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“Choice of Law in Copyright and Related Rights: Alternatives to the *Lex Protectionis*” by Mireille van Echoud, *Kluwer Law International*, 2003

Book review for Copyright Reporter

Catherine Lee

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In 1992, the widow of German composer Carl Orff assigned the moral rights in her husband’s work to a German music publisher. Later that year, two Dutch companies released successful “disco” and “house” versions of “O fortuna” (part of Orff’s famous work “Carmina Burana”) and named Orff as the composer. Could the German publisher claim an infringement of Orff’s moral rights? Was the assignment of moral rights valid according to either German or Dutch law? Such questions are discussed in this text by Dutch lawyer Mireille van Echoud as she tackles the difficult issues which arise in determining the applicable domestic law for in intellectual property disputes involving international parties.

The text is divided into six chapters. Chapter 1 provides a general introduction to the study by providing case examples to illustrate the issues to be explored later in the text. In this chapter, van Echoud clearly she states that the aim of the text is *“to determine which conflict rules are suitable for contemporary copyright and related rights. This central question will be answered from the perspective of the objectives of choice-of-law and the policies that underlie substantive copyright and related rights law.”* As such, the text addresses these issues primarily from an academic perspective in relation to European, especially Dutch, legal theory.

Chapter 2 provides an overview of the general justifications and development of choice-of-law principles. The first part of this chapter discusses two main objectives for the choice-of-law, namely decisional harmony and substantive justice. It also provides a useful brief history of developments in relation to choice-of-law principles from the sixteen-century onwards without specific reference to copyright disputes. In particular, van Echoud argues that as the choice-of-law process develops toward achieving a just result (as demonstrated by a growing number of choice-of-law concepts), decisional harmony becomes increasingly difficult to achieve. She then discusses the “functional allocation method”, which focuses on the nature of the legal relationship between the parties, rather than the territorial scope of domestic rules of law. Next, she outlines potential concerns arising from the adoption of the allocation method, including the position of weaker parties (such as individual creators versus business, consumers versus manufacturers).

The rights of foreign authors and foreign works are considered in Chapter 3. Most of this chapter is devoted to an analysis of the protection of foreign authors prior to the Berne Convention, in the Berne Convention and Post-Berne Convention treaties including TRIPs, the Universal Copyright Convention, the more recent WIPO Internet Treaties and proposed WIPO Broadcast Treaty. After this discussion, van Echoud provides some tentative conclusions regarding why the identification of choice-of-law rules in international instruments is difficult. In particular, she states that the Berne Convention itself does address the issue because private international and copyright law concepts were in their infancy when the Convention was drafted. According to van Echoud, the reason for the lack of choice-of-law principles in later copyright instruments is due to the harmonisation of copyright protection by reciprocity tests (that is, where foreign authors are given the same protection as domestic authors). She also notes that the proposed WIPO Broadcast Treaty contains provisions for conflict rules. However, it appears that this was not done not out of a desire to provide some clarification of the issue, but because there was no agreement on certain substantive provisions and it was not acceptable to leave the issue to individual states.

Chapter 4 considers the main principles used for determining which domestic law should be applied in copyright disputes. In particular, the author discusses the conflict rules relating to law of the country for which protection is claimed (*lex protectionis*); law of the country of origin of the work or author (*lex origins*), and law of the court (*lex fori*). The remainder of the chapter considers the advantages and disadvantages of these rules and their application in various jurisdictions. van Eechoud argues that although *lex protectionis* is the most advocated conflict rule (presumably owing to the territorial nature of intellectual property laws), there are a number of criticisms which can be made of it. These include that the basis for *lex protectionis* can only be found in a creative interpretation of Article 5 of the Berne Convention, and that it does not sit well with the more contemporary theory of the allocation method for determining the applicable law.

As van Eechoud argues that the nature and rationale of the particular area of private law is critical in determining which conflict rule should be applied, Chapter 5 largely focuses on the legal characteristics of copyright. The Chapter begins with an overview of recent trends in information markets and technology and then analyses, in a rather workman-like manner, the legal characteristics of copyright and various economic and social justifications for the grant of such protection. In particular, van Eechoud contends that the public interests that underlie some of these exceptions, such as the freedom of expression, are important when determining which choice-of-law rule should be applied in a dispute.

Chapter 6 examines in more detail the emerging principles in choice-of-law disputes, which were introduced in chapter 2, by reference to their suitability for resolving different categories of copyright issues. In particular, van Eechoud discusses the principles of geographical connection, functional allocation, favour principle (where one party in a relationship receives preferential treatment to another), and party autonomy (where contracting parties can decide which law is to apply to the agreement) in terms of scope and duration of rights, ownership of copyright, transfer of rights, and copyright infringement. She then considers some alternatives to the *lex protectionis* principle for resolving copyright disputes and whether some of the conflict rules should be adopted into the proposed development of the Rome Convention on the Law Applicable to Contractual Obligations into a Regulation.

This text is well-researched and is an interesting treatment of a complex issue which is of increasing importance in a global society. However, van Eechoud's academic approach and emphasis on European and Dutch law, means that the text is unlikely to be suitable for students in general or lawyers in common law countries such as Australia, the United Kingdom and the United States.

Australian Copyright Council

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- assist creators and other copyright owners to exercise their rights effectively;
- raise awareness in the community about the importance of copyright;
- identify and research areas of copyright law which are inadequate or unfair;
- seek changes to law and practice to enhance the effectiveness and fairness of copyright;
- foster co-operation amongst bodies representing creators and owners of copyright.



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