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## Lost in Transit: How Enforcement of Foreign Copyright Judgements Undermines the Right to Research

Naama Daniel

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# LOST IN TRANSIT: HOW ENFORCEMENT OF FOREIGN COPYRIGHT JUDGMENTS UNDERMINES THE RIGHT TO RESEARCH

NAAMA DANIEL\*

*The ease of travel in the globalized, modern world is a double-edged sword for the right to research: while research opportunities are bolstered due to information and data traveling extremely easily in the digital world, the right to research may be undermined by the easy travel of foreign copyright judgments between countries. This article analyzes thoroughly, for the first time, the threats posed to the right to research by private international law instruments on recognition and enforcement of foreign copyright judgments. This article uses a theoretical and doctrinal perspective to analyze the matter, demonstrating that the right to research, aimed at promoting innovation and creativity, is an integral part of, and an important*

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*balance within, the copyright paradigm. Since the right to research differs from country to country, it is especially vulnerable at the transnational level and is thus susceptible to abusive use of strategic foreign judgment enforcement proceedings. The article demonstrates that the risks to the right to research are intensified by a threefold bias that benefits the copyright holder while disadvantaging researchers, as the right holder is usually the initiator of the proceedings; has the choice of the forum; and has an incentive to request enforcement of the foreign judgment after it is granted—a bias summarized by the acronym ICE. These risks and vulnerabilities justify serious consideration in light of recent efforts to negotiate international instruments on the enforcement of foreign copyright judgments, especially in an age when national courts grant extraterritorial and even global injunctions in the realm of intellectual property. The article conceptualizes the application of private international law rules and notions to copyright law as akin to a legal transplant within copyright law, highlights the risks of such “transplant”, and demonstrates that private international law rules may not only interfere with internal copyright balances, but also undermine, and even nullify, the right to research. The article then outlines possible policy solutions to address these threats both on the national and international levels and, most importantly, proposes that the discussions on any international instrument on the enforcement of foreign copyright judgments take place under the auspices of the World Intellectual Property Organization (WIPO), a copyright-expert forum that will properly protect the right to research.*

INTRODUCTION.....	89
I. COPYRIGHT, PERMITTED USES, AND THE RIGHT TO RESEARCH .....	93
A. THE RESTRICTIVE POWER OF COPYRIGHT LAW OVER THE RIGHT TO RESEARCH .....	93
B. THE RIGHT TO RESEARCH AS A PART OF COPYRIGHT LAW .....	98
C. THE VULNERABILITY OF THE RIGHT TO RESEARCH AT THE TRANSNATIONAL LEVEL.....	101
II. ENFORCEMENT OF FOREIGN COPYRIGHT JUDGMENTS AND THE RIGHT TO RESEARCH.....	112
A. EFFORTS TO INCLUDE ENFORCEMENT OF FOREIGN	

COPYRIGHT JUDGMENTS IN INTERNATIONAL INSTRUMENTS.....	112
B. INTERFERING WITH BALANCES—HOW ENFORCEMENT OF FOREIGN COPYRIGHT JUDGMENTS MAY NULLIFY THE RIGHT TO RESEARCH .....	118
C. CONCEPTUALIZING THE RISK—IS THE RIGHT TO RESEARCH GETTING AN UNWANTED TRANSPLANT? ....	128
III. FROM THEORY TO PRACTICE .....	134
A. THE INCREASING TENDENCY TO ADJUDICATE TRANSNATIONAL COPYRIGHT CASES AND POSSIBLE COUNTER ARGUMENTS.....	134
1. Other Private International Law Rules .....	142
2. Antisuit Injunctions .....	147
B. THE (LACK OF) ENFORCEMENT OF FOREIGN DEFAMATION AND PRIVACY JUDGMENTS .....	149
C. PROPOSED SOLUTIONS.....	154
CONCLUSION .....	156

## INTRODUCTION

Recent decades have indicated the development of vast information resources, accompanied by creative new means to gather, process, and utilize data. Researchers today have the immense potential to advance human knowledge in ways unseen before by using technological developments such as supercomputers, artificial intelligence, and big data.<sup>1</sup> In order to maximize scientific progress and innovation in a globalized world, it has become increasingly important to bolster the right to research by allowing free flow of ideas, data, and information. In the context of intellectual property law, this goal is mainly achieved by designing intellectual property laws that inherently recognize the importance of research and facilitate its execution.<sup>2</sup> This approach has

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1. See Jerome H. Reichman & Ruth L. Okediji, *When Copyright Law and Science Collide: Empowering Digitally Integrated Research Methods on a Global Scale*, 96 MINN. L. REV. 1362, 1364–69 (2012) (discussing the effect of modernized technologies on the execution, diffusion, and dissemination of scientific research).

2. See, e.g., Reichman & Okediji, *supra* note 1, at 1364–69, 1374 (noting that intellectual property laws stand in the way of using new technologies to conduct research, particularly the extension of copyright law to literary works and data collections without providing exceptions for research); Reto M. Hilty et al., *International Instrument on Permitted Uses in Copyright Law and Explanatory Notes* 4 (Max Planck Institute for Innovation & COMPETITION Research Paper No.

led to the implementation of what this article will refer to as “the right to research”—copyright balances which allow research to be carried out freely, even in the presence of copyright protections. This article does not analyze the specific content of “the right to research” but rather, uses this term broadly as referring to any research-related use permitted by states in their respective national copyright laws.<sup>3</sup> For example, if the laws of a state permit private copying of scientific articles for research purposes—whether because such use is permitted specifically for research purposes, or because it is considered to be a permitted private use or a permitted fair use, etc.<sup>4</sup>—such copying would be a part of the right to research for the purposes of this article.

This article fills a gap in academic literature by revealing, conceptualizing, and analyzing the risks posed to the right to research in a transnational context, specifically by private international law instruments on recognition and enforcement of foreign copyright judgments. In the past, intellectual property lawyers, treatises, and casebooks largely ignored private international law matters, and vice versa.<sup>5</sup> In recent decades, some legal scholarship has addressed the intersection between intellectual property and private international

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21-06, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3771241](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3771241).

3. The discussion on whether such permitted uses take the form or definition of “rights,” “privileges,” “interests,” etc., is outside the scope of this article. In this regard see, for example, Niva Elkin-Koren, *Copyright in a Digital Ecosystem: A User Rights Approach*, in *COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS* 132 (Ruth L. Okediji ed., 2017); Niva Elkin-Koren, *The New Frontiers of User Rights*, 32 *AM. U. INT'L L. REV.* 1 (2016) [hereinafter Elkin-Koren, *New Frontiers*]; David Vaver, *Copyright Defenses as User Rights*, 60 *J. COPYRIGHT SOC'Y U.S.A.* 661 (2013); Abraham Drassinower, *Taking User Rights Seriously, in IN THE PUBLIC INTEREST: THE FUTURE OF CANADIAN COPYRIGHT LAW* 462 (Michael Geist ed., 2005); Jane C. Ginsburg, *Authors and Users in Copyright*, 45 *J. COPYRIGHT SOC'Y U.S.A.* 1 (1997) [hereinafter Ginsburg, *Authors and Users*]; Haochen Sun, *Fair Use as a Collective User Right*, 90 *N.C. L. REV.* 125 (2011). *Cf.* Jane C. Ginsburg, *Fair Use for Free, or Permitted-but-Paid*, 29 *BERKELEY TECH. L.J.* 1383 (2014) (proposing that some fair uses will be permitted conditional to payment to the authors and rightsholders).

4. See Reichman & Okediji, *supra* note 1, at 1372–74 (delineating questions of unauthorized reproduction of copyrighted scientific research as resolved by the fair use exception in the United States and the private use exception in Europe).

5. See Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought*, 49 *AM. J. COMPAR. L.* 429, 429 (2001) (noting the absence of scholastic and legal discussions on the intersection between intellectual property and private international law).

law.<sup>6</sup> However, there is no detailed discussion in legal literature regarding the intersection of copyright balances—and specifically the right to research—and the enforcement of foreign copyright judgments. This article fills that gap.

This article uses a theoretical and doctrinal perspective to analyze the matter, demonstrating that the right to research is an integral part of the copyright paradigm, and emphasizing that the right to research serves as one of the internal balances within copyright laws, aimed at promoting innovation and creativity. The article builds upon previous work illustrating the differences between the approaches of common law and civil law states to copyright, demonstrating that the content of the right to research may differ at the national level, between states. The article further argues that these differences render the right to research vulnerable at the transnational level.

Offering a broad, interdisciplinary view, this article argues that the different balances incorporated in different national copyright laws, aiming at protecting the right to research, may be undermined by strategic abuse of foreign proceedings. To a large extent, this erosion is caused by the application of private international law standards to transnational copyright cases. These standards may enable easy enforcement of foreign copyright judgments while downplaying, and at times ignoring, the underlying principles and balances of copyright laws designed to facilitate and protect the right to research.<sup>7</sup> In a globalized world, these practices pose a substantial threat to the right to research. Recent international efforts to cement these standards in an internationally binding instrument concluded in 2019, further

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6. See, e.g., Rochelle C. Dreyfuss & Jane C. Ginsburg, *Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters*, 77 CHI.-KENT L. REV. 1065, 1066 (2002) (advocating for a private international law instrument drafted specifically for intellectual property disputes); Jane C. Ginsburg, *Global Use/Territorial Rights: Private International Law Questions of the Global Information Infrastructure*, 42 J. COPYRIGHT SOC'Y U.S.A. 318, 319 (1995) [hereinafter Ginsburg, *Global Use/Territorial Rights*]; Dinwoodie, *supra* note 5.

7. For simplification, this article refers to enforcement of foreign judgments as including both recognition and enforcement of foreign judgments. For general discussion on recognition and enforcement of foreign judgments see generally Adrian Briggs, *THE CONFLICT OF LAWS* (2019); Ralf Michaels, *Recognition and Enforcement of Foreign Judgments*, in *MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* (Rüdiger Wolfrum ed., 2009) (outlining the various requirements and exceptions for recognitions and enforcement of foreign judgments).

exacerbate the threat to the right to research and exemplify the urgent need to address it. This article proposes new means to understand this threat by conceptualizing the application of private international law rules to copyright law using the prism of legal transplants, arguing that private international law standards may be conceptualized, by analogy, as an elusive legal transplant within copyright laws. It further demonstrates that this conceptualization corresponds with the critique of legal transplants, as, by analogy, the external rationales of the system “donating” the legal transplant (private international law) may interfere with the internal rationales of the system “borrowing” the legal transplant (copyright law) which is based on national economic, cultural, and social considerations. Moreover, this article exposes how relying on external rationales of private international law, rather than on internal rationales of copyright law, may undermine, and even nullify, the right to research. Finally, the article outlines possible solutions to address and diffuse the threats exposed by the analysis both on the national level and the international level, focusing on policy considerations. Most importantly, this article proposes that any discussion on international instruments regarding the enforcement of foreign copyright judgments should take place under the auspices of the World Intellectual Property Organization (WIPO), a copyright-expert forum that is sensitive to internal copyright balances, and that will protect the right to research.

Part I of this article discusses the restrictive power copyright law has over potential research, and therefore over the right to research, demonstrating that the differences in approaches between states regarding the right to research lead to different national scopes of protection granted to the right to research, making it vulnerable at the transnational level. As a result, this Part reveals that enforcement of foreign copyright judgments may put the national, territorial right to research at risk. Part II analyzes in detail the threats that enforcement of foreign copyright judgments poses to the right to research, *inter alia*, in light of recent efforts to negotiate international instruments on the enforcement of foreign copyright judgments, showing that these threats are exacerbated by the potential abuse of strategic proceedings of foreign judgment enforcement. This Part further offers to conceptualize the application of private international law rules to transnational copyright cases by using an analogy derived from the prism of legal transplant, demonstrating that this conceptualization

assists in the understanding that applying private international law rules to copyright may interfere with internal copyright balances and undermine the right to research. Part III discusses the realization of these threats in practice, in light of the increasing tendency of national courts to adjudicate foreign copyright cases. This Part subsequently analyzes possible counter arguments that may diffuse the concerns raised by the analysis, reviews the treatment granted by private international law instruments to other fields of law which share similar characteristics with copyright law—defamation and privacy, and outlines possible solutions to address the threats revealed by the analysis. In doing so, this article grants the international community tools—both national and international—to better address the threats posed to the right to research at the transnational level, and to better protect it.

## I. COPYRIGHT, PERMITTED USES, AND THE RIGHT TO RESEARCH

To understand how enforcement of foreign judgments impacts the right to research, it is useful to first identify the “location” of the right to research within the general copyright regime, as well as core characteristics making it vulnerable at the transnational level. This Part will first demonstrate how research may be restricted by copyright protection. Considering the nature of the right to research as a part of copyright law, this Part will discuss different approaches implemented by different states regarding copyright as a whole, and regarding permitted uses and the right to research in particular. This Part will show that due to the difference in approaches, different states protect the right to research in different manners and to different extents in their national laws. These characteristics of the right to research, combined with the territorial nature of copyright, make it vulnerable at the transnational level, and hence enforcement of foreign copyright judgments may put the national, territorial right to research at risk.

### A. THE RESTRICTIVE POWER OF COPYRIGHT LAW OVER THE RIGHT TO RESEARCH

Intellectual property is a field of innovation.<sup>8</sup> Its goal is to

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8. See, e.g., Reichman & Okediji, *supra* note 1, at 1426, 1459.



incentivize new inventions and creations.<sup>9</sup> The main challenge of intellectual property law, including copyright law, is striking a balance that allows for protection of subject matters, while still leaving enough subject matter in the public domain to facilitate further developments, innovation, and creativity.<sup>10</sup> In this field, it is common to refer to current researchers and authors as “standing on the shoulders of giants,” the giants being previous researchers and authors.<sup>11</sup> Against this backdrop, Reichman and Okediji note that it is more common for scholars to discuss the effect of patent monopolies on innovation and the right to research, as opposed to discussing the effect of copyright protection on the right research.<sup>12</sup> However, many aspects of scientific

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9. See, e.g., *id.* at 1377.

10. Regarding the public domain, see generally A. Samuel Oddi, *The Tragicomedy of the Public Domain in Intellectual Property Law*, 25 HASTINGS COMM. & ENT. L.J. 1 (2002) (distinguishing the private and public domains and arguing that the public domain should be referred to primarily as within the “public-domain-as-stimuli” thesis and only secondarily as an “intellectual commons”).

11. See, e.g., Suzanne Scotchmer, *Standing on the Shoulders of Giants: Cumulative Research and the Patent Law*, 5 J. ECON. PERSPS. 29 (1991) (discussing the innovation within science and entrepreneurship because of cumulative and shared research).

12. See, e.g., Reichman & Okediji, *supra* note 1, at 1364–69, 1373–74; Graeme B. Dinwoodie & Rochelle Cooper Dreyfuss, *International Intellectual Property Law and the Public Domain of Science*, 7 J. INT'L ECON. L. 431 (2004) (exploring efforts to ensure a broader public domain for upstream innovation in the context of U.S. patent law in light of the TRIPS Agreement); Rebecca S. Eisenberg, *Noncompliance, Nonenforcement, Nonproblem? Rethinking the Anticommons in Biomedical Research*, 45 HOUS. L. REV. 1059, 1093–98 (2008) (describing the shared norms in academic research, which shifted away from sharing and not pursuing patents to obtaining patents and ignoring the patent within the community); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCI. 698, 698–701 (1998) (depicting the need for patent law to account for upstream research and downstream development in the biomedical field); Kenneth G. Huang & Fiona E. Murray, *Does Patent Strategy Shape the Long-Run Supply of Public Knowledge? Evidence from Human Genetics*, 52 ACAD. MGMT. J. 1193, 1193–1221 (2009) (discussing the institutional impacts of patents on private versus public knowledge streams in genetic research); Fiona Murray & Scott Stern, *When Ideas Are Not Free: The Impact of Patents on Scientific Research*, 7 INNOVATION POL'Y & ECON. 33, 54–60 (2006) (exploring the effect of formal intellectual property rights on the production and diffusion of “dual knowledge,” finding that once patent rights are obtained, subsequent scientific research decreases); Arti Kaur Rai, *Regulating Scientific Research: Intellectual Property Rights and the Norms of Science*, 94 NW. U. L. REV. 77, (1999) (applying law-and-norms theory to argue that intellectual property goals would be maximized through norms that militate against the securing of intellectual property rights rather

research may be protected by copyright rather than by patents, for example, scientific literature.<sup>13</sup> In addition, different states may grant copyright protection, to different extents and while implementing different thresholds, to subject matters such as scientific research methods,<sup>14</sup> databases,<sup>15</sup> compilations of facts,<sup>16</sup> etc. In the world of big data, artificial intelligence, and other data manipulation techniques that may process immense quantities of facts and data, access to other subject matters protected by copyright may be essential for any research.<sup>17</sup> For example, data mining technologies may be used to analyze mass quantities of texts, such as works of literature, that copyright protects.<sup>18</sup> Some scholars maintain that while the scope of copyright protection has been gradually extended, there are no

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than through stronger intellectual property rights, focusing on patents).

13. See Reichman & Okediji, *supra* note 1, at 1364–69, 1373–74 (highlighting the scientific literature and data that are consumed by data-mining techniques and automated knowledge discovery tools for scientific research).

14. Usually, only the specific expression of the method will be protected, as opposed to the underlying method, idea, or facts. See, e.g., *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 356 (1991) (holding the expression of the method is protectable and not the underlying method, idea, or fact).

15. See, e.g., Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 art. 1, 1996 O.J. (L 77) 20 [hereinafter Directive on the Legal Protection of Databases] (extending protection to databases insofar as the selection or arrangement of data “constitute the author’s own intellectual creation”).

16. See, e.g., *Feist Publ'ns*, 499 U.S. at 344–45 (ruling that a factual compilation will be protected to the extent it exhibits a modicum of creativity in selection, order, or arrangement of the data).

17. See, e.g., Reichman & Okediji, *supra* note 1, at 1364–69, 1373–74 (referring to the advancement of technology to foster the creation of new scientific field-specific knowledge repositories and to revolutionize scientific methodologies, such as data mining); James Boyle, *Mertonianism Unbound? Imagining Free, Decentralized Access to Most Cultural and Scientific Material*, in UNDERSTANDING KNOWLEDGE AS A COMMONS: FROM THEORY TO PRACTICE 123 (Charlotte Hess & Elinor Ostrom eds., 2007) (narrating the benefits of modernized technology to professional scholars in research and the importance of access to works); Paul W. Jeffrey, *The Developing Concept of e-Research*, in WORLD WIDE RESEARCH: RESHAPING THE SCIENCES AND HUMANITIES, 51 (William H. Dutton & Paul W. Jeffrey eds., 2010) (detailing the effect of new technologies on e-research).

18. See, e.g., Michael W. Carroll, *Copyright and the Progress of Science: Why Text and Data Mining Is Lawful*, 53 U.C. DAVIS L. REV. 893 (2019) (arguing that U.S. copyright law permits researchers to conduct text and data mining under the fair use exception, thereby providing a competitive advantage in innovation policy and bolstering research); Alex H. Poole, *The Conceptual Ecology of Digital Humanities*, 73 J. DOCUMENTATION 91 (2017) (describing the role of data and text mining within the digital humanities field).

adequate protections for researchers who wish to use copyrighted works for research.<sup>19</sup> For example, the European Union enacted a directive implementing a *sui-generis* protection for databases which is derived from copyright protection.<sup>20</sup> In addition, international instruments concluded in 1996 by the World Intellectual Property Organization (WIPO) obligate their Member States, *inter alia*, to provide legal protection against the circumvention of Technological Protection Measures (TPMs) that authors use in connection with the exercise of their rights.<sup>21</sup> These TPMs are being used by publishers to

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19. See, e.g., Mark A. Lemley, *Should a Licensing Market Require Licensing?*, 70 L. & CONTEMP. PROBS. 185, 185–86 (2007) (“As copyright continues its apparently unstoppable expansion in scope, duration, and strength, fair use seems unable to rise to the challenge of preserving a vibrant space in which people are free to ‘tinker’ with or recode copyrighted works.”); see Reichman & Okediji, *supra* note 1 at 1364–69, 1373–74 (emphasizing the need for researchers to access, analyze, and aggregate scientific data, databases, and journals that are protected by copyright law); Charles R. McManis, *The Proposed Anti-Counterfeiting Trade Agreement (ACTA): Two Tales of a Treaty*, 46 HOUS. L. REV. 1235, 1235–39 (2009) (analyzing the ACTA negotiations in light of criticism that ACTA was meant to broaden the protection of intellectual property rights); Sun, *supra* note 3, at 127–29 (arguing that recent expansion of copyright protection may jeopardize the important role of fair use, *inter alia* for research); Rochelle Dreyfuss & Susy Frankel, *From Incentive to Commodity to Asset: How International Law Is Reconceptualizing Intellectual Property*, 36 MICH. J. INT’L L. 557, 557–60 (2015) (depicting the strengthening of intellectual property rights by trade and investment agreements, that are largely unconcerned by intellectual property flexibilities and balances); Oddi, *supra* note 10, at 1–8 (noting the expansion of intellectual property protection and the concerns of restricted access to works, among others, in the philosophical, academic, and artistic areas). Note that the protected subject matter may be the technology that is being used to reach or mine the data (including literature, etc.), as well as the data itself.

20. See Directive on the Legal Protection of Databases, *supra* note 15 (stating the *sui generis* rights and exceptions for database protections); see also Reichman & Okediji, *supra* note 1, at 1374 (noting the European Union’s strengthening of factual compilation protection deviates from copyright tradition by extending protection to facts and data).

21. WIPO Copyright Treaty art. 11, Dec. 20, 1996, S. Treaty Doc. No. 105–17, 2186 U.N.T.S. 152 [hereinafter WCT]; WIPO Performances and Phonograms Treaty art. 18, Dec. 20, 1996, S. Treaty Doc. No. 105–17, 2186 U.N.T.S. 245. TPMs are sometimes also referred to as Digital Rights Management (DRM). Following the inclusion of TPMs protection in the WCT, WIPO Member States had to include a specific article to overcome these obligations in a permitted-use treaty, Article 7 of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, June 27, 2013, 52 I.L.M. 1312. The Article requires Member States to ensure that the protection of TPMs does not prevent beneficiary persons from enjoying the permitted uses provided for in the

restrict the access to scientific literature and data,<sup>22</sup> therefore restricting researchers' access to professional journals and databases, and the ability of researchers to make full use of data mining techniques and other automated tools, even where the right to research applies to the use.<sup>23</sup> Strict, inflexible copyright and quasi-copyright protection may thus collide with the social goals that the right to research is meant to serve.

Moreover, large commercial enterprises and repeat players own copyright protecting subject matters necessary for research.<sup>24</sup> For example, authors of scientific literature routinely transfer their rights to commercial publishers.<sup>25</sup> These large enterprises and repeat players

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Treaty. However, with regard to all other permitted uses, not regulated by the Marrakesh Treaty, there is no requirement imposed upon Member States to ensure that TPMs do not interfere with their execution.

22. See Reichman & Okediji, *supra* note 1, at 1369–70 (describing TPMs as “electronic fences and digital locks” to prevent access to data even for purposes of scientific research).

23. See, e.g., Gideon Parchomovsky & Philip J. Weiser, *Beyond Fair Use*, 96 CORNELL L. REV. 91 (2010) (describing the challenge that technological advancement, and specifically the protection of TPMs, pose to the fair use doctrine); Ian R. Kerr et al., *Technical Protection Measures: Tilting at Copyright's Windmill*, 34 OTTAWA L. REV. 7 (2002) (recommending that Canadian legislation counterbalance the access-control right granted by the protection of TPMs with an obligation of the rightholder to provide access-to-work when the use falls within exception and limitations to copyright, including use by educational institutions); Vincent Ooi, *License to Lock: The Overextension of Technological Protection Measures*, 35 INT'L REV. L. COMPUTERS & TECH. 270, 270–87 (2021) (concluding that the circumvention of TPMs should only be prohibited when an infringement of existing intellectual property rights is involved). Cf. Jane C. Ginsburg, *The Pros and Cons of Strengthening Intellectual Property Protection: Technological Protection Measures and Section 1201 of the United States Copyright Act*, 16 INFO. & COMM. TECH. L. 191, 191–92 (2007) (maintaining that 17 U.S. Code § 1201, which prohibits the circumvention of copyright protection systems “presents an excellent case study of the benefits and dangers of strengthening copyright protection.”).

24. See Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 616 (2010) (arguing that larger enterprises may be more likely to bear the costs of copyright).

25. See *id.* at 560 (depicting the history of the transfer of ownership and the commonality of authors assigning their rights to publishers and other consolidating intermediaries); Ginsburg, *Authors and Users*, *supra* note 3, at 7–9 (describing the “death of the author” and the concept of death of the benevolent publisher); Josh Lerner & Jean Tirole, *A Model of Forum Shopping*, 96 AM. ECON. REV. 1091, 1091 (2006) (stating that authors, including academics, typically submit their works to journals and aim to convince publishers to print their works). It should be noted that academic institutions such as universities may (and presumably often do) subscribe,

may use their resources to try and enforce their rights aggressively and to prevent uses which the right to research actually permits.<sup>26</sup> This creates a chilling effect that discourages researchers from making permitted uses and further derogates from the lawful possibility of researchers to use copyrighted subject matters for research purposes.<sup>27</sup> In practice, matters such as reproducing published research results in scientific journals were typically resolved by “limitations and exceptions to copyright.”<sup>28</sup> The analysis thus briefly explores the nature of limitations and exceptions to copyright and their development as part of copyright law.

## B. THE RIGHT TO RESEARCH AS A PART OF COPYRIGHT LAW

For the purposes of this article, it is useful to divide the copyright system into three categories of rules.<sup>29</sup> These categories together

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for fees, to databases containing scientific and professional literature of such publishers. However, this does not overcome the difficulties regarding the execution of the right to research by persons who are not affiliated with an academic institution, or of academic institutions that cannot afford such subscription. In addition, terms of use agreements applied to these databases may further restrict certain uses of them. This discussion is outside the scope of this article but see generally, for example, Viva R. Moffat, *Super-Copyright: Contracts, Preemption, and the Structure of Copyright Policymaking*, 41 U.C. DAVIS L. REV. 45 (2007).

26. See, e.g., Emily Meyers, *Art on Ice: The Chilling Effect of Copyright on Artistic Expression*, 30 COLUM. J.L. & ARTS 219, 219-20 (2007) (outlining how copyright owners may attempt to aggressively assert rights which they do not have).

27. See, e.g., Oren Bracha & Patrick R. Goold, *Copyright Accidents*, 96 B.U. L. REV. 1025, 1067 (2016) (noting that large commercial repeat players are typically better situated to manage the risks of copyright compared to small entities and creators); Meyers, *supra* note 26, at 219 (describing how artists are cautious in leveraging existing works and thus creating a chilling effect on the artists' expressions); Rachel M. Smith, *Why Can't My Waiter Sing Happy Birthday: The Chilling Effect of Corporate Copyright Control*, 56 IDEA 399 (2016) (discussing the corporate copyright control concept in promoting revenues and sales as opposed to inspiring new expressions, leading to, inter alia, a chilling effect on users); cf. Robert G. Bone, *Rights and Remedies in Trademark Law: The Curious Distinction between Trademark Infringement and Unfair Competition*, 98 TEX. L. REV. 1187, 1214 (2020) (discussing the socially valuable use of a trademark).

28. Reichman & Okediji, *supra* note 1, at 1364-69, 1373-74; Pamela Samuelson, *Justifications for Copyright Limitations and Exceptions*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS, *supra* note 3, at 12, 28 (“Fair dealing and fair use provisions typically shield personal use copying for purposes of research, study, criticism, and review.”).

29. See, e.g., Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 367 (2005) (discussing what constitutes the “public

constitute a balanced copyright system, demonstrating the interplay between all players in the copyright field: rightholders, the public as a whole, and users.<sup>30</sup> First, copyright includes a well-defined scope of protection, such as the author's right to prevent anyone from copying their work.<sup>31</sup> Second, copyright includes the notion that anything which is not prohibited, is allowed.<sup>32</sup> For example, if a national copyright law does not grant the author a right to prohibit the study or viewing of their work, any researcher may study or view the work without restriction.<sup>33</sup> Similarly, when the copyright term of protection expires, the work falls into the public domain and anyone may use it.<sup>34</sup> The third category consists of "permissions" granted to users by law in certain conditions, to make certain uses of copyrighted works for important social goals, even though the use itself is included within the scope of protection granted to the work and the author.<sup>35</sup> This category can be viewed as a "carve out" from copyright protection.<sup>36</sup> For example, it is prohibited to copy an academic article without the consent of the copyright holder, but the law of a certain state may allow such copying for research purposes even absent such consent.<sup>37</sup>

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domain").

30. See, e.g., Samuelson, *supra* note 28.

31. See, e.g., 17 U.S.C. § 106; Samuelson, *supra* note 28, at 12 ("Modern copyright laws grant authors a broad set of rights to control exploitations of their works"); U.S. Copyright Office, *Copyright in General*, COPYRIGHT.GOV, <https://www.copyright.gov/help/faq/faq-general.html> (last accessed Dec. 7, 2022) (illustrating the original works of authorship protected under copyright law and the protection available over this expression).

32. See Samuelson, *supra* note 28; Martin Senftleben, *Bridging the Differences between Copyright's Legal Traditions—The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC'Y U.S.A. 521, 524 (2010) ("Those forms of use that need not be reserved for the rights owner to provide the necessary incentive remain free.").

33. See Samuelson, *supra* note 28, at 16 ("When [copy]rights were narrow, it was unnecessary to create exceptions to limit those rights.").

34. See Oddi, *supra* note 10, at 5 (highlighting that works will be in the public domain if the duration of the copyright is expired, or if they are abandoned or invalidated, etc.)

35. E.g., 17 U.S.C. § 107; see Samuelson, *supra* note 28 (describing the evolution of limitations and exceptions to copyright, which restrain the rights granted to copyright holders).

36. See, e.g., Reichman & Okediji, *supra* note 1, at 1376–77 (referring to permitted uses as "carve outs" from copyright protection)

37. See, e.g., Samuelson, *supra* note 28, at 28 ("Fair dealing and fair use provisions typically shield personal use copying for purposes of research, study, criticism, and review").

The right to prevent copying for research purposes is thus carved out of the scope of protection granted to the author. International treaties usually define this category as “limitations and exceptions” to copyright.<sup>38</sup> This section argues that the term “limitations and exceptions” is somewhat misleading. The better term, as scholars note, is “permitted uses” in copyright.<sup>39</sup>

The right to research is usually included within the third category, and its main goals are to promote free flow of ideas and information, and to facilitate scientific innovation.<sup>40</sup> This analysis maintains that copyright is the sum of the first category (the scope of protection), combined with the two last categories (the notion that anything which is not prohibited is allowed, and limitations and exceptions).<sup>41</sup> Together, the three categories establish a balanced copyright system. The two last categories are aimed at creating a sufficiently diverse public domain to facilitate further developments, innovation, and creativity, which is the very core goal of granting copyright protection *ab initio*.<sup>42</sup> Thus, this analysis maintains that the premise underlying limitations and exceptions to copyright is not to confine the unlimited rights of the author, but rather to clarify the boundaries of copyright

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38. Berne Convention for the Protection of Literary and Artistic Works art. 9, Sept. 9, 1886, as revised at Paris on July 24, 1971 and amended in 1979, S. Treaty Doc. No. 99-27 (as amended Sept. 28, 1979) [hereinafter Berne Convention]; Agreement on Trade-Related Aspects of Intellectual Property Rights art. 13, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299 [hereinafter TRIPS Agreement]; Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978–2005*, 156 U. PA. L. REV. 549, 557 (2008) (“Structurally, the Copyright Act leans toward protection; it gives broadly and takes away narrowly.”).

39. See, e.g., Hilty et al., *supra* note 2, at 4 (using this term). Some scholars use the term “permissible uses,” for example, see Elkin-Koren, *New Frontiers*, *supra* note 3, at 4 (“It is necessary to develop a more comprehensive approach to permissible uses.”).

40. It should be noted that this article refers to “the right to research” as including any lawful use for research purposes. Accordingly, for the purposes of this article, it includes any permitted use that may facilitate research, as well as using any subject matter that is a part of the public domain for research purposes. For example, for the purposes of this article, the right to research also includes facts that are not protected by copyright; works in which the copyright term has expired, etc.

41. Samuelson, *supra* note 28, at 12–13.

42. On this matter see, for example, Hilty et al., *supra* note 2, at 4 (depicting the benefits to knowledge and society of protecting copyright holders and permitting certain uses); Reichman & Okediji, *supra* note 1, at 1376 (arguing authors’ “entitlements remain subject to carve outs that support the public interest *ab initio*”).

protection itself. It follows that viewing the right to research as a “limitation” or “exception” to copyright may not be accurate as it is, in fact, an internal part of copyright balances.<sup>43</sup> It is thus more accurate to refer to the right to research not as a limitation or an exception to copyright, but as a “permitted use” in copyright. This notion is largely based on the common law perception of copyright as a utilitarian mechanism, as opposed to the civil law perception of copyright derived from natural law notions.<sup>44</sup> The next Section discusses the roots of copyright protection in both common law and civil law traditions to reveal the differences between these traditions regarding the right to research. As a result, the threats that enforcement of foreign copyright judgments pose to the right to research will be unveiled.

### C. THE VULNERABILITY OF THE RIGHT TO RESEARCH AT THE TRANSNATIONAL LEVEL

Historically, the roots and justifications to the grant of copyright protection largely differed between civil law and common law regimes.<sup>45</sup> Civil law regimes implement natural law notions which emphasize authors’ personality interests in their work, while common law regimes base the grant of copyright protection on utilitarian notions of social welfare or “public good,” perceiving copyright as a prerogative granted to enhance the overall welfare of society by ensuring a sufficient supply of knowledge and information.<sup>46</sup> Even though today there is some convergence of these two basic notions in the two regimes, they entail differences in the fundamental approach

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43. For general discussion on copyright balances, see Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1181–83, 1194 (2010).

44. See Reichman & Okediji, *supra* note 1, at 1375–78 (describing the continental author’s rights law rooted in natural law including the protection of the author’s personality interest in contrast to the common law copyright approach rooted in utilitarianism).

45. See *id.* at 1375–78 (distinguishing between the civil and common law approaches to copyright exceptions).

46. *Id.*; Martin Senftleben, *Bridging the Differences between Copyright’s Legal Traditions – The Emerging EC Fair Use Doctrine*, 57 J. COPYRIGHT SOC’Y U.S.A. 521, 524 (2010) (contextualizing the differences in the civil law, focusing on author-centralism rooted in natural theory, and common law, targeting social welfare based upon a utilitarian foundation).



towards permitted uses (limitations and exceptions) in copyright.<sup>47</sup> Traditionally, the civil law approach viewed permitted uses as conflicting with the author's personality interest and so sought to limit and narrow their scope.<sup>48</sup> The starting point was that most uses of the author's creative work would require compensation, otherwise the author essentially "finances" public goods.<sup>49</sup> As opposed to that, the common law approach sought to restrain entitlements granted to the author so that they would only encompass the exact incentive that would lead the author to create the work in the first place, overcoming the risks of market failure and free-riders.<sup>50</sup> This approach aspires to expand the public domain and the possibility of the public to freely use works, so long as the authors' incentive to create is still

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47. See Reichman & Okediji, *supra* note 1, at 1375–78 (describing the breadth of the United States' fair use provision in contrast to Europe's enumerated exceptions); see also Senftleben, *supra* note 46, at 522–25 (contrasting the continental European approach to outlining exceptions to copyright protection with the Anglo-American practice of the fair use system).

48. See Reichman & Okediji, *supra* note 1, at 1375–78 (elaborating on the civil law approach to narrowly interpret copyright exceptions insofar as to not encroach on the author's interest); Senftleben, *supra* note 46, at 524–25 (noting that the civil law regime regarding copyright "follow from the natural law underpinning of continental-European *droit d'auteur*").

49. *Id.* at 1376 (furthering the author's interest in receiving compensation for creative works to not be construed as financing work for the public good); Senftleben, *supra* note 46, at 524–25 ("The author centrism of the civil law system calls on the legislator to safeguard rights broad enough to concede to authors the opportunity to profit from the use of their self-expression, and to bar factors that might stymie their exploitation.").

50. W. Landes & R. Posner, *An Economic Analysis of Copyright Law*, 18 J. LEGAL STUD. 325, 325–63 (1989) (analyzing copyright economics, highlighting the balance between access and incentives to promote economic efficiency and the effect of free-riding in that context); see Reichman & Okediji, *supra* note 1, at 1375–78 (discussing the risk of market failure considering "free-riding copiers"); Senftleben, *supra* note 46, at 524–26 (describing the utilitarian foundation of copyright as justifying only the grant of the necessary rights to incentivize the author, while all other forms of use not necessary to provide such incentive remain free); Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1107–10, 1132 (1990) (describing copyright's goals to stimulate creation for the enrichment of the public, and detailing how free-rider infringers profit from selling inexpensive copies, leveraging the copyright owner's publicity and depriving the owners of rewards for their works); Ruth Okediji, *Givers, Takers and Other Kinds of Users: A Fair Use Doctrine for Cyberspace*, 53 FLA. L. REV. 107, 153–61 (2001) (arguing that while compensating authors is a fairness matter, broadening the author's incentives could pose hindrances to the goal of promoting progress and use of information).

sufficient.<sup>51</sup>

It is also worth noting that, generally, states who are members of the Berne Convention and the TRIPS Agreement<sup>52</sup> must comply with the “three step test” when implementing permitted uses in their national laws.<sup>53</sup> According to the three step test, permitted uses should be confined “to certain special cases” (step one), “which do not conflict with a normal exploitation of the work” (step two), “and do not unreasonably prejudice the legitimate interests of the right holder” (step three).<sup>54</sup> This test allows states to implement a wide range of permitted uses in their national laws to facilitate the use of scientific literature works for research purposes, among other goals.<sup>55</sup> International treaties thus grant states the freedom to design the permitted uses in their national laws in accordance with their national policies, including national economic, social, political, and cultural considerations.<sup>56</sup> Combined with the differences between the civil law

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51. See Senftleben, *supra* note 46, at 524–25 (summarizing the justification of producing intellectual property works and contributing to the welfare of society).

52. The TRIPS Agreement alone encompasses more than 160 states, all members of the World Trade Organization. See *Members and Observers*, WTO, [https://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm) (last visited March 19, 2023).

53. See Berne Convention, *supra* note 38, art. 9; TRIPS Agreement, *supra* note 38, art. 13; Reichman & Okediji, *supra* note 1, at 1379–90 (describing the three-part test for exceptions originating from the Berne Convention in 1967 later adopted in the final version of the TRIPS Agreement in 1994).

54. Reichman & Okediji, *supra* note 1, at 1379–90.

55. See *id.* at 1378–80.

56. See, e.g., Christophe Geiger et al., *The Three Step Test Revisited: How to Use the Test's Flexibility in National Copyright Law*, 29 AM. U. INT'L L. REV. 581, 582 (2013) (demonstrating the three-part test for exceptions and limitations to be adaptable to satisfy economic, social, and cultural interests); see Samuelson, *supra* note 28, at 52; 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, 267 (2000) (reviewing international instruments and maintaining that “in an era of international trade and norms . . . [n]ational copyright laws are a component of local cultural and information policies. As such, they express each sovereign nation's twin aspirations for its citizens: exposure to works of authorship, and participation in their country's cultural patrimony. . . . [N]ational exceptions to copyright present a . . . case for persistence of national norms . . .”); see Dinwoodie, *supra* note 5, at 436 (“[I]n certain crucial areas, the treaties allow member states significant latitude to adopt rules that are tailored to their own social and economic priorities and philosophies.”). In the words of Jerome Reichman, international intellectual property instruments allow states “ample ‘wobble room’ in which to implement national policies favoring the public interest.” Jerome. H.

and common law regimes, which lead to different approaches to permitted uses, it is not surprising that different states actually implement different types of permitted uses in their respective national laws. For example, while civil law states tend to have confined lists of exceptions to copyright, and their courts tend to interpret them narrowly, common law states like the United States implement an open-ended list of such exceptions, mostly by the open-ended fair use standard that will be discussed below, combined with a list of other specific exceptions.<sup>57</sup> The substantive differences between civil law and common law regimes thus affects the manner in which permitted uses in copyright are perceived by these two different regimes.<sup>58</sup>

A note should be made here that legal scholarship and inter-governmental organizations often discuss the “harmonization” of intellectual property rights, inter alia, by virtue of the abovementioned treaties which set a minimum standard of protection for intellectual property rights.<sup>59</sup> A detailed discussion on this subject is outside the

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Reichman, *From Free Riders to Fair Followers: Global Competition under the Trips Agreement*, 29 N.Y.U. J. INT'L L. & POL. 11, 28 (1996).

57. See Reichman & Okediji, *supra* note 1, at 1375–78 (contrasting Europe’s enumerated list of exceptions to the United States’ broad fair use provision in addition to a list of specific exceptions); Niva Elkin-Koren & Neil Weinstock Netanel, *Transplanting Fair Use across the Globe: A Case Study Testing the Credibility of U.S. Opposition*, 72 HASTINGS L.J. 1121, 1129, 1135–36 (2021) (noting the United States’ open-ended fair use unlike the narrowly defined permitted uses of the civil law countries).

58. For general discussion on limitations and exceptions (permitted uses) for research purposes and the differences between continental (civil law) states and common law states, see Reichman & Okediji, *supra* note 1, at 1378–89.

59. See, e.g., Ruth L. Okediji, *New Treaty Development and Harmonization of Intellectual Property Law*, in *TRADING IN KNOWLEDGE: DEVELOPMENT PERSPECTIVES ON TRIPS, TRADE AND SUSTAINABILITY* 89, 89–98 (Christophe Bellmann & Ricardo Melendez-Ortiz eds., 2003) (describing the harmonization of intellectual property standards in development and noting the accompanying concerns); see JUNJI NAKAGAWA, *INTERNATIONAL HARMONIZATION OF ECONOMIC REGULATION* 137, 137–68 (2011) (contextualizing the history of harmonization in substance and procedure for intellectual property in the Paris Convention and Berne Convention, particularly the establishment of a basic national treatment provision). *But see* Pamela Samuelson, *Implications of the Agreement on Trade Related Aspects of Intellectual Property Rights for Cultural Dimensions of National Copyright Laws*, 23 J. Cultural Econ. 95, 96–98 (1999) (noting that “[i]t may be wise for WTO dispute panels and the TRIPS Council to exercise restraint in pushing for harmonization of national intellectual property laws, especially copyright laws, because national intellectual property policies are often intertwined with cultural values and policies that are deeply connected to national identity,” and “substantial harmonization of

scope of this article. Notwithstanding, for the purposes of this article, however harmonized (or unharmonized) the standard of copyright protection is at the international level, permitted uses are clearly not unified between Member States—neither is the scope of the right to research.<sup>60</sup> As shown above, even upon the premise that international instruments bring about some harmonization of intellectual property rights, it does not mean that permitted uses and the right to research are “harmonized,” or are the same in all Member States.<sup>61</sup> Granted, the three step test sets restrictions regarding the scope of permitted uses that states may implement in their national laws. However, it still leaves a considerable freedom for states to determine the scope of such permitted uses, and states use this freedom in practice to set different scopes of national permitted uses and to facilitate the right to research

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national intellectual property laws may be difficult to achieve”); Sarah R. Wasserman Rajec, *The Harmonization Myth in International Intellectual Property Law*, 62 ARIZ. L. REV. 735, 735–51 (2020) (noting, inter alia, that “[t]he history of international IP law is often told as a story of harmonization [but] . . . [t]he real story is one of maximization, not harmonization” and that “the harmonization narrative is a myth”). See also the WIPO website, which contains a webpage titled “Patent Law Harmonization.” *Patent Law Harmonization*, WIPO, [https://www.wipo.int/patent-law/en/patent\\_law\\_harmonization.htm](https://www.wipo.int/patent-law/en/patent_law_harmonization.htm) (last visited Dec. 2, 2022).

60. Sometimes cited in this regard is the principle of “national treatment” incorporated in these treaties—obligating Member States to grant foreign authors the same copyright protection granted to local authors. But this only means that a “foreign” work is granted the same protection in a given state, as granted for “local” works. Similarly, the same permitted uses apply to local and foreign works. It does not harmonize the standard of protection between states, and it does not harmonize permitted uses, nor the scope of the right to research, between Member States. See TRIPS Agreement, *supra* note 38, art. 3 (National Treatment); Berne Convention, *supra* note 38, art. 5(1); Dinwoodie, *supra* note 5, at 437–38. With regard to national treatment and the harmonization of intellectual property rights, see Ulrich Loewenheim, *The Principle of National Treatment in the International Conventions Protecting Intellectual Property*, in PATENTS AND TECHNOLOGICAL PROGRESS IN A GLOBALIZED WORLD 593 (Wolrad Prinz zu Waldeck und Pyrmont et al. eds., 2009); cf. Dinwoodie, *supra* note 5, at 437–38 (noting, with regard to the national treatment standard, that “international intellectual property agreements simply grant authors and producers the right to receive in foreign countries a guaranteed minimum level of protection, and to receive protection on the same terms as local authors and producers”).

61. Dinwoodie goes even further by noting that “[e]ven identical rules of law may lead to different results when applied in different social contexts by different tribunals. National laws—including harmonized national laws—are normally applied by reference to national market conditions. Factual differences in social practices, competitive conditions or consumer attitudes will lead to different legal conclusions (even under the same legal standard).” Dinwoodie, *supra* note 5, at 436.

in different manners.<sup>62</sup> In turn, these differences, combined with a core principle of copyright—the principle of territoriality that will be discussed below—lead to the diminishing effect that enforcement of foreign copyright judgments has on the right to research, as will be discussed below.<sup>63</sup>

The territoriality of intellectual property rights is one of the main principles around which intellectual property laws, including copyright laws, are designed.<sup>64</sup> Intellectual property rights are territorial—they confer a territorial protection upon the subject matter to which they apply.<sup>65</sup> It follows that each state has the sovereign power, subject to the international instruments it is party to, to design copyright laws in its territory as it sees fit.<sup>66</sup> States are allowed to shape

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62. See Dinwoodie, *supra* note 5, at 436 (identifying the variety in Member States adopting rules to tailor to their own social and economic priorities and philosophies).

63. See *id.* at 437–38, 440 (noting that international copyright does not exist and hesitancy in the United States to litigate under foreign intellectual property laws).

64. See *id.* at 437 (invoking territoriality as a characterization of intellectual property laws).

65. See, e.g., Ginsburg, *Global Use/Territorial Rights*, *supra* note 6, at 319 (defining the territoriality principle in which each country structures its own regime for governing works of authorship); Jane C. Ginsburg, *The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World*, 15 SANTA CLARA COMPUT. & HIGH TECH L.J. 347 (1999) [hereinafter Ginsburg, *Captivity of Copyright*]; Jacklyn Hoffman, Note, *Crossing Borders in the Digital Market: A Proposal to End Copyright Territoriality and Geo-Blocking in The European Union*, 49 GEO. WASH. INT'L L. REV. 143 (2016) (stating, for example, that “[i]n the digital market, copyright territoriality presents an additional problem. From its inception, the intent of the Internet was to be a borderless, decentralized medium, available to and accessible by all. Distributing territorially-copyrighted content on the Internet requires creating borders where typically none exist”); Dinwoodie, *supra* note 5, at 437–38; Marketa Trimble, *The Territorial Discrepancy Between Intellectual Property Rights Infringement Claims and Remedies*, 23 LEWIS & CLARK L. REV. 501, 510 (2019) (“Because IP rights are territorial—they arise from a particular country’s laws and exist only within the scope of that country’s prescriptive jurisdiction—they cannot be infringed in countries where a country’s laws do not establish or recognize the rights.”).

66. Berne Convention, *supra* note 38, art. 5(2) (“[A]part from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”); Toshiyuki Kono et al., Editorial, 12 J. INTELL. PROP., INFO. TECH., & ELEC. COM. L. 1 (2021); Alexander Peukert & Benedetta Ubertaini, *International Law Association’s Guidelines on Intellectual Property and Private International Law (“Kyoto Guidelines”): General Provisions*, 12 J. INTELL. PROP., INFO. TECH., & ELEC. COM. L. 4, 6 (2021) (discussing the

their respective copyright laws and permitted uses in a manner that complies with their perception of copyright and expresses the balances they wish to achieve by their implementation, considering their national policies, including national economic and cultural considerations.<sup>67</sup> Different states indeed implement different types of permitted uses in their territories.<sup>68</sup>

One significant difference in this regard, as mentioned above, is the tendency of common law states to implement an open-ended list of permitted uses, as opposed to a closed list of permitted uses that civil law states implemented.<sup>69</sup> States implementing an open-ended list of

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territoriality of intellectual property rights); Marie-Elodie Ancel et al., *International Law Association's Guidelines on Intellectual Property and Private International Law ("Kyoto Guidelines"): Applicable Law*, 12 J. INTELL. PROP., INFO. TECH., & ELEC. COM. L. 44, 56–58 (2021) (discussing the rule of the applicable law to infringements of intellectual property rights and remedies for such infringements in the Kyoto guidelines and in the context of the territoriality principle, upholding that “[t]he underlying rationale of this rule is that each State has sovereignty to determine the scope of intellectual property rights and the consequences of their infringement”); Maxence Rivoire, *An Alternative to Choice of Law in (First) Ownership of Copyright Cases: The Substantive Law Method*, 65 J. COPYRIGHT SOC’Y U.S.A. 203, 211–12 (2018) (discussing the principle of territoriality and noting, regarding choice of law, that “the application of the *lex protectionis* allows countries to tailor their innovation policies to their sovereign territories”); Jane C. Ginsburg, *Copyright Without Borders—Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15 CARDOZO ARTS & ENT. L.J. 153, 154 (1997) (noting that the Internet is indifferent to national borders whereas the rules regarding copyright infringement are territorial).

67. See, e.g., Geiger et al., *supra* note 56, at 582–83 (noting that the three-step test “was intended to serve as a flexible balancing tool offering national policy makers sufficient breathing space to satisfy economic, social, and cultural needs” and highlighting the international three-part test to enable flexibility to be adopted by national legislation to further their needs); Samuelson, *supra* note 28, at 52. See Dreyfuss & Ginsburg, *supra* note 6, at 1066 (“The strong link between culture on the one hand, and intellectual production and utilization on the other, means that the territoriality of these rights is of crucial importance: individual nations must be able to retain some control over the local conditions under which these products are created, exploited, and accessed.”).

68. Trimble, *supra* note 65, at 541; see also Pedro A. De Miguel Asensio, *Recognition and Enforcement of Judgments: Recent Developments*, in RESEARCH HANDBOOK ON CROSS-BORDER ENFORCEMENT OF INTELLECTUAL PROPERTY, 469, 490 (Paul Torremans ed., 2014) (“[I]ntellectual property disputes may affect significant public interests in sensitive areas in which basic values differ across different jurisdictions.”).

69. Jerome H. Reichman, *The Limits of “Limitations and Exceptions” in Copyright Law*, in COPYRIGHT LAW IN AN AGE OF LIMITATIONS AND EXCEPTIONS,

permitted uses usually do so by implementing a “fair use” standard in their national laws. According to the fair use standard, the court may review any use (act) to determine whether it was “fair” according to the standards set in the national law, and therefore does not constitute a copyright infringement.<sup>70</sup> Fair use usually includes an open-ended list of purposes that are *prima facie* considered to be fair and mentions research as one of them.<sup>71</sup>

In addition to either an open-ended or closed list of permitted uses, states usually also implement in their legislation a specific permitted use for research purposes.<sup>72</sup> As fair use regimes *de facto* contain an open-ended list of permitted uses, they carry the potential of being more inclusive, allowing for a broader scope of permitted uses for research and research-related purposes, than closed-list regimes.<sup>73</sup> In

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*supra* note 3, at 292, 293; Senftleben, *supra* note 46, at 522–23 (describing the Anglo-American approach in the open fair use doctrine requiring courts to analyze case-by-case what constitutes authorized use).

70. *See, e.g.*, 17 U.S.C. § 107.

71. *See, e.g., id.* (providing that the fair use doctrine applies to use “for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research” and that such use “is not an infringement of copyright”). Compare this with the “fair dealing” regime, according to which only if the use (act) falls within the scope of one of the categories listed in the fair dealing clause, it may be considered to be fair and therefore does not constitute an infringement. *See, e.g.*, Copyright, Designs and Patents Act 1988, c. 48, §§ 29, 30, 30A (U.K.) [hereinafter CDPA], <https://www.legislation.gov.uk/ukpga/1988/48/contents> (applying the fair dealing doctrine to a closed list of uses: research, private study, criticism, review, quotation, news reporting, parody, caricature, pastiche and illustration for teaching); *see also* Elkin-Koren & Netanel, *supra* note 57, at 1129, 1137–38 (discussing the United Kingdom’s codified fair dealing, allowing exceptions for research and private study).

72. *See, e.g.*, Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, art. 3, 1019 O.J. (L 130) 92 (amending Directives 96/9/EC and 2001/29/EC and referring to permitted uses pertaining to text and data mining for the purposes of scientific research).

73. *But see* *Am. Geophysical Union v. Texaco Inc.*, 60 F.3d 913, 931 (2d Cir. 1994) (finding that photocopying articles from scientific journals by research scientists for research files is not fair use); *see also* Ann Bartow, *Educational Fair Use in Copyright: Reclaiming the Right to Photocopy Freely*, 60 U. PITT. L. REV. 149, (1998) (arguing that students and instructors are among the greatest beneficiaries of fair use, but that the scope of educational fair use is shrinking due to judges evaluating the commercial detriment to publishers); Pamela Samuelson, *Unbundling Fair Uses*, 77 *FORDHAM L. REV.* 2537, 2580–87 (2009) (describing Congress’ intent in teaching, scholarship, and research being considered a fair use, contrasting with litigated cases, in which fair use defenses have rarely succeeded

contrast, states implementing specific permitted uses pertaining to research may design it to encompass a broader and more comprehensive scope of uses for research purposes.<sup>74</sup> The consequence of the differences between these systems is that some uses may constitute an infringement of copyright in one state, whereas the exact same use may constitute a permitted use and thus not a copyright infringement in another state.<sup>75</sup> Against this backdrop, enforcement of foreign copyright judgments may render these differences obsolete and put the right to research at risk at the transnational level.<sup>76</sup>

Enforcement of foreign judgments means that a court in the enforcing state orders to enforce a judgment a court of a foreign state granted. The enforcing court does not review the foreign case or judgment on its merits, but rather gives the foreign judgment, as is, an effect in the enforcing state, as if it were a judgment rendered by the

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and highlighting the uncertainties regarding the scope of fair use for learning-related purposes); Mark A. Lemley & Bryan Casey, *Fair Learning*, 99 TEX. L. REV. 743, 743–49, 776–77. (2021) (noting the uncertainty of whether the use of copyrighted works for machine learning will be considered fair use, and suggesting to incorporate a principle of “fair learning” into the analysis of fair use for machine and AI learning and training); Lemley, *supra* note 19, at 185–86 (“Because fair use relies upon a vague, multi-factor test, it is often impossible to know *ex ante* whether any particular use will qualify as fair.”). As opposed to that, in a recent decision the U.S. Supreme Court ruled that copying some 11,500 lines of code constitutes fair use in the circumstances of the case, which may greatly benefit the right to research. *Google LLC v. Oracle Am., Inc.*, 141 S. Ct. 1183 (2021).

74. *See, e.g.*, CDPA, *supra* note 71, § 29 (“[F]air dealing with a . . . work for the purposes of research for a non-commercial purpose does not infringe any copyright in the work provided that it is accompanied by a sufficient acknowledgement.”).

75. *See* Trimble, *supra* note 65, at 540–41 (noting that the use of extraterritorial cross-border remedies regarding intellectual property is especially problematic when exceptions and limitations to the intellectual property rights would make an act infringing in one country and non-infringing or otherwise permissible in another). *Cf.* Rochelle Cooper Dreyfuss, *An Alert to the Intellectual Property Bar: The Hague Judgments Convention*, 2001 UNIV. ILL. L. REV. 421, 423–24 (2001) (discussing the “wobble room” international intellectual property instruments allow their member states); Reichman & Okediji, *supra* note 1, at 1378–89 (discussing limitations and exceptions and the differences between continental (civil law) states and common law states).

76. Rochelle Dreyfuss notes, regarding multiple litigation in copyright: “if posting particular material on a website is infringing under the law of one of the locations where the site can be accessed, while the same conduct is not actionable elsewhere, [a] parallel litigation will yield conflicting judgments.” Dreyfuss, *supra* note 75, at 423.



enforcing state itself.<sup>77</sup> Particularly, the foreign judgment may originate in a state that implements a narrower right to research, whose court may assume jurisdiction of the case and apply its own laws to it, or grant an extraterritorial global injunction. The prevailing plaintiff may then seek to enforce the judgment in a state that implements a broader right to research. In such cases, enforcing the foreign judgment may entail a prohibition of uses for research which are generally permitted in the enforcing state.<sup>78</sup> The right to research is therefore at great risk, as such legal proceedings may be abused to

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77. See, e.g., De Miguel Asensio, *supra* note 68, at 485, 495; Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters art. 4.2, July 2, 2019, 2019 O.J. (L 339) 3 [hereinafter 2019 Convention] (“There shall be no review of the merits of the judgment in the requested State. There may only be such consideration as is necessary for the application of this Convention.”). This means that the enforcing court may perform a review on the merits of the case only in certain cases defined by the Convention. In addition, the 2019 Convention allows for a partial refusal of a foreign judgment in certain cases. See, e.g., *id.* arts. 8.2, 9–10. Although this Convention has yet to enter into force, and in any case does not apply to intellectual property, it does mirror the main goals of enforcement of foreign judgments. In general, private international law goals are to facilitate mechanisms that minimize litigation and allow the prevailing party of the proceeding to execute the judgment granted in their favor, in order to reduce costs, increase predictability and facilitate access to justice and to judicial cooperation. A review on the merits may contradict these goals. See *infra* note 144 and accompanying text; Catherine Kessedjian, *Comment on the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters: Is the Hague Convention of 2 July 2019 a Useful Tool for Companies Who Are Conducting International Activities?*, 1 NEDERLANDS INTERNATIONAAL PRIVAATRECHT, 19, 27 (2020) (noting that the rule according to which the requested court shall not review the merits of the foreign judgment is a “classic rule” in private international law, aiming at ensuring certainty and that only in a limited capacity may the judgment be re-reviewed to ensure it abides by the Convention’s requirements).

78. See De Miguel Asensio, *supra* note 68, at 480; *cf.* Trimble, *supra* note 65, at 540–41 (noting that the use of extraterritorial cross-border remedies in intellectual property results in “the exportation of IP rights from the country of the underlying law to a target country . . . without any consideration of the laws of the target country, a shortcoming that is most apparent when the particular IP rights do not even exist in the target country, the same IP is owned there by another person or entity, or exceptions and limitations to the IP rights exist in the target country that would make the acts non-infringing or otherwise permissible in the target country,” but also noting that, in some cases, such as copyright, well-known trademarks and trade secrets this may be less problematic due to relative global harmonization, and stating that limitations and exceptions in intellectual property are not uniform worldwide, resulting in the possibility that an infringing act in one country may be permitted in another).

diminish the right to research in practice.<sup>79</sup> This risk carries even broader implications as it may undermine the principle of territoriality, since states will find themselves required to de-facto prohibit uses which are de-jure permitted in their respective territories. As Marketa Trimble describes in a similar context:

One of the reasons that [intellectual property (IP)] laws are not uniform around the world is that they are shaped by countries' differing public policies. Freedom of speech, the right to access information, the right to health and healthcare, the right to education, and other rights and freedoms affect the content of IP laws, and affect them differently by country; a combination of national public policies and international obligations form the mold from which individual country's IP laws are cast. By exporting IP rights and features from one country to another, extraterritorial remedies affect the mold—containing other rights and freedoms—that shapes IP rights.<sup>80</sup>

This Part demonstrated that copyright laws may de-facto restrict the possibility of the public, including researchers, to conduct research, and identified the nature of the right to research as a permitted use within, and a part of, the general copyright regime. It went on to demonstrate different approaches various states implemented regarding copyright as a whole, and regarding permitted uses and the right to research in particular, resulting in different scopes of protection afforded to the right to research in different states. This Part further detected core characteristics of copyright and the right to research, specifically their territorial nature and differences in their implementation between states, which make them vulnerable at the transnational level. Therefore, this Part concluded that enforcement of foreign copyright judgments may pose a serious threat to the national

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79. For possible grounds for refusal to enforce such judgments, see *infra* notes 121–23, 129 and accompanying text, and sources cited *infra* note 197.

80. Trimble, *supra* note 65, at 541; see also De Miguel Asensio, *supra* note 68, at 490 (“[I]ntellectual property disputes may affect significant public interests in sensitive areas in which basic values differ across different jurisdictions.”). An argument may arise here stating that due to the principle of territoriality, a judgment given by state X would typically only apply to an infringement that took place in state X, applying state X’s laws. In that case, the argument would be that even if state Y enforces the judgment, there is absolutely no effect on the right to research in state Y, as enforcement would only pertain to the infringement in state X. Part III will show that this argument may be very gravely contested in the era of digital use of works, and when national courts grant extraterritorial injunctions.

and territorial right to research. There are still no empirical studies documenting this phenomenon, let alone analyzing it.<sup>81</sup> Still, it seems that recent developments, which will be discussed below, have rendered this phenomenon more prominent and substantial than ever before. The next Part conceptualizes the abovementioned phenomenon and analyzes it against the backdrop of recent efforts to conclude an international instrument on the matter.

## II. ENFORCEMENT OF FOREIGN COPYRIGHT JUDGMENTS AND THE RIGHT TO RESEARCH

This Part analyzes the actual risks that enforcement of foreign copyright judgments poses to the right to research, starting by examining recent efforts to include copyright judgments in international instruments on the matter, rendering these risks prominent. This Part subsequently thoroughly analyzes the concrete and systematic risks posed to the right to research by enforcement of foreign copyright judgment, emphasizing that such enforcement may undermine and diminish the right to research. Further, this Part proposes a conceptualization of the problem by looking at it through the prism of legal transplants, focusing on how such enforcement interferes with copyright balances.

### A. EFFORTS TO INCLUDE ENFORCEMENT OF FOREIGN COPYRIGHT JUDGMENTS IN INTERNATIONAL INSTRUMENTS

The most recent effort to include foreign copyright judgments in an international instrument took place just a few years ago. On July 2, 2019, the Hague Conference on Private International Law (HCCH) adopted the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2019 Convention), that will enter into force on September 1, 2023.<sup>82</sup> The

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81. Cf. Matthew Marinett, *The Race to the Bottom: Comity and Cooperation in Global Internet Takedown Orders*, 53 U.B.C. L. REV. 463, 487–96 (2020) (discussing the plausibility of a possible “race to the bottom” with regard to removal of access to content).

82. 2019 Convention, *supra* note 77. The convention will enter into force on September 1, 2023; see *id.* arts. 28–29; *The EU and Ukraine Join the 2019 Judgments Convention—Ukraine Ratifies the 2007 Maintenance Obligations Protocol*, HCCH (Aug. 29, 2022), <https://www.hcch.net/en/news-archive/details/?varevent=870>.

HCCH is an intergovernmental organization established in 1893, comprised of approximately ninety Member States today.<sup>83</sup> The HCCH develops legal instruments in the field of private international law. As such, it is not a forum specializing in intellectual property law. In line with the goals of the HCCH, the 2019 Convention establishes a general international framework for enforcement of foreign judgments in civil and commercial matters, which will apply between the states parties to the Convention, subject to its provisions.<sup>84</sup> Most drafts of the 2019 Convention discussed by the HCCH proposed to apply the Convention, *inter alia*, to intellectual property judgments including copyright.<sup>85</sup> However, as a result of substantive disagreements between Member States on the matter,<sup>86</sup> and after intensive discussions, the HCCH Diplomatic Session tasked with completing the work on the 2019 Convention agreed to exclude intellectual property judgments from the scope of the Convention altogether.<sup>87</sup> Interestingly, this is not the first time such occurrence has taken place in this forum.

In the early 1990s, the HCCH Member States began negotiating a convention on enforcement of foreign judgments and jurisdiction.<sup>88</sup> In

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83. See *About the HCCH*, HCCH <https://www.hcch.net/en/about> (last visited July 24, 2022, 3:26 PM) (explaining history and structure of HCCH).

84. See 2019 Convention, *supra* note 77, at 1.

85. See *Judgments Section*, HCCH, <https://www.hcch.net/en/instruments/conventions/specialised-sections/judgments> (last visited July 25, 2022). For a general description of meetings leading to the adoption of the Convention and of its general structure, see Ronald A. Brand, *Jurisdiction and Judgments Recognition at the Hague Conference: Choices Made, Treaties Completed, and the Path Ahead*, 67 NETH. INT'L L. REV. 3, 14–15 (2020); Ning Zhao, *Completing a Long-Awaited Puzzle in the Landscape of Cross-Border Recognition and Enforcement of Judgments: An Overview of the HCCH 2019 Judgments Convention*, 30 SWISS REV. INT'L & EUR. L. 345, 347–48, 362–63 (2020) (providing a brief history of the Judgements Project and the discussions regarding intellectual property).

86. See, e.g., David Goddard, *The Judgments Convention—The Current state of Play*, 29 DUKE J. COMP. & INT'L L. 473 (2019) (examining the debate regarding the extent to which the instrument negotiated by the HCCH should apply to judgements on intellectual property matters).

87. See 2019 Convention, *supra* note 77, art. 2.1(m) (declaring that the Convention shall not apply to intellectual property matters); HCCH COMM'N I, Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 22d Sess., Minutes No. 7 (June 21, 2019); Zhao, *supra* note 85, at 362–63 (explaining the history of intellectual property in the Judgements Project leading to its exclusion from the Convention).

88. Ronald Brand notes that “single” (or “simple”) conventions apply only to

2000–2001, after a decade of work, the negotiations collapsed—due in large part to disagreement on if and how to include intellectual property within the scope of the convention.<sup>89</sup> Despite the general failure of these efforts, this work led, inter alia, to the conclusion of the 2005 Choice of Court Agreements Convention (2005 Convention) which refers partially and narrowly to disputes concerning intellectual property and specifically copyright.<sup>90</sup> The general scope of the 2005 Convention is narrow ab initio, as it only applies if there is an exclusive choice of court agreement between the parties to the

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decision of courts requested to enforce foreign judgments, that is, conventions that only address indirect jurisdiction (where the jurisdiction of the court that issued the judgment is only considered indirectly by the enforcing court in its decision whether to enforce the judgment). “Double conventions” provide rules for enforcement of foreign judgments as well as direct jurisdiction rules that the court rendering the original judgment should apply to a case. “Mixed conventions” are a variation of the double convention—they provide rules for jurisdiction as well as enforcement, but they contain a non-exhaustive list of allowed (required) and prohibited bases for jurisdiction (“jurisdictional filters”). That means that states are allowed to set in their internal legislation other jurisdictional filters, but judgments complying with such filters will not be enforced by virtue of the mixed convention. The convention negotiated by the HCCH in the 1990s was a mixed convention. See Ronald A. Brand, *Intellectual Property, Electronic Commerce and the Preliminary Draft Hague Jurisdiction and Judgments Convention*, 62 U. PITT. L. REV. 581, 583–85 (2001) [hereinafter Brand, *Intellectual Property*]; see Brand, *supra* note 85, at 7–14 (describing the negotiations and influences at the Hague Conference).

89. Intellectual property matters, together with electronic commerce matters, were the two main issues in dispute. See Brand, *Intellectual Property*, *supra* note 88, at 583–85; Graeme B. Dinwoodie, *Developing a Private International Intellectual Property Law: The Demise of Territoriality?*, 51 WM. & MARY L. REV. 711, 719 (2009) (detailing the Hague Conference’s unsuccessful attempt to negotiate a jurisdiction and judgements convention of general applicability in civil and commercial matters); Michael Douglas et al., *The HCCH Judgments Convention in Australian law*, 47 FED. L. REV. 420, 421 (2019) (stating the HCCH has been attempting to negotiate multilateral arrangements for recognition and enforcement of foreign jurisdictions for a half-century but has been unsuccessful); see also Dreyfuss & Ginsburg, *supra*, note 6, at 1065.

90. See Convention of 30 June 2005 on Choice of Court Agreements art. 2.2(n), (o), June 30, 2005, 2005 O.J. (L 353) 5 [hereinafter 2005 Convention]; Lydia Lundstedt, *The Newly Adopted Hague Judgments Convention: A Missed Opportunity for Intellectual Property*, 50 INT’L REV. INTEL. PROP. & COMPETITION L. 933, 934 (2019) (detailing a somewhat similar attempt to narrow the scope of the 2019 Convention in an effort to salvage its application to at least some intellectual property judgments); Brand, *supra* note 85, at 12–14 (describing the history of the 2005 Convention and explaining the Convention excludes most issues of validity and infringement of intellectual property rights); De Miguel Asensio, *supra* note 68, at 473.

proceedings, and it sets uniform rules on jurisdiction and on enforcement of foreign judgments where such an agreement exists between the parties.<sup>91</sup> Moreover, with regard to intellectual property, the Convention applies only to very specific issues: to disputes regarding the validity or infringement of copyright and related rights, and to infringement proceedings regarding any intellectual property right insofar as they were brought, or could have been brought, for a breach of contract between the parties.<sup>92</sup> All other disputes regarding intellectual property matters are excluded from the scope of the 2005 Convention, even if the parties have an exclusive choice of court agreement between them.<sup>93</sup> In turn, the HCCH Member States that supported the inclusion of intellectual property matters in the 2019 Convention referred to the 2005 Convention as a “precedent,” basing some of the textual and substantive proposals in the 2019 Convention drafts on the text of the 2005 Convention.<sup>94</sup> As mentioned, these efforts did not bear any fruit with regard to intellectual property.<sup>95</sup>

While both of these experiences, which stretched over more than three decades, have largely collapsed, the matter of applying private

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91. 2005 Convention, *supra* note 90, art. 1 (stating the Convention shall apply to exclusive choice of court agreements concluded in civil or commercial matters); *id.* arts. 5–6, 8 (stating, in general, that the court designated in an exclusive choice of court agreement shall have jurisdiction to decide a dispute to which the agreement applies and shall exercise its jurisdiction accordingly; that all other courts shall suspend or dismiss proceedings to which an exclusive choice of court agreement applies; and that a judgment given by a court designated in an exclusive choice of court agreement shall be enforced in other Contracting States).

92. *See id.* art. 2.2(n), (o).

93. *Id.* art. 2.2.(n), (o). Regarding the right to research it seems that the 2005 Convention does not pose significant risks as presumably in most cases researchers do not have an exclusive choice of court agreement with right holders. Nevertheless, right holders may apply standard form contracts (adhesion contracts) regarding the use of their databases. *See* sources cited *supra* note 25. However, a detailed discussion on this matter is outside the scope of this article.

94. *See, e.g.*, FRANCISCO GARCIMARTÍN & GENEVIÈVE SAUMIER, CONVENTION OF 2 JULY 2019 ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN CIVIL OR COMMERCIAL MATTERS, EXPLANATORY REPORT (2019), ¶¶ 64–65, at 63–64 <https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf> (explaining intellectual property was excluded as a broad concept, while the exclusion of contracts relating to intellectual property rights is more nuanced, and referring to the 2005 Convention).

95. For a review of other multilateral private international law instruments on the matter, including instruments that were concluded by the HCCH and the European Union, see Brand, *supra* note 85, at 4–7.

international law rules to judgments on intellectual property rights is definitely not off the international and national agenda. From the international perspective, the HCCH resolved, as an outcome of the negotiations of the 2019 Convention, to continue work on the intersection between private international law and intellectual property.<sup>96</sup> It has done so together with the WIPO.<sup>97</sup> In March 2022, the HCCH decided to continue monitoring the intersection between intellectual property and private international law as part of its “Work Relating to Possible New Legislative Instruments.”<sup>98</sup> The HCCH has also recently set up a working group to discuss the development of instruments on parallel proceedings and direct jurisdiction.<sup>99</sup> The issue of applying these instruments to intellectual property may therefore arise again in this framework. In addition, the secretariat of the United Nations Commission on International Trade Law (UNCITRAL) recently distributed a draft of model provisions for technology-related dispute resolution to state members of the Working Group on Dispute

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96. See HCCH Comm’n II Gen. Aff. & Pol’y, 22d Sess., Minutes No. 1, (Oct. 21, 2019) (on file with author) (expressing will of delegations to consider continuing work on application of private international law to intellectual property); *id.* Minutes No. 2, ¶¶ 2–3 (noting no objections of Member States to the working proposals regarding intellectual property); HCCH Comm’n II Gen. Aff. & Pol’y, *Working Proposal No. 1*, 22d Sess., Minutes No. 2, ¶ 3 (July 1, 2019) (on file with author) (inviting Council to consider further work it wishes the HCCH undertake on intersection between private international law and intellectual property); HCCH Council on Gen. Aff. & Pub. Pol’y, CONCLUSIONS & DECISIONS: ADOPTED BY CGAP, ¶ 14, (2020), <https://assets.hcch.net/docs/70458042-f771-4e94-9c56-df3257a1e5ff.pdf> [hereinafter CONCLUSIONS & DECISIONS] (encouraging preparation of questionnaire to identify actual and practical issues of private international law faced by practitioners in cross-border intellectual property dealings, in cooperation with WIPO).

97. See HCCH & WIPO, IDENTIFYING ACTUAL AND PRACTICAL ISSUES OF PRIVATE INTERNATIONAL LAW IN CROSS-BORDER INTELLECTUAL PROPERTY DEALINGS (2022) <https://www.wipo.int/export/sites/www/about-ip/en/judiciaries/docs/hcch-questionnaire-report-annex.pdf>; ANNABELLE BENNETT & SAM GRANATA, WHEN PRIVATE INTERNATIONAL LAW MEETS INTELLECTUAL PROPERTY LAW—A GUIDE FOR JUDGES (2019) (creating a guide for Judges via collaboration of HCCH and WIPO; a detailed discussion regarding this guide is outside the scope of this article).

98. See HCCH COUNCIL ON GEN. AFF. & PUB. POL’Y, CONCLUSIONS & DECISIONS: ADOPTED BY CGAP, ¶ 10, (2022) (deciding to continue monitoring developments on the intersection of private international law and intellectual property).

99. See Zhao, *supra* note 85, at 365–67.

Settlement.<sup>100</sup> This draft encompasses intellectual property and unfair competition disputes.<sup>101</sup> Moreover, numerous academic initiatives offering soft law mechanisms on the intersection between intellectual property and private international law were published throughout the previous decades,<sup>102</sup> although legal scholarship on the matter began developing only relatively recently.<sup>103</sup>

From the national perspective, states may encounter specific requests for enforcement of foreign copyright judgments, whose outcome may contradict the right to research in their respective territories. Hence, states may find themselves having to set rules for such enforcement regardless of the development of any international instrument on the matter or their accession to such instrument. Therefore, even though an inclusive international instrument on the matter is yet to be concluded, the risks such enforcement poses to the right to research, which will be discussed below, are extremely pressing.

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100. See U.N. Comm'n on Int'l Trade L. Working Grp. II (Dispute Settlement), Draft Provisions for Technology-Related Dispute Resolution, U.N. Doc. A/CN.9/WG.II/WP.224, 1 (Jan. 31, 2022) (providing provisions to facilitate further exploration of issues surrounding technology-related dispute resolution).

101. See *id.* at 2–3 (stating that technology disputes include intellectual property rights and unfair competition disputes).

102. For proposals on jurisdiction, choice of law, and enforcement of foreign judgements on intellectual property matters see, for example, Am. L. Inst., *Intellectual Property: Principles Governing Jurisdiction, Choice of Law and Judgments in Transnational Disputes*, in INTELLECTUAL PROPERTY IN THE GLOBAL ARENA 347 (Jürgen Basedow et al. eds., 2010); Japanese Transparency Grp., *Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property*, in INTELLECTUAL PROPERTY IN THE GLOBAL ARENA, *supra*, at 394; Priv. Int'l L. Ass'n of Kor. & Japan, Joint Proposal, Q. REV. CORP. L. & SOC'Y 112 (2011); EUROPEAN MAX PLANCK GROUP ON CONFLICT OF LAWS IN INTELLECTUAL PROPERTY, CONFLICT OF LAWS IN INTELLECTUAL PROPERTY (TEXT AND COMMENTARY) (2013). For a recent example see the Kyoto Guidelines, published after a decade of work by some 35 academics. Toshiyuki Kono et al., annex, *Guidelines on Intellectual Property and Private International Law* (“Kyoto Guidelines”), 12 J. INTELL. PROP. INFO. TECH. & ELEC. COM. L. (Thomas Dreier et al. eds, 2021); see also Rivoire, *supra* note 66, at 204 (stating that “[a] significant number of academic initiatives also flourished in a rather short period of time” and providing that the ILA established a Special Committee in an attempt to merge the large number of academic initiatives relating to private international law and intellectual property law).

103. See Dinwoodie, *supra* note 5, at 429 (noting intellectual property lawyers, treatises, and casebooks largely ignored private international law matters, and vice versa).



B. INTERFERING WITH BALANCES—HOW ENFORCEMENT OF FOREIGN COPYRIGHT JUDGMENTS MAY NULLIFY THE RIGHT TO RESEARCH

This Section analyzes the risks posed to the right to research by the possible enforcement of foreign copyright judgments, drawing a distinction between concrete risks and systematic risks. Both the concrete and systematic risks are derived from an inherent bias of the private international law paradigm, intensified by a certain bias of the copyright regime towards rightholders. The analysis refers to three main concrete aspects of this bias that stem from the identities of the parties. The acronym ICE stands for this bias, and it stands for three questions: first, who the *initiator* of the initial proceedings in the foreign court is; second, who has the *choice* of the forum; and third, who has an incentive to request *enforcement* of the foreign judgment.

First, who is the *initiator* of the initial proceedings in the foreign court? The vast majority of copyright cases are brought to court by rightholders for copyright infringement.<sup>104</sup> In jurisdictions implementing statutory damages regimes for copyright infringement, the incentive of rightholders to sue is even greater.<sup>105</sup> As opposed to that, users rarely initiate proceedings to ask courts to recognize that the use they are making constitutes a permitted use,<sup>106</sup> or that it

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104. See, e.g., Matthew Sag, *Copyright Trolling, an Empirical Study*, 100 IOWA L. REV. 1105 (2015) (discussing copyright trolling regarding multi-defendant John Doe lawsuits); Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981 (2014) (providing an empirical examination of copyright infringement cases).

105. See Sag, *supra* note 104, at 1109 (highlighting statutory damages as a unique feature of copyright law that creates incentives for “copyright trolls” to sue and is used by them as leverage).

106. See, e.g., Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions Updated, 1978–2019*, 10 N.Y.U. J. INTELL. PROP. & ENT. L. 1 (2020) (indicating that fair use always comes up as a defense, describing it as “the fair use defense”); see Cotropia & Gibson, *supra* note 104; Marinett, *supra* note 81, at 519 (stating, from the users’ point of view, that “[l]ikely no one would be able to challenge Google’s decision to comply with the Canadian order on freedom of expression or public policy grounds” and noting that no cause of action is generally available to restore content removed by an intermediary such as Google); Julie E. Cohen, *Right to Read Anonymously: A Closer Look at Copyright Management in Cyberspace*, 28 CONN. L. REV. 981, 996 (1996) (explaining that “to the extent digital copyright management systems can be said to reflect shared extra-legal norms developed by repeat-player members of a copyright “community,” that community does not include readers); Sun, *supra* note 3 (stating that the characterization of fair

corresponds with their right to research. Therefore, *ab initio*, enforcement of foreign copyright judgments will lead mainly to the enforcement of judgments ruling in favor of the rightholder, and finding that a right was infringed. It will rarely lead to the enforcement of judgments ruling in favor of researchers, finding that a certain act constitutes a permitted use in line with the right to research, simply because such proceedings are much less common and researchers rarely initiate them. In other words, enforcement of foreign copyright judgments will rarely, if at all, lead to the facilitation of the right to research, and even worse—it is expected to always operate against the right to research, as will be discussed below.

Second, who has the *choice* of the forum? The initiator of the proceedings, who is in most cases the rightholder, also has control over the forum that adjudicates the case. They can decide in which forum to bring their proceedings (forum shopping).<sup>107</sup> Naturally, rightholders will prefer to bring their proceedings, if possible, in jurisdictions where the right to research is narrowest.<sup>108</sup> This is the core seed from

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use as an affirmative defense has caused indirect harms to users and to the public interest in the free flow of information and knowledge, while emphasizing that rightholders aggressively enforce their rights and lobby to broaden copyright protection by “copyright holder-centered developments”).

107. See Kimberly A. Moore & Francesco Parisi, *Rethinking Forum Shopping in Cyberspace*, 77 CHI.-KENT L. REV. 1325, 1328 (2002) (noting that “[b]y strategically choosing the forum, a plaintiff can maximize the expected return from litigation”); cf. Dreyfuss & Ginsburg, *supra*, note 6, at 1066; Trimble, *supra* note 65, at 515 (“A plaintiff’s aspiration regarding the country or countries whose laws should apply to his claim will affect the plaintiffs definition of the territorial scope of his claim, and the territorial scope of his claim will affect the choice of applicable law.”). Note, however, that the court still has to first assume jurisdiction of the case, and the defendant (researcher) can raise *forum non-conveniens* arguments. However, in recent years, courts are more inclined to assume jurisdiction of international copyright cases); *Lucasfilm Ltd. v. Ainsworth*, 91–92 [2011] UKSC 39, (appeal taken from Eng.) (U.K.); *Performing Right Soc’y Ltd. v. Qatar Airways Grp. Q.C.S.C.*, 224 [2020] EWHC (Ch) 1872 (U.K.).

108. It should be noted that according to Article 7.2 of the 2019 Convention, parallel proceedings in the enforcing state are grounds for a court in that state to refuse enforcement of a foreign judgment. This ground of refusal applies if the proceedings are between the same parties on the same subject matter, and either (a) were brought to the court of the enforcing state first, or (b) there is a close connection between the dispute and the enforcing state. That means that in almost all cases alternative (a) does not apply, because the researcher rarely initiates proceedings. It also means that the researcher, as a defendant, might be able to stop the enforcement of a foreign judgment, but only if there is a close connection between the dispute

which the systematic risk discussed below grows.

Third, who has an incentive to request *enforcement* of the foreign judgment? Here, the answer is again—the rightholder. The prevailing rightholder has an incentive to seek enforcement of judgments rendered in their favor, ordering damages or injunctions. A binding international instrument on the matter would have obligated any member state to enforce the judgment, even if the use ruled on in the foreign judgment is permitted according to the laws of the enforcing state. Such enforcement, of course, undermines the right to research and copyright balances, on a case-by-case basis. As Rochelle Dreyfuss notes, in the context of foreign intellectual property judgments enforcement, “intellectual property suits are in some ways different from run-of-the-mill litigation: outcomes affect not only the parties to the suit, but also the health, safety, intellectual development, expressive capacity, and quality of life of the populace of the enforcing state.”<sup>109</sup> Additionally, as Marketa Trimble notes, defendants may lack

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and the enforcing state (de-facto, presumably such connection will be established if the dispute pertains to an intellectual property right protected in the enforcing state). In that case, the defendant will have to initiate and engage in costly proceedings in the enforcing court, in order to avoid having the foreign judgment enforced against them. Therefore, it can be expected that such proceedings will be rare. *See, e.g.*, Moore & Parisi, *supra* note 107, at 1328 (noting that forum shopping has distributional effects and efficiency implications); *see* Fabricio Bertini Pasquot Polido, *How Far Can Private International Law Interact with Intellectual Property Rights—A Dialogue with Benedetta Ubetazzi’s Book ‘Exclusive Jurisdiction in Intellectual Property,’* 9 J. PRIV. INT’L L. 171, 178 (2013); 2019 Convention, *supra* note 77.

109. Dreyfuss, *supra* note 75, at 436 (advocating for more discretion to be granted to courts deciding on the enforcement of foreign intellectual property judgments as opposed to “ordinary tort or contract actions”); Trimble refers to a scenario in which a conduct that is infringing in one state, whose court issued “a territorially unlimited injunction” to stop the use, yet the same conduct is permitted in another country, which is also covered by the extraterritorial reach of the injunction (“the target country”) under the target country’s copyright law, “which reflects a calibration of the target country’s copyright law with the country’s free speech and educational policies.” In such a case, Trimble notes that the injunction not only limits the user’s conduct in the target country, in conflict with the law of that country, but “it also limits the target country’s public in their access to and enjoyment of the content, which the target country’s law is designed to provide. In this case the [user] is definitely not the only person affected negatively by the importation of the IP rights from another country; the importation diminishes the public domain and encroaches onto the rights of the public in the target country. The effect on the general public of an importation of IP rights via a remedy might go unnoticed, particularly if the public has no standing and no actionable right to contest the remedy.” Trimble, *supra* note

the resources to object to requests for enforcement of the foreign judgment or be unwilling to bear the burden of such objection and it is uncertain whether representatives of the public, even when the public is affected, could contest such requests.<sup>110</sup> The next Section will discuss the systematic risk concealed within the accumulation of such cases.<sup>111</sup>

A note should be made here, as in some cases, the defendant (researcher) may prevail and win the case if the court finds that the use they made of a copyrighted work was permitted by the right to research. However, even in such cases, assumingly, the prevailing researcher will not seek enforcement of the judgment in another state; the main incentive to seek enforcement of a judgment granted in a foreign state (state of origin) is to collect damages ordered by the court if the losing party does not have any assets in the state of origin, or to enforce an injunction granted by the court of origin.<sup>112</sup> If the court in the state of origin determined that there was no copyright infringement

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65, at 541–42. This is applicable, of course, to the similar findings of infringement in a certain country, due to an act that is covered by the right to research, and is therefore permitted, by another country.

110. Trimble, *supra* note 65, at 547.

111. See, e.g., Wendy J. Gordon, *An Inquiry into the Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1351–52 (1989) (pertaining to an abuse by right holders).

112. See, e.g., Marketa Trimble, *Cross-Border Injunctions in U.S. Patent Cases and Their Enforcement Abroad*, 13 MARQ. INTELL. PROP. L. REV. 331, 345 (2009) (referring to a case where the defendant and its assets are not located within the issuing court's country as requiring enforcement of foreign judgments, although noting that the defendant may still voluntarily comply with court-ordered injunctions, and explaining a number of reasons why parties do so); Ronald A. Brand, *Federal Judicial Center International Litigation Guide: Recognition and Enforcement of Foreign Judgments*, 74 U. PITT. L. REV. 491, 494 (2013) (stating that the most common type of cases in which the question of recognition of foreign judgments arises in U.S. courts is when “the judgment creditor seeks to enforce a foreign money judgment through access to local assets of the judgment debtor”); David P. Stewart, *The Hague Conference Adopts a New Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters*, 113 AM. J. INT'L L. 772, 773 (2019) (stating that “[i]n an increasingly interconnected global economy, where cross-border transactions are common and defendants may well have no assets within the jurisdiction against which a successful plaintiff can enforce its judgment, the result has been a significant impediment to the complete and efficient resolution of transnational disputes,” and noting that absence of agreed on international standards can cause judgements rendered by courts of one country to face the risk of non-enforcement by courts of another).

because the use was permitted in accordance with the right to research, and barring any damages or injunction ordered in favor of the researcher, the prevailing researcher has no incentive to seek enforcement of the judgment in another state.

Of course, if a researcher is granted a judgment in their favor by the court of state X, stating that they do not infringe copyright in states X, Y and Z, the researcher may invoke this judgment as a defense if the copyright holder brings further proceedings for infringement due to the same use and work against the same researcher.<sup>113</sup> One may presume that if so, then the researcher has an incentive to prevent such proceedings in advance, by seeking enforcement of that foreign judgment<sup>114</sup> before the rightholder brings proceedings in states Y or Z. However, for the prevailing researcher to do so, they must initiate costly “protecting” proceedings in courts of both states Y and Z, based on the presumption that the rightholder will bring proceedings against them in these forums. This is a risk; the rightholder may never bring proceedings against the researcher in these forums, and then the researcher would have wasted their resources in vain. This is especially the case since if the rightholder does bring proceedings against the researcher in state Y or Z, and the researcher did not seek prior (protecting) enforcement of the judgment granted by state X in their favor, the researcher is at the same exact starting point: the researcher will seek enforcement of the foreign judgment by the court discussing the current proceeding, and if the court grants such enforcement, they will prevail. In other words, if the researcher initiates a “protecting” proceeding, they necessarily waste their resources, whilst their gain is speculative at best. If they wait for the rightholder to bring proceedings in another forum, they may save their costs, if the rightholder never brings such proceedings, while in no way being worse off than if they would have initiated a “protecting” proceeding.

These are the three main aspects of the ICE bias that create the

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113. Although, in light of the principle of territoriality, it is far from clear whether the courts of States Y and Z would accept such a ruling, even if it was made applying their respective laws. For example, Dinwoodie notes that identical rules of law may lead to different results when applied in different social contexts by different tribunals. *See* Dinwoodie, *supra* note 5, at 436.

114. As was mentioned, for the purposes of this article, enforcement also includes recognition of the foreign judgments. *See supra* note 7.

concrete risks posed to the right to research by enforcement of foreign copyright judgments, and specifically enforcement of foreign injunctions. The analysis above shows that the party dominant in the proceedings is the plaintiff, who will be the rightholder in most cases. A systematic risk also arises here, which will be especially severe if an international instrument obligating the enforcement of copyright judgments is established. As initiators of the proceeding, who choose the forum and benefit from the enforcement of foreign judgments, rightholders have an incentive to embark on strategic litigation to undermine the right to research. This risk is intensified if the rightholder is a large enterprise, as they will be more prone to use their resources to embark on such strategic litigation.<sup>115</sup> By contrast, researchers and other users ordinarily have significantly fewer resources,<sup>116</sup> and so the gap of powers once again works to benefit the rightholder.<sup>117</sup> This practice of strategic litigation may start a “race to the bottom:” the rightholder, who is the party that usually initiates the proceedings and chooses the forum, will always seek to bring

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115. See, e.g., Sag, *supra* note 104, at 1109 (describing the economic viability of the multidefendant John Doe lawsuit litigation as dependent on “suing as many defendants as possible in a single action to keep costs low and leveraging the threat of statutory damages in order to maximize the flow of settlement dollars”); Bracha & Goold, *supra* note 27, at 1067 (noting that large commercial repeat players are typically better situated to manage the risks of copyright compared to small entities and creators); Meyers, *supra* note 26, at 219 (describing how artists are cautious in leveraging existing works and thus creating a chilling effect on the artists’ expressions); Smith, *supra* note 27 (discussing the corporate copyright control concept in promoting revenues and sales as opposed to inspiring new expressions, leading to, among others, a chilling effect on users).

116. See Moore & Parisi, *supra* note 107, at 1328 (“By strategically choosing the forum, a plaintiff can maximize the expected return from litigation. The strategic choice of forum has distributional effects and efficiency implications. . . . [I]f some individuals are statistically more likely to be plaintiffs than defendants, such as property rights holders (copyright owner, patentee, or trademark owner), the opportunity for forum shopping may have biased distributional effects with a potential impact on the ex ante incentives of the parties.”); Lemley, *supra* note 19, at 186 (stating that individuals, non-profits, and small companies may not be able to afford the costs of a lawyer to argue in court that the use they made is fair use, and adding that even large studios and publishing houses that could afford to litigate fair use generally prefer to compromise outside of court, rather than test their rights in court).

117. See, e.g., Lemley, *supra* note 19, at 186; Cohen, *supra* note 106, at 1001–02; cf. Ginsburg, *Global Use/Territorial Rights*, *supra* note 6, at 321–22 (noting that barring a convenient forum, a plaintiff who is “an individual author or a modest copyright owner” is likely to give up cases ex ante).

proceedings in the jurisdiction implementing the narrowest, most limited right to research.<sup>118</sup> After obtaining a judgment ruling that their right was infringed, the rightholder will have an incentive to enforce the judgment in all other member states of the international instrument. Enforcing foreign copyright judgments may thus result in the strictest regime, which limits the right to research to the maximum, becoming the global norm.<sup>119</sup> Moreover, it follows that such enforcement will allow the most restrictive elements of each national law to become the global norm, resulting, de facto, in a global norm which is more restrictive than any national law or system as a whole. To borrow from the known term “chilling effect” and in light of the abovementioned description of the ICE bias, this will create an “ICEing” effect that will deter researchers from performing permitted research.<sup>120</sup>

It may be that this is the “worst case scenario” and that states will find ways to block such judgments from being enforced in their territories. However, at least three conditions should be met for states to refuse such enforcement. First, states must be aware of the risks to their copyright system. As this section discusses below, this risk is an elusive concept, which this article flags; second, states need to be free from international obligations to enforce such judgments. For example, international instruments on enforcement of foreign judgments should allow for such refusal. Third, states must have grounds to refuse such enforcement. Granted, private international law instruments usually allow courts to refuse enforcement of foreign judgments, inter alia, if the enforcement is “manifestly incompatible with the public policy” in the enforcing state.<sup>121</sup> However, this

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118. See Marinett, *supra* note 81, at 483–502. The court of course has to assume jurisdiction of the case and decide on the applicable law. As mentioned, courts are more willing to assume jurisdiction on international intellectual property cases, and to apply their own laws to them, especially if the infringement takes place over the internet. See *infra* Part III.

119. With regard to foreign defamation cases, compare *Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights? Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 3, 24, 125 (Feb. 23, 2010) (testimony and submission for the record of Kurt Wimmer, Partner, Covington & Burling, LLP), <https://www.congress.gov/event/111th-congress/senate-event/LC6795/text>.

120. Cf., Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 443 (2009) (discussing the chilling effect of statutory damages on individuals and technology providers).

121. See, for example, the 2019 Convention, *supra* note 77, art. 7.1(c) and the

exception does not suffice to protect the right to research, for both doctrinal and practical reasons: first, if the appropriate rule is that such judgments should not be enforced (to protect the right to research), then the rule should be drafted such that foreign copyright judgments will not be enforced, as relying instead on an exception that de facto constitutes the rule is a doctrinal anomaly; second, the public policy ground for non-recognition is “an exceptional device to be applied only in very limited situations, where the extension of the relevant judgment effects to the requested country openly undermines the fundamental principles and basic values of its legal order.”<sup>122</sup> The public policy exception is interpreted very narrowly by different states.<sup>123</sup> Therefore, in practice, relying on this exception will not

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2005 Convention, *supra* note 90, art. 9(e) (providing that enforcement of a foreign judgment may be refused if it would be manifestly incompatible with the public policy of the requested state).

122. De Miguel Asensio, *supra* note 68, at 490; *see also* Marketa Trimble Landova, *Public Policy Exception to Recognition and Enforcement of Judgments in Cases of Copyright Infringement*, 40 INT’L REV. INTELL. PROP. & COMPETITION L. 642 (2009).

123. *See, e.g.*, HCCH Special Commission on the Recognition and Enforcement of Foreign Judgments, Rep. Mtg. No. 5, ¶¶ 52–53 (2017) (outlining discussion of Chair of Working Group on IP Matters); S.A.R.L. Louis Feraud Int’l v. Viewfinder, Inc., 489 F.3d 474, 479 (2d Cir. 2007) (“The public policy inquiry rarely results in refusal to enforce a judgment unless it is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense. . . . The standard is high, and infrequently met.”); *see* Lydia Lundstedt, *Putting Right Holders in the Centre: ‘Bologsupplysningen and Ilsjan’ (C-194/16): What Does It Mean for International Jurisdiction over Transborder Intellectual Property Infringement Disputes?*, 49 INT’L REV INTELL. PROP. & COMPETITION L. 1022, 1038–39 (2018) (maintaining that public policy exception is narrowly applied, leading to legal uncertainty for users of copyright material); Yahoo!, Inc. v. La Ligue Contre Le Racisme et L’Antisemitisme, 433 F.3d 1199, 1252–53 (9th Cir. 2006) (holding unenforceable a French judgment rendered under law prohibiting Nazi propaganda because such law would violate the First Amendment); *cf.* De Fontbrune v. Wofsy, 39 F.4th 1214, 1227 n.11 (9th Cir. 2022) (“We leave for another day the question of whether a defendant’s lack of opportunity to assert a clearly *meritorious* fair use defense would render a foreign judgment repugnant to the public policy of the United States or of California.”). *See also* Ancel et al., *supra* note 66, at 68–69 (stating that the public policy safeguard “requires more than a mere incompatibility with the public policy of the forum . . . this device is an exception that is subject to restrictive interpretation. . . . Only serious breaches of essential values and fundamental principles of the law of the forum would justify intervention by way of this exceptional clause.”); Pedro de Miguel Asensio & Marketa Trimble, *International Law Association’s Guidelines on Intellectual Property and Private International Law (“Kyoto Guidelines”): Recognition and Enforcement*, 12 J. INTELL. PROP. INFO.



suffice.

A further concern, albeit less immediate, arises from enforcement of foreign copyright judgments granting the plaintiff statutory damages. For example, assume A sues B in state X for copyright infringement over the internet, for copying works in the process of data mining. Further assume that B operates from State Y. Court in state X finds that B infringed A's copyright protected in state X,<sup>124</sup> and grants a judgment ordering statutory damages in A's favor. A then seeks to enforce the monetary judgment in state Y. Further assume that according to the laws of state Y, B's use is fair use in line with the right to research. The enforcement of the foreign judgment itself by state Y will not prohibit B from continuing to make the permitted use de-facto as the judgment is monetary, and in any case only concerns infringement of the territorial copyright in state X. In that respect, enforcing a foreign copyright judgment granting the plaintiff statutory damages may be less intrusive of state Y's laws and sovereignty than enforcing a foreign judgment granting an extraterritorial injunction actually prohibiting the use. However, it may create a chilling effect over B's permitted use.<sup>125</sup> State Y may refuse to enforce the judgment as it will be considered repugnant to state Y's public policy, if state Y's national law includes such an exception, but in some states this argument is hard to make.<sup>126</sup> In addition, the chilling effect may occur

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TECH. & ELEC. COM. L. 74, 79–81 (2021) (explaining the public policy exception); GARCIMARTÍN & SAUMIER, *supra* note 94, ¶ 119, at 80–81 (“[T]he court addressed cannot refuse recognition or enforcement on the ground that there is a discrepancy between the law applied by the court of origin and the law which would have been applied by the court addressed.”); Karen E. Minahan, *The Public Policy Exception to the Enforcement of Foreign Judgments: Necessary or Nemesis*, 18 LOY. L.A. INT'L & COMP. L.J. 795 (1996) (analyzing the public policy exception, maintaining that empirical data reveals that the concerns that the exception will be abused so as to eliminate potential benefits of the underlying convention are exaggerated, and noting that the public policy exception as a defense against enforcement of foreign judgment is an important issue in HCCH negotiations).

124. For example, the court, implementing its internal laws, finds that the infringement took place in state X. *See infra* note 192 and accompanying text.

125. *See* sources cited *supra* note 27 and accompanying text. *Cf. Are Foreign Libel Lawsuits Chilling Americans' First Amendment Rights? Hearing Before the S. Comm. on the Judiciary*, *supra* note 119 (going one step further regarding defamation cases and stating that even if foreign defamation judgments are not enforced in the U.S., foreign judgments still create a chilling effect on free speech in the U.S.).

126. *See* sources cited *supra* notes 121–23 and accompanying text.

even if the enforcing state is not state Y; A may request state Z to enforce the judgment. State Z, *prima facie*, has no reason not to enforce the judgment, which does not concern copyright in state Z's territory. In that case, B will be deterred from continuing to make a use that is protected by their right to research as provided for by state Y's laws. This may also deter researchers from making full use of their national right to research and lead them to impose upon themselves more restrictive norms regarding their research.<sup>127</sup> Enforcement of foreign copyright judgments granting statutory damages may therefore also lead to "a race to the bottom."<sup>128</sup>

The analysis above thus reveals an unequivocal bias towards the rightholder, who is the main, and mostly the only, beneficiary of enforcement of foreign copyright judgments.<sup>129</sup> It further indicates a

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127. Cf. Jane C. Ginsburg, *International Issues: Which Country's Law Applies When Works are Made Available over the Internet?*, 34 COLUM. J.L. & ARTS 49, 53–54 (2010) (noting that archives and libraries are exposed to possible judgments ruling that a sum of money should be paid for every day of not obeying the court's orders, maintaining that archives and libraries should take that into account before making materials available online, even if such judgments are not enforced in the U.S.).

128. This concern of a "race to the bottom," which may restrict access to information to the maximum, has been previously discussed by scholars with regard to judicial extraterritorial takedown orders. See Marinett, *supra* note 81, at 483–502. In this context, Google's representative said, "one country shouldn't be able to decide what information people in other countries can access online. . . . Undermining this core principle inevitably leads to a world where internet users are subject to the most restrictive content limitations from every country." Davey Alba, *Google Fights Against Canada's Order to Change Global Search Results*, WIRED (July 24, 2017), <https://www.wired.com/story/google-fights-canada-order-global-search-results> (quoting David Price, senior product counsel at Google). Some scholars used even harsher words, commenting that "a court or government can now censor any online speech it believes to be contrary to a truth it deems universal." Robert Diab, *Search Engines and Global Takedown Orders: Google v Equustek and the Future of Free Speech Online*, 56 OSGOODE HALL L.J. 231, 256 (2019).

129. It is interesting to note that indeed, most academic articles, as well as many Member States of the HCCH, view the matter from the sole standpoint of the right holder. See, e.g., Polido, *supra* note 108, at 175, 187–88 (asserting that the primary reason why petitioned courts decline jurisdiction in cases involving foreign intellectual property rights is because they relate to a state's sovereignty of domestic policies and viewing private international law matters from the standpoint of the rightholder); Terence Yeo, *The Hague Judgments Convention: A View from Singapore*, 32 SING. ACAD. L.J. 1153, 1181 (2020) (focusing on the perspective of the right holder by concluding that there is a need to enforce judgments handed down by the country of protection because the internet allows traders to infringe on IP rights in another country without the need to maintain physical presence there);

risk of a race to the bottom that rightholders may embark upon and control, leading to the diminish of information flow for research purposes. The next Section will draw on the prism of legal transplants, to demonstrate that this outcome is caused by an elusive “transplant”, forcing an external approach of private international law on copyright rationales and balances.

### C. CONCEPTUALIZING THE RISK—IS THE RIGHT TO RESEARCH GETTING AN UNWANTED TRANSPLANT?

The method used in international forums to regulate the intersection between copyright law and enforcement of foreign judgments is to include copyright judgments within private international law instruments. This technique incorporates copyright law, or intellectual property law in general, into instruments which are inherently private international law instruments, and which also refer to many other fields of law.<sup>130</sup> Thus, it formally seems as if private international law instruments are the ones incorporating and “hosting” copyright law notions. This section analyzes this technique and argues that despite the technical incorporation of copyright law into private international law instruments, the actual effect here is the exact opposite. The analysis will demonstrate that substantively and unintuitively, it is not copyright law notions that are incorporated into private international law instruments and affects them. Rather, it is private international law external notions that are elusively incorporated into copyright laws, almost undetected, and may undermine their internal underlying balances. The right to research, as a balance of the utmost importance in the copyright paradigm, is therefore at a risk of being affected to a point that it will become null.

The prism of legal transplants may assist with this analysis. Coined in the 1970s under comparative law doctrine,<sup>131</sup> the term “legal

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Lundstedt, *supra* note 90, at 935 (noting the importance of including intellectual property matters in the 2019 Convention from the perspective of right holders, as it would have provided them with an effective means to enforce their rights).

130. This is evident by the 2019 Convention, the 2005 Conventions and the negotiations on a possible private international law convention in the 1990s. *See* Brand, *supra* note 85 (detailing the history of the Hague negotiations in the 1990’s, of the 2005 Convention, and of the 2019 Convention).

131. *See* John W. Cairns, *Watson, Walton, and the History of Legal Transplants*, 41 GA. J. INT’L & COMP. L. 637, 638–40 (2013) (explaining legal transplant study as comparative law).

transplants” refers to situations in which a rule from one jurisdiction is being adopted or borrowed (transplanted) into the laws of another jurisdiction.<sup>132</sup> In general, a legal transplant is a rule, created and developed in a specific environment, that is transplanted “as is” into another environment.<sup>133</sup> This analysis argues that the prism of legal transplants can be used, by way of analogy, to assist in analyzing situations in which a rule or a notion from one general field of law, such as intellectual property or private international law, is implemented into another general field of law. It further argues that critique pertaining to legal transplants can reveal the unwanted risks that enforcement of foreign copyright judgments pose to the right to research.

While some scholars view legal transplants as a natural and positive development of law,<sup>134</sup> others maintain that they may create complications due to their incompatibility with the borrowing system.<sup>135</sup> Kahn-Freund noted that whoever requires to transplant (borrow) a rule should have knowledge not only of the foreign law they wish to borrow, but also of the social and political context of the

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132. See Alan Watson, *Comparative Law and Legal Change*, 37 CAMBRIDGE L.J. 313 (1978) [hereinafter Watson, *Comparative Law & Legal Change*] (noting that legal rules can easily be transplanted from one system or society to another); ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* (2d ed., 1993) [hereinafter WATSON, *LEGAL TRANSPLANTS*]; O. Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) (explaining how rules or institutions could be transplantable); Paul Edward Geller, *Legal Transplants in International Copyright: Some Problems of Method*, 13 U.C.L.A. PAC. BASIN L.J. 199, 199 (1994) (defining legal transplant); Cairns, *supra* note 131, at 638 (noting that the first work on legal transplants was published in 1974); Toby Susan Goldbach, *Why Legal Transplants?* 15 ANN. REV. L. & SOC. SCI. 583, 583–97 (2019) (examining the history of legal transplantation and why it has been studied).

133. See, e.g., Watson, *Comparative Law & Legal Change*, *supra* note 132, at 313 (stating that one of the most obvious characteristics of legal rules is “the apparent ease with which they can be transplanted from one system or society to another”); Goldbach, *supra* note 132, at 584 (asserting that legal transplant is a conceptual tool used to study the movement of law from one jurisdiction or legal system to another).

134. See WATSON, *LEGAL TRANSPLANTS*, *supra* note 132 (noting that legal rules can easily be transplanted from one system or society to another); Watson, *Comparative Law & Legal Change*, *supra* note 132, at 313.

135. See Kahn-Freund, *supra* note 132, at 5 (holding that transplantation of an organism and part of a mechanism are comparable in purpose but nothing else). Elkin-Koren & Netanel, *supra* note 57, at 1129 (discussing the legal transplantation of U.S. fair use standard into other nation’s copyright regimes, describing the critique regarding said transplant and testing the credibility of said critique).

transplanted rule.<sup>136</sup> Freedland noted that “[f]or Kahn-Freund, the ‘problem of transplantation’ was the inappropriateness of assuming that a legal norm or structure which had been seen to work well in one jurisdiction could be successfully introduced into another.”<sup>137</sup> The basic question regarding legal transplants is whether a law originating in the society of one state may serve other states at all.<sup>138</sup> Scholars also argue that legal transplants raise questions concerning the geographical, sociological, economic, cultural, and political nature of the two jurisdictions—the donating jurisdiction and the borrowing jurisdiction.<sup>139</sup> This analysis argues that these observations are applicable, by way of analogy, when discussing the transplant of notions, principles, or rules from one legal field of law into another. Similar to specific national laws, fields of law are based on different economic, sociological, political, and cultural notions and principles. The economic-sociological-political-cultural environment and justifications from which intellectual property laws stem are different, for example, from the economic-sociological-political-cultural environment and justifications which serve as the foundation for tort laws. Further, they are different from the ones on which private international laws are based. Following Freedland and Kahn-Freund, this analysis considers the “inappropriateness of assuming” that a *general* legal norm, structure, principle, or rule which worked well in

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136. See Kahn-Freund, *supra* note 132, at 6, 27 (maintaining that “in most cases one must ask what chances there are that the new law will be adjusted to the home environment and what are the risks that it will be rejected,” as “any attempt to use a pattern of law outside the environment of its origin continues to entail the risk of rejection”); Cairns, *supra* note 131, at 644–45 (reflecting on Kahn-Freund’s assertion that anyone inclined to borrow laws should reflect on nature of society that generated the rule); Watson, *Comparative Law & Legal Change*, *supra* note 132, at 315–16 (referring to same factors as Kahn-Freund).

137. See Mark Freedland, *Otto Kahn-Freund (1900-1979)*, in *JURISTS UPROOTED: GERMAN-SPEAKING EMIGRÉ LAWYERS IN TWENTIETH CENTURY BRITAIN*, 299, 311–12 (Jack Beatson & Reinhard Zimmermann eds., 2004).

138. See Kahn-Freund, *supra* note 132, at 6–7 (examining Montesquieu’s environmental criteria of various factors linking law to its environment); Cairns, *supra* note 131, at 644–45 (reflecting on Kahn-Freund’s assertion that anyone inclined to borrow laws should reflect on nature of society that generated the rule).

139. See Kahn-Freund, *supra* note 132, at 7–8, 12–13 (following Montesquieu by referring to these elements as “environmental factors”); R. B. Seidman, *Book Review: Legal Transplants: An Approach to Comparative Law*, 55 B.U. L. Rev. 682 (1975) (referring to WATSON, *LEGAL TRANSPLANTS*, *supra* note 132).

one field of law could be successfully introduced into another.<sup>140</sup>

However, this requires first to identify the parties; the “home environment” (“host” or “recipient” system) into which the law is transplanted (the recipient system) and the foreign “donor” system should first and foremost be detected.<sup>141</sup> This identification is important not only from the perspective of critics, but from the perspective of advocates for legal transplants as well; it can be inferred that Watson, who is considered to be the conceptualizer of the term and a proponent of legal transplants,<sup>142</sup> also recognized the importance of this identification, as Watson maintained that the focus in transplanting a law should be on the borrowing (recipient) system.<sup>143</sup>

It follows that to examine the intersection between the two conceptual fields of copyright law, including the right to research, and private international law concerning foreign judgment enforcement, through the prism of legal transplants, we must first identify which is the recipient system and which is the donating system. Doing so is key to assessing the feasibility and possible effects of the transplant. This article argues that despite the technique used by international forums, in which copyright matters are formally incorporated into private international law instruments, the actual transplantation is reversed. Copyright matters are not transplanted into the field of private international law; rather, private international law norms are being transplanted into copyright law and interfere with its balances. This is apparent by reviewing the justifications underlying the two fields. With regard to enforcement of foreign judgments in general, private international law goals are to facilitate mechanisms that minimize litigation and allows the prevailing party of the proceeding to execute the judgment granted in their favor, to reduce costs and duplicative proceedings, increase predictability, and facilitate access to justice and

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140. Cf. Freedland, *supra* note 137, at 311–12 (discussing the inappropriateness of assuming that a legal norm that works well in one jurisdiction could be successfully implemented into another).

141. See Alan Watson, *Legal Transplants and Law Reform*, 92 L.Q. REV. 79 (1976).

142. See Cairns, *supra* note 131, at 638–39 (describing Watson’s legal transplant work).

143. See Watson, *supra* note 141, at 79; WATSON, LEGAL TRANSPLANTS, *supra* note 132, at 316–18, 321 (asserting that the relationship between legal systems as a result of borrowing is the heart of comparative law); see Cairns, *supra* note 131, at 646–47 (examining the history of scholarly debate on legal transplants).

judicial cooperation.<sup>144</sup> These mechanisms apply similarly to any proceeding, from any field of law, caught within the scope of international instruments on the matter.<sup>145</sup> The inclusion of copyright proceedings within the scope of these instruments, or the exclusion thereof, does not affect the internal justifications of private international law.

As shown above, copyright law is a system of territorial internal balances, including the right to research. An infringement of copyright in one state may be deemed a permitted use by the right to research in another. But applying private international law instruments requiring enforcement of foreign judgments to copyright may obligate a state to prohibit acts which are permitted in their territory by its right to research, thereby diminishing internal copyright balances in the name of private international law policies such as efficiency. Jane Ginsburg notes that “national copyright laws are a component of local cultural and information policies. As such, they express each sovereign nation’s twin aspirations for its citizens: exposure to works of authorship, and participation in their country’s cultural patrimony.”<sup>146</sup> Following that, the critique above may be especially important in the context of enforcement of foreign copyright judgments and the right to research, which itself incorporates national economic, cultural, political, and social considerations.<sup>147</sup>

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144. See, e.g., sources cited *supra* note 77; GARCIMARTÍN & SAUMIER, *supra* note 94, ¶¶ 12–19 at 48 (detailing the objectives of the 2019 Convention); Zhao, *supra* note 85, at 351 (asserting that the Convention provides legal certainty for parties, enhances effectiveness of judgements, helps avoid duplicative proceedings in different jurisdictions, and reduces costs and time associated with cross-border disputes, thereby increasing judicial efficiency and promoting access to justice).

145. See, e.g., 2019 Convention, *supra* note 77, art. 1.1 (“This Convention shall apply to the recognition and enforcement of judgments in civil or commercial matters.”). The Convention thus applies to any judgment, on any civil or commercial matters, unless the matter is explicitly excluded from the scope of the convention by a specific provision of the Convention. See also 2019 Convention, *supra* note 77, art. 2.

146. See Ginsburg, *supra* note 56, at 267 (noting that national copyright laws are a component of local cultural and information policies).

147. See sources cited *supra* notes 56, 67 and accompanying text; Reichman & Okediji, *supra* note 1, at 1378–80 (noting that different philosophical foundations of copyright protection produced two different approaches to limitations and exceptions in Continental traditions and in common law traditions); Samuelson, *supra* note 28, at 12–59; Geiger et al., *supra* note 56, at 3; Dreyfuss & Ginsburg, *supra* note 6, at 1066; Samuelson, *supra* note 59, at 95–96, 102–03, (considering the

The misleading technique of incorporating copyright judgments into private international law instruments leads to an approach that views the matter from a private international law perspective, which is external to copyright, instead of from the internal perspective of copyright laws themselves.<sup>148</sup> This approach leads to the ICE bias which serves in favor of the rightholder, overlooks researchers, copyright users, and balances, and undermines the right to research in practice, both in concrete cases and in a systematic, global manner, creating a race to the bottom. The ICE bias and its results affect the core balances of copyright law. Hence, the analysis argues that the “home environment” being affected by an external transplant is copyright law, and that the donating system is private international law. It follows that the international technique used to regulate copyright and private international law intersections is somewhat misleading. It shifts the center of attention to private international law justifications and goals, and away from copyright justifications and balances, and from the right to research, which are the ones truly affected. Here lies another risk, as the technique used stands in contradiction to the actual legal and policy effects, and masks them. This technique creates an elusive transplant that focuses the attention on the donating system—private international law—instead of on the real home environment system—copyright law.

This Part demonstrated that threats to the right to research caused by enforcement of foreign judgments are prominent and pressing due to international discussions on the matter. The analysis demonstrated, in detail, the risks posed to the right to research by enforcement of foreign copyright judgment, emphasizing that such enforcement is both concretely and systematically biased towards rightholders and against the right to research, and thus may undermine and diminish the

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goals and implications of the TRIPS Agreement, particularly its implications on the cultural dimensions of national intellectual property laws). Rochelle Dreyfuss notes that intellectual property law “is territorial precisely because its contours are importantly influenced by each society’s cultural, social, and intellectual needs, technological capacity, and appetite for progress; [intellectual property law] is complex because it must provide adequate incentives to innovate while taking into account the cumulative nature of knowledge development. Countries take divergent approaches to resolving these tensions.” Dreyfuss, *supra* note 75, at 441.

148. Cf. BENNETT & GRANATA, *supra* note 97, at 13 (explaining that intellectual property law and private international law are two separate and distinct fields of law).



right to research. Finally, this Part conceptualized the problem by inferring from the prism of legal transplants, arguing that private international law rules and norms are being elusively transplanted into the copyright regime, finding that the critique used to illustrate the difficulties of legal transplants may be applied to criticize the implementation of private international law standards into copyright law and the right to research. The next Part examines the effects of this phenomenon in practice.

### III. FROM THEORY TO PRACTICE

This Part analyzes the actual scope and practical risks posed to the right to research by enforcement of foreign copyright judgments, *de facto*. It starts by demonstrating the growing tendency of national courts to adjudicate transnational copyright cases, and a precedent in which Canada's highest court upheld an injunction requiring the worldwide removal of links to a website allegedly infringing intellectual property rights. This Part then examines whether actual practices may minimize, or even nullify, the risks demonstrated by this analysis, focusing on the possible use of other private international law rules and antisuit injunctions. Finding that no such practices adequately minimize the risks, this Part concludes by proposing solutions to the threats posed to the right to research exposed by this article, both at the national and at the international level.

#### A. THE INCREASING TENDENCY TO ADJUDICATE TRANSNATIONAL COPYRIGHT CASES AND POSSIBLE COUNTER ARGUMENTS

According to Dinwoodie, historically, courts in various states would only assume jurisdiction over cases involving alleged infringement of intellectual property rights registered or recognized under the laws of their own state, against conduct occurring in their state.<sup>149</sup> Courts would also dismiss cases regarding infringement of foreign intellectual property rights.<sup>150</sup> This tendency stems from the different approaches to copyright that different states implemented and from the principles of territoriality and sovereignty, recognizing

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149. See Dinwoodie, *supra* note 89, at 733 (noting that historically, national courts only assumed jurisdiction over alleged infringements of intellectual property rights recognized under the laws of that country).

150. See *id.*; see also Lundstedt, *supra* note 90, at 935.

that copyright law is a territorial law of balances and that its roots go down to national policies regarding culture, economy, and innovation.<sup>151</sup> Copyright cases concern not only the parties to the disputes, but the public as a whole; finding that a copyright is valid, and that a certain act constitutes an infringement of copyright, means that the public is deprived of conducting certain actions due to rights granted to the copyright owner, resulting in a higher price paid by the public.<sup>152</sup> Hence, some scholars and courts maintain that the authority to decide such matters should be given only to the state of the public who pays the higher costs—the state where the copyright is claimed to be protected.<sup>153</sup>

However, this tendency to dismiss claims concerning foreign copyright seems to be in the past, possibly due to the ubiquity of the internet and recent issues emerging from the existence of territorial intellectual property rights in a digital, global age.<sup>154</sup> As Dinwoodie notes, foreign courts may be more willing to assume jurisdiction over cross-border cases under their own intellectual property laws to

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151. See sources cited *supra* notes 56, 67 and accompanying text; see also sources cited *supra* note 147; Dinwoodie, *supra* note 89, at 733 (“National courts assumed jurisdiction only over alleged infringement of intellectual property rights conferred by their local law.”); Lundstedt, *supra* note 90, at 935 (noting that the “country of protection/registration is in many cases the most appropriate forum to adjudicate an infringement of an IP right,” and that because of the principle of territoriality, “the country of protection/registration may be the only State willing to exercise jurisdiction of the claim.”).

152. Dinwoodie, *supra* note 89, at 789–90 (discussing the function towards intellectual property law to the public).

153. *Id.* (“[Some courts and scholars] have grounded their legitimacy concerns . . . in the function of intellectual property rights.”); A United Kingdom court stated, although as part of an obiter dictum of a case regarding patents, that “[f]or myself I would not welcome the task of having to decide whether a person had infringed a foreign patent. Although patent actions appear on their face to be disputes between two parties, in reality they also concern the public. A finding of infringement is a finding that a monopoly granted by the state is to be enforced. The result is invariably that the public have to pay higher prices than if the monopoly did not exist. If that be the proper result, then that result should, I believe, come about from a decision of a court situated in the state where the public have to pay the higher prices.” *Plastus Kreativ AB v. Minn. Mining & Mfg. Co.*, [1995] R.P.C. 438, 447 (Eng.).

154. Ginsburg, *Global Use/Territorial Rights*, *supra* note 6, at 319 (discussing the role of the Global Information Infrastructure in eroding the principle of territoriality in the context of private international copyright law).

develop a body of precedent,<sup>155</sup> And indeed, recent cases demonstrate that national courts are more willing to assume jurisdiction over international copyright cases in practice.<sup>156</sup> However, assuming jurisdiction over an international copyright case in and of itself does not necessarily conflict with the right to research. If the assuming court applies the law of all other involved jurisdictions correctly, including the right to research protected in their respective territories, a practical problem may not arise. But if courts apply foreign laws incorrectly, or if they are willing to apply their own laws to transnational cases, or to issue global, extraterritorial injunctions, conflict arises.<sup>157</sup>

An example of this occurred in *Google Inc. v. Equustek Solutions Inc.*<sup>158</sup> In that case, courts in Canada found that a company named Datalink had breached several Canadian judgments by continuing to unlawfully use the intellectual property rights of Equustek in selling products on the Datalink website.<sup>159</sup> As a result, the Canadian courts enjoined Google from displaying any part of the Datalink website, on any of its search results, *worldwide*.<sup>160</sup> The case started in the Supreme Court of British Columbia, which gave the initial ruling,<sup>161</sup> proceeded on appeal by Google to the British Columbia Court of Appeals that upheld the ruling,<sup>162</sup> and went on to the Supreme Court of Canada which also upheld the ruling.<sup>163</sup> It is said to be the first time that a nation's highest court supported and upheld an injunction requiring a

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155. See Dinwoodie, *supra* note 89, at 792 (noting that this leads to broad comity concerns); see also Marinett, *supra* note 81, at 505–12 (discussing the connection between comity and territorial sovereignty, stating that “comity is the means by which courts attempt to fashion a tacit agreement on the content of private international law, even while adjudicating a particular case before them. The mechanism of such action is simple: a court, through its decision on a global internet takedown order, effectively suggests an international norm”).

156. See, e.g., *Lucasfilm Ltd. v. Ainsworth*, [2011] UKSC 39, ¶¶ 50, 105 (appeal taken from Eng.) (U.K.); *Performing Right Soc’y Ltd. v. Qatar Airways Grp.* Q.C.S.C., [2020] EWHC (Ch) 1872, ¶¶ 11, 72 (U.K.).

157. Cf. Ginsburg, *Global Use/Territorial Rights*, *supra* note 6, at 322 (noting that application of foreign law by the seized court may prove daunting, especially if the foreign laws differ significantly).

158. [2017] 1 S.C.R. 824 (Can.).

159. *Id.* at 826, 833–36.

160. *Id.* at 826, 841–46.

161. *Equustek Sols. Inc. v. Jack*, 2014 Can. LII 1063, ¶¶ 159, 161 (Can. B.C.S.C.).

162. *Equustek Sols. Inc. v. Google Inc.*, 2015 B.C.C.A. 265, ¶¶ 107, 113 (Can. B.C.).

163. [2017] 1 S.C.R.

company—Google—to remove links to a website which allegedly infringe intellectual property rights from its search results worldwide.<sup>164</sup>

Subsequent to the ruling by the Supreme Court of Canada, Google initiated proceedings in the United States, seeking a preliminary injunction, followed by a permanent injunction, stating that the Canadian judgment will not be enforced in the United States.<sup>165</sup> The U.S. District Court of the Northern District of California granted a preliminary injunction accordingly, holding that the Canadian judgment shall not be enforced in the United States as its enforcement would undermine policy goals of U.S. legislation and threaten free speech on the global internet.<sup>166</sup> Following the preliminary injunction, the same court granted a default judgment and a permanent injunction, ruling that the Canadian judgment shall not be enforced in the United States.<sup>167</sup> The same U.S. District Court similarly refused to enforce a French judgment regarding an *astreinte* resulting from a copyright infringement, maintaining that the use that the French court deemed as infringing actually constitutes fair use in the U.S.<sup>168</sup> This decision was reversed by the Ninth Circuit, but mainly because the Ninth Circuit found that the act itself would not have constituted fair use according to U.S. law.<sup>169</sup>

It should be noted that national courts of first and second instances have issued in the past, on occasion, injunctions with an extraterritorial effect due to infringement of intellectual property rights, albeit these injunctions were usually confined and limited in scope.<sup>170</sup> For

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164. Marinett, *supra* note 81, at 468; Diab, *supra* note 128, at 234.

165. Google LLC v. Equustek Sols. Inc., No. 5:17-cv-04207-EJD, 2017 WL 5000834, at \*4 (N.D. Cal. Nov. 2, 2017); Google LLC v. Equustek Sols. Inc., No. 5:17-cv-04207-EJD, 2017 WL 11573727, at \*2 (N.D. Cal. Dec. 14, 2017).

166. [2017] 1 S.C.R. at 828; 2017 WL 5000834 at \*4.

167. 2017 WL 11573727 at \*2. Following the U.S. district court decision, Google went back to Canada, this time applying to the Supreme Court of British Columbia to have the global injunction set aside or varied. This application was dismissed. *See Equustek v. Jack*, 2014 Can. LII ¶¶ 159, 161; *see also*, Marinett, *supra* note 81, at 469–75 (providing a detailed summary of the cases—both in Canadian and U.S. courts).

168. *See De Fontbrune v. Wofsy*, 409 F. Supp. 3d 823 (N.D. Cal. 2019).

169. *See De Fontbrune v. Wofsy*, 39 F.4th 1214 (9th Cir. 2022). A detailed discussion of the decision in this case is outside the scope of this paper.

170. Although, Marketa Trimble notes that “[r]emedies on the internet have global effects even if they are granted to enforce rights under a single country’s law.

example, courts in the United States have issued injunctions extending to Mexico, Canada, and Germany.<sup>171</sup> On other occasions, U.S. courts of appeals vacated such injunctions<sup>172</sup> or reaffirmed the territorial

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Unless the issuing court imposes some territorial restrictions on an injunction that is applicable to internet activities, the injunction extends globally.” Trimble, *supra* note 65, at 532. This determination is debatable, as Trimble recognizes, due to the continuing improvements of “geoblocking” and “geolocation technologies.” *See id.* The term “extraterritorial” in this article refers to any injunction reaching outside of the borders of the state of the court issuing the injunction. For discussion on the differences between an extraterritorial injunction and a cross border injunction, see *id.*

171. With regard to injunctions extending to Mexico, see, for example, *Steele v. Bulova Watch Co.*, 344 U.S. 280 (1952) (affirming a judgment by the United States District Court awarding, inter alia, injunction against acts of trademark infringement and unfair competition consummated in Mexico by a citizen and resident of the United States); injunctions extending to Canada see, for example, *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, No. ED CV14-01926 JAK (SPx), 2017 WL 3271706 (C.D. Cal. Aug. 1, 2017). However, the district court’s decision on this matter cited as a basis for the issuance of the injunction, inter alia, the finding by the jury of dilution of the plaintiff’s trade dress. This finding was contested on appeal, and the United States Court of Appeals for the 9th Circuit reversed it. *Blumenthal Distrib., Inc. v. Herman Miller, Inc.*, 811 F.App’x 421 (9th Cir. 2020); with regard to injunctions extending to Germany, see *Spindelfabrik Suessen-Schurr v. Schubert & Salzer Maschinenfabrik Aktiengesellschaft*, 903 F.2d 1568, 1577–78 (Fed. Cir. 1990). There, the injunction was granted after recurring infringements of a U.S. patent by manufacturing the underlying machines in Germany, for an American customer in order to send them to the customer, and shipping them to the United States. The U.S. Court of Appeals for the Federal Circuit affirmed the ruling, finding that “[t]he defendants’ repeated and “flagrant” violations of the district court’s earlier injunction fully justified” the issuance of such injunction, and that “[t]hese provisions are a reasonable and permissible endeavor to prevent infringement in the United States and not a prohibited extra-territorial application of American patent law.” *Id.*

172. For example, in *Tieleman Food*, the U.S. Court of Appeals for the Federal Circuit vacated an injunction with an overly-broad territorial scope that had no nexus to the United States. See *Tieleman Food Equip., B.V. v. Stork Gamco, Inc.*, 62 F.3d 1430 (Fed. Cir. 1995). In *Johns Hopkins* the same Court found that the district court abused its discretion in ordering the repatriation and destruction of products exported to Canada because the acts predated the grant of the patent for the products, thereby vacating the injunction. *Johns Hopkins Univ. v. CellPro, Inc.*, 152 F.3d 1342, 1365–68 (Fed. Cir. 1998). It should be noted, however, that the court stated that an injunction issued due to the infringement of a patent “can reach extra-territorial activities. . . . It is necessary however that the injunction prevent infringement of a United States patent.” *Id.*, at 1366–67. In *Spine Solutions*, the same court ordered the district court to vacate the extraterritorial portions of an injunction issued by the district court, finding that the district court abused its discretion in imposing extraterritorial restraints on the defendant, as its overseas sales cannot infringe any U.S. patent. *Spine Sols., Inc. v. Medtronic Sofamor Danek USA, Inc.*, 620 F.3d

scope of the U.S. intellectual property system.<sup>173</sup> Recently, the U.S. Supreme Court granted a petition for certiorari on a related matter—the question of the extraterritorial application of the U.S. trademark law—the Lanham Act.<sup>174</sup>

The cases cited above, and others,<sup>175</sup> indicate that national courts

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1305, 1320 (Fed. Cir. 2010).

173. See, e.g., *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531 (1972) (“Our patent system makes no claim to extraterritorial effect. . . . To the degree that the inventor needs protection in markets other than those of this country, the wording of 35 U.S.C. §§ 154 and 271 reveals a congressional intent to have him seek it abroad through patents secured in countries where his goods are being used.”); *Vanity Fair, Inc. v. T. Eaton Co.*, 234 F.2d 633, 642 (2d Cir. 1956) (“[W]e do not think that Congress intended that the infringement remedies provided in [the Lanham Act] should be applied to acts committed by a foreign national in his home country under a presumably valid trade-mark registration in that country.”). *But cf.* *Branch v. F.T.C.*, 141 F.2d 31, 35 (7th Cir. 1944) (stating, regarding unfair methods of competition, that “Congress has the power to prevent unfair trade practices in foreign commerce by citizens of the United States, although some of the acts are done outside the territorial limits of the United States.”). However, a discussion of this notion is outside the scope of this article.

174. *Hetronic Int’l, Inc. v. Hetronic Ger. GmbH*, 10 F.4th 1016 (10th Cir. 2021), *cert. granted sub nom. Abitron Austria GmbH v. Hetronic Int’l, Inc.*, 143 S. Ct. 398 (2022) (No. 21-1043). It should also be noted that in trade secrets cases, extraterritorial and even global injunctions are more common, aimed at maintaining the secrecy of the information, that renders the information a protected trade secret. See, e.g., RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 44 cmt. d (AM. L. INST. 1995) (“Geographic limitations on the scope of injunctive relief in trade secret cases are ordinarily inappropriate.”); see also, e.g., *Trimble*, *supra* note 65, at 529–30; *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) (“An injunction in a trade secret case seeks to protect the secrecy of misappropriated information and to eliminate any unfair head start the defendant may have gained. . . . A worldwide injunction here is consistent with those goals.”) (citation omitted); *Nordson Corp. v. Plasschaert*, 674 F.2d 1371, 1377 (11th Cir. 1982) (noting that “[i]n the abstract, most confidential information is worthy of protection without geographic limitation because once divulged the information or the fruits of the information quickly can pass to competitors anywhere in the world. As a practical matter, however, geographical limits often can be set,” thereby affirming the trial court’s judgement that issued the injunction to encompass Western Europe, Canada, and the United States) (citation omitted). A further debate regarding the grant of extraterritorial injunctions in trade secret cases is outside the scope of this article.

175. See, e.g., *Ginsburg*, *supra* note 127, at 53 (noting that in *Tribunal de Grande Instance (TGI)*, a French trial court ordered Google not only to make “snippets” from scanned books unavailable in France, but also to purge them from Google’s database in the United States) (citing *Tribunal de Grande Instance [TGI]* [ordinary court of original jurisdiction] Paris, 3e ch., Dec. 18, 2009, 09/00540, <http://www.juriscom.net/documents/tgiparis20091218.pdf>).

are more willing to adjudicate cases involving transnational aspects of copyright,<sup>176</sup> and may apply their own laws, or aspects of them, globally.<sup>177</sup> Indeed, the protection of copyrighted works in the global, digital era is a substantive problem. Jane Ginsburg notes, albeit regarding applicable law matters: “A key feature of the [Global Information Infrastructure (GII)] is its ability to render works of authorship pervasively and simultaneously accessible throughout the world. The principle of territoriality becomes problematic if it means that posting a work on the GII calls into play the laws of every country in which the work may be received when . . . these laws may differ substantively.”<sup>178</sup> However, the fact that national laws may—and do—significantly differ from one another is the key threat to the right to research in the context of enforcement of foreign judgments.<sup>179</sup> The cases cited above indicate that states with strong permitted uses or freedom of expression regimes should view the enforcement of foreign copyright judgments as highly suspicious, and should consider to refuse to enforce them as a matter of policy when it risks its own internal copyright balances. These cases strengthen the analysis above,

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176. Marinett, *supra* note 81, at 465, 475 (indicating that this phenomenon only becomes more relevant, and illustrating the concern that more restrictive states will follow such precedents, issuing increasing takedown orders, thereby undermining free flow of information); Diab, *supra* note 128, at 255 (suggesting that *Google v. Equustek* is a part of a larger trend in which courts acknowledge that the global nature of the internet requires nothing short of a global order in some cases).

177. *Google Inc. v. Equustek Solutions Inc.*, [2017] 1 S.C.R. 824, ¶¶ 44–49, at 846–48 (Can.). (“Google’s argument that a global injunction violates international comity because it is possible that the order could not have been obtained in a foreign jurisdiction, or that to comply with it would result in Google violating the laws of that jurisdiction is, with respect, theoretical . . . it hardly seems equitable to deny Equustek the extraterritorial scope it needs to make the remedy effective, or even to put the onus on it to demonstrate, country by country, where such an order is legally permissible. We are dealing with the Internet after all, and the balance of convenience test has to take full account of its inevitable extraterritorial reach when injunctive relief is being sought against an entity like Google. . . . Even if it could be said that the injunction engages freedom of expression issues, this is far outweighed by the need to prevent the irreparable harm that would result from Google’s facilitating Datalink’s breach of court orders.”).

178. Ginsburg, *Global Use/Territorial Rights*, *supra* note 6, at 319.

179. See Lundstedt, *supra* note 123, at 1044 (noting with regard to jurisdiction and trademarks that even in the E.U., which implements a relatively harmonized system of intellectual property law “a court in a Member State where a trademark is registered does not have jurisdiction to order a defendant to cease using the trademark on the internet with effect for all Member States because the court would exceed the scope of its jurisdiction, which is limited to its territory”).

as they make clear that the U.S. district court, in refusing to enforce foreign copyright judgments, applied the internal approach of national intellectual property balances, and freedom of expression, in deciding to do so.<sup>180</sup> They bring to mind the critique of legal transplants, maintaining that questions concerning geographical, sociological, economic, cultural, and political factors arise with relation to such transplants.<sup>181</sup> As shown above, these considerations are implemented into copyright laws as part of their balances.

This analysis argues that private international law instruments are not sensitive enough to copyright balances, as their approach is external to these balances and as they implement different goals and notions than the ones implemented by copyright law. Concluding an international instrument on the enforcement of foreign copyright judgments could have de-facto led to the enforcement of judgments, such as the *Google v. Equustek* judgment, by states such as the United States.<sup>182</sup> This means that states could have been obligated to enforce prohibitions on uses which are permitted according to their national laws in their respective territories. This, of course, undermines the right to research in these states. It follows that a possible international obligation to enforce foreign copyright judgments carries a true risk for the right to research, importing the balances of a different field of law—private international law—into copyright law. In doing so, national copyright balances and justifications are pushed out of the way, and private international law balances and justifications take their place. The risk is especially severe regarding the right to research. Brand already mentioned, in reference to the draft convention negotiated in the early 1990s through 2001, that different substantive

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180. See *Google v. Equustek*, [2017] 1 S.C.R. 824; *Google LLC v. Equustek Sols. Inc.*, No. 5:17-cv-04207-EJD, 2017 WL 5000834 (N.D. Cal. Nov. 2, 2017); *De Fontbrune v. Wofsy*, 409 F. Supp. 3d 823 (N.D. Cal. 2019); *De Fontbrune v. Wofsy*, 39 F.4th 1214 (9th Cir. 2022). It is worth noting that scholars identify at least two rights which are included under freedom of expression: the right of the speaker (to speak) and the right of the recipient to receive information—which is applicable to the cases discussed in this article. See Marinett, *supra* note 81, at 497–98.

181. See, e.g., *Limitations & Exceptions*, WIPO, <https://www.wipo.int/copyright/en/limitations> (last visited Dec. 2, 2022) (“limitations and exceptions to copyright and related rights vary from country to country due to particular social, economic and historical conditions.”).

182. The possibility to refuse the enforcement on grounds of the judgment being manifestly repugnant to public policy was discussed above; see sources cited *supra* notes 121–23 and accompanying text.



intellectual property laws on issues such as fair use cause concern to both content providers and content users in the context of private international law.<sup>183</sup> This is because authorizations of jurisdiction may result in decisions on substantive law in one state being more easily enforced by another state with significantly different substantive laws.<sup>184</sup> Brand noted that such enforcement may affect the balances found in national copyright laws and may have implications on both rightholders, authors, and users, such as libraries and academics.<sup>185</sup> The judgments cited above show that these concerns in fact materialized.

However, at least two counterarguments may arise against this backdrop, suggesting that the risks posed to the right to research by enforcing foreign copyright judgments are not at all grave. The first argument emerges from the private international law field itself, maintaining that other private international law rules overcome and defuse the risks described above. The second argument is based on a possible use by the researcher of proceedings that are becoming increasingly common in recent years—antisuit injunctions. This argument maintains that antisuit injunctions may benefit the researcher and minimize the risks described above. This section will discuss each of these counterarguments and show that they do not defuse these risks.

### 1. *Other Private International Law Rules*

This article discusses the intersection between intellectual property law and private international law in the context of the recent 2019 Convention, which is the most recent hard law intergovernmental instrument that an intergovernmental organization adopted on the

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183. Brand, *Intellectual Property*, *supra* note 88, at 602 (“With different substantive laws on issues such as moral rights and fair use, both content providers and content users are concerned about the extent to which authorizations of jurisdiction will result in decisions on substantive law in one state being more readily enforceable in a state with very different substantive law rules.”).

184. *Id.*

185. *Id.* (“This has implications for the balance affecting authors, libraries academics and consumers in the use of copyrighted material.”); Polido, *supra* note 108, at 187–88 (“This proposition seems to be concrete in connection with global issues . . . and the protection of the interests of particular groups . . . and goods . . . always in benefit of international co-operation, access to justice and respect of human rights.”).

subject.<sup>186</sup> It follows that this article focuses on enforcement of foreign judgments. But, of course, enforcement of foreign judgments is not the only intersection of intellectual property and private international law; to rule on a cross-border intellectual property case, a court discussing the case has to first assume jurisdiction of the case and address applicable law issues—both private international law branches that the 2019 Convention did not touch upon.<sup>187</sup>

An agreed-upon international instrument on jurisdiction and applicable law (choice of law) in cross-border intellectual property cases may have eliminated at least some of the problems raised in this article.<sup>188</sup> One concrete example in this regard is a possible international agreement stating that the applicable law in cross-border intellectual property cases is the law of the state where the infringement took place.<sup>189</sup> Such agreement may have appeased the states that were concerned that enforcement of foreign judgments would lead to an extraterritorial application of foreign laws in their

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186. See 2019 Convention, *supra* note 77.

187. See DAVID HILL, PRIVATE INTERNATIONAL LAW 1–3 (2014) (discussing the three pillars of private international law: jurisdiction, choice of law, and recognition and enforcement of judgments); Michaels, *supra* note 7, ¶ 2. (“Recognition and enforcement of foreign judgments is one of the three parts of conflict of laws, besides jurisdiction and . . . choice of law.”).

188. Cf. Graeme B. Dinwoodie, *Remarks by Graeme Dinwoodie*, 30 BROOK J. INT’L L. 885, 885 (2005) (noting that including applicable law issues in the discussion regarding a possible standard on intellectual property and private international law is “absolutely vital”); Dreyfuss & Ginsburg, *supra* note 6, at 1072, 1144–46 (noting that one of the concerns raised in the 1990’s negotiations was the undermining of the territorial nature of intellectual property law, which is based mainly on the risk that courts will apply the wrong law to a dispute, and proposing a new ground for refusal to enforce intellectual property judgments, in cases in which the court in the enforcing state finds that the choice of law applied to the case by the court that rendered the original judgment was arbitrary or unreasonable). Hague Conf. on Priv. Int’l L. [HCCH], *Principles on Choice of Law in International Commercial Contracts*, art. 1.7 (2015), <https://assets.hcch.net/docs/5da3ed47-f54d-4c43-aaef-5eafc7c1f2a1.pdf> [hereinafter *Hague Principles*]. It should be noted that the Hague Principles apply, very narrowly, to intellectual property matters and so does (albeit even more narrowly) the 2005 Convention. However, both only apply in the existence of a contract, and the Hague Principles also only constitute a soft-law instrument and thus cannot resolve the problems manifested in this article.

189. See also Berne Convention, *supra* note 38, art. 5.2 (“[T]he extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.”).

territories.<sup>190</sup> For example, if A sued B in state X, claiming that B infringed their copyright in both states X and Y, applying this rule would lead the court in state X to apply the laws of state X to the infringement that took place in state X, and the laws of state Y to the infringement that took place in state Y. However, even if all states agree to implement this rule in practice—an assumption that no consensus was reached upon in the negotiations of the 2019 Convention nor is completely unequivocal in legal literature<sup>191</sup>—at least two significant problems still arise. First, agreeing on rules to be used in determining where the infringement “took place” in the digital era—and specifically regarding infringements over the internet—may be highly controversial.<sup>192</sup> No such international agreement on choice

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190. *But see* Trimble, *supra* note 65, at 515 (“In countries like the United States, where the burden falls upon the parties to raise foreign law if they wish that law to be applied, rights owners may try to proceed based on the law of the forum even as regards infringements that have occurred outside the forum country. A plaintiff might claim infringements of IP rights existing in foreign countries, but if the court does not ascertain what the foreign law is, the court might proceed under forum law even with respect to the foreign IP rights infringements.”).

191. *Cf. id.* at 519 (noting that the negotiations of the 2019 Convention have shown that countries are not close to agreeing on an international standard for personal jurisdiction); Ginsburg, *supra* note 127, at 51–52 (citing Tribunal de Grande Instance [TGI] [ordinary court of original jurisdiction] Paris, 3 ch., Dec. 18, 2009, 09/00540, <http://www.juriscom.net/documents/tgiparis20091218.pdf>); Ginsburg, *supra* note 56, at 283–84 (discussing the importance of choice of law in copyright ownership matters, stating that “[c]opyright ownership is a particularly important area for choice of law, since the applicable rule will determine whether copyright ownership will vary with each national territory on which the work is exploited, or instead will remain constant, whatever the territory of exploitation”).

192. *See, e.g.*, Case C-172/18, *AMS Neve Ltd v. Heritage Audio SL*, ECLI:EU:C:2019:674, ¶ 30 (Sept. 5, 2019) (interpreting the concept “the Member State in which the act of infringement has been committed or threatened” regarding trademark infringement in online disputes); *see* Lydia Lundstedt, *AMS Neve and Others (C-172/18): Looking for a Greater ‘Degree of Consistency’ Between the Special Jurisdiction Rule for EU Trade Marks and National Trade Marks*, 69 GRUR INT’L 355 (2020) (discussing different interpretations of the concept by different courts); Trimble, *supra* note 65, at 508–09, 515 n.62, 515–17 (noting that “courts in different countries, and even different courts in the same country, may localize the same act or circumstance in different locations. . . . Cases of infringements that occur on the internet present the most obvious example of when an act or circumstance could be localized in multiple locations” and that when an infringement is claimed in a foreign country, the choice of law rules point to the law of that foreign country, as “[*lex loci protectionis*] is the typical rule for IP rights infringements”); *but see id.* (noting also that the rules and approaches for localization vary between countries and courts, hence result in differences of choice-of-law

of law exists, or was even recently discussed.<sup>193</sup> Therefore, had intellectual property matters been included in the 2019 Convention, member states would have been obligated to enforce judgments no matter what law was applied to the case.<sup>194</sup>

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analysis). See Dinwoodie, *supra* note 5, at 438–39 (noting that “[n]otions of conceptually defined places of conduct governing an infringement action become problematic when works are distributed . . . on the internet”); see also, Case C-194/16, *Bolagsupplysningen OÜ v. Svensk Handel AB*, ECLI:EU:C:2017:554, ¶ 70–90, (July 13, 2017) (opinion of Bobek, Advoc. Gen.) (discussing international jurisdiction for claims concerning harm to personality rights caused by information published online); Case C-194/16, *Bolagsupplysningen OÜ v. Svensk Handel AB*, ECLI:EU:C:2017:766, ¶ 32–44 (Oct. 17, 2017); Ginsburg, *supra* note 127, at 51–53 (noting that in France, courts discussed claims of copyright infringement by Google (Google Books and Google Images), finding at times that U.S. copyright law applies to the case and at other times that French copyright law apply); Jean-François Bretonnière & Thomas Defaux, *Online Copyright Infringement: When Google Images Finally Meets French law*, BAKER MCKENZIE LEXOLOGY 1–2 (Mar. 9, 2011), <https://www.lexology.com/library/detail.aspx?g=c8afd353-6c40-4aba-8088-18e5ff7bce8b> (discussing *SAIF v. Google*, *H&K v. Google*, and *SNE v. Google*). It should be noted that a court may assume jurisdiction of a case but only grant remedies regarding specific territories, and sometimes may not grant injunctions. It should further be noted that a different question in this regard is that of the law applicable to the case. Discussion of these issues is outside the scope of this article. See *Bolagsupplysningen OÜ*, ECLI:EU:C:2017:766, ¶ 50; Lundstedt, *supra* note 123, at 1038–39 (“If a court in the [EU] Member State of origin applies its own law to protect the moral rights of authors habitually resident in its territory with effects in other Member States, this might raise difficulties when the judgment is enforced in another Member State.”).

193. Some law scholars even propose a different approach that will apply one law to multinational copyright disputes. See Ginsburg, *supra* note 127, at 51 (analyzing the possible applicable law in multinational copyright infringement disputes, finding that “[t]here are a couple of alternative points of attachment. One is the law of the country from which the communication is originating. . . . Another possibility . . . is the law of the country where the harm from the communication is felt. . . . And a third possibility is the country with the most significant relationship to that communication, which could be . . . the country in which the communication is received.”); Jane C. Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37 VA. J. INT’L L. 587, 600–01 (2010) (1997) (proposing to apply, in multinational copyright cases, the law of the state from where the communication of the infringing work became available to the public, wherever that public may be located, or the law of the state which is the “nerve center” for foreign distributions).

194. It should be noted that the Special Commission that negotiated the 2019 Convention briefly discussed adding a possible ground that will allow for refusal to enforce a foreign judgment if “the judgment ruled on an infringement of an intellectual property right, applying to that right a law other than the law governing that right.” See *February 2017 Draft Convention* art. 7.1(g), (HCCH Special

Second, concerns may arise with regard to inaccurate application of a foreign law.<sup>195</sup> Say, for example, that A sued B in state X, claiming that B infringed their copyright in both states X and Y, and B claims that their use was permitted in state Y, under the right to research included in the fair use doctrine implemented by state Y. Applying the abovementioned rule would lead the court in state X to apply the laws of state X to the infringement that took place in state X, and the laws of state Y including fair use and the right to research, to the infringement that took place in state Y. However, in that case, a court in state X must apply the fair use doctrine of state Y to the case, and it may interpret it in a stricter, narrower manner than the interpretation the courts would have applied in state Y itself.<sup>196</sup> Court in state X may therefore issue an injunction on this basis. Since the Convention did not refer to these matters, the outcome may have been an obligation imposed on state Y to enforce such judgments in its own territory.<sup>197</sup> An agreement on such issues was out of the scope of the negotiations, and it is still seemingly far from reach.<sup>198</sup>

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Comm'n on Recognition & Enf't Foreign Judgments, Working Document No. 170 E Rev., 2017). This, however, does not solve the issue of interpretation of the phrase "the law governing the right" when an act online is involved.

195. For more regarding the rule that a foreign judgment will not be reviewed on its merits, see sources cited *supra* note 77 and accompanying text; the Explanatory Report states that "as a general matter, the court addressed is not to examine the substantive correctness of [a] judgment: it may not refuse recognition or enforcement if it considers that a point of fact or law has been wrongly decided," however, noting that "while the primary principle is that no review of the merits of the foreign judgment is permitted, applying the Convention may require consideration of legal or factual issues connected to the foreign proceedings or the foreign judgment. This paragraph is worded to strictly constrain such consideration, ensuring respect of the primary obligation not to review the merits of the foreign judgment." GARCIMARTÍN & SAUMIER, *supra* note 94, ¶¶ 119, 122–23. The Explanatory Report gives Article 7, that lists grounds for refusal, as an example that could justify a review on the merits of a foreign judgment. *Id.* ¶ 123; *cf.* Trimble, *supra* note 65, at 514 (noting that judges naturally prefer to apply the law of the forum—their national law—rather than foreign laws due to the extreme difficulty associated with applying foreign law correctly).

196. As Dinwoodie notes, identical rules of law may lead to different results when applied in different social contexts by different tribunals. See Dinwoodie, *supra* note 5, at 436.

197. In such a case, enforcement could have been refused only on the grounds and to the extent listed in the Convention. See, e.g., 2019 Convention, *supra* note 77, arts. 7, 9–10.

198. *Cf.* Zhao, *supra* note 85, at 365 (noting that "it was considered that harmonising court jurisdiction rules is unrealistic").

A more detailed discussion of these examples is outside the scope of this article. However, they are important to better understand why, as the international instruments stand today, enforcement of foreign copyright judgments may jeopardize the right to research.

## 2. *Antisuit Injunctions*

In recent years, litigants make increasing use of proceedings brought to courts seeking “antisuit injunctions” in intellectual property cases. Raushenbush defines an “antisuit injunction” as a court order prohibiting or conditioning the maintenance of a suit in another court.<sup>199</sup> The order is addressed to a party within the personal jurisdiction of the issuing court.<sup>200</sup> These proceedings are used mainly in relation to patents and specifically with regard to fair, reasonable, and non-discriminatory (FRAND) licenses of standard-essential patents (SEPs) by both rightholders and users.<sup>201</sup> But some pertain to copyright.<sup>202</sup> It is theoretically possible for a researcher to gain such an injunction, thereby enjoining a copyright holder from bringing proceedings for copyright infringement against them in other states. The researcher can choose to bring such antisuit proceedings to court in a state that implements a broad scope of the right to research, and, if the court grants an antisuit injunction in their favor, the researcher

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199. Richard W. Raushenbush, Note, *Antisuit Injunctions and International Comity*, 71 VA. L. REV. 1039, 1040 n.6 (1985) (defining antisuit injunction).

200. *Id.* at 1039–40 (analyzing antisuit injunctions and international comity); Edwin A. Perry, *Killing One Bird with One Stone: How the United States Federal Courts Should Issue Foreign Antisuit Injunctions in the Information Age*, 8 U. MIAMI BUS. L. REV. 123, 124 (1999).

201. SEPS are patents that are essential to the manufacture and sale of standardized products. *See, e.g.*, Jorge L. Contreras, *The New Extraterritoriality: FRAND Royalties, Anti-Suit Injunctions and the Global Race to the Bottom in Disputes over Standards-Essential Patents*, 25 B.U. J. SCI. & TECH. L. 251 (2019) (discussing various cases concerning antisuit injunctions in the context of SEPs and FRAND litigation).

202. *See, e.g.*, *Comput. Assocs. Int’l, Inc. v. Altai, Inc.*, 950 F. Supp. 48, 54 (E.D.N.Y. 1996); *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 126 F.3d 365, 372 (2d Cir. 1997), cert. denied, 523 U.S. 1106 (1998) (declining the appeal of the United States District Court for the Eastern District of New York dismissal of a request by Altai to enjoin Computer Associations from litigating a French claim of copyright infringement); *Skype Technologies SA v Joltid Ltd.*, [2009] EWHC (Ch) 2783 [10, 40] (U.K.) (granting an anti-suit injunction to enjoin Joltid from litigating in the U.S.). *See also* Perry, *supra* note 200, at 129–35 (analyzing U.S. and French copyright infringement case involving antisuit injunctions).

will be able to protect their right against proceedings taking place in other states. However, three comments should be made here. First, to date, much of the antisuit injunction cases pertain to patents, and specifically to FRAND and SEPs, and not to copyright, let alone to the right to research.<sup>203</sup> A detailed analysis of the presumed effect of FRAND-related antisuit injunction judgments on the possible prospect of researchers to be granted such injunctions is outside of the scope of this article, but numerous differences between the fields may render any such deduction at least not trivial. Second, the parties in most antisuit injunction proceedings, even if their main subject is copyright, are companies—mostly large companies such as Microsoft, Apple, Huawei, and Skype, that do not lack resources.<sup>204</sup> It is doubtful that a researcher will have the same resources to bring such proceedings to court.<sup>205</sup> Third, courts often dismiss requests for antisuit injunctions on the basis of the territoriality principle, rightfully finding that an intellectual property right in a given state is a different subject matter than an intellectual property right (even applying to the same work) in a different state.<sup>206</sup> Therefore, antisuit injunctions cannot resolve the

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203. Contreras, *supra* note 201, at 265–66 (discussing the U.S approach to cases involving FRAND royalty determinations).

204. *See, e.g.*, sources cited *supra* note 202; Microsoft Corp. v. Lindows.com, Inc., 319 F. Supp. 2d 1219, 1221 (W.D. Wash. 2004).

205. *See, e.g.*, sources cited *supra* note 202.

206. *See, e.g.*, Stein Assocs., Inc. v. Heat & Control, Inc., 748 F.2d 653, 658 (Fed. Cir. 1984) (denying a motion for antisuit injunction enjoining Heat & Control, Inc. from enforcing a British patent before a British tribunal, finding that “the issues are not the same, one action involving United States patents and the other involving British patents” and that only “a British court, applying British law, can determine validity and infringement of British patents”); *see also* Microsoft, 319 F. Supp. 2d at 1222 (finding that “trademark rights exist in each country solely according to that country’s statutory scheme”); *Comput. Assocs. Int’l*, 126 F.3d at 371–72 (discussing an antisuit injunction to prevent proceedings in France, and finding that “In short, the action in this country involved violations of Computer Associates’ United States copyright, and the French action involves violations of Computer Associates’ French copyright. We can discern no basis for enjoining Computer Associates from pursuing its French action; moreover, the interests of comity caution against such an injunction”); Zynga, Inc. v. Vostu USA, Inc., 816 F. Supp. 2d 824, 830 (N.D. Cal. 2011) (“In the context of an anti-suit injunction, this Court finds that a U.S. copyright claim is not the ‘same’ as a copyright claim arising under foreign law.”); Marshall Leaffer, *Cross-Border Enforcement of Intellectual Property Rights in U.S. Law*, in RESEARCH HANDBOOK ON CROSS-BORDER ENFORCEMENT OF INTELLECTUAL PROPERTY, *supra* note 68, at 3, 44. A further problem is that the standard for an issuance of an antisuit injunction is not unanimous, at least in the United State, where some courts favor international comity over their equitable power to grant such

problems exposed by the analysis in this article.

The analysis thus illustrates that, in practice, courts around the world are dealing with extraterritorial injunctions and enforcing foreign copyright judgments. It further demonstrates that using other private international law rules or antisuit injunctions will not adequately reduce the risks posed to the right to research by enforcement of foreign copyright judgments. In this regard, it is beneficial to draw inspiration from the international discussion on the enforcement of foreign judgments regarding other similar legal fields, which the next Section will address.

#### B. THE (LACK OF) ENFORCEMENT OF FOREIGN DEFAMATION AND PRIVACY JUDGMENTS

Copyright law is not the only field of law based on balances between rights and interests and affected significantly by the digitized and globalized modern world. It shares strong similarities with two other balance-based fields of law: defamation and privacy.<sup>207</sup> These three fields of law deal with very similar challenges: all of them are based on national balances between human rights and interests.<sup>208</sup> The rights they incorporate, which are of a national nature, have become more exposed to transnational proceedings in recent years due to the ubiquity of the internet.<sup>209</sup> With regard to all these fields of law, as a result of different national legislation, the same act may be a violation

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injunctions, whereas others apply a more lenient approach for the issuance of such injunctions. *See id.* at 43.

207. Another field that may be considered in this regard is personality rights. *See generally* Lundstedt, *supra* note 90. However, since the content of this right is less harmonized globally, and as it might be viewed as a part of privacy, defamation, or intellectual property law, this article will not discuss it in detail.

208. Cristina M. Mariottini, *The Exclusion of Defamation and Privacy from the Scope of The Hague Draft Convention on Judgments*, 19 Y.B. PRIV. INT'L L. 475 (2018) (discussing the exclusion of defamation and privacy matters from the scope of the 2019 Convention).

209. Ginsburg, *supra* note 127, at 49–51 (referring to the fact that with regard to copyright, privacy, and defamation, different states implement different standards, which may lead to problems in the era of the internet, specifically to the risks of the defendant being sued in another country or having an unfavorable law applied to the case); *see also* Dreyfuss & Ginsburg, *supra* note 6, at 1074 (noting that “localizing torts involving intangible rights can be difficult”); Dinwoodie, *supra* note 5, at 430, 442.



of the right in one state, but a permitted act in another.<sup>210</sup> This is not to say that these fields of law are identical. Indeed, there are also some significant differences between them; for example, the territoriality principle, which is unique to intellectual property rights.<sup>211</sup> However, they do share common denominators and principles that are important for the purposes of this analysis, as noted above.

Therefore, it is interesting to examine the ongoing international and academic debate on the enforcement of foreign defamation judgments<sup>212</sup> and privacy judgments.<sup>213</sup> This analysis maintains that national laws, academia, and the international community tend to view enforcement of defamation and privacy judgments through the internal approach of the substantive laws themselves, as opposed to through the external approach of private international law.<sup>214</sup> In the words of

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210. See sources cited *infra* notes 212–13; see also Trevor C. Hartley, *Libel Tourism and Conflict of Laws*, 59 INT'L & COMP. L.Q. 25, 26 (2010) (“The problem is that if English courts assume jurisdiction in too wide a range of cases . . . countries that give more weight to free speech could legitimately complain that the English courts were undermining their freedoms.”); Peter Arnt Nielsen, *Choice of Law for Defamation, Privacy Rights and Freedom of Speech*, 6 OSLO L. REV. 32, 32–42 (2019) (discussing defamation, privacy rights, freedom of speech, controversial cases concerning those themes, and the Rome II Regulation); Ginsburg, *supra* note 127, at 50–51 (stating, in the context of applicable law issues pertaining to the internet, that the national laws of copyright, privacy, and defamation differ between states).

211. See Lundstedt, *supra* note 123, at 1029 (noting that personality rights protect a person everywhere, whereas the protection afforded by registered trademarks and economic copyright is territorially limited to the state of registration or protection).

212. See generally Justyna Regan, *Recognition and Enforcement of Foreign Judgments—A Second Attempt in the Hague*, 14 RICH. J. GLOB. L. & BUS. 63, 79–81, 88 (2015) (discussing “libel tourism”); see also Daniel C. Taylor, *Libel Tourism: Protecting Authors and Preserving Comity*, 99 GEO. L.J. 189 (2010) (discussing the foundations of libel tourism and legislative solutions to it); Robert L. McFarland, *Please Do Not Publish This Article in England: A Jurisdictional Response to Libel Tourism*, 79 MISS. L.J. 617, 624 (2010) (arguing that the correct solution to competing concerns regarding libel tourism should be “grounded in jurisdictional restraint”); Andrew R. Klein, *Some Thoughts on Libel Tourism*, 38 PEPP. L. REV. 375 (2011) (discussing libel tourism in cases where plaintiffs seek to enforce foreign judgments in the U.S., reviewing reactions from scholars, legislators, and courts, and assessing whether those reactions properly balance comity and free speech concerns).

213. See generally Stewart, *supra* note 112, at 776 (analyzing the differences between various legal systems in regard to defamation and privacy); Cristina M. Mariottini, *The Exclusion of Defamation and Privacy from the Scope of The Hague Draft Convention on Judgments*, 19 Y.B. PRIV. INT'L L. 475 (2017/2018).

214. *Id.*

this analysis, they recognize defamation or privacy law as the “home environment,” and private international law as the donating field of law. At the national level, this approach is manifested, for example, by U.S. legislation—the Securing the Protection of Our Enduring and Established Constitutional Heritage (SPEECH) Act, enacted in 2010.<sup>215</sup> The Act states that foreign defamation judgments shall not be enforced in the United States, unless “the defamation law applied in the foreign court’s adjudication provided at least as much protection for freedom of speech and press in that case as would be provided by the first amendment to the Constitution of the United States” or “the party opposing recognition or enforcement of that foreign judgment would have been found liable for defamation by a domestic court applying the first amendment to the Constitution of the United States.”<sup>216</sup> In the academic debate, the internal approach is evident as scholars refer to the fundamental and constitutional rights implemented, and to the balances required, by defamation and privacy laws—as opposed to private international law justifications—as the main considerations that should be addressed in this regard.<sup>217</sup>

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215. SPEECH Act, 28 U.S.C. § 4101–4105.

216. *Id.* § 4102(a)(1), (c)(1); Stephen Bates, *More SPEECH: Preempting Privacy Tourism*, 33 HASTINGS COMM. & ENT. L.J. 379 (2011) (describing the SPEECH Act and defining a new risk of “privacy tourism”).

217. With regard to defamation, scholars note the sensitivities in the extraterritorial imposition of standards pertaining to freedom of expression, constitutional rights and silence of opinions (proceedings relating to this intersection are also known as Strategic Lawsuits Against Public Participation or SLAPP). See Douglas et al., *supra* note 89, at 435; see generally Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 348 (1978); Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 10 (1990) (suggesting that *New York Times v. Sullivan* has brought most defamation suits involving public issues under constitutional scrutiny); Yonathan A. Arbel & Murat Mungan, *The Case against Expanding Defamation Law*, 71 ALA. L. REV. 453 (2019) (arguing that the notion that defamation law protects reputations is faulty and discussing the goals and functions of defamation law). With regard to privacy, see Bates, *supra* note 216 (discussing the SPEECH Act and privacy tourism); Cara North, *The Exclusion of Privacy Matters from the Judgments Convention*, 67 NETH. INT’L LAW REV. 33, 33 (2020) (describing “how and why the Diplomatic Session decided to exclude privacy matters from the [2019] Convention”). See also GARCIMARTÍN & SAUMIER, *supra* note 94, ¶¶ 61–63 at 62–63 (discussing the exclusion of privacy matters from the scope of the 2019 Convention and noting the sensitivities in the extraterritorial imposition of standards pertaining to freedom of expression and constitutional rights in this regard); Mariottini, *supra* note 213, at 749–50 (explaining why defamation and privacy

At the international level, the internal approach is evident by virtue of private international law instruments. Examining these instruments, the differences between the internal approach they implement regarding defamation and privacy law on the one hand, and the external approach they implement with regard to copyright—and intellectual property law in general—on the other hand, are striking. The Explanatory Report of the 2019 Convention (Explanatory Report) refers distinctively to each of these fields of law, which were all excluded from the scope of the Convention.<sup>218</sup> With regard to defamation, the Explanatory Report states that “[d]efamation is a *sensitive matter for many States*, since it touches on *freedom of expression* and therefore may have *constitutional implications*.”<sup>219</sup> With regard to privacy, the Explanatory Report states: “As with defamation, privacy involves a *delicate balance between fundamental or constitutional rights*, in particular *freedom of expression*, and is a *sensitive matter for many States* . . . Privacy law is currently in great flux in many *States*.”<sup>220</sup> It can thus not be more clear that the Explanatory Report and the negotiations of the 2019 Convention take the internal approach rather than the external private international law approach, with regard to defamation and privacy. The Explanatory Report explicitly mentions the internal perspective of states on these matters.<sup>221</sup> Furthermore, the Explanatory Report specifically refers to the balances set forth in national defamation and privacy laws regarding constitutional and fundamental rights.<sup>222</sup> These considerations led to a common understanding and agreement upon which cross-border enforcement of defamation and privacy judgments

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matters were excluded from the scope of the 2019 Convention, noting that “[t]he ascertainment of defamation and privacy violations entails a balancing of the right to one’s private life with (often constitutionally mandated) countervailing rights and interests. The different balancing of such competing values renders the matters of defamation and privacy claims sensitive for national legislators,” adding that these exclusions support the avoidance of a systematic recourse to the public policy exception). For a discussion regarding the right to be forgotten, see Marinett, *supra* note 81.

218. See generally GARCIMARTÍN & SAUMIER, *supra* note 94, ¶¶ 60–63 at 62–63 (reviewing paragraphs 1(k) (defamation) and 1(l) (privacy) of Article 2: Exclusions from Scope, of the 2019 Convention).

219. *Id.* at 62 (emphasis added).

220. *Id.* at 63 (emphasis added).

221. *Id.* at 62–63.

222. *Id.*

is generally problematic and undesirable.<sup>223</sup> However, with regard to copyright, and intellectual property law in general, the Explanatory Report does not make any reference to states, to fundamental rights, or to internal balances of national laws. The Explanatory Report simply explains how the term “intellectual property” should be interpreted for the purposes of the Convention and in what cases the Convention may or may not technically apply to such cases.<sup>224</sup> The right to research as an important balance and a part of the copyright system has been completely erased from consideration.

Following the analysis above, it is clear that copyright law and the right to research must be granted the same courtesy granted to defamation and privacy law. The discussion on enforcement of foreign copyright judgments should thus be taken from an approach focused on the internal justifications and balances of copyright, including the right to research,<sup>225</sup> as opposed to the external approach of private international law norms.

Applying the internal approach to the enforcement of foreign copyright judgments means that the substantive national copyright laws and balances of the enforcing state, including the right to

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223. Douglas et al., *supra* note 89, at 435; *see also* GARCIMARTÍN & SAUMIER, *supra* note 94, ¶¶ 60–63, at 62–63 (arguing that both defamation and privacy implicate freedom of expression concerns for many States); 2019 Convention, *supra* note 77, art. 2.1(k), (l).

224. GARCIMARTÍN & SAUMIER, *supra* note 94, ¶¶ 64–65, at 63–64 (discussing what is covered by the intellectual property exclusion and how it applies to contracts concerning intellectual property).

225. In this regard, it is interesting to note that stakeholders, including right holders, were not necessarily enthusiastic supporters of the inclusion of copyright and intellectual property rights within the scope of the conventions negotiated by the HCCH. In fact, both with regard to the convention discussed in the early 1990s through 2001 and the 2019 Convention, some stakeholders expressed reservations on the matter, with some even supporting the exclusion of intellectual property from the scope of these conventions. This article argues that intellectual property stakeholders are generally more prone to consider the matter of enforcement of foreign copyright judgments in light of intellectual property justifications (the internal approach), in comparison with private international law experts and forums. They are more sensitive to the internal balances of copyright law, including the right to research. The fact that stakeholders argued against the inclusion of intellectual property judgments within the scope of these conventions thus strengthens the argument that such enforcement is highly problematic and may undermine copyright balances. With regard to the Convention discussed in the early 1990s through 2001, *see* Brand, *Intellectual Property*, *supra* note 88, at 594–95. With regard to the 2019 Convention, *see* Lundstedt, *supra* note 90, at 933–36.

research, are considered. It would entail an outcome rejecting the enforcement of foreign judgments insofar as they prohibit acts which are permitted by the right to research in the enforcing state. The right to research, as other permitted uses, would then be protected. The next and final Section briefly explores practical solutions to further ensure the right to research is protected.

### C. PROPOSED SOLUTIONS

The analysis above manifests the need to address solutions on two levels: the international level and the national level. Different solutions should be sought for each of them.

First, on the international level, international forums and academics make efforts to establish international instruments to allow for the enforcement of foreign copyright judgments. In general, it is doubtful whether this day and age constitute the opportune moment in history to adopt such a binding, hard-law instrument. Previous efforts to negotiate such binding instruments used a significant amount of the international community's resources, only to ultimately fail after decades of work.<sup>226</sup> However, as demonstrated, if and when such debate takes place, it should implement an approach focusing on internal copyright justifications and balances rather than an external private international law approach. The internal approach will identify copyright law as the "home environment" to which a foreign rule (private international law) is applied.<sup>227</sup> As such, the discussion will naturally take into account the protection of the right to research, since this right will be rightfully viewed as an integral part of the home environment itself. This analysis further maintains that such an instrument, if adopted, would do well to address all aspects and intersections of intellectual property law and private international law.<sup>228</sup> Such instrument should therefore include matters relating to

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226. See sources cited *supra* note 89 and accompanying text.

227. See, e.g., Dreyfuss & Ginsburg, *supra* note 6.

228. See Dinwoodie, *supra* note 188, at 885–86 (stating that the intersection between intellectual property and private international law "can really only be addressed by looking at all of the different components of . . . the "jigsaw puzzle" of private international law, namely, jurisdiction, choice of law or applicable law, and [enforcement] of judgments," arguing that intellectual property lawyers have never thought consciously about the separation of jurisdiction, choice of law, and enforcement). Dreyfuss and Ginsburg also proposed to create a private international law instrument drafted specifically for intellectual property disputes, albeit for

jurisdiction, applicable law (choice of law) and enforcement of foreign intellectual property judgments, and should minimize the risks posed to the right to research, as discussed above.

In practice, to achieve this goal, the discussions on any such international instrument should be facilitated by WIPO—a copyright-expert forum—rather than by the HCCH—a private international law-expert forum—or any other non-intellectual property expert forum.<sup>229</sup> Whereas it is crucial to have experts on both branches of law in any such discussion, a copyright-focused forum is best suited to understand, consider, and maintain all internal nuances of copyright policies and balances. A copyright specialized forum is also more likely to be able to reach the specialized sector and copyright stakeholders, including academics and researchers, and to facilitate a comprehensive and inclusive discussion ensuring the participation of all players in the field of copyright law and the right to research. WIPO already facilitates extensive discussions on the right to research,<sup>230</sup> and has previously discussed the intersection of intellectual property and private international law.<sup>231</sup>

Second, on the national level, national courts may encounter specific requests for enforcement of foreign copyright judgments, which may undermine the right to research in their respective territories. States may therefore find themselves having to set rules for

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different reasons (which are mainly, first, accepting efficiency as a principal target; second, such an instrument would specifically regulate matters relating to the intangibility of intellectual property rights and concerns which are unique to the creative community; and third, confining such instrument to rights covered by the TRIPS Agreement and opening it to signature only by member states of this Agreement). Dreyfuss & Ginsburg, *supra* note 6, at 1066–67.

229. This solution was previously proposed, with regard to the 1990's negotiations, by Dreyfuss and Ginsburg. *See id.* at 1065–66.

230. For many years WIPO has been exploring limitations and exceptions to copyright regarding, *inter alia*, the right to research. It has done so mainly in its Standing Committee for Copyright and Related Rights (SCCR). This should come as no surprise; as the analysis proposes, limitations and exceptions are an integral part of copyright. Hence, it is only natural for a forum specialized in copyright to discuss this matter routinely. *See Standing Committee on Copyright and Related Rights (SCCR)*, WIPO, <https://www.wipo.int/policy/en/sccr> (last accessed Sept. 30, 2022) (exploring limitations and exceptions to copyright, *inter alia*, for research).

231. *See WIPO Forum on Private International Law and Intellectual Property*, WIPO (Jan. 30–31, 2001), [https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=4243](https://www.wipo.int/meetings/en/details.jsp?meeting_id=4243) (last accessed Sept. 30, 2022).

such enforcement.<sup>232</sup> Here, again, states should design the framework for such enforcement with the view of protecting their own internal copyright law balances, including the right to research, as the “home environment.” They should carefully consider which private international law rules they are willing to transplant into their copyright laws in this regard, if at all. The methodology states should apply in determining which foreign copyright judgments to enforce, and to what extent, can be discussed at length, but this is not the place to do so. However, an immediate possible solution is to refrain at least from enforcing injunctions granted by courts of foreign states, which may prohibit the user from carrying out a use permitted in the enforcing state, as enforcing such injunctions have an immediate effect on internal copyright balances and on the right to research in the enforcing state, and may undermine them.<sup>233</sup> This is no radical solution; as Dinwoodie noted, direct enforcement of injunctive relief is rarely acceptable.<sup>234</sup>

## CONCLUSION

The territorial nature of copyright and the right to research, combined with different approaches for the implementation of the right to research in different states, makes the right to research especially vulnerable at the transnational level. Enforcement of foreign copyright judgments exacerbate this vulnerability. First, it undermines the national scope of the right to research set forth by different states. Furthermore, it may create a race to the bottom, which will diminish the right to research due to an inherent bias of private international law and intellectual property proceedings towards

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232. Matters of jurisdiction and choice of law may also arise at the national level. However, a detailed discussion on these matters is outside the scope of this article.

233. Cf. Dreyfuss & Ginsburg, *supra* note 6, at 1088, 1148–49 (proposing to allow states to refuse the enforcement of injunctions and accept damages in lieu of injunctions in certain cases if the original judgment “conflicts with fundamental cultural policies in the State where enforcement is sought”).

234. Dinwoodie, *supra* note 89, at 762 (arguing that injunctive relief orders are often incapable of direct recognition and enforcement); cf. Dreyfuss, *supra* note 75, at 446–48 (discussing problems arising from enforcement of nonmonetary relief and possible solutions). *But see* De Miguel Asensio, *supra* note 68, at 479 (noting that traditionally, legal systems, especially common law jurisdictions, have been reluctant to enforce foreign non-monetary judgments but in most jurisdictions, including the United Kingdom, Australia, and the United States, there is a current clear trend to now make possible such enforcement).

rightholders, summarized here by the acronym ICE. This phenomenon can be analyzed and conceptualized, by way of analogy, using the prism of legal transplants, which makes clear that the abovementioned risks are intensified by the misidentification of the affected (receiving) field of law as private international law, when it is in fact copyright law. Recent efforts to negotiate a binding international instrument on the enforcement of foreign copyright judgments in the framework of the 2019 Convention support this analysis, as they expose a gap between two approaches—the external and internal approach. Considering the matter from the external approach of private international law usually tilt the balance in favor of the rightholder over the researcher who uses their right to research. The external approach undermines core justifications and balances of copyright laws to the extent that it may nullify the right to research. Judgments granted in recent years further aggravate these risks. As the right to research is of prominence to achieve not only scientific progress, but also the internal balances set forth by copyright laws per se, the prevailing approach in policy making should be to consider the matter from the internal approach of copyright laws and their underlying rationales and balances. The internal approach will protect the right to research from being undermined, and de-facto nullified, at both the national and international levels.