

Moral Rights Aspects in New Forms of Use: Private international law

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19 Sept. 2014**

- **Jurisdiction: which courts / country ?**
- **Applicable law: Scope of protection**
- **Applicable law: Author**
- **Applicable law: Contracts**

Jurisdiction : which courts / country ?

- Country of residence/domicile of defendant
- Country of harmful event (causal event or damage)

→ **multiple fora to hear the case**

(perhaps with different laws, rulings and damages)

ECJ (*eDate/Martinez*): *harmful event* as claimant's "center of interest" → allocation of global damages

... also for online IP infringements ? *Pez Hejduk*

Adv.Gen.: NO, but ... only country of initial/causal event!

Applicable law: Extent of protection

✓ Territoriality / national treatment / Art.5.2 BC

→ *Lex loci protectionis*

- Is the work protected?
- Which rights and scope? Also MR
- Limitations or fair uses permitted?
- Term of protection (but rule of shorter term)

→ **Online: negative effects of territoriality ?**

Legal uncertainty: ubiquitous use or infringement?

Expensive and inefficient for authors to obtain protection

Patrick Cariou v Richard Prince



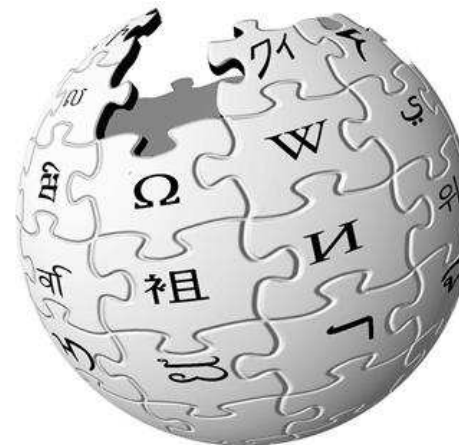
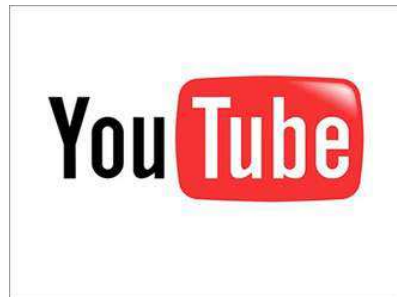


USA: fair use (25/30)

- Transformative use
- Does not usurp primary market (different audiences, Cariou would never license this secondary market)
- OK works published
- OK commercial use
- OK using all work (barely recognizable)

EU: quotation or parody?

...User-generated content



WIKIPEDIA
The Free Encyclopedia

Canada Sec.29.21 Non-commercial UGC

CANADA (2011):

Non-commercial user-generated content (UGC)

... Permitted by law

- Published (non-infringing) works
- Used in a new work/recording (creative output)
- For non-commercial purposes
- Mentioning source & author
- Provided that use does not have a substantial adverse effect on the exploitation or potential market of work

<https://www.youtube.com/watch?v=KAQhG59zqZc>

<http://youtu.be/1sCN3ZA3LQ8>

Any alternative to LLP / Territoriality ...?

✓ Torts / *Lex loci delicti*

- Country of damage (or more significant events)
- Habitual residence of parties
- Law most closely connected (most significant relation)

... No, thanks!

Non-harmonized context of MR

Prevent benefit from higher protection in other countries

→ Let's stick with LLP / Territoriality ... but:

- CC licenses under *lex contractus*
- ISP liability under law country of establishment

Authorship

- ✓ Author, not creator ... and a legal person?
- LLP /territoriality → unstability
- Anchoring: LLO, Closest law, ... Contract law?

... or *favor auctoris* to determine authorship?

LLO for works protected in origin and in protectionis

LLP for works not protected in origin

Mandatory norms / public order

... are they justified anymore?

Contracts

- Law chosen by parties (or parties intention)
- Law closest relation (proper law)

Contractual issues v. Property issues?

... Transferability? Conditions?

Contractual waiver of a MR?

Work commissioned with obligation to divulgate?

Post-mortem exercise of MR

- Inheritance : law of succession
- Art.6bis(2)(a) BC → exercise by persons or institutions authorized by LLP

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