicts issue."<sup>122</sup> Judge Newman reasoned that "copyright is a form of property" and in relation

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116. *Id.* at 102.

117. Ginsburg, *Ownership*, *supra* note 10, at 169.

118. *Id.*

119. *Itar-Tass Russian News Agency v. Russian Kurier*, 153 F.3d 82, 91 (2d Cir. 1998).

120. *Id.* at 88. It is also interesting to note that the District Court applied Russian law to the issue of ownership without considering the conflict of laws issue therein. *Id.*

121. *Id.* at 89.

122. *Id.* at 90.

to property, under the Second Restatement's approach, the governing law is "determined by the law of the state with 'the most significant relationship' to the property and to the parties."<sup>123</sup> Relying on the Second Restatement the court concluded that Russian law should govern the issue of ownership.<sup>124</sup> Under that law, newspaper articles are exempted from the general work-for-hire doctrine, so the newspaper plaintiffs did not own copyright in the separate articles written by their employees. Consequently, they lacked standing to bring the action.<sup>125</sup>

Although the principle announced in *Itar-Tass* — that initial ownership is determined by the law of the country of a work's origin, and that infringement is determined by the law of the country of infringement — was initially disapproved by some commentators,<sup>126</sup> it is now generally accepted by most academics.<sup>127</sup> While the *Itar-Tass* court explicitly stated that it did not make any ruling regarding transfer or assignment of copyrights,<sup>128</sup> the facts of *Itar-Tass* presented an opportune pattern for easy transition from the traditional territorial interpretation of the national treatment principle to a more flexible approach, because those facts unambiguously pointed to Russia as the country of origin, and the difference between Russian and American law was outcome-determinative.<sup>129</sup>

Unfortunately, this bright-line rule loses its simplicity in a slightly different set of facts. This is because, as the leading

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123. *Itar-Tass*, 153 F.3d at 90.

124. *Id.*

125. *Id.* at 92–93 (holding, however, that the news agency plaintiff owned the copyright in the work of its employees because it was not excluded from the work-for-hire doctrine, under the Russian law).

126. See, e.g., David E. Miller, *Finding a Conflicts Issue in International Copyright Litigation: Did the Second Circuit Misinterpret the Berne Convention in Itar-Tass?*, 8 CARDOZO J. INT'L & COMP. L. 239, 246 (2000) (blaming the court for creating conflicts of law by ignoring history, rejecting legal scholarship, and ignoring relevant precedent.”).

127. Dinwoodie, *International Intellectual Property*, *supra* note 17, at 439; LEAFFER, *UNDERSTANDING COPYRIGHT LAW* *supra* note 34, at 529; Paul Torremans, *Choice of Law Issues in Relation to Copyright*, in *COPYRIGHT IN THE CULTURAL INDUSTRIES* 32, 42 (Ruth Towse ed., 2002); GOLDSTEIN, *supra* note 10, at 103.

128. *Itar-Tass*, 153 F.3d at 84.

129. *Id.* at 88. The District Court in *Itar-Tass* applied Russian Law without even considering the choice of law issues in this case and their relation to the Berne principle of national treatment. *Id.*

treatise on copyright law points out, “[b]y looking to U.S. law as the *lex loci delicti* to determine infringement and remedies, but looking to the law of the “home country” to determine threshold issues, *Itar-Tass* raises a host of issues.”<sup>130</sup> These fall into three broad categories: (1) those relating to initial copyright ownership; (2) those concerned with transfer of the copyright interest; and (3) those arising from the copyright-contract dichotomy.

The first cluster, that concerning copyright ownership, encompasses possible difficulties in separating the issues of ownership and infringement; application of the U.S. work-for-hire doctrine to the different settings of other countries’ laws; and, of course, the difficulties associated with determining foreign laws.<sup>131</sup> Additional complications can arise in conflict of laws analysis from the possibility of more than one country being designated a country of origin<sup>132</sup> “when nationality, domicile, place of creation, or first publication are not united in the same country.”<sup>133</sup> Thus, the *Itar-Tass* approach solves the territoriality problem of national treatment, but also opens up for copyright disputes the Pandora’s box of conflict of laws problems that have long dogged other spheres of law, such as torts and contracts.<sup>134</sup>

*Itar-Tass* also expressly left open the question of which law governs the transfer of initial copyright ownership.<sup>135</sup> According to Nimmer on Copyright (“*Nimmer*”), it would be illogical to look to the law of the state with the most significant relationship to the property and parties in determining copyright ownership, but not to do the same thing in the “realm of assignments”<sup>136</sup>

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130. 3 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 17.05(3) (2000) [hereinafter NIMMER ON COPYRIGHT].

131. *Id.*

132. Professor Ginsburg points out that relevant factors in determination of the law governing initial ownership of a work for hire can be: (1) country of a nationality of an employee; (2) country of a nationality of an employer; (3) country where the contract was localized or country determined by the choice of law clause in the contract; (4) country of the first publication; or (5) country of forum. Ginsburg, *Ownership*, *supra* note 10, at 168.

133. Patry, *Choice of Law*, *supra* note 19, at 421.

134. Dinwoodie, *International Intellectual Property*, *supra* note 17, at 442.

135. *Itar-Tass*, 153 F.3d at 91 n.11.

136. NIMMER ON COPYRIGHT, *supra* note 130, § 17.05(2).

Nevertheless, the unwillingness of the *Itar-Tass* court to tackle the conflict of laws in copyright assignments is understandable because this problem is even more complicated than that of initial ownership. One aspect of it is the fundamental question of whether copyright is transferable at all, since “some legal systems allow for transfer of the copyright itself, while others do not.”<sup>137</sup> In general, civil law countries tend to be very protective of individual authors at the expense of the policy of free alienability favored by common law countries.<sup>138</sup> Where an author from a civil law country makes the kind of transfer of his or her rights to a U.S. party that that author’s country prohibits, but U.S. law allows, a true conflict problem can arise.<sup>139</sup>

Additionally, different outcomes can result from restrictions on alienation being characterized — as they often are — as belonging to the sphere of contracts, not copyright law.<sup>140</sup> As Professor Ginsburg points out, “[c]oncerning transfers of copyright ownership, potentially applicable choice of law rules include: (1) the law chosen by the parties to the contract; (2) the law of the country in which the contract can be localized; (3) the law of the forum.”<sup>141</sup> Thus, the logical extension of the interest-analysis in *Itar-Tass* to the assignments of copyrights can complicate the potential conflict of laws issues.

#### IV. APPLICATION OF THE *ITAR-TASS* APPROACH IN *FILMS BY JOVE V. BEROV*

##### A. *Facts of Films by Jove v. Berov*

The decision of the United States District Court for the Eastern District of New York in *Films by Jove* clearly illustrates both the merits of the *Itar-Tass* approach and the significant

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137. Torremans, *supra* note 127, at 45.

138. Patry, *Choice of Law*, *supra* note 19, at 432.

139. *Id.*

140. *Id.*

141. Ginsburg, *Ownership*, *supra* note 10, at 169. *See also* Patry, *Choice of Law*, *supra* note 19, at 433 (citing the Restatement (Second) of Conflicts, which also enumerates a number of possible factors determining the applicable law in contract conflict). “[T]he place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residency, nationality, place of incorporation and place of business of the parties.” *Id.*

difficulties discussed above. *Nimmer* refers to *Films by Jove* as a complex example of choice of law issues in international copyright.<sup>142</sup> *Films by Jove* had a pattern of facts uniquely suited to test the *Itar-Tass* approach. This case involved the issue of ownership of copyright in approximately 1,500 animated films produced by the film studio Soyuzmultfilm in Russia between 1936 and 1991. But, while the issue of ownership in this case seems, at first blush, to be similar to that in *Itar-Tass*, it can be distinguished by some important legal and social factors. The legal factors include the fact that the animated films in *Films by Jove* were restored works,<sup>143</sup> that they were covered by the Berne Convention § 14 bis regarding cinematographic works;<sup>144</sup> and that there was a transfer of copyrights from the initial rightholder.<sup>145</sup> The social factors involved are the significant public importance of the copyrighted subject-matter in this case<sup>146</sup> as well as the somewhat unusual position taken by the Russian government in displaying a very strong interest in this subject-matter.<sup>147</sup>

Because the subject-matter of a controversy often determines the outcome of a legal analysis, it seems logical to begin the discussion of this case with the description of the animated films involved in this controversy, their social importance, and the complicated transactions in which they were involved before proceeding to the legal analysis of the issue.

### 1. The Subject Matter of the Case: Cheburashka

The 1500 animated films at issue in *Films by Jove* were children's classics in Russia. Each of them would reward separate discussion, but four films dedicated to a personage called Che-

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142. NIMMER ON COPYRIGHT, *supra* note 130, § 9.A.04 [B][2] n.92.

143. 17 U.S.C. § 104A(b) (1995) ("a restored work vests initially in the author or initial rightholder of the work as determined by the law of the source country.").

144. Berne Convention, *supra* note 14, art. 14bis.

145. *See generally Films by Jove II*, 250 F. Supp. 2d 156.

146. Pavell, *O Svoystvakh Cheburashki* [About Cheburashka's Characteristics], in TOPOS (2003), at <http://www.topos.ru/cgi.bin/articles.pl?id=1441>. *See also* Alexander Bratersky, *Who Owns Little Cheburashka?*, 736 ST. PETERSBURG TIMES (Jan. 15, 2002), available at [http://www.sptimesrussia.com/archives/times/736/top/t\\_5515.htm](http://www.sptimesrussia.com/archives/times/736/top/t_5515.htm).

147. *See generally Films by Jove II*, 250 F. Supp. 2d 156.

burashka stand apart. Cheburashka is an exotic small brown animal with big ears and big eyes whose adventures are described in books of the Soviet writer Uspenskiy.<sup>148</sup> These books served as the foundation for a popular series of animated films. The prominent role of these films is underscored by the Russian press' reference to Cheburashka movies as being at the heart of this controversy in *Films by Jove*.<sup>149</sup> Several generations of people in the Soviet Union were brought up with a firm belief that Cheburashka films were a national property, an attitude that persists even after the dissolution of the Soviet Union, and turns the issue of copyright ownership in this case into a locally sensitive matter.

In 1992, the plaintiff, an American enterprise named Films by Jove, Inc., entered into a licensing agreement with the lease enterprise Soyuzmultfilm Studios ("SMS"), allegedly a legal successor of a state enterprise of the same name, Soyuzmultfilm Studios ("Soyuzmultfilm").<sup>150</sup> Under this agreement, Films by Jove, Inc. acquired the right of exclusive international distribution for the animated films produced by Soyuzmultfilm.<sup>151</sup> Subsequently, Films by Jove, Inc. invested about three million dollars in the restoration of the films and granted to the defendant, Berov, a right to distribute them through his retail stores in Brooklyn.<sup>152</sup> When Berov violated the terms of the agreement, Films by Jove, Inc. sued him for copyright infringement.<sup>153</sup> Berov conceded the issue of infringement,<sup>154</sup> but the case was dramatically complicated by the intervention of a third party plaintiff.

The third party, Federal State Unitarian Enterprise Soyuzmultfilm Studios ("FSUESMS"), is owned and controlled by the

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148. USPENSKIY E., VSE O CHEBURASHKE I KROKODILE GENE [Everything about Cheburashka and Crocodile Gena] (1967).

149. See Nickolay Kononov, *Teper' Ya Cheburashka* [Now I am Cheburashka], IZVESTIYARU (2003), available at <http://www.izvestia.ru/community/34588> [hereinafter Kononov, *Teper' Ya Cheburashka*]. See also Sergey Zakin, *Komu prinadlezhit Cheburashka?* [Who does Cheburashka Belong to?], BBC RUSSIAN.COM (June 30, 2003), at [http://news.bbc.co.uk/hi/russian/newsid\\_3033000/3033198.stm](http://news.bbc.co.uk/hi/russian/newsid_3033000/3033198.stm).

150. *Films by Jove I*, 154 F. Supp. 2d at 446.

151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.* at 434.



Russian state. FSUESMS alleged that it was the true owner of the copyrighted material because it was the only lawful successor to Soyuzmultfilm. According to FSUESMS, SMS was not the owner of the copyrights and, therefore, could not grant an exclusive distribution license to Films by Jove, Inc. The question of ownership, thus, became the controlling issue in the case.

## 2. District Court's Analysis

Relying on the *Itar-Tass* ruling, Judge Trager held that initial ownership in copyright disputes should be governed by the law of the country with the most significant relation to the matter in question. The country with the most significant relation to the films here was clearly Russia, since the animated films were produced there by the Soviet enterprise Soyuzmultfilm Studios. During perestroika, this state enterprise was transformed into a lease enterprise also called Soyuzmultfilm Studios, which entered into the agreement with Films by Jove in 1992. Thus, the issue of ownership was to be decided in accordance with Soviet-Russian law. Additionally, the court noted that the animated films were "restored works."<sup>155</sup> The Uruguay Rounds Agreements Act of 1995 17 U.S.C. 104A(b), which provides for restoration of copyright in certain foreign works that had fallen into the public domain for non-compliance with formalities, states that ownership of a restored work belongs to "the author or initial rightholder of the work as determined by the law of the source country of the work."<sup>156</sup> This provision, too, seems to support the *Itar-Tass* rule dictating the choice of Russian law. Therefore, Judge Trager applied Russian law to the facts of the case.<sup>157</sup>

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155. *Id.* at 448.

156. 17 U.S.C. 104A(b) (1995).

157. It is interesting that the court did not mention the provision of the Berne Convention expressly providing for the issues of ownership to cinematographic work in either of its two decisions. See generally *Films by Jove I*, 154 F. Supp. 2d 432; *Films by Jove II*, 250 F. Supp. 2d 156. The *Itar-Tass* court mentioned this provision in passing, remarking that "[t]he Convention does not purport to settle issues of ownership, with one exception not relevant to this case." *Itar-Tass*, 153 F.3d at 91. This exception provides that "ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed." *Id.* at 91 n.12 (citing Berne Conven-

Judge Trager saw the central issue as whether the lease enterprise, Soyuzmultfilm Studios, was the rightful owner of the copyrights to the films – for, if it was, then it had the power to grant Films by Jove, Inc. the exclusive right to distribute them abroad. Matters, however, were hardly that simple. The court faced the difficult problem of trudging through the legal jungle of the privatization process in post-Soviet Russia and of wading through the complex legal metamorphosis of the Soviet state enterprise Soyuzmultfilm, which first turned into a lease enterprise in 1989,<sup>158</sup> and then became a joint stock company in 1999.<sup>159</sup> Additionally, the court had to sort out the formation, in 1999, of the FSUESMS, which also claimed to be a successor to Soyuzmultfilm.

After a detailed and thoughtful discussion of the relevant Soviet-Russian law, the court concluded that the Soviet state enterprise Soyuzmultfilm was the initial owner of the copyrights,<sup>160</sup> which were thereafter transferred to the lease enterprise by operation of law<sup>161</sup> when the state enterprise was transformed into the lease enterprise.<sup>162</sup> Consequently, these rights

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tion, Art 14bis(2)(a)). Although the *Itar-Tass* court discussed what implicit meaning this provision could have for the works not included in the above-mentioned provision, its meaning for the works included in the provision also remains open to interpretation. However, the Berne Convention is not self-executory. This means that its provisions can be binding on domestic U.S. courts only through implementation by legislation passed by Congress. Additionally, in the case of *Films by Jove*, this provision is in conflict with U.S. Copyright Law vesting ownership of a restored work in “the author or initial rightholder of the work as determined by the law of the source country of the work.” 17 U.S.C. 104A(b).

158. *Films by Jove I*, 154 F. Supp. 2d at 435.

159. *Id.* at 436.

160. *Id.* at 456 n.28.

161. The court referred to *Itar-Tass*' explicit exclusion of the assignment of rights issue from the holding of the case and stated that there was no reason to consider assignment of rights in this case because, at the heart of the controversy here, is the issue of the ownership. *Id.* at 477 n.42. Although the court seemed to avoid venturing into a new land of conflict of laws in copyright assignments, its decision is justified by the purely domestic character of the copyright transfers. According to *Nimmer*, it was perfectly logical in a domestic dispute to use the law of the source country to determine the issue of assignment as well as the issue of ownership. NIMMER ON COPYRIGHT, *supra* note 130, § 17.05(2).

162. *Films by Jove I*, 154 F. Supp. 2d at 477.

were not limited by the lease, and its expiration did not cause them to expire.<sup>163</sup>

In its analysis, the court considered numerous inconsistent decisions from Russian commercial courts (Arbitrazh courts) of different levels,<sup>164</sup> where the adversaries (SMS and the FSUESMS) disputed the validity of each other's corporate registration.<sup>165</sup> The most relevant opinion, however, was that of a lower level court (Moscow Region Arbitrazh Court) on December 26, 2000, stating that "...copyrights to animated films created by the state enterprise 'Film Studios Soyuzmultfilm' were transferred by operation of law to its successor – lease enterprise 'Film Studios Soyuzmultfilm.'"<sup>166</sup> They could, therefore, not be transferred by the lease agreement nor limited by another agreement.<sup>167</sup> Although this decision was later vacated by the intermediate court (the Federal Arbitrazh Court for the District of Moscow), the *Films by Jove* court found the vacating decision to be "incoherent and, more important, irrelevant to the issue of copyright transfer."<sup>168</sup> The court concluded that the reasoning of the December 26th opinion "remained unscathed."<sup>169</sup> Judge Trager also relied on the implication in the case record that the court of the highest level in Russia (the Higher Arbitrazh Court of the Russian Federation) might have a different view of the case.<sup>170</sup> The District Court, therefore, granted summary judgment to the plaintiffs on August 27, 2001.<sup>171</sup>

Contrary to the District Court's expectations, however, the Higher Arbitrazh Court of the Russian Federation issued an opinion three months later in favor of FSUESMS — overruling the lower courts' decisions.<sup>172</sup> The Higher Court stated that "the

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163. *Id.*

164. Russian commercial courts consist of "a lower court level, an appeals court level, a second appellate court level in the Federal Arbitrazh Court for the District of Moscow and a final appellate level in the Higher Arbitrazh Court of the Russian Federal." *Id.* at 439 n.17. See also HIROSHI ODA, *RUSSIAN COMMERCIAL LAW* 24–28 (2002).

165. *Films by Jove I*, 154 F. Supp. 2d at 439–46.

166. *Id.* at 441 (quoting the decision of Moscow Region Arbitrazh Court).

167. *Id.*

168. *Id.* at 474.

169. *Id.* at 475.

170. *Films by Jove I*, 154 F. Supp. 2d at 474.

171. *Id.* at 480.

172. *Films by Jove II*, 250 F. Supp. 2d at 158.

relevant provisions of the leasing statute did not provide for the conversion of a state enterprise into a lease entity, and furthermore that any succession of rights from a state enterprise to the lease entity would not survive the expiration of the lease term.”<sup>173</sup>

In response to the defendants’ motion for reconsideration,<sup>174</sup> Judge Trager confessed that the Higher Court’s decision had undermined “certain operative premises” which supported his previous decision,<sup>175</sup> but he refused to reconsider it, because the Higher Arbitrazh Court’s decision proved to be “clearly erroneous.”<sup>176</sup> Additionally, Judge Trager found evidence on the record that the Higher Arbitrazh Court’s decision was “strongly influenced, if not coerced, by the efforts of various Russian government officials seeking to promote ‘state interests.’”<sup>177</sup> In these circumstances, he questioned the independence of the Russian judiciary and affirmed his earlier ruling.

### *B. Problems of Copyright Law Revealed in Films by Jove*

*Films by Jove* demonstrates four problems inherent in the *Itar-Tass* approach: (1) the conflict of laws problems; (2) difficulties in interpretation of foreign laws; (3) the required degree of deference to parallel decisions of foreign courts; (4) and the international impact of the decision, in particular its effect on international transactions.

#### 1. Conflict of Laws Problems

As with *Itar-Tass*, the facts of *Films by Jove* unambiguously pointed to Russia as the country of origin for the films.<sup>178</sup> The

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173. *Id.* at 174.

174. *Id.* at 159.

175. *Id.* at 191.

176. *Id.* at 205.

177. *Id.* at 216.

178. On the other hand, contrary to *Itar-Tass*, in *Films by Jove*, the copyrighted works are covered by both provisions regulating the choice of law in international copyright: Article 14bis(2) of the Berne Convention and Section 104A(b) of the Copyright Act because animated films at the heart of this case are both cinematographic works under Article 14bis(2) and restored works under Section 104A(b) of the Copyright Act. According to Article 14bis(2) the issue of their ownership has to be controlled by the law of the protecting country, i.e. the United States. Conversely, under Section 104A(b) the issue of

issue of initial ownership was, therefore, to be determined by Russian law because all the participants were Russian nationals and the place of origin was clearly Russia. On the other hand, in contrast to *Itar-Tass, Films by Jove* involved transfers of the copyright, but the court concluded that there was no reason to consider transfer of rights because the dispositive issue was that of ownership.<sup>179</sup> Sometimes, it is difficult to draw a bright line between ownership and transfer of rights, but in a purely domestic transfer of rights it does not seem proper to go only halfway and not to use the law of the source country.<sup>180</sup> The transfer of copyright from Soyuzmultfilm to SMS, being a purely domestic transaction, cannot be meaningfully distinguished from the issue of initial ownership.

## 2. Difficulties in Interpretation of Foreign Laws

In contrast to the comparatively simple task of interpreting foreign copyright law in *Itar-Tass*, the foreign law issues in *Films by Jove* are significantly more challenging. The *Films by Jove* court had not only to interpret the Soviet-Russian copyright law, but also to grapple with the messy and inconsistent process of privatization in Russia.<sup>181</sup> The court successfully coped with its immediate task, but the increase in international copyright disputes will undoubtedly compel significant expendi-

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ownership has to be controlled by the law of the source country, i.e. Russia. Then, the relevant question is which of these two provisions has supremacy. The Berne Implementation Act of 1988 amends the Copyright Act to provide that “[t]he provisions of the Berne Convention...shall not be enforceable in any action brought pursuant to the provisions of the Berne Convention itself.” 17 U.S.C. § 104(c). Therefore, it is reasonable to conclude that the provision of the Copyright Act shall have a priority. Evidently, the district court came to the same conclusion by applying the Russian law to the issue of ownership.

179. *Films by Jove I*, 154 F. Supp.2d at 477 n.42.

180. NIMMER ON COPYRIGHT, *supra* note 130, § 17.05(2).

181. Paul B. Stephan, *A Becoming Modesty — U.S. Litigation in the Mirror of International Law*, 52 DEPAUL L. REV. 627, 636–37 (2002) [hereinafter Stephan, *A Becoming Modesty*] (commenting that “until the introduction of elements of a market economy, that nation had the most of formal engagements with intellectual property law generally and copyright law in particular. Even now, more than a decade after the end of the Soviet Union, most copyright rules remain precatory and aspirational. Precise questions of ownership turn on the legitimacy of convoluted enterprise reorganizations and privatization transactions that took place during a period of radical legal instability.”).

ture of judicial time on understanding and interpreting foreign copyright laws.

### 3. Degree of Deference to Parallel Decisions of Foreign Courts

Another problem is the potential conflict between the United States courts' interpretation of a foreign law and that of the source country's court. Discussing the *Itar-Tass* decision, *Nimmer* pointed out that the U.S. courts would have to decide whether the decisions of a foreign court of the highest level deserved deference or, possibly, refuse to follow that court's pronouncements because they come from a civil law system, which lacks a system of *stare decisis*.<sup>182</sup> *Nimmer* concluded that these matters remained "unaddressed in the ruling, and hence unanswered at present."<sup>183</sup> In *Films by Jove*, the court's answer to the latter question was a refusal to follow the decisions of the highest court in Russia, in part because Russia does not have the doctrine of *stare decisis*, and in part because the decision of the court was unduly influenced by the government.<sup>184</sup> The court's rejection of the Russian judiciary's opinion in this case is justified. As Professor Stephan, who was a plaintiffs' expert in *Films by Jove*, wrote, "it appeared that the Russian government had taken actions it did largely to influence the outcome of the U.S. case."<sup>185</sup> It is also obvious that the Higher Arbitrazh Court's decision, subsequent to Professor Stephan's paper, was instigated by the desire to influence the U.S. litigation.<sup>186</sup> This evidence of undue influence on the Russian judiciary placed the court in a strange dilemma: it could not ignore Russian law, but neither could it give effect to the Russian judiciary's tainted interpretation of the law. Such disparity of interpretation of foreign laws is particularly troublesome because it undermines the policy of comity.

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182. NIMMER ON COPYRIGHT, *supra* note 130, § 17.05(3).

183. Regarding the *Itar-Tass* ruling, *Nimmer* enumerated some of the questions concerning the issue of deference to foreign courts decisions. For example, "[i]s it only a decision of the highest court that deserves deference? Or should even that court's pronouncements not be followed, to the extent that they come from a civil law system, which lacks a system of *stare decisis*?" *Id.*

184. *Films by Jove II*, 250 F. Supp. 2d at 205, 216.

185. *Id.*

186. *Films by Jove II*, 250 F. Supp. 2d at 208–12.

## 4. The International Impact of the Decision

Perhaps the most important issue in international legal disputes, however, remains the international impact of the decision. In *Films by Jove*, the immediate impact was the plaintiff's successful assertion of its distribution rights in the animated films against Berov's infringement. But this may be a limited victory, for it is not at all clear that the defendant FSUESMS can be prevented from distributing the films in other parts of the world.<sup>187</sup>

Yet, paradoxically, despite these difficulties of worldwide enforceability, *Films by Jove* has broad political ramifications because it is a serious obstacle in the way of the Russian government's attempt to repossess the assets it lost during the period of privatization in Russia. Indeed, the decision prompted a plethora of publications in Russia and in Russian-speaking communities all over the world. Many supported the decision,<sup>188</sup> but some complained that an American court had robbed the Russian people of their cultural legacy.<sup>189</sup> Most agreed that Russia's international image had been tarnished.<sup>190</sup> This broad political impact is both beneficial and detrimental. It is detrimental because it could exacerbate a conflict between nations. But it is beneficial because it reminds governments of the importance of the Rule of Law. If a country's own judiciary is not up to the task or shirks its responsibility, courts of other countries may need to step into the breach. The U.S. judiciary need not sacrifice justice for the sake of comity.

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187. See Zakin, *Komu prinadlezhit Cheburashka?*, *supra* note 149 (the head of FSUESMS publicly stating his intention to enter the international agreements concerning the distribution of the animated films in disregard of the above decision).

188. See *id.* Oleg Sulkin, *Nekotoriye Osobennosti Natsional'nogo Piratstva* [Some Peculiarities of National Piracy], *NOVOYE RUSSKOYE SLOVO*, July 19-20, 2003, at 18; Oleg Sulkin, *Mozhno li Krast' v Gostiakh Serebrianiye Lozhki?* [Are You Allowed to Steal Silver Spoons?], *RUSSKIY ZHURNAL*, Oct. 17, 2003, available at [http://www.russ.ru/culture/cinema/20031017\\_sul.html](http://www.russ.ru/culture/cinema/20031017_sul.html).

189. See Kononov, *Teper' Ya Cheburashka*, *supra* note 149.

190. See Sulkin, *Nekotoriye Osobennosti Natsional'nogo Piratstva*, *supra* note 188; Sulkin, *Mozhno li Krast' v Gostiakh Serebrianiye Lozhki?*, *supra* note 179; Zakin, *Komu prinadlezhit Cheburashka?*, *supra* note 188.

V. FROM THE *ITAR-TASS* APPROACH TO UNIVERSAL COPYRIGHTA. *The Need for Uniformity in International Copyright Disputes*

The shift from the territoriality of national treatment to the functional approach of *Itar-Tass* goes a long way towards satisfying the need for copyright's worldwide marketability. The importance of the international marketability of copyrights, as previously noted, stems from the transition from an industrial to an information economy,<sup>191</sup> a tendency attested to by TRIPs' linkage between intellectual property and trade.<sup>192</sup> Apart from TRIPs, scholars also increasingly relate copyright to property in general,<sup>193</sup> as in the Restatement (Second) of Conflict of Law's principle for immovable property, on which the *Itar-Tass* court relied. Although this tendency is criticized for not taking into consideration the special character of intellectual property,<sup>194</sup> it satisfies an important need in the modern development of copyright law. Until there is a universal copyright law protecting the rights of authors and guaranteeing marketability of copyrights worldwide, academics and judges must go on elaborating alternative ways of attaining these goals. But, the obstacles already noted — a lack of consensus in the general choice of law doctrine, problems with characterization of the issues as ownership or transfer of copyrights, characterization of transfers under contracts or copyright law, difficulties in interpretation of foreign laws, the uncertainty regarding the required deference to foreign judgments, and effectiveness of foreign judgment enforcement — remain. Most of these are amply illustrated in *Films by Jove*. Although a universal copyright law is the ulti-

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191. Brennan, *supra* note 12, at 316.

192. See Guzman, *International Antitrust*, *supra* note 63, at 950.

193. See Frank H. Easterbrook, *Intellectual Property is Still Property*, 13 HARV. J.L. & PUB. POL'Y 108, 113 (1990). See also Lawrence R. Ahern, III, "Workouts" Under Revised Article 9: A Review of Changes and Proposal for Study, 9 AM. BANKR. INST. L. REV. 115, 131-32 (2001) (noting that Revised UCC Article 9 broadens the definition of accounts to include, among other things, "fees and royalties due from the licensing of intellectual property and proprietary information (such as patents, copyrights and trademarks) and fees from software licenses...").

194. See Brennan, *supra* note 12, at 316 ("Trying to force fit intellectual property into the confines of industrial goods law is reminiscent of the ugly sisters of Cinderella butchering their feet to fit slippers never meant for them.").



mate solution, that would require a consensus that is, as of yet, unattainable. In the meantime, scholars have proposed various stop-gap ameliorations briefly noted below. They are the middle ground between the universal and the particular.

*B. The Compromise Between National Copyright Laws and the Need for Uniformity*

1. The Dreyfuss-Ginsburg Approach

The Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters by Professors Rochelle Dreyfuss and Jane Ginsburg<sup>195</sup> addresses the enforceability of judgments and the need for an effective resolution of international copyright disputes.<sup>196</sup> It envisions the adoption of a convention under the auspices of the current international organizations, such as the WIPO or WTO.<sup>197</sup> Such a convention would be open to countries that are members of TRIPs and would cover approximately the same scope of rights.<sup>198</sup> It would also contain the elaboration of the rules of cooperation among courts in the cases of parallel litigation,<sup>199</sup> solidification of claims,<sup>200</sup> and choice of law rules.<sup>201</sup> Although this approach solves many problems of international copyright litigation, its success depends on its formal adoption or accession by states, which is anathema to the jealously cherished freedom of sovereign states to determine their own copyright policy. In this respect, TRIPs may be the high water mark for years to come.<sup>202</sup>

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195. See generally Dreyfuss & Ginsburg, *supra* note 25.

196. *Id.* at 1065.

197. *Id.*

198. *Id.* at 1068.

199. *Id.* at 1069–71.

200. *Id.* at 1071.

201. *Id.*

202. Many scholars point out the internal conflict between developing and developed countries embodied in TRIPs and its threat to enforceability. See J.H. Reichman & Pamela Sanderson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51, 97 (1997) (commenting that “[u]niversal intellectual property standards embodied in the TRIPs Agreement became enforceable within the framework of a World Trade Organization, largely as the result of sustained pressures by a coalition of powerful manufacturing associations in Europe, the United States, and Japan.”); Peter K. Yu, *Toward a Nonzero-sum Approach to Resolving Global Intellectual Property Disputes: What We Can*

In the case of parallel litigation, the success of the proposal will depend on unprecedented cooperation among various national courts. As amply shown in *Films by Jove*, it is not realistic to expect U.S. courts to defer to the decisions of Russian courts in a case where the strong interests of an American plaintiff are involved and the defendant is also an American company. It is equally unrealistic to expect a Russian court to defer to a U.S. court's interpretation of Russian law. Consequently, although the Dreyfuss-Ginsburg model boldly tackles many of the difficulties encountered in international copyright disputes, its realization is by no means certain.

## 2. The Graeme Dinwoodie Approach

In contrast to the Dreyfuss-Ginsburg model's concentration on jurisdiction and enforcement of judgments, Professor Graeme Dinwoodie's approach is directed at substantive issues.<sup>203</sup> Instead of applying the variegated copyright law of different countries, "the substantive method suggests that the court develop a solution that accommodates more than one interest."<sup>204</sup> Dinwoodie noted that "[w]hen compared with the traditional negotiation of treaties, national court's development of 'international law' is more responsive to social conditions and hence more dynamic."<sup>205</sup> He does acknowledge that his approach can be criticized for lack of certainty. His response is that "in the long term some ex ante uncertainty might be worth the gains in terms of aptness and legal rules."<sup>206</sup> Nevertheless, it seems inevitable that a court's process of weighing the interests and trying to accommodate more than one would lead to an intolerable amount of uncertainty, confusion and inconsistency. Indeed, it is not clear how the substantive approach of Professor

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*Learn From Mediators, Business Strategists, and International Relations Theorists*, 70 U. CIN. L. REV. 569, 581 (2002) (noting that although TRIPs succeeds in providing higher standards for the protection of intellectual property, "it masks the significant cultural and ideological differences between developed and less developed countries...").

203. See generally Graeme B. Dinwoodie, *The Architecture of the International Intellectual Property System*, 77 CHI.-KENT. L. REV. 993 (2002) [hereinafter Dinwoodie, *The Architecture*].

204. Dinwoodie, *A New Copyright Order*, *supra* note 26, at 564.

205. Dinwoodie, *The Architecture*, *supra* note 203, at 1011.

206. Dinwoodie, *A New Copyright Order*, *supra* note 26, at 572.

Dinwoodie could ever resolve the dispute in a case like *Films by Jove*.

### 3. A Supranational Body of Principles of Equity

#### a. Foundation

As mentioned at the outset, this Note suggests that the most promising approach is the supplementation of the above ameliorative proposals by a supranational body of equitable principles. This body of principles does not amount to universal copyright law; rather, it is a measured safeguard against some of the dangers associated with the process of balancing conflicting interests and policies. One commentator suggests the idea of a “global justice-constituency” which will need, first, to “articulate what the public purpose [of copyright] is at the global level, instead of simply transporting ready-made purposes and rules from national jurisdictions”<sup>207</sup> and, second, to “formulate rules, norms, and concepts that are carefully calibrated to achieve that public purpose.”<sup>208</sup> Such a body of laws can serve as a solid foundation for the development of universal copyright law and also help solve some difficult situations when policies of several foreign states are deadlocked in a particular copyright dispute.

In a somewhat similar vein, this Note suggests the elaboration of a supranational body of equitable norms, which will help to ensure justice in international disputes when the conflict of law doctrine does not give a clear indication as to what interest should prevail, or when that indication egregiously contradicts the general principles of fairness and justice. This approach is supported by Andrew Guzman’s idea that the purpose of choice of law rules is to increase global welfare — as opposed to the traditional approach of simply protecting “governmental interest.”<sup>209</sup> Equitable principles such as those of promissory estoppel, protection of a good faith purchaser, and apparent agency should be included in this supranational body of law. Some of them are, indeed, present in the national laws of many foreign

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207. Murumba, *supra* note 8, at 459.

208. *Id.*

209. Guzman, *Choice of Law*, *supra* note 1, at 49.

countries.<sup>210</sup> The goal of solidifying them into a robust supranational body of equitable norms is not unattainable. It can be done through both international regulation as well as private adjudication. Some hail formal regulation, such as that signaled by the spectacular success of Berne and TRIPs. Others, however, may see private adjudication as more promising on the view that courts are more dynamic than public international law-making.<sup>211</sup> Through adjudication norms can be elaborated in the course of judicial dialogue, during which courts “will be hammering out both doctrinal solutions and direct relationships to manage the increasingly complex job of multi-jurisdictional dispute resolution.”<sup>212</sup> This Note argues that regulation and private adjudication complement each other, just like their product, supranational equitable norms, complements the ameliorative Dreyfuss-Ginsburg and Dinwoodie models.

b. Application of Equitable Principles to *Films by Jove*

i. Theory of Apparent Authority

The common law doctrine of apparent authority is a well-settled principle of the law of agency which “exists to protect third parties who are misled by appearances.”<sup>213</sup> According to the Restatement (Second) of Agency (1958), “apparent authority to do an act is created as to a third person by written or spoken word or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person pur-

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210. See generally H.L.E. VERHAGEN, AGENCY IN PRIVATE INTERNATIONAL LAW (1995); Wolfram Müller-Freienfels, *Legal Relations in the Law of Agency: Power of Agency and Commercial Certainty*, 13 AM. J. COMP. L. 193 (1964); Larry A. DiMatteo, *Recent Development: Contract Talk: Reviewing the Historical and Practical Significance of the Principles of European Contract Law*, 43 HARV. INT'L L.J. 569 (2002). See also Wendell H. Holmes & Symeon C. Symeonides, *Representation, Mandate, and Agency: A Kommentar on Louisiana's New Law*, 73 TUL. L. REV. 1087 (1999) (discussing the inclusion of equitable norms in Louisiana's revised code).

211. See Dinwoodie, *The Architecture*, supra note 203, at 1011.

212. Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103, 1124 (2000).

213. DANIEL S. KLEINBERGER, AGENCY AND PARTNERSHIP: EXAMPLES AND EXPLANATIONS 26 (1995).

porting to act for him.”<sup>214</sup> It is important to note that apparent authority to bind the principal can exist even when there is no actual agency.<sup>215</sup> Apparent authority is a synthesis of two separate policies underlying the doctrine: the first holds that, between two innocent parties, the loss should be placed on the party who could have more easily avoided the confusion; and the second is the protection of the normal commercial operations.<sup>216</sup> Because of these important policies, the doctrine of apparent authority is widely applied in various spheres of U.S. law.<sup>217</sup>

The versatility of the doctrine of apparent authority can be illustrated by its application to the facts of *Films by Jove*. As their alternative theory, the Plaintiffs in that case advanced the argument that the Russian government either “induced [Films by Jove, Inc.’s] reasonable reliance by cloaking the lease enterprise with apparent authority to license the Soyuzmultfilm Studio copyrights; or had the effect of ratifying...the licensing agreement after it was executed.”<sup>218</sup> The facts of the case leave no doubt that the plaintiff Films by Jove, Inc., had every reason to believe that SMS was the true owner of copyrights given to it

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214. RESTATEMENT (SECOND) OF AGENCY § 27 (1958).

215. KLEINBERGER, *supra* note 213, at 27.

216. *Id.* at 36.

217. See, e.g., Nancy R. Furnari, Comment: *Are Traditional Agency Principles Effective for Internet Transactions, Given the Lack of Personal Interaction?*, 63 ALB. L. REV. 537 (1999) (discussing the role of apparent authority in consumer protection for internet transactions); Rachael E. Schwartz, “*And Tomorrow?*” *The Torture Victim Protection Act*, 11 ARIZ. J. INT’L & COMP. L. 271 (1994) (Torture Victim Protection Act); John W. Larson, *Florida’s New Partnership Law: The Revised Uniform Partnership Act and Limited Liability Partnerships*, 23 FLA. ST. U.L. REV. 201 (1995) (laws of partnership); Robert Emerson, *Franchisors’ Liability When Franchisees are Apparent Agents: An Empirical and Policy Analysis of “Common Knowledge” About Franchising*, 20 HOFSTRA L. REV. 609 (1992) (franchisors’ liability); Frank Partnoy, *The Shifting Contours of Global Derivatives Regulation*, 22 U. PA. J. INT’L ECON. L. 421, 470-472 (2001). See also *Meeting of OAS-CIDIP-VI Drafting Committee on Secured Transactions Conference Transcript Day Three: XI. Electronic Commerce Aspects of Secured Transactions*, 18 ARIZ. J. INT’L & COMP. L. 491 (2001) (securities); Jeffrey A. Parness & Austin W. Bartlett, *Unsettling Questions Regarding Lawyer’s Civil Claim Settlement Authority*, 78 OR. L. REV. 1061 (1999); Jeffrey A. Parness & Austin W. Bartlett, *The Authority of Illinois Lawyers to Settle Their Clients: On Principles Not Quite Settled*, 31 LOY. U. CHI. L.J. 199, 220–21 (2000) (lawyers’ civil claim settlement authority).

218. *Films by Jove II*, 250 F. Supp. 2d at 214.

by the Russian state. The plaintiff's reliance was both reasonable in the circumstances, and it was caused by numerous acts and omissions of the Russian government, such as the letter of September 16, 1992, sent to SMS by a state official confirming SMS's worldwide distribution rights in the films;<sup>219</sup> the January 22, 1997 document from the Russian State Taxation Auditors, which "specifically references the lease enterprise's 1992 agreement with [Films by Jove, Inc.], indicating that the lease enterprise paid taxes on the proceeds received from [Films by Jove, Inc.];<sup>220</sup> and the two licensing agreements between SMS and state-owned Russian television studios."<sup>221</sup> Although the state was fully aware of the licensing agreement between SMS and Films by Jove, Inc., it did not claim copyrights or challenge the agreement. On the contrary, by its letter of September 16, 1992 the government *actually* represented to Films by Jove, Inc. that the license agreement was valid. Elementary notions of justice and fairness do not leave any doubt that the plaintiff who relied, in good faith, on the state's acts and omissions should prevail. Under the law of agency in the United States, therefore, the plaintiffs should, and would be likely to, win their case.

## ii. Conflict of Laws Issues

However, there remains the issue of determining which country's substantive law should be applied to the problem of agency and the equities of the case. It is reasonable to conclude that Russian law should apply because both the agent and the principle were in Russia. Unfortunately, the principle of equity in Russian law is even less developed than Russian copyright law.<sup>222</sup> Consequently, the very same problems we encountered earlier — interpreting foreign law, the degree of deference to the foreign court judgments, and the threat of pervasive incentive to a court of a foreign country to distort its interpretation of

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219. *Films by Jove II*, 250 F. Supp. 2d at 214.

220. *Id.*

221. *Id.* at 215.

222. See generally ANDREYEV, PREDSTAVITEL'STVO V GRAZHDANSOM PRAVE [Representation in Civil Code] (1978); Kuz'mishin A., *Klassifikatsiya Predstavitel'stva i Polnomochiya v Grazhdanskom Prave* [Classification of Representation and Mandate in Civil Code], 8 KHOZIAYSTVO I PRAVO 27–36 (2000).

the law in order to influence the outcome of the international dispute — are still with us.

On the other hand, it seems improper in these circumstances for an American court to apply the American law of equity to the assignment of rights in *Films by Jove*. Although there is no clear answer to this question in the international choice of law doctrine,<sup>223</sup> most of the existing approaches seem to disapprove it.

The approach most widely adhered to is *lex loci actus*.<sup>224</sup> According to this approach, the law of the place where the agent acts determines the issues of agency. It is argued that the purpose of this approach is to protect commercial intercourse, in particular a third party's position, because it requires the third party to consult only the law of the country where the agent acts.<sup>225</sup> However, *lex loci actus* is variously interpreted to mean the law of the country where the agent really commits his acts, the law of the country where the agent has to act according to his agreement with the principal, the law of the country where the agent has his place of business, or the law of the country that governs the contract between the agent and the third party.<sup>226</sup> When applied to *Films by Jove*, all these interpretations, except the last one, point to the use of Russian law.<sup>227</sup> Indeed, even the last one does not unequivocally point to American law: although it is true that the contract between SMS and Films by Jove, Inc. contained a choice of law clause stipulating that the law of California apply to issues arising under the contract,<sup>228</sup> it is doubtful that, under the apparent authority argu-

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223. In a recently decided case, the New York Court of Appeals found American Law, rather than Russian law, controlling the issue of the contract validity and apparent authority because of the choice of law clause in the contract and New York's significant ties. *Indosuez Int'l Fin. B.V. v. Nat'l Reserve Bank*, 98 N.Y.2d 238 (2002).

224. VERHAGEN, *supra* note 210, at 73.

225. *Id.* at 74.

226. VERHAGEN, *supra* note 210, at 75.

227. Section 292(2) of the Restatement (Second) of Conflict of Laws also clearly points to Russian law stating that the principle will be bound "under the local law of the state where the agent dealt with the third person, provided at least that the principle had authorized the agent to act on his behalf in that state or had led the third person reasonably to believe that the agent has such authority." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 292(2).

228. *Films by Jove II*, 250 F. Supp. 2d at 215.

ment, Russia as the principal should be bound by California law by dint of this choice of law clause.

Moreover, the choice of law rules in the law of equity do not always protect the third party to the transaction, nor do they have the virtues of certainty and predictability. This is because of different local laws and the difficulties embedded in the modern choice of law doctrine already noted herein. So, the combination of local equitable protection with conflict of laws rules does not really resolve the problem. The suggested solution lies in a particular construction of the equitable principles which sidesteps many of the difficulties just mentioned.

c. Supranational Norms of Equity as the Safe-Guards in International Copyright

This Note proposes the idea of a supranational body of equitable principles as the solution to obvious distortions encountered in the processes of resolving disputes by a straight balancing of conflicting interests in the interest of justice. Many countries already have the principles of equity mentioned in their laws, though the level of protection can vary and some states may not have every principle found in others.<sup>229</sup> Nevertheless, it seems that uniform norms of equity protecting commerce are much easier for nations to accept than drastic changes in national copyright laws. Supranational equitable principles are, therefore, a more viable avenue for correcting the grossly unjust outcomes that conflicts in international copyright laws would countenance.

In a case like *Films by Jove*, a supranational body of equitable principles could be relied on to protect the plaintiff from the skewed decisions of Russian Arbitrazh courts of different levels. Supranational equitable principles would help to balance the interests of the parties and avoid direct conflicts with other countries' laws. Under this approach, U.S. courts would not have to argue with the Russian judiciary over whether, under Russian law, the ownership of the copyrights belonged, or not, to SMS at the moment of its licensing agreement with Films by

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229. See Symposium, Responding to the Obstacles to Electronic Commerce in Latin America: General Questionnaire, 17 ARIZ. J. INT'L & COMP. L. 23, 43-49 (2000); Meeting of OAS-CIDIP-VI, *supra* note 217, at 558-64.



Jove. It would be sufficient to say that, under international principles of equity, acts and omissions of the Russian government clothed SMS with apparent authority to give worldwide distribution rights to Films by Jove, and directed the latter's reasonable reliance. The Russian government would be precluded from interfering with Films by Jove, Inc.'s exercise of its rights.

#### CONCLUSION

The body of supranational equitable principles, including apparent authority, should be developed to serve as safeguards for the serious problems inherent in the straight functional approach to conflict of laws adopted in *Itar-Tass*. Though supranational equitable principles are uniform (as their name implies), these equitable principles are more palatable because they do not rise to the level of universal copyright law, and because they already exist in the major legal systems of the world. They are not the lightning rod that a fully-fledged copyright law might be; yet they provide more or less the same benefits: smoother international copyright commerce. Their reach is not greater than their grasp, nor is it less than what is realistically attainable. They are the ideal interim measure while consensus builds for a universal copyright law, and may, indeed, contribute to the attainment of that happy but still elusive end.

*Anna Tydniouk\**

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\* J.D., Brooklyn Law School (expected 2005). The author dedicates this Note to her husband, Igor Tydniouk, and her son, Andrey, for their support and patience during these long school years. The author also dedicates this Note to her parents, Lev Sakhnovich and Yelena Melnichenko, for their inexhaustible love and care. The author would also like to thank Brooklyn Law School Professor Samuel Murumba for his invaluable advice and encouragement throughout the writing process.