Copyright: Cross-border Copyright Enforcement in the Digital Age

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Abstract:

This research examines the growing tension between the traditional legal principle of **territoriality** and the digital reality of **ubiquity** in international copyright law. While foundational treaties like the **Berne Convention (1886)** and the **TRIPS Agreement (1994)** establish a global framework for protection, they operate on the doctrine of *Lex Loci Protectionis*—the law of the place where protection is claimed. In the digital age, copyrighted content is frequently hosted, transmitted, and consumed across multiple borders simultaneously, creating a "jurisdictional vacuum" where a single digital act can generate legal consequences in dozens of countries at once.

This paper evaluates the shift from the "Server Location" test to the more modern "Targeting Doctrine," which assesses whether a website specifically aims at users in a certain territory. By comparing the legal systems of US and EU, the research highlights the "choice of law" crisis facing copyright holders and the unpredictable liability risks for corporations. Ultimately, this study seeks to determine whether current judicial mechanisms are sufficient to resolve cross-border disputes or if a new international paradigm is required to harmonize the mosaic of autonomous national rights.

Key words: Cross-border enforcement, Digital Copyright, Extraterritoriality, WIPO Copyright Treaty, Jurisdiction, Digital Rights Management (DRM).

1. Introduction:

Copyright is a type of intellectual property right. In the traditional sense the territoriality is a bedrock of sovereignty as in the traditional age fixing of jurisdiction lies entirely on the territoriality of the infringement being taken palace. But in the modern age deciding the jurisdiction cannot be completely based on the territorial of the infringement or where the file has been uploaded or where the actual act is being taken place rather there exists a very difficult to fix the territorial of the infringement. Intellectual property, specifically copyright now exists in a state of "digital ubiquity." The content can be uploaded from a different place and it can be accessed in some other country and even if a content is being copied disregarding the copyrights due to the outreach of the digital media it is easily accessible for the people in different countries to access it within minutes even before the owner of the content knows the content is being copied or used by some other person without their knowledge and even before the legislative process starts the file or content or image or music which is being copied or used without permission will be accessed by many people. This geographical fragmentation creates a "jurisdictional vacuum" where the 19th-century concept of *lex loci protectionis* (the law of the place of protection) faces unprecedented stress.

Due to territorial complexities the concept creates a legal fiction. As in the pre digital age the enforcement relied on the seizure of the physical goods at customs and borders but today the infringement has been decentralized. The emergence of rouge websites and **"Flagrantly Infringing Online Locations" (FIOLs)** has forced a judicial evolution. The infringing websites migrate their servers to new jurisdiction to escape the liability of the infringement which makes it practically impossible for the judiciary to fix the jurisdiction where the case can be held. Though the Berne conventions and TRIPS agreement specifies the addresses digital challenges, specifically protecting computer programs and databases, and governing rights management information in digital environments it fails to deal with the changing environment and technology and fixation of the jurisdiction.

The contents are borderless they cannot be fixed under one territorial. For say if a server is in Iceland, the uploader is in India, and the copyright holder is in the UK, whose law applies? Most of the country uses the Lox Loci Protections. If that is the case, the question arises whether to use the law of the country where the work was created or the place where the wrong occurred or the law where the protection is being claimed. Here the UK holder sues in an Indian court to stop the Indian uploader the court will likely use the Indian law because that is where the protection is being sought using the concept of Lex Loci Protectionis But the problem is the server is in Iceland and the uploader in India, the work being uploaded is on a global site the place of protection is in every country where a user can download but it is technically impossible to apply 190 countries different national laws to the same single

act of uploading. *Lex loci protectionis* requires you to pick a territory, but the digital act is a "chain" that touches five territories at once. If you pick the wrong one, the case can be dismissed for lack of jurisdiction. Even if the law of the place of protection is being successfully applied there exists a enforcement difficulty as the Indian courts has no power to go to US and pull the plug on that serve, this makes the execution of the law is impractical.

Ultimately, the digital age has transformed copyright from static territorial right to complex fixity of law. While our current laws can help us identify when a copyright is stolen, they are effectively powerless to stop the thief if they are standing on the other side of a digital border."

Statement of Problem:

While the **Berne Convention** and the **TRIPS Agreement** provide a global framework for copyright protection, the enforcement of these rights remains strictly **territorial**. In the digital age, where infringing content is hosted, transmitted, and consumed across multiple borders simultaneously, the principle of *lex loci protectionis* (law of the place of protection) creates a **jurisdictional vacuum**.

Currently, copyright holders face a 'choice of law' crisis. This research seeks to address the inadequacy of territorial enforcement mechanisms and evaluate whether current judicial tests such as the 'Targeting Test'—are sufficient to resolve cross-border digital disputes.

Problem Question:

1. How can a National courts exercise its authority over a digital act that has no physical home?
2. Is the current “territorial” system of enforcement making copyright law inefficient in the digital age?
3. How can the jurisdiction for the act of infringement can be fixed?

Objective of the study:

The primary objective of this research is to evaluate the viability of the **principle of territoriality** in the context of cross-border digital copyright infringement. Specifically, the study aims to:

1. **Analyze the jurisdictional gap: T**o find how the Digital ubiquity challenges the traditional method of fixing the liability.
2. **Evaluate Effectiveness:** Assess the efficiency of current domestic and international legal frameworks to provide the remedies for
3. **EU and US approach Analysis:** Conduct analysis of **EU and US** to identify divergent judicial approaches especially the target test that is being currently followed across the countries.

Research Methodology:

Research design:

This research utilizes the qualitative, doctrinal and comparative approach. It primarily aims at finding the jurisdictional gap in the cross border infringement of copyrights and evaluate the efficiency of existing laws and the comparison between the laws of India US and UK on procedure and implementation of the laws being in existence.

Sources of data:

The primary data used for this study consists of international legal treaties specifically the Berne convention, Rome II Regulation and the legislations of different countries especially Copyrights Act, 1957 Title 17 of the US code and Rome II Regulation. These are supplemented by the analysis of landmark judicial decisions regarding extraterritorial jurisdiction and the tests being set to find the jurisdiction. Secondary data includes Peer reviewed legal journals and policy papers from the years 2015- 2026 and the published articles.

2. Territoriality v. Ubiquity:

2.1 Territoriality principle:

According to the territoriality principle, IP rights are inherently constrained to the territorial boundaries of the sovereign state that grants them. The duration, scope and existence of the copyrights are generally governed and determined by the country’s own laws. A state cannot govern or make rules for the activities outside its territory and even if made it is not enforceable due to lack of territoriality.

To be clearer if a copyright is granted in (for say, India) then the right is an Indian right and enforceable by Indian law and in Indian courts alone. If infringement occurs in US, then the law of US will apply irrespective of the origin country or the rights holder is based.

Lexi Loci Protectionis – (the law of the country where protection is claimed) concept explains the concept of territoriality. The Berne convention enshrines this as a core principle – the exclusivity of the copyright is limited to the member state where the right has been granted.

2.2 Ubiquity principle:

The doctrine of Ubiquity acts as the direct challenge to the Territoriality principle. The internet is fast, borderless and accessible across nations, territories. When a work, design, music or anything which is copyrighted is being uploaded digitally (i.e.) made available in the internet, if infringed the infringement is not specific when the digital era and the internet is concerned, it takes place in different locations also occurs everywhere simultaneously. There is no moment of crossing a border, no customs checkpoint, no geographic attenuation. A single upload is, legally speaking, a simultaneous infringement in every jurisdiction whose copyright law covers the work. A single digital act can generate legal consequences in multiple jurisdictions.

The infringement is ubiquitous and not localized. This creates an immediate problem for the territorial model, which law is to be used? Whether all the downloaders must be sued? The server's country? Or the up loader's country? Or just all of them involved? As previously discussed even before the judiciary is blocking the old one, the servers can be migrated to the new jurisdiction.

The preexisting laws are not potentially over sighting this aspect of the infringement as they lack to accommodate the ubiquity and the simultaneity of online infringement, where a single digital act can generate legal consequences in multiple jurisdiction. **Territorial copyright law becomes structurally inefficient in the digital environment because ubiquitous online infringement produces overlapping legal claims across multiple jurisdictions.**

2.3 How courts tried to resolve this?

Courts in different jurisdictions have developed different theories to the ubiquity problem:

The "server location" test: it is the older approach. According to this test the infringement occurs where the server hosting the content is located i.e. the jurisdiction in which the hosting server located then such law is used. This test seems very simple test but it has a high risk where the infringers can change or move the servers to weak enforcement jurisdictions to escape liability.[1]

The targeting doctrine: the jurisdiction is fixed in the country where the infringement is specifically targeted by the infringing activity. The court looks for evidence that the defendant *intended* to engage with the specific market where the lawsuit is filed. They examine the objective signaling of targeting such as currency language, advertising focus, geo-blocking, currency and language and top level domains.[2]

The CJEU's "Pinckney" Approach: The court of justice of EU held that "that a rights holder can sue in any member state from whose territory the infringing content is accessible — but can only claim damages suffered in *that* member state. This partially accommodates ubiquity while limiting the scope of any single court's judgment." [3] Pinckney allows you to *sue* anywhere content is accessible, it creates a **damages headache**. If you sue in France for a global upload, the French court (under Pinckney) can only give you money for the harm done *in France*.

The **Mosaic approach:** Some scholars propose treating ubiquitous online infringement as a bundle of separate territorial infringements — one per country — each governed by local law. This is theoretically coherent but practically unworkable, as it requires simultaneous litigation in every affected jurisdiction.

3. JURISDICTIONAL HURDLES:

The transition from physical distribution to digital dissemination has created a profound **jurisdictional crisis**." In the digital era, infringement is no longer a territorial or localized one rather it is ubiquitous. Technologies such as social media and streaming allows communication to public of copyrighted work in real time access across borders , where the uploader's physical location is often decoupled from the target audience . This makes it difficult to pin point the single territory for the crime. Torenting makes it much messier. Because the peer to peer tech ology a file isn't just in one place it's broken into tiny pieces shared by swarm of users all over the globe. Here, the *situs* of the infringement is everywhere and nowhere at once.

[1] Perfect 10, Inc. v. Amazon.com, Inc., 508 F.3d 1146 (9th Cir. 2007)
[2] Football Dataco v. Sportradar (CJEU, 2012)
[3] Pinckney v KDG Media tech (2013) – Justice of EU

This creates **Mosaic Problem**: a scenario where a single digital act shatters into a thousand separate territorial legal claims. Under the current framework, a rights holder is forced to piece together a "mosaic" of litigation, suing in every country where the content was accessed to obtain a full remedy. This **ubiquitous infringement** renders traditional border-based enforcement obsolete, as courts struggle to determine whether they should exercise authority based on where the file was "born" (the server), where it was "sent" (the uploader), or where it "landed" (the viewer's screen). The result is a jurisdictional vacuum that rewards "forum shopping" by infringers while leaving creators trapped in a loop of expensive, fragmented, and ultimately ineffective cross-border lawsuits.

4. Choice of law:

The analysis of various legal systems and their choice of laws legislation makes it clear that online infringement prompts question of private international law. There are nations that are signatories of the Berne convention and those counties are ought to look into the treaty as the first and foremost resort to the contradiction arises regarding the choice of law in cases of cross border infringement. But unfortunately the Berne convention provides little to no guidance on this matter. It only provides hat that a copyright owner shall receive the full extent of protection and recourse of the laws of the country in which protection is claimed. Section 5(2) of Berne convention establishes the legal doctrine of Lex Loci Protectionis (the law of the place where protection is sought) it lights up on the idea of territoriality and also sec 5 (2) states that the jurisdiction for a copyright claim is generally the courts of the country where the infringement occurred. It further reinforces territoriality by separating a works legal status in one country from its status in another. This creates too room for different interpretations on how to approach conflict of laws issues in cases of multinational copyright infringement.

While such confusions keeps existing the European Parliament and the council on law applicable to non-contractual obligation (Rome II)proposed a regulation which is one of the choice of law that provides for cases of intellectual property infringement. The European law binds on all the ember states thus Rome II being a European regulation it is also binding on all the states.

5. EU Harmonization:

Rome II represents one of the most important modern choice-of-law frameworks governing intellectual property infringement within the European Union. Because it is an EU regulation, it is binding on all Member States. Article 8(1) of Rome II expressly adopts the principle of *lex loci protectionis* by providing that the applicable law for intellectual property infringement shall be "the law of the country for which protection is claimed." This wording was intentionally designed to clarify ambiguities within Article 5(2) of the Berne Convention and reinforce the territorial basis of copyright protection within the EU legal framework.

The EU has adopted certain harmonization efforts to problems created by territorial copyright law in the digital environment through a process of harmonization. Most importantly it instructed the InfoSoc Directive and DSM Directive, together with the Jurisprudence of the court of justice of the European Union on the Doctrine of "communication to the public".

5.1 InfoSoc Directive: (2001/29/EC)

It was adopted to harmonize copyright law within the European Union in response to digital technologies and online dissemination of works.

- **Article 2(Reproduction Right)-** Article 2 grants authors the exclusive right to authorize or prohibit reproduction of their works, including direct or indirect, temporary or permanent copying by any means. This provision covers digital activities such as downloading, caching, and electronic storage, forming the basis of online copyright protection.
- **Article 3 — Communication to the Public**
  Article 3(1) provides authors with the exclusive right to authorize or prohibit communication of works to the public, including making works available online on-demand. This is the central provision governing digital copyright infringement and applies to streaming services, online platforms, hyperlinking, and file-sharing activities. The CJEU has interpreted this provision broadly to strengthen copyright protection in digital environments.
- **Article 5 — Exceptions and Limitations**
  Article 5 establishes exceptions and limitations such as private copying, quotation, parody, and educational use. However, most exceptions are optional, allowing Member States flexibility in implementation, which has resulted in continued differences between national copyright systems despite harmonization efforts.
- **Article 5(5) — The Three-Step Test**
  Article 5(5), derived from the Berne Convention, states that copyright exceptions are permitted only in special cases that do not conflict with the normal exploitation of the work or unreasonably prejudice the legitimate interests of rights holders. This provision limits the scope of national copyright exceptions and reinforces protection for rights holders.

5.2 The DSM Directive (2019/790/EU):

- **Article 17(1) — Communication to the Public by Platforms**

Article 17(1) states that Online Content-Sharing Service Providers (OCSSPs) perform an act of "communication to the public" when they provide public access to copyrighted works uploaded by users. This provision fundamentally changed platform liability because platforms are no longer treated as passive intermediaries.

- **Article 17(4) — Conditions for Avoiding Liability**

To avoid direct liability, platforms must demonstrate that they:

- Made best efforts to obtain authorization or licenses from rights holders.
- Made best efforts to ensure unavailability of infringing content using high industry standards.
- Acted expeditiously to remove infringing content after notice.
- Prevented future uploads of notified infringing works.

In practice, these obligations encourage the use of automated upload filters and content-recognition systems.

- **Article 17(7) — Protection of Users' Rights**

Article 17(7) provides safeguards for lawful uses such as quotation, criticism, review, caricature, parody, pastiche. This provision seeks to balance copyright enforcement with freedom of expression.

5.3 Analysis:

Drawbacks in EU Harmonization:

Despite three decades of harmonization, three significant territorial gaps remain:

1. No EU-Wide Copyright Title. After 30 years of harmonization at EU level, copyright and related rights remain decidedly territorial in scope — despite the continuous quest for an internal market and the profound impact on cross-border creation, dissemination, and use of cultural content. National territorial rights persist. There is no "EU copyright" in the way there is an EU trade mark or a European patent with unitary effect. Each work holds 27 separate national copyrights, each governed by its own national law even if harmonized in content.

2. No Remedy for the Mosaic Problem. The lex loci protectionis seems old-fashioned and dated. It has its place in bilateral copyright disputes, but it is untenable in complex multinational copyright infringements. The situations that arise are unfair for information users and can lead to a lack of legal certainty for all parties. The European Commission's own 2025 staff working document on Rome II flagged this problem, noting that experts have proposed adjustments to the lex loci protectionis rule to address ubiquitous internet infringement — but no legislative reform has followed yet.

3. No Extraterritorial Reach. The EU framework — even Article 17's proactive upload filter obligation — applies only to OCSSPs targeting EU users. A platform hosted outside the EU that targets non-EU users but whose content is accessible to EU users sits in a legal grey zone. The six-country letter to the Commission (2024) makes clear that even within the EU, the international application of EU copyright law is unresolved.

4. AI and the TDM Exception. The EU AI Act requires providers of general-purpose AI models to put in place a policy to comply with EU copyright rules, including Article 4(3) of the DSM Directive's text and data mining exception. However, the TDM exception under Article 4 only applies if the rights holder has not opted out — creating a new territorial problem: how does an EU opt-out by a rights holder bind an AI company that trains its model outside the EU?

6. **The US Approach:**

While the European Union moved towards a "proactive" liability model, the United States continues to rely on the Digital Millennium Copyright Act (DMCA) 1988, which prioritizes safe harbor system to protect the growth of the digital economy.

6.1 The Safe Harbor: Notice-and-Takedown vs. Filtering

Under **17 U.S.C 512 (DMCA)**, online service providers benefit from a "Safe Harbor"—meaning they are not legally liable for the infringing content uploaded by their users—provided they meet specific criteria.

- **Reactive vs. Proactive:** Unlike the EU's Article 17, which effectively requires platforms to use "upload filters" to prevent infringement *before* it happens, the DMCA is a **reactive system**. A platform like YouTube is only required to act once it receives a formal "Takedown Notice" from a copyright holder.
- **No General Monitoring:** US law explicitly states that platforms have no general obligation to monitor their networks for infringing material. As long as the platform does not have "actual knowledge" of a specific infringement and acts expeditiously to remove it once notified, its Safe Harbor remains intact.
- **The "CS" Takeaway:** For a Company Secretary, the DMCA model is lower-risk but requires a highly efficient internal legal team to process notices quickly. In contrast, the EU model requires a heavy investment in expensive AI-filtering technology.

6.2 The Extraterritorial Limit: "The World is Not a US Courtroom"

One of the biggest hurdles in cross-border enforcement is the **Presumption against Extraterritoriality**. US courts are famously strict about the fact that US Copyright law stops at the physical border.

- **The Core Rule:** Under Supreme Court precedents like ***RJR Nabisco v. European Community***, a US statute is presumed to apply only within the US unless Congress clearly stated otherwise. The Copyright Act does not have such a statement.
- **The Domestic Act Requirement:** To sue in a US court for copyright infringement, a plaintiff must usually prove that an "act of infringement" (like an unauthorized download or display) took place **on US soil**. If an uploader in India shares a file to a server in Iceland, a US court will likely dismiss the case for lack of jurisdiction, even if the copyright holder is a US company.
- **Exceptions (The "Predicate Act" Doctrine):** The only major exception is if an infringer commits a "predicate act" in the US (like making a master copy in New York) and then uses that copy to spread the work globally. In that rare case, US courts may award damages for the global harm. Otherwise, the US remains a strictly territorial system, reinforcing the "Jurisdictional Vacuum" discussed in earlier chapters.

7. Conclusion & Suggestion:

7.1 Conclusion:

The conflict between the ubiquity and territoriality represents the most significant challenge to modern intellectual laws, The Berne convention was adopted by the countries in order to create harmony but it failed to provide provisions considering the current situation of the digital era. The work's legal status in one country is decoupled from its status in another provided stability in the physical world but has led to legal chaos in the digital realm. Though it provides territorial model which ensures the sovereign diversity and legal certainty within borders, it is fundamentally ill- equipped to handle the simultaneous global infringement characteristics of the internet.

Current judicial responses such the EU's Pinckney approach or the targeting approach offers only the localized relief but fail to provide a comprehensive global solution. The "mosaic Approach" which treats one digital act as a bundle of separate territorial infringements, remains theoretical as the practical approach is unworkable for the right holders due to necessity of simultaneous multi jurisdiction litigation. The EU had tried to harmonize the current issue by keep on providing different rules through different cases yet it could not find one proper stagnant solution. As digital infrastructure continues to evolve as AI, cloud hosting. The traditional reliance on Lex Loci Protectionis will continue to create national sovereignty.

7.2 Suggestions:

To bridge the gap between the territories laws and ubiquitous infringement, the following laws are suggested:

1. **Standardization of law:** The law that governs the copyrights can be standardized among the nations which will make no difference whatever the jurisdiction may be and as each procedure remains the same the execution of such laws would also be easier which will build the gap between the actual plan and the execution. Though a complete standards are not possible the exceptions, criteria could remain different according to the situation of the country.
2. **Standardization of "targeting test":** International courts can move towards harmonized set of criteria for targeting – either the language, currency or geo targeting to reduce the unpredictability of "choice of law" decisions.

3. **Enhanced Digital Rights Management (DRM):** In line with the WIPO Copyright Treaty (WCT), there should be greater international cooperation in governing rights management information to better track the origin and flow of digital content across borders.

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