仲裁硏究, 第16卷 第1號
2006년 3월 2일 발행, pp.343-375

논문접수일 2005. 10. 27
게재확정일 2006. 2. 16

The Hague Convention on Jurisdiction and Enforcement of Judgments

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〈목 차〉

Key Words : Hague Convention, Enforcement of Foreign Judgment, WIPO, Intellectual Property, Copyright, Infringement

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Ⅰ. Introduction

It is a basic principle of international law that national law cannot extend beyond its own borders or territories.[1] Traditionally, copyright protection has been territorial and national laws have applied only to acts of infringement committed in a particular country, regardless of the national origin of the infringed work.[2]

However, the recent proliferation of new technologies that allow for the reliable, widespread and virtually instantaneous transmission of digital files has created a swell of litigation worldwide.[3] Moreover, the spread of copyrighted works on the Internet has led to the rise of multinational infringements, forcing copyright owners to bring enforcement actions in hundreds of countries at the same time.[4]

By mandating the non-discrimination rule of national treatment, the principal multilateral copyright conventions in effect today are aimed at promoting the international exchange of works of authorship.[5] But while copyrights are mainly territorial and apply only within the borders of a particular country under the current international copyright regime, a territorial copyright receives automatic protection in all other Berne

1) Graeme B. Dinwoodie, William O. Hennessey & Shira Perlmutter, I*nternational Intellectual Property Law and Policy*, 1 (LexisNexis 2001).

2) 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).

3) Jeffrey L. Dodes, *Beyond Napster, Beyond the United States: The Technological and International Legal Barriers to On-Line Copyright Enforcement,* 46 N.Y.L. Sch. L. Rev. 279, 279 (2002)

4) Brenda Tiffany Dieck, *Reevaluating the Forum Non Coveniens Doctrine in Multiterritorial Copyright Infringement Cases,* 74 Wash. L. Rev. 127, 127 (1999).

5) Graeme B. Dinwoodie, *International Intellectual Property Litigation: A Vehicle for Resurgent Comparativist Thought?*, 49 Am. J. Comp. L. 429, 435, 2001.

countries under "the laws of the country where protection is claimed" under Article 5(2) of the Berne Convention.[6] This has been interpreted as the law of the country where the infringing act took place.[7]

Thus, under U.S. law, although a work may be published first in another country, the copyright of foreign origin is conferred all the rights of a U.S. copyright holder when the infringing act takes place within the U.S. borders. The courts then treat the infringement as a violation of U.S. copyright law.[8] As a result, this legal rule simultaneously preserves national sovereignty by confining other nations' copyright regimes to their local borders, while also promoting the permeability of national boundaries by copyrighted works in accordance with Berne.[9]

However, the Internet presents unique and difficult challenges to the application of this rule. Maintaining compliance with local laws, for example, is now rarely sufficient to assure a business that it has eliminated its exposure to legal risks related to infringement.[10] And since websites are accessible worldwide, an unsuspecting website owner may be called into a courtroom in a far-off jurisdiction.[11] But can a U.S. court then enforce principles of U.S. copyright law in the case of a website operator who transfers his business to a foreign country, yet still allows access to U.S.-based consumers? And what legal mechanisms exist to allow copyright owners to enforce judgments or legally prevent a similar service

6) Berne Convention for the Protection of Literary and Artistic Works, September 9, 1886 Paris Act of July 24, 1971, as amended on September 28, 1979. (available at <http://www.wipo.int/edocs/trtdocs/en/wo/wo001en.htm>).

7) William Patry, *Choice of Law and International Copyright*, 48 Am. J. Comp. L. 383, 406, 2000.

8) Brenda Tiffany Dieck, *supra* n. 2, at 131.

9) *Id.*

10) Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345, 1347 (2001).

11) *Id.*

that is operating overseas?

The problems that Internet companies will confront in an increasingly digital and borderless world, as well as the problems that courts will face in applying traditional legal principles to enforce foreign judgments, were highlighted by the Yahoo! France decision[12] and the iCraveTV decision in the U.S, which are examined in Part II of this paper.[13]

Going beyond the provisions set forth in Berne, the Hague Convention provides for the enforcement of judgments abroad. The Special Commission of the Hague Conference on Private International Law worked for seven years to create a Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters.[14] As a result, the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the "Preliminary Draft") was completed in November 1999.[15] Under Hague, a decision rendered in one signatory State would be fully enforceable in any other member State of the Hague Convention.[16] The Convention would also standardize jurisdictional requirements for the signatory states.[17]

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12) *Yahoo!, Inc. v. La Ligue Contre le Racisme et L'Antisemitisme*, 169 F. Supp. 2d 1181, 1186 (N.D. Cal. 2001).

13) *Twentieth Century Fox v. iCraveTV*, No. 00-121, 2000 U.S. Dist. LEXIS 11670 (W.D. Pa. Feb. 8, 2000).

14) Peter D. Trooboff, *The Hague Conference*, the Natl. L. J, (July, 2001) (available at <www.NLJ.com>).

15) Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Judgments in Civil and Commercial Matters, adopted by the Special Commission on 30 October 1999 (available at <http://www.hcch.net/e/conventions/text01e.html>).

16) Marc H. Greenberg, *A Return to Lilliput: The LICRA v. Yahoo! Case and the Regulation of Online Content in the World Market,* 18 Berkeley Tech. L.J. 1191, 1250-51 (2003).

17) Kristen Hudson Clayton, *The Draft Hague Convention On Jurisdiction and Enforcement of Judgments and the Internet, A New Jurisdictional Framework,* 36 J. Marshall L. Rev. 223, 224 (2002).

This paper examines the recent cases and traditional law analysis on international jurisdiction and examines them in respect to the Hague Convention. Part II introduces the Yahoo! and iCraveTV decisions, while Part III focuses on the current status of international law on global Internet jurisdiction with respect to the Hague Convention. Part IV of this paper discusses the traditional rationale for recognizing foreign jurisdiction in comparison with Article 25 of the Hague Convention. Finally, Part V scrutinizes the public policy exception to enforcement of foreign judgments and Article 28 of the Hague Convention.

Ⅱ. The Cases

1. The Yahoo! case[18)]

In May 2000, the League Against Racism and Anti-Semitism (LICRA) and the Union of French Jewish Students (UEJF) brought an action in French courts against Yahoo! Inc., a major Internet service provider incorporated under the state laws of Delaware and operated principally in Santa Clara, California,and Yahoo France.[19)] In their argument, the LICRA and UEJF alleged that Yahoo! Inc. hosted an auction website that was accessible to French citizens and engaged in the sale of Nazi paraphernalia in violation of Article R645-2 of the French Penal Code, and additionally that Yahoo France provided links and access to this content through the Yahoo website.[20)]

18) *Yahoo!, Inc., supra* n. 12.
19) *Id.* at 1183.
20) (available at

In defense, Yahoo! Inc. argued that the French tribunal lacked jurisdiction because the alleged violation was committed in the United States, where Yahoo! Inc. maintains its web servers.[21] Yahoo! Inc. further contended that the French claims should be dismissed because the obligations to be imposed would violate the law and Constitution of the United States, and that compliance with the order would be impossible because no technical means existed for reliably identifying Internet surfers who logged on from France.[22]

The French tribunal rejected Yahoo!'s arguments in holding that access by French Internet users to the auction website violated French law and constituted an offense to the "collective memory" of the country.[23]

In the first of two orders, dated May 22, 2000, the French court ordered Yahoo! Inc. to take all necessary measures to make it impossible for French users to access the auction service for Nazi memorabilia impossible via its website.[24] Failure to comply with the order would result in fines of Euro £100,000 per day being levied after a three month grace period.However, when Yahoo! claimed that it would be technically impossible for it to comply, the court ordered the formation of an expert panel to report on whether compliance was technically feasible.[25] Based in part on the expert panel's report, the court issued a second order, dated November 20, 2000,

<http://www.gcwf.com/gcc/GrayCary-C/News--Arti/Journal/0901_JIL.doc_cvt.htm> http://www.cyber-rights.org/documents/yahoo_ya.pdf>).

21) Interim Court Order dated May 22, 2000, p. 4. A translated copy of the order and other materials submitted in the French proceeding are attached to declarations filed by Yahoo! with the District Court in connection with its opposition to LICRA/L'Union's motion to dismiss and Yahoo!'s own motion for summary judgment.

22) *Id.*

23) (available at <http://www.cyber-rights.org/documents/yahoo_ya.pdf>).

24) Interim Court Order dated May 22, 2000, p. 5.

25) *"Experts testify in French Yahoo! case over Nazi memorabilia,"* Associated Press, Nov. 6, 2000

which claimed that Yahoo! Inc. did possess the ability to identify French users and thereby install geographical filters, essentially confirming the rulings of the first order.[26]

One month after the second order, Yahoo! Inc. filed a complaint for declaratory relief in the U.S. District Court for the Northern District of California. First, the complaint sought a judicial declaration that the French orders against Yahoo! are not recognizable or enforceable in the United States and, second, it sought an order enjoining LICRA and UEJF from attempting to enforce them in the United States.[27]

Yahoo! advanced several reasons to support its claim that the French court's orders should not be enforceable in the United States. First, Yahoo! contended that the orders violated public policy in favor of free speech, recognized by both the U.S. Constitution and the Constitution of the State of California, as well as by treaty and international law.[28] In addition, Yahoo! argued that the order of the French court directs it to implement filtering mechanisms and to monitor, a priori, all postings to all Yahoo!-provided sites and services, and thus constitutes an unconstitutional prior restraint on constitutionally protected speech.[29]

Yahoo! further alleged that the French court's orders were inconsistent with federal law that immunizes ISPs like Yahoo! from liability for content posted to its sites by third parties, citing section 230 of the Communications Decency Act.[30] And if the French order were to be enforced in the U.S., Yahoo! argued that it would give foreign nationals a cause of action that

26) (available at <http://www.cyber-rights.org/documents/yahoo_ya.pdf>).
27) (available at <http://www.gcwf.com/gcc/GrayCary-C/News--Arti/Journal/0901_JIL.doc_cvt.htm>).
28) Yahoo!'s Complaint filed December 21, 2000, p. 9.
29) *Id.*
30) 47 U.S.C. § 230(a).

U.S. citizens lack.[31] . Yahoo!'s Complaint, supra n. 28. p. 10. Finally, Yahoo! claimed that the French court's orders were rendered in proceedings that did not comport with acceptable principles of jurisdiction or due process, similar to the jurisdictional points raised by LICRA and UEJF in the U.S. litigation.[32]

The French defendants moved to dismiss the action claiming that the California court lacked jurisdiction over the French citizens. The U.S. court rejected this argument and held that the effects of the French defendant's activities could be felt in California, therefore, the court's exercise of jurisdiction over French defendant was proper. The U.S. court found that the French Court order is contrary to Yahoo!'s First Amendment rights under the U.S. Constitution, therefore, the French judgment is unenforceable in the U.S.[33]

2. The iCraveTV case[34]

In this case, Toronto-based iCraveTV.com was sued in federal court in Pittsburgh for putting programs that it intercepted from TV stations in New York and Canada on its free website. The company asserted that the rebroadcasts were legal under Canadian law, but the plaintiffs, including Disney, MGM, Paramount, ABC, CBS and Fox, proclaimed the website as being "one of the largest and most brazen thefts of intellectual property ever committed."[35]

31) Yahoo!'s Complaint, *supra* n. 28. p. 10.

32) *Id.*

33) Ray August, *International Cyber-Jurisdiction: A Comparative Analysis*, 39 Am. Bus. L.J. 531, 532 (2002).

34) *Twentieth Century Fox v. iCraveTV*, No. 00-121, 2000 U.S. Dist. LEXIS 11670 (W.D. Pa. Feb. 8, 2000).

The U.S. district court agreed and exercised jurisdiction over the website, ordering an injunction against the Canadian company to prevent the re-airing of TV broadcasts that U.S. users could access. As a result, iCraveTV shut down its site, and thereby prevented Canadians from viewing material that was legal in Canada. Specifically, the iCraveTV site allowed users to watch seventeen channels of television on their personal computers. The channels included programming by both Canadian and U.S. broadcasters.[36]

In order to access the site, the user needed to pass through a series of click-wrap agreements. To indicate acceptance of the first agreement, the user was required to enter their area code, if the area code was not Canadian, the user could not continue accessing the site. If the user succeeded in passing through the first step, the second step required a confirmation that the user was in Canada. Finally, the user was presented with a third click-wrap, which included the terms of service agreement.[37] The user was required to affirmatively assent to this agreement by clicking on the "I agree" icon. Therefore, in order for U.S. users to access the site, they had to fraudulently enter into the series of click-wrap agreements.[38]

35) (available at <http://www.freep.com/tech/tcha29_20000229.htm>).
36) *Id.*
37) *Supra* n. 34.
38) Kristen Hudson Clayton, *supra* n. 17, at 242-43.

Ⅲ. Hague Convention Article 10 and Personal Jurisdiction

1. Article 10 of the Hague Convention

The HagueConvention would create jurisdictional rules governing international lawsuits and provide for the recognition and enforcement of judgments by the courts of member States.[39]

Under Article 4 of the Hague Convention, the parties can agree which courts of a State shall have jurisdiction.[40]

> *Article 4 Choice of court*
>
> *1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and that jurisdiction shall be exclusive unless the parties have agreed otherwise.*

A question raised was whether a court chosen by the parties must have a reasonable link with the case. No requirement was added to the provision because a greater number still favored giving the parties the widest possible latitude to permit the choice of a neutral forum, or one with technical skills particularly useful for the litigation concerned.[41]

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39) Kurt Wimmer, *International Law and the Enforcement of Foreign Judgments Based on Internet Content*, 1, 18 (2002) (available at <http://www.cov.com>).

40) Hague Convention, *supra* n. 15, Art 4(1).

Recognizing the need for a uniform system of jurisdiction and recognition of judgments in international law, particularly where those judgments arise from intellectual property disputes,[42] the World Intellectual Property Organization ("WIPO") proposed a Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters (the "WIPO draft") in January 2001.[43]

The WIPO draft was based upon the work of both the Hague Convention and the American Law Institute International Jurisdiction and JudgmentProject, but it was tailored specifically to issues arising from the recognition and enforcement of intellectual property judgments, as opposed to the more general approach of the Hague Convention.[44]

Article 4 of the WIPO draft adds a feature to the Hague Convention that handles unilateral forum designations in a novel way.[45] In the Draft of the Hague Convention, the effect of forum selection clauses was limited by other articles.[46] Consumers were able to rely on these agreements, but a

41) Masaki Hamano, *The Hague Conference on Private International Law, Comparative Studies in the Approach to Jurisdiction in Cyberspace,* (available at <http://www.geocities.com/SiliconValley/Bay/6201/intl/art.html>).

42) Marc H. Greenberg, supra n. 16, at 1252

43) Rochelle C. Dreyfuss & Jane C. Ginsburg, *WIPO Forum on Private International Law and Intellectual Property, Draft Conventionon Jurisdiction and Recognition of Judgments in Intellectual Property Matters* (Jan, 2001) (available at <http://www.wipo.org/pil-forum/en/documents/pdf/pil_01_7.pdf>).

44) *Supra* n. 42

45) WIPO draft, supra n. 43, Art 4. *Agreements Pertaining to Choice of Court*

1. If the parties have agreed that a court or courts of a Contracting State shall have jurisdiction to settle any dispute which has arisen or may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, and its jurisdiction shall be exclusive unless the parties have agreed otherwise. Where an agreement having exclusive effect designates a court or courts of a non-Contracting State, the courts in Contracting States shall decline jurisdiction or suspend proceedings unless the court or courts chosen have themselves declined jurisdiction.

46) Rochelle C. Dreyfuss & Jane C. Ginsburg, Symposium On *Constructing International Intellectual Property Law: The Role of National Courts: Draft Convention On*

seller-imposed choice of forum clause was recognized only if the agreement was entered into after the dispute at issue arose.[47] In addition, a court was prohibited from exercising jurisdiction based solely upon the unilateral designation of the forum by the plaintiff.[48]

The Hague Convention articulates the general provisions regarding the adjudication of tort and contract claims, and unauthorized use of intellectual property comes within their scope.[49] .Rochelle C. Dreyfuss & Jane C. Ginsburg, supra n. 46, at 1074. Article 10 of the Hague Convention articulates the requirements for court actions, including copyright infringement.[50]

> *Article 10or delicts*
>
> *1. A plaintiff may bring an action in tort or delict in the courts of the State -*
>
> *a) in which the act or omission that caused injury occurred, or*
>
> *b) in which the injury arose, unless the defendant establishes that the person claimed to be responsible could not reasonably have foreseen that the act or omission could result in an injury of the same nature in that State.*
>
> *2. Paragraph 1 b) shall not apply to injury caused by anti-trust violations, in particular price-fixing or monopolization, or conspiracy to inflict economic loss.*

Jurisdiction And Recognition Of Judgments in Intellectual Property Matters, 77 Chi.-Kent. L. Rev. 1065, 1101-02 (2002).

47) WIPO draft, *supra* n. 43, Art. 7.

48) *Id.* Art. 18(2)(g).

49) Rochelle C. Dreyfuss & Jane C. Ginsburg, *supra* n. 46, at 1074.

50) *Supra* n. 39.

3. A plaintiff may also bring an action in accordance with paragraph 1 when the act or omission, or the injury may occur.

4. If an action is brought in the courts of a State only on the basis that the injury arose or may occur there, those courts shall have jurisdiction only in respect of the injury that occurred or may occur in that State, unless the injured person has his or her habitual residence in that State.[51]

The WIPO draft specially aims for intellectual property disputes and Article 1 articulates the substantive scope of the draft.[52]

Article 1 Substantive Scope

1. The Convention applies to copyright, neighboring rights, patents, trademarks, other intellectual property rights, and rights against unfair competition, as covered by the Agreement on Trade Related Aspects of Intellectual Property, and its successor Agreements. In addition, this Convention applies to rights over communication to the public of Sound Recordings and to claims involving domain names.[53]

Under Article 10 of the Hague Convention, a plaintiff can bring an action in the courts of the State where the act or omission that caused the injury occurred or in the courts of the State where the resulting injury occurred. The criteria of Article 10 sub-paragraph (a) and (b), however, would lead to different jurisdictions. Thus, under subparagraph (a), a plaintiff may

51) Hague Convention, supran. 15, Art 10.
52) Rochelle C. Dreyfuss & Jane C. Ginsburg, *supra* n. 46, at 1073.
53) WIPO draft, *supra* n. 43, Art. 1

bring an action in *torts or delictincluding copyright infringement in the courts of the State in which the act or omission that caused injury occurred.* The determination envisaged by the Convention, however, is not as straightforward. For example, assume that a party placed infringing materials online on a U.S. website. If a plaintiff in foreign country perceives the material online and it injures the plaintiff in her country, can the plaintiff bring suit against the defendant in either the U.S. or her own country?

Furthermore, in Internet cases, the place of harm can be understoodas being either the place of the generation of the harm or of the locations of its impact. Non-resident defendants thus could be subject to suit at the point of the origin of the communication. This raises the problem of localizing the origin of the communication.

In connection with Internet cases, Article 6.1 of the WIPO draft stipulates that the forum will not be competent if the defendant took reasonable steps to avoid acting in or directing activity to that state.[54]

> *Article 6 Infringement Actions*
>
> *1. A plaintiff may bring an infringement action in the courts of -*
>
> *c. any State in which the alleged infringement foreseeably occurred unless the defendant took reasonable steps to avoid acting in or directing activity to that State.*

This language refers to efforts to screen out access from particular jurisdictions, for example, by requiring users to identify their country of

54) *Id.* Art 6.

residence, and excluding users from countries to which the defendant does not wish to communicate.[55] Technological measures that make it possible to limit internet communications to particular countries may well be on the horizon.[56] Like the Yahoo! case, if a single reader in any signatory country accesses a web page containing information considered illegal in that country, the publishercould be sued in the jurisdiction of the one signatory that considers the material illegal.[57] With Internet cases, the location of the host computer does not affect where the information is viewed, and information may be viewed in one country while the host computer is located on the other side of the world.[58] Moreover, the territorial scope of the claim would cover not only distributions of the work to U.S. users but also the distributions to foreign users who access and download from the U.S. website.[59] In the above example, an individual who places materials on the website that is legal in his country cannot foresee that it is illegal in another country where the downloading occurs.[60]

In addressing this issue, the Convention provides that, under subparagraph (b), a plaintiff may bring an action in the courts of the State in which the injury arose when the defendant *could reasonably have foreseen* that the act or omission could result in an injury of the same nature in that State.[61]

55) Rochelle C. Dreyfuss & Jane C. Ginsburg, *supra* n. 46, at 1109.
56) *Id.* at 1110.
57) Kurt Wimmer, *supra* n. 39, at 19.
58) Kristen Hudson Clayton, *supra* n. 17, at 231.
59) Jane C. Ginsburg, *supra* n. 2, at 157.
60) Report of the experts meeting on the intellectual property aspects of the future Convention on jurisdiction and foreign judgments in civil and commercial matters, Geneva, 1, 7 (February 2001) (available at <http:// http://www.hcch.net/doc/jdgmpd13.doc>).
61) Hague Convention, *supra* n. 15, Art 10 (b).

1. International Personal Jurisdiction on Internet

The U.S. Supreme Court has recognized the changes brought about by increased interstate contact and extended states'jurisdictional reach with a two-part test to determine whether jurisdiction can be asserted against an out-of-state defendant. The two-part test looks at: 1) whether the defendant had sufficient "minimum contacts" with the forum state to justify the exercise of jurisdiction,[62] and 2) whether allowing the defendant to be sued in the forum state would offend "traditional notions of fair play and substantial justice."[63]

Initially, the Court applied the "passive versus active test" as a refinement of the traditional jurisdiction that recognized the unique characteristics of Internet commerce. If the site required a high degree of interaction between site host and visitor, the visitor who became a plaintiff would be able to assert jurisdiction against the website host/defendant.[64] By contrast, a purely passive, information-only site would generally remain outside of the jurisdictional reach of the plaintiff's home State.[65] Under the *Zippo* test,[66] commonly referred to as the "passive versus active test", courts gauge the relative interactivity of a website to determine whether assertion of jurisdiction is appropriate.[67] At one end of the spectrum lies the "passive" websites - minimally interactive information-based websites.[68] And at the

62) *International Shoe v. Washington*, 326 U.S. 310, 316 (1945).
63) Id. at 320.
64) See Bensusan Rest. Corp. v. King, 126 F.3d 25, 27-29 (2d Cir. 1997); Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1121 (W.D. Pa. 1997).
65) Marc H. Greenberg, *supra* n. 16, at 1201.
66) *Zippo, supra* n. 64, at 1121.
67) *Id.* at 1122-23.

other end of the spectrum are "active" websites, which feature high interactivity and end-user contacts.[69] The *Zippo* test suggests that courts should refrain from asserting jurisdiction over passive sites, while jurisdiction over active sites is appropriate.[70]

Courts began to move away from the passive versus active test and towards the effects[71] based approach pursuant to the U.S. Supreme Court's decision in *Calder v. Jones*[72] The Supreme Court first established the "effects test" in *Calder* to extend Due Process considerations when purposeful availment in a non-resident forum may not otherwise exist.[73] The effects test doctrine focuses primarily on the effects that the website has on the jurisdiction, rather than the level of activity of the website.[74] Courts have applied the effects test doctrine, focusing on where the harm occurs, in a number of Internet cases.[75]

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68) *Id.* at 1124.

69) *Id.* at 1127.

70) Michael A. Geist, *supra* n. 10, at 1348.

71) *Id.* at1372.

72) 465 U.S. 783 (1984); Shirley Jones, an entertainer, sued the National Enquirer for writing and publishing an allegedly defamatory article. Even though defendants wrote and published the article inFlorida for a national publication, the court held their actions had a harmful effect on Shirley Jones in California, the state where she resided. Additionally, the magazine had its largest circulation in California. The Court held that "California was the focal point both of the story and of the harm suffered." Therefore, exercising personal jurisdiction in California was proper. The following test emerged: personal jurisdiction may be predicated upon "(1) intentional actions (2) expressly aimed at the forum state (3) causing harm, the brunt of which is suffered, and which the defendant knows is likely to be suffered, in the forum state." Generally, courts apply the effects test to intentional torts, not contract actions.

73) Susan Nauss Exon, *A New Shoe is Needed to Walk Through Cyberspace Jurisdiction,* 11 Alb. L.J. Sci. & Tech. 1. 34 (2002).

74) Kristen Hudson Clayton, *supra* n. 17, at 232.

75) *Nissan Motor Co. v. Nissan Computer Corp.*, 89 F. Supp. 3d 1154 (C.D. Cal. 2000); Euromarket Designs Inc. v. Crate & Barrel Ltd., 96 F. Supp. 2d 824 (N.D. I11. 2000).

Under the effects test doctrine, the Courts find personal jurisdiction when the following four elements are present: 1) the defendant's tortious actions, 2) expressly aimed at the forum state, 3) caused harm to the plaintiff in the forum state, 4) which the defendant knows is likely to be suffered.[76]

More recently, the jurisdictional question has shifted towards a targeting analysis,[77] and the interpretation of the "foreseeability" in Article 10(1)(*b*) of the Hague Convention has led to an ongoing debate as to whether jurisdiction should only be exercised when the website targeted the particular jurisdiction.[78]

An effective targeting test requires an assessment of whether the targeting of a specific jurisdiction was itself foreseeable.[79] Foreseeability in this context depends upon three factors: contracts, technology, and actual or implied knowledge.[80] Forum selection clauses found in website terms of use agreements or transactional click-wrap agreements allow parties to mutually determine an appropriate jurisdiction in advance of a dispute.[81] Therefore, they provide important evidence as to the foreseeability of being called into the courts of a particular jurisdiction.[82]

Targeting jurisdiction under the Convention also provides the most protection for Internet companies.[83] Under a targeting analysis, jurisdiction would only be proper if a website directed its activities toward a particular forum.[84]

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76) Marc H. Greenberg, *supra* n. 16, at 1203.
77) Michael A. Geist, *supra* n. 10, at 1360.
78) Kristen Hudson Clayton, *supra* n. 17, at 245; Michael A. Geist, supran. 10, at 1382.
79) Michael A. Geist, *id.* at 1362.
80) Marc H. Greenberg, *supra* n. 16, at 1254.
81) *Id.* at 1385.
82) *Id.*
83) Kristen Hudson Clayton, *supra* n. 17, at 245.
84) *Id.*

Applying the targeting jurisdiction principles of the Hague Convention to both the Yahoo! and iCraveTV cases would likely have resulted in different outcomes in both cases. In Yahoo!, for example, the French court would most likely not have been able to assert jurisdiction if the issue of jurisdiction was determined under a targeting analysis.[85] Under the targeting analysis, the factors weigh in favor of Yahoo!'s contention that its auction site did not target French users.[86] The "Terms of Use Agreement", for example, stated specifically that U.S. law governed the website and that the site was intended for U.S. users.[87] In addition, the website's servers were located in the U.S., the auction site only accepted U.S. currency, and all of the written instructions and information on the site were in English.[88] Based on these facts, it was not foreseeable that U.S.-based Yahoo! Inc. was directing its activities to the French users; thus subjecting them to being hauled into a French court.[89]

Similarly, in *iCraveTV*, if the U.S. court had applied a targeting analysis under the Hague Convention a different result would probably have occurred. The iCraveTV site had even more protections than the Yahoo! site, as it required a user to enter into three separate click-wrap agreements to ensure that only Canadian users would have access to the site.[90]

Under the Article 6.1 of the WIPO draft, iCraveTV may be precluded from liability because it took reasonable steps to avoid acting in the U.S. via technical measures.

Therefore, the Hague Convention's jurisdictional principles would greatly

85) *Id.* at 246.
86) *Id.*
87) Yahoo!, *supra* n. 12, at 1187.
88) *Id.*
89) Kristen Hudson Clayton, *supra* n. 17, at 246.
90) *Id.* at 247.

benefit Internet and e-commerce companies. Internet and e-commerce companies could be more certain of which activities would and would not expose them to cross-border liability.[91]

Ⅳ. Hague Convention Article 25 and Enforcement of Foreign Judgment

The rationale for recognizing foreign judgments depends on three main theories: "obligation," "reciprocity" or "international comity."[92] These are the three competing theories stating the practice for foreign judgment recognition.[93]

The English common law rule held that a foreign judgment was only "prima facie evidence of the matter decided" and was thus not conclusive of the merits of the dispute between the parties.[94]

In 1895, the U.S. Supreme Court in *Hilton*[95] rejected the English rule. Under the Hilton rule, a procedurally regular and non-fraudulently obtained foreign judgment enjoyed conclusive effect in the U.S..[96] This rule was based on comity. The Court recognized that "international law, in its widest and most comprehensive sense, is part of the United States law."[97]

91) *Id.*
92) Alan Reed, *A New Model of Jurisdictional Propriety for Anglo-American Foreign Judgement Recognition and Enforcement: Something Old, Something Borrowed, Something New?*, 25 Loy. L.A. Int'l & Comp. L. Rev. 243, 245 (2003).
93) *Id.*
94) Violeta I. Balan, *Recognition and Enforcement of Foreign Judgments in the United States: The Need for Federal Legislation*, 37 J. Marshall L. Rev. 229, 234-35 (2003).
95) *Hilton v. Guyot*, 159 U.S. 113, 162 (1895).
96) Violeta I. Balan, *supra* n. 94, at 235.
97) *Id.*

"Comity"is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.[98] But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.[99]

Accordingly, several states have adopted the Uniform Recognition Act (URA), which features relevant provisions that differ only slightly from the Court's rule in *Hilton*.[100] Thus, the sources of recognition law in the U.S. are the states' common law derived from *Hilton* and the Uniform Recognition Act.[101]

The Hague Convention would also apply to the recognition of a judgment rendered by a court in another signatory country.[102]

Thus, one Hague member country's restrictions on speech may effectively limit speech in every Hague member country because, where one country would have jurisdiction to enter judgment under the terms of the Convention, the Convention would require every signatory country to recognize and enforce the original judgment absent specific exceptions.[103]

Article 23(a) defines "judgment" as "any decision given by a court, including a decree or order, as well as the determination of costs or expenses by an officer of the court, provided that it relates to a decision which may be recognized or enforced under the convention."[104]

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98) *Id.*

99) *Id.*

100) *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

101) Johnthan Pittman, T*he Public Policy Exception to the Recognition of Foreign Judgments*, 22 Vand. J. of Transnat'l L. 969, 973 (1989).

102) Kurt Wimmer, *surpa* n. 39, at 19.

103) *Id.*

104) Hague Convention, *supran.* 15, Art 23(a).

Article 25 establishes conditions for the recognition or enforcement of a signatory country's judgment.[105]

> *Article 25to be recognized or enforced*
>
> *1. A judgment based on a ground of jurisdiction provided for in Articles 3 to 13, or which is consistent with any such ground, shall be recognized or enforced under this Chapter.*
>
> *2. In order to be recognized, a judgment referred to in paragraph 1 must have the effect of res judicata in the State of origin.*
>
> *3. In order to be enforceable, a judgment referred to in paragraph 1 must be enforceable in the State of origin.*
>
> *4. However, recognition or enforcement may be postponed if the judgment is the subject of review in the State of origin or if the time limit for seeking a review has not expired.*

One such issue identified by the WIPO draft is the problem of adjudicating multi-territorial claims. The draft's authors suggest in Article 13 that such multi-territorial claims be consolidated and heard by a single court in a single forum.[106]

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105) *Id.* Art 25.

106) WIPO draft, *supra* n. 43, Art. 13. *Consolidation of Territorial Claims*

1. Upon the motion of a party, or sua sponte, a court should consider the advantages of worldwide resolution of the dispute among the parties through consolidation of related pending actions, and through inviting the parties to assert all intellectual property claims related to the action in a single *forum*.. . .
3. In deciding whether and how to consolidate the action, the court should consult with the parties and with other courts in which related actions are pending, and together they should consider: (a) which court has jurisdiction over the greatest number of parties with claims relating to the action; (b) in general, whether consolidating would promote efficiency and conserve judicial resources and the resources of the parties; (c) whether or not inconsistent judgments would result if

Consequently, if the parties agreed to the consolidation of both the French and U.S. actions in the Yahoo! Case, Article 19(1) would have made the French court's interlocutory order directing the use of geo-location filtering software on Yahoo's server in California an enforceable trans-border injunction.[107]

V. Hague Convention Article 28 and the First Amendment Rights

Notwithstanding the fact that the Hague Convention provides for the recognition and enforcement of judgments by the courts of member states, most countries may not recognize or enforce a foreign judgment if it runs contrary to their own public policy.

Article 28 lists the grounds for refusal of recognition or enforcement of a foreign court's judgment.

> *Article 28for refusal of recognition or enforcement*
>
> *1. Recognition or enforcement of a judgment may be refused if -*
>
> *f)recognition or enforcement would be manifestly incompatible with the public policy of the State addressed.*

multiple courts adjudicated the related claims; (d)in a patent case, the relative expertise of the judicial systems in which the cases are pending. . .5. There is no consolidation of related actions, the judgment in one action shall not be preclusive of the other.

107) Marc H. Greeburg, *supra* n. 16, at 1253.

This provision appears in the Brussels Convention and in the Hague Convention.

In the U.S., the public policy exception serves as a discretionary ground of non-recognition in the Uniform Recognition Act[108] and the Restatement (Third) of Foreign Relations.[109] This provision has been construed narrowly and has rarely led to the denial of recognition or enforcement of foreign judgments in the U.S. However, the task of defining what is encompassed by public policy has proven to be problematic.[110]

The public policy exception applies when there is an "overriding public interest which outweighs comity principles."[111] One federal court of appeals applied the following test: a foreign judgment should not be enforced when doing so "tends clearly to injure the public health, the public morals, the public confidence in the purity of the administration of the law, or to undermine that sense of security for individual rights, whether of personal liberty or of private property, which any citizen ought to feel ... "[112]

Therefore, a judgment involving implementation of laws intended to discriminate against racial minority groups would most likely not be recognized or enforced in the U.S. based on public policy grounds.[113] First Amendment libel issues would also be likely to invoke public policy

108) Unif. Foreign Money-Judgments Recognition Act 4(b)(3), 13 Part II U.L.A. 59 (2002).

109) *See* Restatement (Third) of the Foreign Relations Law of the United States 482(2)(d)(1987) (stating that a United States court does not need to recognize a foreign judgment if "the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought").

110) Violeta I. Balan, *supra* n. 94, at 244-45.

111) *Id.* at. 246.

112) *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 443 (3d Cir. 1971); Id.

113) *Id.*

defenses.[114] Courts have denied enforcement of foreign judgments that offend free speech values protected by the First Amendment.[115]

In *Yahoo!*, the court granted Yahoo's motion and acknowledged the sovereign right of a nation to determine by law what forms of speech and conduct are acceptable within its borders.[116] Based on this fundamental right, the court found that the French court's order violated Yahoo's First Amendment free speech rights and was therefore unenforceable in the United States.

Another example can be found in *Bachchan*,[117] where a defendant distributed a defamatory report on the plaintiff's alleged crimes in the United Kingdom. The plaintiff brought an action against the defendant in the U.K. and was awarded £40,000 in damages in addition to attorney's fees. The plaintiff then sought to enforce the U.K. libel judgment in the United States. The U.S. court found that enforcement of the U.K. judgment would have a chilling effect on speech and seriously jeopardize the First Amendment's protection of free speech and the press.[118]

The WIPO draft also provides suggestions for dealing with the regulation of online content, while still retaining the "public policy" exemption found in the Hague Convention for refusal of recognition or enforcement, found in Article 25 of the WIPO draft.[119]

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114) *See, e.g., Bachchan v. India Abroad Publ'ns Inc.*, 585 N.Y.S.2d 661, 663-64 (N.Y. Sup. Ct. 1992) *Telnikoff v. Matusevitch*, 702 A.2d 230, 258 (Md. 1997).

115) Christine Duh, *Cyberlaw: A. Internet Jurisdiction: 2. International: Yahoo! Inc. v. LICRA*, 17 Berkeley Tech. L.J. 359, 268 (2002).

116) *Supra* n. 12.

117) *Bachchan v. India Abroad Publications, Inc.*, 585 N.Y.S.2d 661 (N.Y. Sup. Ct. 1992).

118) *Id.* at 664-65.

119) WIPO draft, *supra* n. 43, Art. 25. *Grounds for Refusal of Recognition or Enforcement*

1. Recognition or enforcement of a judgment may be refused if: (f) recognition or enforcement would be manifestly incompatible with the public policy of the State

Article 25 Grounds for Refusal of Recognition or Enforcement

(g) recognition or enforcement would be manifestly incompatible with the public policy of the State addressed;

Permitting non-enforcement or refusal to enforce elements of a judgment, such as an order for injunctive relief, under such conditions could be considered to be in line with the TRIPs Agreement, which also contemplates the possibility that a general obligation imposed on all member States could have a disparate impact for certain members.[120]

Ⅵ. Conclusion

To conclude, we must go back to the questions asked in the beginning. Thus, if a copyright infringement suit arose in which a U.S.-based website moved its service abroad and ran it from a foreign county, jurisdiction in a U.S. court over the website operator and over the foreign national who deliberately sent the work to that site would be proper at the location of the server.

Under the Hague Convention, the foreign copyright owner can bring a suit against the website so long as the website directed or 'targeted'its activities toward the particular foreign national's forum and it was foreseeable that the website was directing its activities to users in that nation.

However, under the WIPO draft, the latent protections in the website, such as a detailed terms-of-use agreement, instructions and information in

addressed.

120) Rochelle C. Dreyfuss & Jane C. Ginsburg, *supra* n. 46, at 1144.

a certain language and click-wrap agreements, may be interpreted in favor of a defendant website. And if the foreign judgment is not contrary to the public policy, such as the restriction of free speech rights of the First Amendment, U.S. courts should enforce the foreign judgment.

The rapid spread of digital content and rise of new technologies has highlighted the need for a dynamic and adaptable international legal framework that can preserve both the spirit and the letter of global copyright law as laid out by current multilateral conventions.

However, the Internet poses difficult challenges to the effective application of the law in this area. There must be clear legal guidelines, for example, governing when a U.S. court may enforce principles of U.S. copyright law in the case of a website operator who transfers his business to a foreign country, yet stillallows access to U.S.-based consumers. And defined legal mechanisms must be established to allow copyright owners the option of enforcing judgments or legally preventing a similar service that is operating overseas.

The problems that Internet companies will confront in an increasingly borderless world, as well as the problems that courts will face in applying traditional legal principles to enforce foreign judgments, were highlighted by the Yahoo! France decision[121] and the iCraveTV decision in the U.S, which were discussed earlier.[122]

Going beyond the provisions set forth in Berne, the Hague Convention would provide for the enforcement of judgments abroad. Under Hague, a decision rendered in one signatory State would be fully enforceable in any other member State of the Hague Convention.[123] Therein may lay the key.

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121) *Supra* n. 12.

122) *Supra* n. 13.

123) Marc H. Greenberg, *supra* n. 16, at 1250-51.

국 문 요 약

박 유 선

지적재산권의 속지주의 원칙에 따라 전통적으로 지적재산권의 침해에 있어서 결과의 발생이 없는 행위지를 침해지로 인정하지 않았다. 어문과 예술작품을 보호하기 위해 1886년 체결된 베른협약(Berne Convention for the Protection of Literary and Artistic Works) 제5조 제1항은 저작자가 베른 협약에 따라 보호되는 저작물에 관하여 본국 이외의 동맹국에서 각 법률이 현재 또는 장래에 자국민에게 부여하는 권리 및 이 협약이 특별히 부여하는 권리를 향유한다고 규정하여 내국민대우원칙을 천명하고 있다. 또한 베른협약 제5조 제2항은 저작권의 보호와 향유는 저작물의 본국에서 보호가 존재하는 여부와 관계가 없이, 보호의 범위와 저작자의 권리를 보호하기 위하여 주어지는 구제의 방법은 오로지 보호가 주장되는 국가의 법률의 지배를 받는다라고 규정하여 저작권 침해가 발행한 국가의 법률의 적용을 명시하고 있다.

인터넷과 무선통신 기술의 발달은 저작물을 디지탈 형식으로 실시간에 전세계에 배포하는 것을 가능하게 하였다. 특히 저작물의 인터넷상에서의 배포는 다국적 저작권 침해행위를 야기하여, 저작권자가 다수의 국가에서 저작권 침해소송을 제기하여 판결을 집행하는 것이 필요하게 되었다. 헤이그국제사법회의(Hague Conference on Private International Law)에서 1992년부터 논의되어 온 민사 및 상사사건의 국제재판관할과 외국판결에 관한 협약(Convention on Jurisdiction and Foreign Judgment in Civil and Commercial Matters)에서 채택된1999년의 예비초안(preliminary draft) 및 2001년 외교회의에서 수정된 잠정초안(Interim text) (이하 "헤이그 협약")은 저작권자가 저작권침해행위가 발생한 각 국가에서 저작권 침해행위를 금지하는 소송을 제기할 필요없이, 동 협약의 한 가맹국가의 법원의 저작

권침해금지판결을 다른 가맹국가에서도 집행할 수 있는 가능성을 제시해 주는데 의미가 있다.

헤이그 협약 제10조는 불법행위(torts)에 관한 일반적인 재판관할에 관한 규정을 두고 있으며, 저작권침해에 관한 분쟁은 동 조항의 적용을 받는다. 제10조에 의해 당사자는 가해행위지 국가의 법원 또는 결과발생지 국가의 법원에서 소송을 제기할 수 있다. 결과발생지의 경우 제10조 1항(b)는 피고가 자신의 행위가 본국의 법규에 비추어 동일한 성격의 손해를 초래할 수 있다라고 합리적으로 예견할 수 없었던 경우에 본 조항의 적용을 배제하고 있다. 인터넷을 통한 저작권침해의 경우, 피고가 자신의 국가의 법규하에서 합법적으로 저작물을 웹사이트에 게시하였으나, 그 행위가 다운로딩이 행해진 국가에서 불법인 경우, 피고는저작권침해를 예견할 수 없었으므로 이에 문제가 제기된다. iCrave TV사건에서, 피고인 캐나다 회사가 미국 및 캐나다에서 방송되는 텔레비젼 방송 프로그램을 자신의 웹사이트에 게시하여 이용자들로 하여금 컴퓨터를 통하여 방송을 재시청할 수 있도록 하였는데 이는 캐나다에서 합법인 반면에 미국에서는 저작권 침해에 해당한다. 피고는 방송 프로그램을 인터넷상에서 재방송하는 것은 캐나다법상 합법이므로 저작권침해를 예견할 수 없었다고 주장하면서, 해당 사이트에 오직 캐나다 거주자만의 접속을 허용하고 미국 거주자의 접속을 제한하는 일련의 Click-Wrap 계약과 스크린 장치를 제공하였다고 주장하였다. 본 사건 피고의 주장을 받아들인다고 가정할 때, 제10조 1항(b)에 의해 원고는 결과발생지인 미국법원의 재판관할을 강제할 수 없을 것이다.

지적재산권을 둘러싼 분쟁에 관한 재판관할과 국제법상의 판결의 승인 및 집행의 통일성을 기하기 위하여 2001년 1월 세계지적재산권기구(World Intellectual Property Organization)가 제안한 WIPO 협약초안(Draft Convention on Jurisdiction and Recognition of Judgments in Intellectual Property Matters)은 헤이그 협약이 재판관할과 판결의 승인 및 집행에 대

한 일반적인 접근을 하고 있는 점에 반하여 지적재산권자의 보호라는 측면을 고려하여 지적재산권침해소송에 국제재판관할권을 규정하고 있다. WIPO 협약초안 제6조는 저작권자가 저작권 침해를 막기 위한 합리적인 조치를 취한 국가에서 저작권 침해소송을 피할 수 있다고 규정하고 있다. 따라서 본 조항에 의할 경우, iCrave TV사건의 피고는 미국에서의 저작권 침해소송을 회피할 수 있을 것이다.

이상과 같이 헤이그 협약이 외국판결의 승인 및 집행을 가능하게 하고 있음에도 불구하고, 외국법원의 판결이 다수의 가맹국가에서 집행되지 못하는 가장 큰 장애는대다수의 국가들이 외국법원의 판결이 공서양속(Public Policy)에 반하는 경우 판결을 승인하지 않는 예외규정을 두고 있기 때문이다. 미국의 경우, Uniform Recognition Act와 Restatement(Third) of Foreign Relations에 따른 공서양속의 예외규정(Public Policy exception)은 외국법원의 판결의 승인을 부인하는 근거가 된다. Yahoo! 사건에서 Yahoo! Inc.의 옥션 사이트를 통해 독일 나치 소장물의 판매가 이루어졌는데, 프랑스 형법상 이는 범죄행위에 해당하므로, 프랑스 법원은Yahoo! Inc.에게 프랑스 이용자가 당해 옥션 사이트에 접속할 수 없도록 모든 가능한 조치를 취할 것을 명하였다. 이에 미국 법원은 프랑스 법원의 판결은 Yahoo! Inc.의 미국헌법 제1 수정(First Amendment)의 언론의 자유(freedom of speech)에 반하므로 판결의 집행을 거부하였는데 이는 공서양속의 예외규정을 보여주는 예이다. 헤이그 협약 제28조와 WIPO 협약초안 제25조 또한 공서양속의 예외규정을 두고 있다.

본 논문은 인터넷과 통신기술의 발달로 야기되는 다국적 저작권 침해사건에서 한 국가의 법원의 저작권 침해금지판결이 다수의 국가에서 승인 및 집행될수 있는 능성을 헤이그 협약과 WIPO 협약초안 및 미국판결을 중심으로 살펴보았다. 국제적으로 통일된 저작권법이 존재하지 않고 외국판결의 승인을 부인하는 예외조항과 외국판결의 집행에 관한 각국의 이해관계와 준거법의 해석이 다른 현시점에서 지적재산권의 속지주의를 뛰어

넘어 외국법원의 판결을 국제적으로 집행하는 것은 다소 어려움이 있어 보이나 국제적인 집행가능성의 열쇠를 제시하는 헤이그 협약과 장래의 국제조약에 그 기대를 걸어볼 수 있겠다.

주제어 : 외국판결의 승인 및 집행, 헤이그, 세계지적재산권기구, 지적재산권, 저작권, 저작권침해소송.