Creative Technology, Ltd. v. Aztech System, PTE, Ltd.: The Ninth Circuit Sends a United States Copyright Infringement Case to Singapore on a Motion of Forum Non Conveniens

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Note

CREATIVE TECHNOLOGY, LTD. v. AZTECH SYSTEM PTE, LTD.: THE NINTH CIRCUIT SENDS A UNITED STATES COPYRIGHT INFRINGEMENT CASE TO SINGAPORE ON A MOTION OF FORUM NON CONVENIENS*

I. INTRODUCTION

As innovation continues to fuel success in the computer industry, creators of works rely on intellectual property law, especially copyright law, to help protect their innovative efforts. At the same time, copyright laws have not always evolved along with the rapid changes occurring in the area.

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I. INTRODUCTION

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Reproductive technology, such as the copying, storing and retrieving of information, has lowered the cost of copying intellectual products. Marshall A. Leaffer, Protecting United States Intellectual Property Abroad: Toward a New Multilateralism, 76 Iowa L. Rev. 273, 275 (1991) (detailing emerging "piracy" problem plaguing United States). Concurrently, production of intellectual products has become increasingly expensive. Id.


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of intellectual property.\(^2\) As a result, computer software developers have become increasingly concerned with perceived inadequacies in the scope of legal protection afforded software.\(^3\) Two major treaties address international protection of an author's intellectual property rights: the Berne Convention for the Protection of Literary and Artistic Works\(^4\) (Berne Con-


When established, the Berne Convention had five main objectives:

1. the development of copyright laws favorable to authors in all civilized countries;
2. the elimination of basing rights upon reciprocity;
3. the end of discrimination between foreign and domestic authors;
4. the abolition of formalities as a condition of protection; and
vention) and the Universal Copyright Convention (UCC). Although both treaties protect an author’s intellectual property rights, neither establishes a true global copyright system. Additionally, neither treaty provides an enforcement mechanism. Instead, they leave enforcement of an author’s rights entirely to the state where the author seeks copyright protection. Therefore, the copyright laws of one particular state—and not

(5) the promotion of uniform international law for the protection of copyrightable works.


5. Universal Copyright Convention, 6 U.S.T. 2731, 216 U.N.T.S. 134 (1952), revised July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 (hereinafter UCC). The UCC is a multilateral treaty with over 80 signatories. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT app. 21, at 21-1 (1993) (describing UCC). The UCC was developed primarily because of the refusal of the United States to join the Berne Convention. Beryl R. Jones, Legal Framework for the International Protection of Copyrights, in GLOBAL INTELLECTUAL PROPERTY SERIES, at 165, 180 (Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 367, 1993). The intention of the UCC was to bind non-Berne countries, to other Berne and non-Berne countries, but not to bind Berne countries to each other. INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 1, intro. § 3, at 70. While the UCC has many provisions which are similar to the Berne Convention, the UCC does not provide the high level of minimum substantive rights that are found in the Berne Convention. Id.; see Harry G. Henn, The Quest for International Copyright Protection, 39 CORNELL L.Q. 43, 63 (1953) (regarding UCC as retrogressive in comparison to Berne Convention); Hamish R. Sandison, The Berne Convention and the Universal Copyright Convention: The American Experience, 11 COLUM.-VLA L.J. & ARTS 89, 90 (1986) (discussing UCC as successful means of including United States in worldwide copyright community). Also, the UCC does not dispense with formalities, a feature which was patterned after U.S. copyright legislation. 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 1, intro. § 3, at 70 n.140. When a conflict arises between the UCC and the Berne Convention, deference is given to the Berne Convention. The LAW OF COPYRIGHT UNDER THE UNIVERSAL CONVENTION 136-40 (Arpad Bogsch ed., 1968) (discussing articles 19 and 20 of UCC which explain UCC’s relation to other treaties); see ARPAD BOGSCH, UNIVERSAL COPYRIGHT CONVENTION (1958) (providing analysis and commentary on UCC); THE UNIVERSAL COPYRIGHT CONVENTION ANALYZED (T. Kupperman & M. Foner eds., 1955) (same); Sandison, supra at 95-101 (discussing United States involvement in UCC).


7. STEPHEN M. STEWART, INTERNATIONAL COPYRIGHT AND NEIGHBOURING RIGHTS 296 (2d ed. 1989) (noting copyright conventions have been critically described as “having no teeth”); see also Jones, supra note 5, at 170 (describing lack of enforcement measures in international copyright agreements).

8. Kirios, supra note 6, at 53 (discussing territoriality and international copyright infringement actions); Edward A. Sargoy, UCC Protection in the United States: The Coming into Effect of the Universal Copyright Convention, 33 N.Y.U. L. REV. 811, 814 (1958) (finding UCC requires each member state to create individual copyright protection laws); see also UCC, supra note 5, at art. II(1) (“Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to...
global copyright law—will determine the availability and scope of any international enforcement of the author's rights.9

The doctrine of forum non conveniens further inhibits U.S. copyright holders from obtaining enforcement against international copyright infringements.10 Under this doctrine, United States federal courts may dismiss a cause of action either instituted in an inconvenient forum or not relating to the community of the forum court.11 In addition, the trial court judge has complete discretion over when to apply the doctrine.12

The United States Court of Appeals for the Ninth Circuit visited the question of copyright enforcement under the United States Copyright Act in Creative Technology, Ltd. v. Aztech System Pte, Ltd. ("Creative").13 The main issue that the court addressed in Creative was whether the High Court of Singapore was an adequate alternative forum on the grounds of forum non conveniens, when there were twelve registered United States copyrights at issue and both parties to the action were Singapore corporations.14 The majority held that the High Court of Singapore was an adequate alternative forum for this United States copyright infringement action.15 The dissent, on the other hand, argued that public and private interest factors weighed in favor of retaining this action in a United States district court.16

works of its nationals first published in its own Territory, as well as the protection specially granted by this Convention.

9. Krios, supra note 6, at 54; see also Strong, supra note 2, at 195 (noting that "[c]opyright law is intrinsically a creature of national law"); June M. Besek, Protecting Your Copyright Abroad: Selected Issues, in Global Trademark and Copyright, at 597, 599 (Patent, Copyrights, Trademarks and Literary Property Course Handbook Series No. 993, 1993) (stating that "[c]opyright laws are territorial").

In addition, an author has a heavy burden of copyright enforcement when distributing a work with a geographically immense market yet quantitatively small distribution. Krios, supra note 6, at 54. In this case, the author is realistically without an effective means of protecting his or her copyright. Id. While a single international tribunal applying a "worldwide law of copyright" could overcome this problem, no such tribunal exists. Id. The problem of effective relief arises because copyright protects works often infringed in multiple national territories simultaneously. 1 International Copyright Law and Practice, supra note 1, intro. § 3, at 49. It is especially difficult to grant effective relief in cases where works are exploited across a border where there are rights on one side of the border but not the other. Id.


13. 61 F.3d 696 (9th Cir. 1995).

14. For a discussion of the facts of Creative, see infra notes 122-33 and accompanying text.

15. For a discussion of the majority's opinion in Creative, see infra notes 134-63 and accompanying text.

16. Creative, 61 F.3d at 704. Further, Judge Ferguson argued that there was no basis in claiming that it is not convenient to try the case in a U.S. District Court. Id.
This Note will examine the proper venue for a cause of action based on U.S. copyright infringement when not all of the infringing acts occur domestically. As background, Part II explores international copyright law and the mechanism for enforcement. Next, Part III of this Note presents the facts of the Creative case, discussing both the majority and dissenting opinions of the decision. Part IV of this Note analyzes the policy driving the majority and minority decisions, ultimately resulting in the case being dismissed on the basis of forum non conveniens. In Part V, this Note considers the impact that the Ninth Circuit's decision will have on future cases involving copyright infringement actions brought in United States district courts by foreign plaintiffs. Finally, this Note concludes that a more uniform and predictable practice needs to be established to aid plaintiffs in early determination of proper venue for copyright infringement that does not completely occur in one country.

II. BACKGROUND

A. International Copyright Protection

1. Is There Such a Thing as an International Copyright?

The term "international copyright" is somewhat inaccurate, since there is no existing code governing copyright protection across national borders. Thus, a true international copyright does not exist. Instead,
a web of copyright relations among sovereign states, based on bilateral copyright treaties and multilateral copyright conventions, potentially protects copyrights internationally. Each state within the web has its own copyright law which is applicable to acts occurring within its territory. As a result, copyright protection for citizens outside their country is available only to the extent that the copyright is protected by individual countries where the infringement occurs. Although most countries extend copyright protection to foreign works under certain circumstances, protection varies considerably. It is important to note, however, that certain fundamental copyright principles have gained worldwide acceptance.

2. Policies Supporting International Copyright Protection

Governments primarily implement copyright protection because of its social benefits. A copyright is a monopoly to protect tangible work from reproduction. Governments offer this protection to motivate individual

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25. Baumgarten, supra note 6, at 251. Further, “[i]nternational copyright law is a hybrid” between private and public international law. Stewart, supra note 7, at 30. The main source of international copyright law is international conventions, such as the Berne Convention and the UCC. These conventions are treaties and as such are accorded substantial weight in international law. International Law at xiv (Ingo von Munch & Andreas Buske eds., 1985). For a discussion of the elements of these two conventions, see supra notes 4-9, infra notes 42-56 and accompanying text.


27. For a discussion of international intellectual property rights, see supra note 8 and accompanying text; see also 2 Goldstein, supra note 24, § 16.3, at 682-84 (stating that copyright is territorial and exists under law of individual countries); Robert A. Leflar et al., American Conflicts Law 152 (4th ed. 1986) (stating territoriality is choice of law principle). Territoriality provides that the nation where the transaction took place is the nation governing the substantive law of the action. Leflar, supra, at 152.

28. Jones, supra note 5, at 165 (discussing legal framework for international copyright protection).

29. Id. For a discussion of generally accepted copyright principles, see infra notes 30-41 and accompanying text.

30. Sony Corp. of Am., 464 U.S. at 429 (stating that copyright protection provides reward to copyright owner that is secondary to primary benefit for general public). The enhancement of scientific and artistic progress is the primary purpose of U.S. copyright law. Joseph Drexel, What is Protected in a Computer Program? 1 (1994). This, however, is not true throughout the world. Id. For example, in continental Europe, the primary purpose of copyright law is to protect the author’s property based on personality and social protection. Id. at 2. This concern is arguably nonexistent in the field of software copyright as computer programs are inherently depersonalized. For a further discussion of the policy behind copyright protection generally, see Drexel, supra, at 30-36.

creators to continue their creative work. In the end, societies benefit from the resulting freer flow of works and ideas. Additionally, governments implement copyright protection to allow creators to benefit from the investment and risk of their creative efforts. The creator initiates and then invests in the production of a work. Through copyright protection, "tangible form" may be either visually or audibly recreated to represent the original work. Protectable form includes a broad range of artistic, literary and musical works of authorship. See generally Gary M. Kopski & Michael J. Kline, A Primer on Intellectual Property: The Basics of Patents, Trademarks, Copyrights, Trade Secrets, and Related Rights, 50 ALB. L. REV. 405 (1986) (offering overview of intellectual property law).

Examples of works that are not copyrightable are "mere ideas, ephemeral sounds or gestures." See Takeall v. PepsiCo Inc., 14 F.3d 596 (4th Cir. 1993) (declining protection for phrase "You Got the Right One, Uh-Huh"), cert. denied, 114 S. Ct. 2742 (1994). For more criteria establishing categories of works entitled to copyright protection under the U.S. Copyright Act, see 17 U.S.C. § 102 (1994) and STRONG, supra note 2, at 1-5 (discussing subject matter of copyrights).

The scope of copyright protection extends to the "right to copy, distribute, display, perform or create derivative works of an original work." See Anthony L. Clapes, Software: The Legal Battles for Control of the Global Software Industry 27 (1993). While copyright law offers protection against plagiarism, it does not offer protection from the creation of similar or identical works, through independent efforts. In this way, copyright law does not create an absolute monopoly.

Copyright protection is of limited duration. Under the U.S. Copyright Act, the duration of a copyright "endures for a term consisting of the life of the author and fifty years after the author's death." See 17 U.S.C. § 302(a).

Other remedies for copyright infringement include temporary and final injunctions, actual and statutory damages, and additional profits of the infringer. Moreover a court may allow full recovery of costs, including reasonable attorney's fees. Further criminal penalties may also apply. See DoRr & MunCh, supra note 31, §§ 5.18 & 5.19, at 298-305 (discussing copyright infringement remedies); Goldstein, supra note 24, §§ 11 & 12, at 247-577 (same); MODERN INTELLECTUAL PROPERTY, supra note 3, § 4.02[D], at 4-51 to 4-63 (same).
tection, governments seek to balance the public interest in wide dissemination of creative works with the private interest in rewarding creators. 36

Comparative differences between copyright laws of developed countries and those of less developed countries demonstrate how difficult it can be to balance these public and private interests. 37 Generally, developed countries believe that elevated protection of intellectual property is essential to promote creative inventions and literary works. 38 Less developed countries, however, tend to believe that intellectual property is the "common heritage" for all to share without compensation. 39 Although developing countries would not allow wholesale piracy, they argue that certain current knowledge is necessary for the growth of an established industry and should be freely disseminated. 40

Even if a nation succeeds in harmonizing these competing public and private interests in the form of domestic copyright law, the rights of its creators still cannot be effectively protected absent an adequate international enforcement mechanism. 41 An examination of the possible means of enforcing copyrights internationally is, therefore, crucial.

36. STEWART, supra note 7, at 79. The widest dissemination of the work benefits the potential users of the work. Id.

One commentator noted:

The fortunes of the law of copyright have always been closely connected with freedom of expression, on the one hand, and with technological improvements in means of dissemination, on the other. Successive ages have drawn different balances among the interest of the writer in the control and exploitation of his intellectual property, the related interest of the publisher, and the competing interest of society in the untrammelled dissemination of ideas.

BENJAMIN KAPLAN, AN UNHURRIED VIEW OF COPYRIGHT at vii-viii (1967).

37. STEWART, supra note 7, at 296-302; see also Marshall A. Leaffer, at 76 IOWA LAW REVIEW 273, 275 (1991) (noting that "changing patterns of trade and technology have produced a schism between the West and the developing world in their respective attitudes toward the protection of intellectual property").


39. Cordray, supra note 38, at 138; see also STRONG, supra note 2, at 197 (explaining some qualifications to national treatment favors developing countries). A. Samuel Oddi, The International Patent System and Third World Development: Reality or Myth?, 1987 DUKE L.J. 831, 832-42 (discussing great expense Third World countries must incur to protect intellectual property). In many cases, developing countries will only pay for information protected by copyrights after receiving substantial concessions. STRONG, supra note 2, at 200.

40. Wan Kwong Weng & Tom Allen, Computer Software and Singapore's Law of Copyright, 16 EUR. INTELL. PROP. REV. 500, 500 (1994). Therefore, copyright laws for a developing country must be permissive enough to permit some borrowing from existing works, but strict enough to satisfy international expectations. Id.

41. STEWART, supra note 7, at v.
B. International Agreements Regarding Copyrights

1. The Berne Convention and the Universal Copyright Convention

The Berne Convention and UCC are the major international treaties in the area of copyrights.42 From these two treaties evolved the two important principles of "national treatment"43 and "territoriality."44 National treatment means that member countries must treat non-nationals as they would treat nationals.45 Because national treatment binds each country to


43. Eugen Ulmer, Intellectual Property Rights and the Conflict of Laws 9 (1978). The principle of national treatment is one of the main buttresses of the major international copyright conventions. Id. The Senate Judiciary Committee, in the Senate Report on the U.S. Adherence to the Berne Convention and the interpretation of the Implementation Act, explicitly acknowledged the importance of this principle. See S. REP. No. 100-352 (1988), reprinted in 1988 U.S.C.C.A.N. 3706, 3707 (noting that protection under both Berne Convention and UCC is based on general concept of national treatment, which "requires each member State to accord to nationals of other member States the same level of copyright protection provided to its own citizens").

The international copyright conventions adopted the principle of national treatment for three reasons. Stewart, supra note 7, at 38-39. First, it allows both the courts and litigants to use the forum law. Id. Second, national treatment makes all persons equal before the law, minimizing discrimination against foreigners. Id. Third, national treatment upholds the principle of non-extraterritorial application of copyright law. Id.

44. For a further discussion of territoriality, see supra note 8 and infra notes 48-56 and accompanying text.

45. Ulmer, supra note 43, at 1; see also 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 1, intro. § 5, at 145-74 (finding central thrust of these conventions is national treatment and detailing principle of national treatment); Stewart, supra note 7, at 37-48 (exploring implication of national treatment); Strong, supra note 2, at 196 (explaining principle of national treatment); Cinque, supra note 1, at 1272-76 & n.181 (same).

Article 3(1)(a) of the Berne Convention provides that "[t]he protection of this Convention shall apply to: (a) authors who are nationals of one of the countries of the Union, for their works, whether published or not." Berne Convention, supra note 4, art. 3(1)(a).

The first paragraph of Article 5 of the Berne Convention further states that: "Authors shall enjoy, in respect of works for which they are protected under this convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals . . . ." Id. art. 5.

The UCC also espouses the principle of national treatment:

Published works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as the other State accords to works of its nationals first published in its own territory, as well as the protection specially granted by this Convention.

UCC, supra note 5, at art. II(1). To illustrate the principle of national treatment: An American artist in Italy must be able to obtain identical treatment as an Italian artist in Italy; likewise, an Italian artist in the United States must be able to obtain the same treatment as an American artist in the United States. Strong, supra note 2, at 196; see also David R. Toraya, Note, Federal Jurisdiction Over Foreign Copyright
treat nonnationals as nationals for purposes of copyright protection, national treatment has largely obviated conflict of law problems in international copyright law.\textsuperscript{46} It is important to note that the principle of national treatment does not mean that the works of United States nationals will get the same treatment abroad as they do in the United States, but rather, that works protected by the Berne Convention (a "Berne work" or right) will be protected abroad on roughly the same terms as they are for nationals of that country.\textsuperscript{47}

The second principle, territoriality, is intertwined with national treatment.\textsuperscript{48} Copyright law has traditionally been viewed as territorial.\textsuperscript{49} As a result, protection extends to works based on where the infringement takes place.\textsuperscript{50} The principle of territoriality localizes copyright actions by finding jurisdiction over an infringement claim in the courts of the nation where the alleged infringement occurred.\textsuperscript{51} While the procedural law of the forum governs how relief is granted, the law of the protecting coun-

\textsuperscript{46} Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1097 (9th Cir.) (en banc), cert. denied, 115 S. Ct. 512 (1994). For example, this problem would arise where the owner of a copyrighted work authored by a U.S. national sued for infringement occurring in Germany. \textsuperscript{2} GOLDSTEIN, supra note 24, § 16.2, at 681-82. German law would govern this action, not U.S. law. \textsuperscript{Id.; see also} Toraya, supra note 45, at 1172 (noting national treatment provides complete conflict of laws rules—law where infringement occurred is always applicable law).

\textsuperscript{47} Besek, supra note 9, at 603 (defining national treatment to mean country will protect foreign nationals' works on same terms and to same extent as it protects its own nationals' works).

\textsuperscript{48} UCC, supra note 5, at art. II(1); \textsuperscript{see also} Kirios, supra note 6, at 53, 55 (finding principle of territoriality applied to copyright law since beginning of nineteenth century).

\textsuperscript{49} 1 GOLDSTEIN, supra note 24, § 1.14, at 43-44; \textsuperscript{see also} Strong, supra note 2, at 195-99 (characterizing copyright as intrinsically creature of national law).

\textsuperscript{50} 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 1, intro. § 3, at 45 (discussing how to identify protecting countries). Several difficulties arise when trying to determine the protecting country. \textit{Id.} First, what constitutes "inside" a country. \textit{Id.} Second, what "act" triggers liability. \textit{Id.} Third, what constitutes a "work." \textit{Id.}

\textsuperscript{51} ROBERT A. GORMAN, COPYRIGHT LAW 102 (1991). With transborder copyright protection, it is helpful to break down the infringement into components, country-by-country prior to analyzing which law or laws should apply to which acts. 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 1, intro. § 3, at 46.
try—where the infringement occurred—is determinative, even if the suit is brought in a forum outside that country.52

Territoriality can be a “somewhat elastic notion.”53 When confronted with an act triggering copyright liability, a court will hear an action if the act occurred within the country whose law defines the act as infringing.54 Many courts, however, will not entertain a claim that the defendant violated a copyright as a result of the defendant’s action in a different nation.55 While the doctrine has been challenged recently, United States courts remain relatively faithful to the principle.56

2. The United States and International Agreements

Originally, the United States did not participate in the Berne community of countries (Berne Union) for several reasons.57 First, the United

52. 1 INTERNATIONAL COPYRIGHT LAW AND PRACTICE, supra note 1, intro. §§ 5[4][b] & 6[1][b], at 173-80, 202-05.
53. Id. at intro. § 3, at 48.
54. Id. In order to ensure that the courts do not construe territoriality at will, the Berne Convention and UCC have created a worldwide system within which member countries are required to localize infringing acts. Id.
55. Berne Convention, supra note 4, at art. 5(2); see also 1 GOLDSTEIN, supra note 24, § 1.14, at 43-44 (extending U.S. Copyright Act no further than U.S. borders); Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1097 (9th Cir.) (en banc) (finding no cause of action under U.S. copyright laws when infringing conduct consists solely of authorization action occurring within territorial boundaries of United States for acts that occur entirely abroad), cert. denied, 115 S. Ct. 512 (1994); Filmvideo Releasing Corp. v. Hastings, 668 F.2d 91, 93 (2d Cir. 1981) (holding U.S. Copyright laws do not have extraterritorial application to prevent appellant from using copyrighted material abroad, in absence of evidence showing unlawful possession). But see Update Art, Inc. v. Modiin Publishing, Ltd., 843 F.2d 67, 73 (2d Cir. 1988) (finding extraterritorial application of copyright law permissible “when the type of infringement permits further reproduction abroad”); Timberlane Lumber Co. v. Bank of Am., N.T. & S.A., 549 F.2d 597, 615 (9th Cir. 1976) (asserting extraterritorial jurisdiction when effects of infringement in United States and contacts of offending party with United States are particularly strong), aff’d, 749 F.2d 1378 (9th Cir. 1984), cert. denied, 472 U.S. 1032 (1985).
56. Ortmann v. Stanray Corp., 371 F.2d 154 (7th Cir. 1967) (holding claim for patent infringement not open to courts of foreign infringements unless there was also similar domestic infringement suit); Vanity Fair Mills, Inc. v. T. Eaton Co., 254 F.2d 633, 644 (2d Cir.) (refusing jurisdiction because U.S. remedies are constitutionally limited and cannot provide extraterritorial application to foreign nationals), cert. denied, 352 U.S. 871 (1956); Packard Instrument Co. v. Beckman Instruments, Inc., 346 F. Supp. 408 (N.D. Ill. 1972) (finding action to invalidate foreign patents was inappropriate subject matter for U.S. courts).
57. At the time the Berne Union was formed in 1886, the executive branch of the U.S. government agreed in principle with the Berne Convention but the legislative branch had not advanced far enough on the question of international copyright law to permit the conclusion of a copyright treaty. Thorvald Solberg, The International Copyright Union, 36 YALE L.J. 68, 96-97 (1926) (referencing then Secretary of State Winchester’s report of 1886 that advocated principle of full international protection for authors). Additionally, the United States was hesitant to join the Berne Union because of its protection of moral rights and the duration of its protection of copyright. Id.; see also Robert Plaisant, Droit de Suite and Droit Moral Under the Berne Convention, 11 COLUM.-VLA J.L. & ARTS 157, 160-64 (1986) (discuss-
States Copyright Act did not provide protection for foreign work as required under the Berne Convention. Second, the United States was at odds with perhaps the hallmark of the Berne Convention: the breakdown of certain formalities such as notice and registration. Even after U.S. copyright law did extend to foreign works, the United States chose to enter into bilateral agreements with other countries rather than join the Berne Union.

Over time, however, the Berne Convention became an attractive alternative for the United States. First, worldwide demand for American books, records, films, computer software and other copyrighted works continued to expand. Second, advances in technology generated new forms of creativity and protectable works. Third, new technology, like coming moral rights under Berne Convention). In fact, the United States promoted the formation of the UCC as an alternative to the Berne Convention. STRONG, supra note 2, at 196.

The United States did not view formal membership in the Berne Union as an urgent matter partly because of what is known as the "back door to the Berne." Sandison, supra note 5, at 103. By simultaneously publishing a U.S. work in the United States and in a Berne Convention member nation, like Canada, it was possible to secure protection of that work throughout the Berne Union without obligating the United States to provide reciprocal protection for any Berne Convention work. Max M. Kampelman, The United States and International Copyright, 41 AM. J. Int'l L. 406, 419 (1947) (finding that because of "courtesy" copyright protections, Americans could have their rights protected throughout many Berne Convention countries if they simultaneously published their works in participating country like England); Barbara A. Ringer, The Role of the United States in International Copyright Past, Present and Future, 56 GEO. L.J. 1050, 1059 (1968) (noting other countries permitted Americans to obtain "courtesy" copyright protection).

58. FOSTER & SHOOK, supra note 1, at 15 (contending that during early part of nineteenth century, not only did U.S. copyright law afford less protection for foreigners, U.S. government virtually allowed U.S. printers to pirate foreign publication of any books they wished). With no copyright restrictions in place, U.S. citizens paid much lower prices than if the United States government had prohibited such reprinting. Id.

59. 2 NIMMER & NIMMER, supra note 5, §§ 7.01 & 7.02, at 7-9 to 7-18.


61. 3 NIMMER & NIMMER, supra note 5, § 17.01[C], at 17-12 (discussing United States's accession into Berne Convention).


63. See Cordray, supra note 38, at 121 (discussing higher standards of intellectual property protection necessitated by advances in technology).
Computers, "internationalized" intellectual property.\textsuperscript{64} The United States came to believe that membership in the Berne Union would better promote protection and enforcement of United States copyrights in the global marketplace.\textsuperscript{65}

In 1988, the United States enacted amendments to the 1976 Copyright Act (Copyright Act) in order to satisfy Berne Convention obligations.\textsuperscript{66} Today, the Copyright Act protects copyright owners against both unauthorized importation and subsequent unauthorized distribution of copyrighted materials.\textsuperscript{67} Although, the courts have held that when the alleged copyright infringement takes place both in and outside the United States, U.S. law will only reach domestic infringement.\textsuperscript{68}

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The United States Copyright Act applies to computer programs. 17 U.S.C. § 101(10); 96th Cong., 2d Sess. (1980) 94 Stat. 3028 and Pub. L. No. 96-517 reprinted in 1980 U.S.C.C.A.N. 6460, 6506, 6509 (1980); see also Frederic W. Neitzke, A SOFTWARE LAW PRIMER 13 (1984) ("Copyright protection automatically attaches to a work as it is 'fixed in a tangible medium.' This means that as you write a letter or make out a shopping list or write a computer program, copyright protection comes into existence as the words are put on paper.").

While the trend, however, is toward the copyright protection of software, many countries have not yet specifically addressed this issue. The LAW AND BUSINESS OF COMPUTER SOFTWARE, § 12.03, at 12-7 (D.C. Toedt III ed., 1995). A few years ago, the United States was the only country in the world affording copyright protection to computer software by statute. Id. Since then, over 20 countries, including Singapore, have amended their copyright laws to include computer software. Id.

\textsuperscript{65} Neil Boorstin, Boorstin On Copyright § 17.01, at 17-1 to 17-5 (1994).


\textsuperscript{67} Parfums Givenchy, Inc. v. Drug Emporium, Inc., 38 F.3d 477 (9th Cir. 1994) (affirming grant of summary judgment, finding no distinction under U.S. copyright law between distribution and importation), cert. denied, 115 S. Ct. 1351 (1995); BMG Music v. Perez, 952 F.2d 318, 320 (9th Cir. 1991) (affirming district court holding that defendant infringed plaintiffs' copyright by importing and selling plaintiffs' copyrighted material manufactured abroad), cert. denied, 505 U.S. 1206 (1992); see also 17 U.S.C. § 501(a) (1994).

\textsuperscript{68} Metzke v. May Dep't Stores Co., 878 F. Supp. 756, 760 (W.D. Pa. 1995). But see Update Art Inc., v. Modiin Publishing Ltd., 843 F.2d 67, 73 (2d Cir. 1988) (finding exception to prohibition of extraterritorial application of copyright laws "when the type of infringement permits further reproduction abroad such as the unauthorized manufacture of copyrighted materials in the United States"). For a discussion of the principles of territoriality and extraterritoriality, see supra notes 48-56 and infra notes 87-89.
3. Singapore’s Copyright Law

Increasing economic development, with an emphasis on high-technology industries and an export-based economy, prompted Singapore to modernize its intellectual property protection.\textsuperscript{69} Similar to the U.S. copyright law, Singapore’s reformed copyright law, the Singapore Copyright Act of 1987 (the “Singapore Copyright Act”) extends protection to the originality of the work.\textsuperscript{70} The Singapore Copyright Act also extends to computer software\textsuperscript{71} and requires no formal registration to obtain copy-

\textsuperscript{69}. INTELLECTUAL PROPERTY RIGHTS IN SCIENCE, TECHNOLOGY AND ECONOMIC PERFORMANCE: INTERNATIONAL COMPARISONS 187 (Francis W. Rushing & Carole G. Browne eds., 1990) (indicating that advantages for Singapore in enacting intellectual property protection outweighed drawbacks); Weng & Allen, supra note 40, at 501 (examining computer software under Singapore copyright law); see also COPYRIGHT LAWS AND TREATIES OF THE WORLD (SINGAPORE) 6-53 (1956) (reprinting complete text of Copyright Act of 1987) [hereinafter COPYRIGHT LAWS (SINGAPORE)].

The United States applied a significant amount of pressure on the Singapore government to enact updated intellectual property laws. INTELLECTUAL PROPERTY PROTECTION IN ASIA § 8.31, at 8-31.0 to 8-31.1 (Arthur Wineburg ed., 1995); INTELLECTUAL PROPERTY RIGHTS GLOBAL CONSENSUS, GLOBAL CONFLICT? 313 (R. Michael Gadbaw & Timothy J. Richards eds. 1988) [hereinafter GLOBAL CONSENSUS]. In fact, U.S. government officials regularly traveled to Singapore beginning in the 1980s to encourage these intellectual property changes. GLOBAL CONSENSUS, supra, at 313.

\textsuperscript{70}. INTELLECTUAL PROPERTY PROTECTION IN ASIA, supra note 69, § 8.31, at 8-31.0 to 8-31.1 (noting copyright law covers expression of idea in permanent form). “Originality” refers to the form of the expression of an idea, but does not encompass the underlying idea in the work. Regional Focus: New Works Under Copyright Law (Singapore), IP Asia 11 (Oct. 17, 1992) [hereinafter Regional Focus]. For a comparison between Singapore copyright law and U.S. copyright law, see infra notes 66-77 and accompanying text.

\textsuperscript{71}. The Singapore Copyright Act of 1987 (“Singapore Copyright Act”) defines a computer program as:

an expression, in any language, code or notation, of a set of instructions (whether with or without related information) intended, either directly or after either or both of the following:

(a) conversion to another language, code or notation;

(b) reproduction in a different material form, to cause a device having digital information processing capabilities to perform a particular function.

COPYRIGHT LAWS (SINGAPORE), supra note 69, § 7(1), at 7-8; see also Singapore, in INTELLECTUAL PROPERTY WORLD DESK REFERENCE 1-4 (Thomas M.S. Hemnes et al. eds., 1992) (overviewing Singapore’s intellectual property laws finding and computer software protected by copyright laws); Regional Focus, supra note 70, at 11-12 (same); Weng & Allen, supra note 40, at 501-02 (examining computer software under Copyright Act).

As the definition of computer program under the Singapore Copyright Act is identical to the definition in section 10(1) of the Australian Copyright (Amendment) Act 1984 (“Australian Copyright Act”), the Singapore courts treat Australian case law on section 10 as extremely persuasive. Weng & Allen, supra note 40, at 501; see also INTELLECTUAL PROPERTY PROTECTION IN ASIA, supra note 69, § 8.31, at 8-31.0 to 8-31.1 (asserting Singapore Copyright Act is landmark in Singapore copyright protection history); Michael S. Keplinger, International Protection for Computer
right protection. Further, it protects copyrighted works for the duration of the author's life plus fifty years. The enactment of the new Singapore Copyright Act did not begin to affect software piracy for about three years. This delayed decline in software piracy rates was due in part to the country's self-help policy. Under this policy, copyright owners can self-initiate criminal action on behalf of the State. They must do so, however, without any governmental help or resources.

4. The United States and Singapore's Bilateral Copyright Treaty

Seeking the widest possible foreign protection of U.S. copyrights, the United States entered into several bilateral copyright agreements with countries not signatories to the Berne Convention. The United States and Singapore have such an agreement. In 1987, the Minister for Law of Singapore and President Ronald Reagan entered into a bilateral copy-
right agreement, the Copyright Relations Agreement ("U.S.-Singapore Treaty"). Under this treaty, Singapore agreed to protect United States and Singapore works equally under its national laws. In exchange, the United States agreed to protect works of Singapore nationals or domiciliaries or works first published in Singapore under Title 17 of the United States Code (Copyrights).

C. The Limits of United States Domestic Action to Enforce Copyright Protection

1. The Doctrine of Extraterritoriality

Holders of U.S. copyrights have frequently lobbied the United States government for stronger international protection of their works. Towards this end, U.S. copyright holders have supported congressional enactment of unilateral trade action and the exercise of broader
jurisdiction by United States courts. Enlarged jurisdiction can be based on extraterritoriality protection of copyright law and also on the theory that a copyright cause of action is transitory.

Extraterritoriality protection of copyright law is domestic enforcement for copyright infringement occurring entirely abroad. Under United States law, infringing acts that occur outside of the United States are generally not within the jurisdiction of U.S. courts. When, however,
part of an infringing act occurs within the United States, the party who contributed to the act within the United States may be rendered liable under the United States Copyright Act.89

Another way U.S. courts can broaden their jurisdiction over copyright infringement cases is by viewing copyright infringement as a transitory cause of action.90 A transitory cause of action is an action that may be brought in any court that has jurisdiction over the defendant.91 Accordingly, the cause of action could be adjudicated in a U.S. court instead of a court where the action arose.92 Thus, even when the United States Copyright Act does not apply to an infringing act, a U.S. court may have jurisdiction.93 Foreign authors could rely on this concept to sue unauthorized

California Auth. of Racing Fairs, 785 F. Supp. 854, 862 (E.D. Cal. 1992) (rejecting *Danjaq* ruling that unlawful authorization is actionable as infringement if it occurs in United States).

89. 3 NIMMER & NIMMER, supra note 5, §§ 14.05, 17.02 & 17.03, at 14-96, 17-21 to 17-25; see also Cable/Home Communication Corp. v. Network Prods., Inc., 902 F.2d 829, 846 (11th Cir. 1990) (holding defendant liable for infringement of software copyright abroad because act of funding transaction occurred in United States); GB Marketing USA, Inc. v. Gerolsteiner Brunnen GmbH & Co., 782 F. Supp. 763, 773 (W.D.N.Y. 1991) (holding that printing of infringing material in Germany and giving to co-defendant who imported material to United States was actionable under U.S. law); De Bardossy v. Puski, 763 F. Supp. 1239, 1243 (S.D.N.Y. 1991) (finding United States has jurisdiction over copyright infringement occurring in another country if plaintiff shows infringing act occurred in United States and led to further infringement abroad); P&D Int'l v. Halsey Publishing Co., 672 F. Supp. 1429 (S.D. Fla. 1987) (holding defendant's copying of film in Florida at co-defendant's request was sufficient domestic act to give court jurisdiction over extraterritorial showings of infringing film).

90. A transitory cause of action is "[a] lawsuit that may be brought in any one of many places. Actions are 'transitory' when transaction on which they are based might take place anywhere, and are 'local' when they could not occur except in some particular place; the distinction being in nature of subject of injury and not in means used or place at which cause of action arises." BLACK'S LAW DICTIONARY 1499 (6th ed. 1990) (citations omitted); see also 2 GOLDSTEIN, supra note 24, § 16.3 (discussing transitory nature of copyright actions); LEFLAR, supra note 27, at 137-59 (same); 3 NIMMER & NIMMER, supra note 5, §§ 14.05 & 17.03, at 14-96, 17-23 to 17-25 (same); ULMER, supra note 43, at 6-18 (same).

91. 3 NIMMER & NIMMER, supra note 5, § 17.03, at 17-23 to 17-25 (arguing that plaintiff with valid cause of action can bring action in any court where personal jurisdiction of defendant can be obtained); see also Arthur K. Kuhn, Local and Transitory Actions in Private International Law, 22 U. Pa. L. Rev. 301 (1918) (discussing transitory cause of action of foreign copyright infringements).

92. Smith, supra note 85, at 587-88. This principle is subject to jurisdictional requirements of the forum where the action is brought. 2 GOLDSTEIN, supra note 24, § 16.3, at 682-84; 3 NIMMER & NIMMER, supra note 5, § 17.03, at 17-23 to 17-25 (referencing Kirios, supra note 6, at 53); Kuhn, supra note 91, at 301 (noting valid action brought by plaintiff is subject to forum jurisdictional requirements); Note, Jurisdiction Over Foreign Patent Claims, 66 Mich. L. Rev. 358, 358-61 (1967) (discussing whether American court may properly adjudicate foreign patent infringement claim).

93. Smith, supra note 85, at 587-88. Two initial determinants are whether the plaintiff has a valid cause of action under the copyright laws of a foreign country and whether personal jurisdiction over the defendant can be obtained in the U.S.
exploitors of their works in U.S. courts for acts which occurred abroad and constitute infringements of foreign copyright law. 94

District courts in the United States disagree over whether copyright infringement is a transitory cause of action. 95 In London Film Productions, Ltd. v. Intercontinental Communications, Inc., 96 a U.S. court considered the issue of whether copyright infringement was a transitory cause of action for the first time. 97 The London Film court held that "copyright infringement constitutes a transitory cause of action and hence may be adjudicated in the courts of a sovereign other than the one in which the cause of action arose. 98 After London Film, the United States District Court for the Southern District of New York found jurisdiction in several cases where the infringement took place abroad. 99 At the same time, however, the

94. 3 NIMMER & NIMMER, supra note 5, § 17.03, at 17-25. But, even if the court does adjudicate the claim, the range of remedies may be different if there are extraterritorial acts. See, e.g., Update Art, Inc., v. Modiin Publishing, Ltd., 843 F.2d 67 (2d Cir. 1988) (awarding damages accruing from illegal infringement on U.S. copyright of poster in Israeli newspapers).

95. Compare 3 NIMMER & NIMMER, supra note 5, § 17.03, at 17-23 to 17-25 (arguing for extraterritoriality of copyright law) with Toraya, supra note 45, at 1190 (arguing that extraterritorial copyright infringement cases should not be heard in U.S. courts).


97. Id. In London Film, the plaintiff was a British motion picture film production company and the defendant was a New York licensing company. Id. at 48. The plaintiff claimed that the defendant had contributorily infringed its motion picture copyrights in Chile, Venezuela, Peru, Ecuador, Costa Rica and Panama. Id. at 48, 50 n.6.

98. Id. at 49 (citing 3 NIMMER & NIMMER, supra note 5, § 17.03 at 17-25). The court also found that reciprocity was a reason independent of Nimmer's theory to adjudicate the British film production company's claim in the U.S. courts. Id. Under the concept of reciprocity, the London Film court was unwilling to hear a complaint against its own citizens, with regards to a violation of foreign law, a similar unwillingness may result on the part of foreign jurisdictions when a question arises concerning a violation of U.S. laws by one of its citizens. Id.


The plaintiff in Update, Update Art, Inc., a New York corporation, owned the exclusive contract right for worldwide publication and distribution of "Ronbo," which was art work. Update, 843 F.2d at 68. The "Ronbo" poster Update produced was reproduced without Update's permission in the weekend edition of Maariv, a...
United States District Court for the Northern and Eastern Districts of California found no jurisdiction in such cases. Further adding to the confusion, the United States District Court for the Southern District of Florida reached a conclusion similar to that of the New York court, while relying upon the reasoning of the California district courts. Overall, by not agreeing that copyright infringement constitutes a transitory cause of action, the courts have limited the enforcement of copyright protection.

2. Forum Non Conveniens

Even if United States courts do recognize copyright infringement as a transitory cause of action, the doctrine of forum non conveniens still limits copyright enforcement. Under this doctrine, a court may "resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute." This doctrine is well established within

Hebrew language daily newspaper published in Israel. *Id.* at 69. *Maariv* is published by Modiin Publishing, Ltd., an Israeli corporation. *Id.* at 68. The court held that the predicate act of reproducing the poster in the United States for distribution abroad was enough to find that American copyright laws governed this dispute. *Id.* at 73.

100. *ITSI T.V. Prods., Inc. v. California Auth. of Racing Fairs*, 785 F. Supp. 854 (E.D. Cal. 1992) (holding extraterritorial copyright infringement not actionable in U.S. federal courts); *Zenger-Miller, Inc. v. Training Team GmbH*, 757 F. Supp. 1062 (N.D. Cal. 1991) (adopting expansive view of subject matter jurisdiction based on effect of extraterritorial activity on U.S. commerce, but not finding jurisdiction proper under facts presented). In *Zenger-Miller*, the court noted that the subject matter of the case would involve the production of German documents, the testimony of German nationals and the testimony of plaintiff's employees in Germany. *Id.* at 1070. The defendants consented to personal jurisdiction in the United States by the terms of the contract. *Id.* at 1068-69. Under U.S. case law, however, subject matter jurisdiction cannot be consented to by the parties. *Id.* at 1069. Absent a showing that the defendant intended to affect U.S. commerce, the court held that subject matter jurisdiction could not be found. *Id.* at 1071.

101. *P&D Int'l v. Halsey Publishing Co.*, 672 F. Supp. 1429 (S.D. Fla. 1987) (denying motion for conditional dismissal on forum non conveniens grounds in copyright action against U.K. corporation). In *P&D International*, the plaintiff was incorporated in the Cayman Islands and sued Halsey, a Florida corporation, and Cunard N.A.C., the British operator of cruise ships, over Halsey's infringement of a travel film produced by P&D and shown on Cunard's ships. *Id.* at 1431. In dictum, the court noted that U.S. copyright law had no extraterritorial effect. *Id.* at 1432. The court did note, however, that extraterritorial infringers could be prosecuted only for contributing to the act within the United States. *Id.*

102. *ITSI*, 785 F. Supp. at 854 (declining jurisdiction over Mexican corporation charged with infringing copyright held by Illinois corporation for broadcast of horse races); *Zenger-Miller*, 757 F. Supp. at 1062 (declining jurisdiction when copyright infringement outside United States is not part of, nor consequence of, infringing act occurring within United States).


104. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). The *Gulf Oil* decision, however, has been disputed on the basis that forum non conveniens dismis-
the U.S. federal court system and can apply even where the alternative forum would not provide the same range of remedies as would the original forum. Courts may choose to apply this doctrine whenever dismissal would “best serve the convenience of the parties and the ends of justice” and an adequate alternative forum is available.

In *Gulf Oil Corp. v. Gilbert* and its companion case *Koster v. Lumbermens Mutual Casualty Co.*, the United States Supreme Court crystallized the doctrine of forum non conveniens. After these two cases, a court considering a motion to dismiss on the ground of forum non conveniens sals are inappropriate if the plaintiff has chosen a legitimate forum. See, e.g., Brainerd Currie, *Change of Venue and the Conflict of Laws*, 22 U. Chi. L. Rev. 405, 420-34 (1955) (arguing that forum non conveniens dismissals are inappropriate when alternate forum lies within federal system); Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. Pa. L. Rev. 781, 841-46 (1985) (arguing that forum non conveniens should be replaced by more stringent standards for jurisdiction).

105. 28 U.S.C. § 1404(a) (1994) (authorizing federal courts to apply forum non conveniens). Section 1404(a) provides: “For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.” *Id.*

106. Ceramic Corp. of Am. v. Inka Maritime Corp., 1 F.3d 947, 949-50 (9th Cir. 1993) (holding that this action illustrates rare instance where available remedy in alternative forum, Japan, was “clearly unsatisfactory” and thus, inadequate alternative forum because Japanese court would “not permit litigation of the subject matter of the dispute”); Mercier v. Sheraton Int’l, Inc., 981 F.2d 1345 (1st Cir. 1993) (finding only if remedy provided is so clearly inadequate or unsatisfactory that it is no remedy at all should forum non conveniens dismissal be denied), *cert. denied*, 508 U.S. 912 (1993); Lockman Found., 930 F.2d at 768-69 (holding that even if RICO and Lanham Act claims were unavailable in Japan, “‘possibility of unfavorable change in law’ is not to be given conclusive or substantial weight in forum non conveniens inquiry” (quoting *Piper Aircraft v. Reyno*, 454 U.S. 235, 249-51 (1981))).


108. *Piper*, 454 U.S. at 254 n.22; Ceramic, 1 F.3d at 949 (finding Japan inadequate alternative forum because Japan will not permit litigation of subject matter of dispute); *Mercier*, 981 F.2d at 1349 (finding defendant must bear burden of proving both adequate alternative forum available and likelihood of serious unfairness in absence of transfer).


111. The doctrine of forum non conveniens has a long history, beginning in Scotland. For a discussion of the history of forum non conveniens, see Robert Braucher, *The Inconvenient Federal Forum*, 60 Harv. L. Rev. 908, 909-10 (1947). The Scottish courts saw the doctrine of forum non conveniens as an exception to the general rule that a court must exercise the jurisdiction it possesses. Following Scotland’s lead, the United States firmly established the doctrine of forum non conveniens through the Supreme Court decisions in *Gulf Oil* and *Koster*. *Koster*, 330 U.S. 518; *Gulf Oil*, 330 U.S. 501.

In *Gulf Oil*, the Virginia plaintiff brought an action in a federal district court in New York City against a Pennsylvania corporation. *Gulf Oil*, 330 U.S. at 502-03. The court had jurisdiction based on diversity of citizenship. *Id.* at 503. The plaintiff sought to recover damages for the destruction of its Virginia warehouse and its contents resulting from the defendant’s negligence. *Id.* at 502-03. Since all of the events took place in Virginia, most of the witnesses lived in Virginia and Virginia
must apply a two-part test. First, the court must determine whether an adequate alternative forum exists. Second, the court must determine whether the balance of public and private interests warrants dismissal.

courts were available to the plaintiff, the court dismissed the suit on the grounds of forum non conveniens. Id. at 509-12.

Similarly, in Koster, a federal district court in New York dismissed a suit on the grounds of forum non conveniens. Koster, 330 U.S. at 520. The plaintiff, a member and policyholder of Lumbermen's Mutual Casualty Company, brought a derivative action “in the right of Lumbermen's and on behalf of all its members and policy holders.” Id. at 519. The defendant, Lumbermen's Mutual Casualty Company, had its home and principal place of business in Illinois. Id. at 520. This derivative action could have had hundreds of potential plaintiffs. Id. at 524. The plaintiff in Koster did not introduce any evidence showing the benefit of his chosen forum. Id. at 531-32. Additionally, the defendant introduced evidence showing harassment. Id. On these grounds, the Supreme Court concluded that the plaintiff’s choice of forum was not suitable to decide this controversy. Id. at 532. In so holding, the Court reasoned that the ultimate inquiry is focused on determining where the trial will best serve the convenience of the parties and the ends of justice. Id. at 527; see also Peter G. McAllen, Deference to the Plaintiff in Forum Non Conveniens, 13 S. Ill. U. L.J. 191, 211 (1989) (discussing possible rationale of Gulf Oil Court for deference to plaintiff's choice of forum).

112. See generally Piper, 454 U.S. at 235 (applying two-part test in forum non conveniens analysis); Gulf Oil, 330 U.S. at 501 (establishing two-part forum non conveniens test); Ceramic Corp. of Am. v. Inka Maritime Corp., 1 F.3d 947 (9th Cir. 1993) (applying two-part test in forum non conveniens analysis).

113. Gulf Oil, 330 U.S. at 507. In determining whether an adequate alternative forum exists, the court must evaluate two criteria: (1) whether the defendant is subject to jurisdiction in the alternative forum and (2) whether the alternative forum provides “some potential avenue for redress.” Ceramic, 1 F.3d at 959.

To satisfy the first criteria, all that is generally required is that the defendant be amenable to process in the other jurisdiction. Gulf Oil, 330 U.S. at 506-07. The defendant can submit to jurisdiction in the alternative jurisdiction to satisfy this requirement. Hoffman v. Blaski, 363 U.S. 335, 364 (1960) (Frankfurter, J., dissenting) (noting that to obtain forum non conveniens dismissals, defendants often agree to waive jurisdictional objections); Lockman Found. v. Evangelical Alliance Mission, 990 F.2d 764, 768 (9th Cir. 1991) (submitting to Japanese jurisdiction).

To satisfy the second criteria, the plaintiff must be able to litigate the subject matter of the dispute in the alternative forum. Gulf Oil, 454 U.S. at 254-55 n.22. Therefore, if the alternative forum offers a less favorable forum to the plaintiff, this would not, by itself, defeat a motion for forum non conveniens. Id. at 246. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative. Piper, 454 U.S. at 255 n.22. A common example of an unsatisfactory remedy is one where the alternative forum does not permit litigation of the subject matter of the dispute such that “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.” Piper, 454 U.S. at 254 & n.22; cf. Phoenix Canada Oil Co. v. Texaco, Inc., 78 F.R.D. 445 (Del. 1978) (refusing dismissal where alternative forum, Ecuador, may not hear case and there is no generally codified Ecuadorian legal remedy for unjust enrichment and tort claims asserted).

114. Ceramic, 1 F.3d at 949 (holding this showing must “overcome ‘great deference’ . . . due plaintiff”); see also Piper, 454 U.S. at 241 n.6 (listing factors pertaining to private and public interest of litigants).

The public interest factors include:
(1) administrative difficulties flowing from court congestion;
(2) imposition of jury duty on the people of a community that has no relation to the litigation;
With this two-part test, the party seeking the motion for forum non conveniens bears the burden of proof. In determining how the public and private factors balance, courts generally are flexible and do not find one factor to be controlling. Instead, they may look to a number of traditional factors.

3. Forum Non Conveniens and Foreign Plaintiffs

Under the doctrine of forum non conveniens, foreign plaintiffs are treated differently from forum plaintiffs. When presented with a forum plaintiff, courts generally assume that the plaintiff’s choice of forum is convenient and do not grant dismissal. When the plaintiff is foreign, however, the court is less likely to assume that the forum chosen is convenient. In such a case, the party opposing dismissal bears the burden of

(3) local interest in having localized controversies decided at home;
(4) the interest in having a diversity case tried in a forum familiar with the law that governs the action;
(5) the avoidance of unnecessary problems in conflicts of law.

Contact Lumber Co. v. P.T. Moges Shipping Co., 918 F.2d 1446, 1452 (9th Cir. 1990); Zipfel v. Halliburton Co., 832 F.2d 1477, 1485 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988).

The private interest factors include:
(1) the relative ease of access to sources of proof;
(2) availability of compulsory process for attendance of unwilling witnesses, and cost of obtaining attendance of willing witnesses;
(3) possibility of viewing subject premises; and
(4) all other factors that render trial of the case expeditious and inexpensive.

Zipfel, 832 F.2d at 1485.

Unless the balance of these factors weighs strongly in favor of the defendant, the action should not be dismissed on the grounds of forum non conveniens. Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1334-35 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985).

115. Ceramic, 1 F.3d at 949 (holding balance of public and private interest warranting dismissal must outweigh great deference due to plaintiff).
118. For a discussion of the treatment of foreign plaintiffs under the doctrine of forum non conveniens, see infra notes 119-21 and accompanying text.
119. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947); see also Koster v. Lumbermens Mut. Casualty Co., 330 U.S. 518, 524 (1947) (holding that real showing of convenience by plaintiff who has sued in his or her home forum will normally outweigh inconvenience defendant may have shown); McAllen, supra note 111, at 239-42 (detailing Gulf Oil doctrine).
120. Piper, 454 U.S. at 256. A plaintiff who chooses a foreign forum substantially undercuts the presumption that the choice is reasonable: "Because the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign plaintiff’s choice deserves less deference." Id.
showing that "a strong preponderance" of the evidence favors retention of the action. 121

III. CREATIVE TECHNOLOGY, LTD. v. AZTECH SYSTEM PTE, LTD.

In November 1992, a dispute erupted between two Singapore corporations, Creative Technology, Ltd. ("Creative") and Aztech System Pte, Ltd. ("Aztech") when Creative publicly accused Aztech of infringing on its twelve registered United States copyrights for the "text of computer software." 122 Both Creative and Aztech develop, manufacture and market sound cards and related software for personal computers. 123 Creative disciple of national treatment. Murray, 906 F. Supp. at 858. A British plaintiff's copyright infringement claims based on both United States and English law were dismissed on the grounds of forum non conveniens. Id. at 866. The plaintiff argued that the principle of national treatment required greater deference to the foreign plaintiff's choice of forum. Id. at 861-62. The court disagreed, noting that the Berne Convention makes no mention of national treatment with respect to access to the courts of justice. Id. at 862. The court in Murray concluded that the general rule applies—a foreign plaintiff's choice of forum receives less deference than that of a domestic plaintiff. Id.

121. Lony v. E.I. DuPont de Nemours & Co., 935 F.2d 604, 609 (3d Cir. 1991) (reversing district court's order of dismissal on forum non conveniens grounds and remanding case so that discovery and trial can begin); Lacey v. Cessna Aircraft Co., 932 F.2d 170, 179 (3d Cir. 1991) (reversing district court's order of dismissal on forum non conveniens grounds and remanding for determination of whether plaintiff would have access to essential sources of proof in alternative forum of British Columbia). Furthermore, the burden of proof is heavy in copyright cases; defendants rarely prevail on their motions for discretionary transfer. 2 GOLDSMITH, supra note 24, § 13.4, at 410-11. There are times where transfer of venue may be unnecessary. For example, when inferential proofs leave no doubt that the plaintiff's work was copied by the defendant. Then, the only substantial questions are whether the defendant copied an unlawful amount and can the defendant substantiate an affirmative defense. Id.

122. Creative Technology, Ltd. v. Aztech Systems Pte, Ltd., 61 F.3d 696, 705 (9th Cir. 1995) (Ferguson, J., dissenting). Creative filed suit against both Aztech Systems Pte, Ltd., a Singapore corporation and Aztech Labs, Inc., a California corporation and wholly owned subsidiary who marketed Aztech's sound cards in the United States. Id. at 698-99. All of the copyrighted works were first published in the United States. Id. at 705. Creative's complaint was entirely based on Aztech's U.S. infringement of Creative's twelve United States copyrights because of Aztech's design, manufacture, importation and distribution in the United States of similar software. Id.

The copyrights in dispute covered both the computer code in the sound card's memory and the applications programs which enabled users to use Creative's sound card. Opening Brief for Appellant at 5, Creative Technology, Ltd. v. Aztech Systems Pte, Ltd., 61 F.3d 696 (9th Cir. 1995) (No. 93-16997). An application program is "the program with which the ultimate user directs the computer to perform [the user's] particular task." Id.; see also 1 BENDER, supra note 74, § 2.06[2], at 2-117 (discussing difference between system programs and application programs).

123. Creative, 61 F.3d at 698-99. A sound card is a peripheral hardware product which enhances the sound quality of a personal computer while running a program. Opening Brief for Appellant at 5, Creative (No. 93-16997). Creative and Aztech are competing companies in the area of sound cards. Id. Aztech Labs, a wholly owned subsidiary, is Aztech's U.S. distributor. Creative, 61 F.3d at 699.
tributes its sound cards under the name "Sound Blaster," while Aztech distributes its sound cards under the name "Sound Galaxy." Aztech responded to Creative's charges by filing the equivalent of a declaratory relief action in Singapore under the Singapore Copyright Act. The declaratory relief action resulted in a settlement agreement on December 7, 1992. This agreement, however, fell apart. Creative subsequently filed suit in the United States District Court for the Northern District of California, claiming that Aztech's reproduction, adaptation and distribution in the United States of "Sound Blaster clones" violated Creative's exclusive rights under 17 U.S.C. §§ 106 and 501 (1988). In response, Aztech returned to the High Court of Singapore, again seeking declaratory relief.


124. Creative, 61 F.3d at 699. Creative was the pioneer in the sound card field. Opening Brief for Appellant at 5, Creative (No. 93-16997); see also Leong, supra note 123, at 9 (discussing generally competition between Creative and Aztech). Its "Sound Blaster" sound cards are considered the de facto standard by the computer industry. Opening Brief for Appellant at 5, Creative (No. 93-16997).

125. A declaratory action is a statutory remedy for the determination of justiciable controversy where the plaintiffs are in doubt as to their legal rights. BLACK'S LAW DICTIONARY 409 (6th ed. 1990). While no relief is awarded, binding adjudication of the rights and status of litigants is determined through a declaratory action. Id.

126. In the settlement agreement, Aztech agreed to withdraw the action before the High Court of Singapore. Creative Technology, Ltd. v. Aztech Systems Pte, Ltd., No. C-93-1155 WHO, slip op. at 2-3 (N.D. Cal. Oct. 8, 1993). Furthermore, Aztech agreed to allow Creative three weeks to examine the Sound Galaxy series to determine whether any actual infringement existed. Id.

127. Creative, 61 F.3d at 699. While each party accused the other of repudiating the settlement agreement, the district court found the resolution of this issue to be of no consequence to the court's decision on the motion to dismiss on the ground of forum non conveniens. Creative, No. C-93-1155 WHO, slip op. at 3.

128. Creative, 61 F.3d at 699. Section 106(3) grants copyright holders the exclusive right to distribute copyright work; Section 501(a) defines copyright infringement. 17 U.S.C. §§ 106(3) & 501(a) (1994). All research and development of these sound cards occurred in the corporation's principal place of business, Singapore. Creative, 61 F.3d at 699. In the United States, Creative markets its sound cards under the brand name "Sound Blaster" through Creative Labs, Inc., a California corporation and wholly-owned subsidiary. Id. Aztech markets its sound cards in the United States under the brand name "Sound Galaxy" through Aztech Labs, Inc., again a California corporation and wholly-owned subsidiary. Id.

Generally, if copyright infringement does occur within the United States, U.S. copyright law allows the plaintiff to recover the defendant's profits accruing from the exploitation of the work anywhere in the world. 3 NIMMER & NIMMER, supra note 5, § 14.05, at 14-80 (discussing geographic limits on monetary recovery).
under the Singapore Copyright Act, this time for Creative's alleged breach of the December 7, 1992 settlement agreement.\textsuperscript{129}

Aztech, in turn, asked the district court to dismiss Creative's complaint on the ground of forum non conveniens.\textsuperscript{130} The district court granted Aztech's motion for dismissal, holding that: (1) Singapore offered an adequate alternative forum\textsuperscript{131} and (2) the balance of public and private interest factors favored dismissing the action in favor of adjudication in Singapore.\textsuperscript{132} Creative appealed the district court's dismissal, claiming the district court: (1) erroneously applied the forum non conveniens doctrine to an action arising under the U.S. Copyright Act; (2) abused its discretion by concluding that the High Court of Singapore would provide an adequate alternative forum; and (3) abused its discre-

\textsuperscript{129} Creative filed this action in district court on March 31, 1993. \textit{Creative}, No. C-93-1155 WHO, slip op. at 3. Aztech filed a second action in Singapore on April 2, 1993. \textit{Id.} In that action, Aztech sought to compel Creative to comply with the settlement agreement and to renew its request for declaratory relief under the Singapore Copyright Act. \textit{Id.} In response to Aztech's claim, Creative filed mandatory counterclaims in Singapore alleging copyright infringement based on the manufacture of "Sound Blaster clones" in Singapore and their distribution abroad. \textit{Id.} In that action, Aztech sought to compel Creative to comply with the settlement agreement and to renew its request for declaratory relief under the Singapore Copyright Act. \textit{Id.} In response to Aztech's claim, Creative filed mandatory counterclaims in Singapore alleging copyright infringement based on the manufacture of "Sound Blaster clones" in Singapore and their distribution abroad. \textit{Id.} All parties to this action were subject to personal jurisdiction in Singapore and were parties to the parallel action in Singapore. \textit{Id.} at 4-5. Aztech Labs, a California corporation, consented to Singapore jurisdiction and thereby became a party to the action before the High Court of Singapore. \textit{Id.}

\textsuperscript{130} Creative, 61 F.3d at 699. Alternatively, Aztech argued that this action should be dismissed on the basis of the \textit{Colorado River} abstention. \textit{Creative}, No. C-93-1155 WHO, slip op. at 1. For a general discussion of the \textit{Colorado River} abstention argument, see \textit{Colorado River Water Conservation Dist. v. United States}, 424 U.S. 800 (1976). Because the district court granted Aztech's motion for dismissal on the grounds of forum non conveniens, the court did not address Aztech's alternative argument. \textit{Id.} at 1 n.1.

\textsuperscript{131} The district court found that Aztech had shown Singapore to be an adequate alternative forum under the \textit{Piper} test because: (1) the High Court of Singapore had personal jurisdiction over the two parties; (2) the threshold acts of design and manufacture occurred in Singapore; and (3) both corporations were Singapore companies. \textit{Creative}, No. C-93-1155 WHO, slip op. at 4-11.

\textsuperscript{132} The district court found that both the private and public interest factors tipped in favor of Singapore. \textit{Id.} at 11-14.

In assessing the private interest factors, the district court found that the factors of ease of access to proof and the expeditiousness of trial favored Singapore as the proper forum. \textit{Id.} at 12-13. The factor of the location of the witnesses, however, favored the United States as the proper forum. \textit{Id.} at 12. Overall, the court found that private interest factors weighed in favor of Singapore. \textit{Id.} at 13.

The district court found the public interest factors to balance neutrally. \textit{Id.} at 13-14. The court found that both factors would have to apply the law of the other and that there was no comparison offered as to the relative congestion of the two courts. \textit{Id.} The district court also analyzed which forum had a strong local interest in protecting valuable copyright interests, finding that this factor tipped in favor of Singapore as the proper forum. \textit{Id.} Therefore, the public interest factors also weighed in favor of Singapore. \textit{Id.} at 14.

For a detailed discussion of the public and private interest factors which make up the second prong of the test for a forum non conveniens dismissal, see \textit{supra} notes 103-21 and accompanying text.
tion by determining that the balance of relevant public and private interest factors favored dismissal. 133

A. Judge Gibson's Majority Opinion 134

1. Applicability of the Forum Non Conveniens Doctrine

To begin its review of the district court's dismissal of Creative's copyright infringement case, the Ninth Circuit examined when the forum non conveniens doctrine applies to federal statutes. 135 Creative argued that 28 U.S.C. § 1338(a) grants the federal district courts exclusive jurisdiction over claims arising under the Copyright Act. 136 Therefore, Creative concluded, the doctrine of forum non conveniens was inapplicable. 137 The court, however, held that 28 U.S.C. § 1338(a) does not provide the same type of mandatory venue provision as found under other federal statutes, such as the Jones Act or Federal Employer's Liability Act (FELA), and accordingly held that the doctrine of forum non conveniens did apply to copyright infringement claims. 138

133. Opening Brief for Appellant at 3, Creative Technology, Ltd. v. Aztech Systems Pte, Ltd., 61 F.3d 696 (9th Cir. 1995) (No. 93-16997).

134. Judge Floyd R. Gibson is a Senior Judge for the United States Court of Appeals for the Eighth Circuit, sitting by designation.

135. Creative, 61 F.3d at 699-701. The doctrine of forum non conveniens is inapplicable to federal statutes such as the Jones Act or the Federal Employers' Liability Act (FELA). Id. at 699-700. These two statutes contain special provisions mandating venue in U.S. district courts. Id. at 700. The Jones Act provides in pertinent part: "Jurisdiction in [actions under this Act] shall be under the court of the district in which the defendant employer resides or in which his principal office is located." 46 U.S.C.A. § 688(a) (1975 & Supp. 1995). FELA provides in pertinent part: "An action may be brought in a district court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action." 45 U.S.C. § 56 (1994).

136. Creative, 61 F.3d at 700. Creative argued that its claim under the United States Copyright Act, like the Jones Act and FELA, mandated venue exclusively in the U.S. district court. Id.

137. Id. Creative's argument was based on Zipfel v. Halliburton Co., 832 F.2d 1477 (9th Cir. 1987), cert. denied, 486 U.S. 1054 (1988). In Zipfel, the Ninth Circuit held that actions brought under the Jones Act are not subject to dismissal for forum non conveniens. Id. at 1483-87. The Zipfel court reversed the dismissal of an American plaintiff because his claim was governed by U.S. law. Id. at 1487. Creative argued that Zipfel and § 1338(a) jointly precluded the court from exercising any discretion to grant the defendant's forum non conveniens motion. Opening Brief for Appellant at 18, Creative Technology, Ltd. v. Aztech Systems Pte, Ltd., 61 F.3d 696 (9th Cir. 1995) (No. 93-16997). Section 1338(a) provides in pertinent part: "The district courts shall have original jurisdiction of any civil action arising under any act of Congress relating to patents, plant variety protection, copyrights and trade-marks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases." 28 U.S.C. § 1338(a) (1994).

138. Creative, 61 F.3d at 700-01. The court relied on La Seguridad v. Transytur Line, 707 F.2d 1304 (11th Cir. 1983), in reaching this conclusion. Creative, 61 F.3d at 700. The Eleventh Circuit in La Seguridad explained that "[t]he court must ascertain if there is anything about the specific federal statute which indicates that...
In addition, the Ninth Circuit looked at what role, if any, national treatment played in the forum non conveniens analysis. After a brief discussion of the principles of national treatment and territoriality, the court concluded that these principles do not preclude the application of forum non conveniens. The court found that they are choice of law principles and could not serve as a “special immunity” from a forum non conveniens dismissal.

2. Adequate Alternative Forum

Next, the Ninth Circuit turned to the first part of a forum non conveniens analysis—whether an adequate alternative forum for the dispute existed. The court stated that an alternative forum will generally be

Congress implicitly spoke to, and rejected, the application of forum non conveniens doctrine to a suit thereunder. Id. (citing La Seguridad, 707 F.2d at 1310 n.10).

The majority in Creative reinforced its conclusion by referring to the Ninth Circuit’s previous decision in Lockman Foundation v. Evangelical Alliance Mission, 930 F.2d 764 (9th Cir. 1991). Creative, 61 F.3d at 700. In Lockman, the plaintiff appealed the forum non conveniens dismissal of its noncopyright claims and the district court’s refusal to allow it to amend its complaint to drop the copyright claims. Lockman, 930 F.2d at 766. Based on the entire complaint, including the copyright claims, the court in Lockman concluded that there was “no arguably applicable law that would end the forum non conveniens inquiry.” Id. at 771. In light of its decision in Lockman, the court in Creative concluded that “[w]e believe this statement of the law to be equally applicable to the instant case.” Creative, 61 F.3d at 700.

139. Creative, 61 F.3d at 701. The court noted that both the UCC and the Berne Convention mandate a policy of national treatment. Id. at 700. For a further discussion of the policy of national treatment, see supra notes 43, 45-47 and accompanying text.

140. Territoriality is a by-product of national treatment. For a further discussion of territoriality and national treatment, see supra notes 43-56 and accompanying text.

141. Creative, 61 F.3d at 700-01 (finding both U.S. nationals and non-nationals alleging U.S. copyright violations are subject to forum non conveniens analysis).

142. Id. at 701. The court stated that national treatment only requires that Creative be granted the same copyright protections enjoyed by American authors. Id. U.S. nationals are subject to forum non conveniens doctrine and the court concluded that Creative should be as well. Id.

In reaching this conclusion, the court relied on Subafilms, Ltd. v. MGM-Pathé Communications Co. and Nimmer on Copyrights. Creative, 61 F.3d at 701. See Subafilms, Ltd. v. MGM-Pathé Communication Co., 24 F.3d 1088, 1097 (9th Cir.) (en banc) (finding national treatment and territoriality are choice of law principles), cert. denied, 115 S. Ct. 512 (1994); 3 Nimmer & Nimmer, supra note 5, § 17.05, at 17-39 (discussing conflict of laws problems under copyright law).

143. Creative, 61 F.3d at 701-03. The two-part forum non conveniens test was explained in Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981). For a discussion of the two-part forum non conveniens test, see supra notes 103-21 and accompanying text.

In proving the existence of an alternative forum, the defendants bear the burden of proof. Cheng v. Boeing Co., 708 F.2d 1406, 1411 (9th Cir.), cert. denied, 464 U.S. 1017 (1983). The U.S. Supreme Court in Piper stated that the key determination of whether an adequate alternative forum exists is whether “the remedy pro-
deemed adequate if the defendant is amenable to service of process in that forum. The court acknowledged that even in such a situation, an alternative forum may still be inadequate in the rare circumstances where the remedy the forum offered was "clearly unsatisfactory." The majority found that, in this case, the High Court of Singapore could offer an adequate alternative remedy through application of either the Singapore Copyright Act or U.S. Copyright Act to Creative's counterclaim. As a result, the majority concluded that Singapore could provide an alternative forum for this dispute.

Provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all." Piper, 454 U.S. at 254.

144. Creative, 61 F.3d at 701 (relying on Piper, 454 U.S. at 254 n.22). A defendant's agreement to submit to the personal jurisdiction of the foreign forum will satisfy this requirement. Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764, 768 (9th Cir. 1991). The High Court of Singapore has jurisdiction over all the parties. For a description of the High Court of Singapore's jurisdiction in this case, see supra note 114.

145. Creative, 61 F.3d at 701. An inadequate forum is one which "does not permit litigation of the subject matter of the dispute." Id. (quoting Piper, 454 U.S. at 254). For further examples of a "clearly unsatisfactory forum," see supra note 106 and accompanying text.

146. Creative, 61 F.3d at 702. "Regardless of whether the High Court of Singapore has jurisdiction to adjudicate acts of copyright infringement occurring outside Singapore, we believe that the Court is capable of offering Creative an adequate monetary or injunctive remedy under the Singapore Copyright Act." Id. In so holding, the court acknowledged that the scope of relief available to Creative may not be what "Creative envisioned when it filed its claim in the United States district court." Id. The court held, however, that the forum non conveniens doctrine does not require the scope of relief to be what the plaintiff envisioned. Id. Even if the alternative forum does not provide all of the remedies and benefits which might be available in a United States court, the alternative forum is adequate as long as the remedies provided are not "so clearly inadequate or unsatisfactory that [there] is no remedy at all." Id. (quoting Piper, 454 U.S. at 254). In Piper, the Supreme Court further explained that the plaintiff's potential damages award may be smaller, but a satisfactory alternative forum exists because there is no danger that they will be deprived of any remedy or treated unfairly. Piper, 454 U.S. at 255.

The court cited the Singapore Copyright Act which states in relevant part: "Subject to this Act, the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the license of the owner of the copyright, does in Singapore, or authorizes the doing in Singapore of, any act comprised in the copyright." Creative, 61 F.3d at 701 n.4 (citing Singapore Copyright Act § 31(1)).

147. Creative, 61 F.3d at 700. Creative argued that the High Court of Singapore was not an adequate alternative forum for two reasons. First, the High Court would be unable to grant relief for the alleged U.S. copyright infringements because the reach of the Singapore Copyright Act is limited to infringing acts occurring within Singapore. Id. at 701. Second, § 1338(a)'s grant of "exclusive" jurisdiction to the U.S. district courts over claims brought under the U.S. Copyright Act prevents the High Court of Singapore from applying U.S. copyright law to supplement the remedies afforded under the Singapore Copyright Act. Id. The court, however, rejected both arguments. Id. at 700-03.

In rejecting Creative's two arguments, the court found two factors indicated that there were adequate remedies under the Singapore Copyright Act. Id. at 701-
3. **The Balance of Private and Public Interest Factors**

The Ninth Circuit also addressed the second part of a forum non conveniens analysis, the balancing of private and public interest factors.\(^{148}\) On one side of the scale, the majority found that the private factors relating to relative ease of access to sources of proof, as well as the factors that render trial of the case expeditious and inexpensive, weighed in favor of dismissal.\(^{149}\) Most of the evidence upon which the parties would rely was located in Singapore.\(^{150}\) Further, because the court found the parallel action in a Singapore court to have advanced further, it concluded that

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08. First, the court concluded that the High Court of Singapore could grant the relief Creative was seeking despite the territorial limitation of the Singapore Copyright Act. *Id.* at 702. In the counterclaim Creative filed in Singapore, it sought both monetary and permanent injunctive relief for all alleged acts of infringement arising from both the development of the “Sound Blaster clones” in Singapore and their distribution abroad. *Id.* The Ninth Circuit reasoned that the High Court of Singapore could award damages to remedy Aztech Labs’ illegal distribution of pirated sound cards within the United States by including those damages in the amount awarded under the Singapore Copyright Act for Aztech’s alleged infringing acts occurring in Singapore. *Id.* As the Second Circuit did exactly that in *Update Art, Inc. v. Modiin Publishing, Ltd.*, 843 F.2d 67 (2d Cir. 1988), the court saw no barrier preventing the High Court of Singapore from following a similar course of remedy. *Id.* For a further discussion of *Update Art*, see supra notes 88, 99.

Second, the court stated that it was aware of nothing preventing the High Court of Singapore from applying U.S. copyright law to Creative’s counterclaim. *Creative*, 61 F.3d at 702-03. The court recognized that U.S. courts are able to address actions under the copyright laws of other nations. *Id.* (citing Subafilms, Ltd. v. MGM-Pathe Communications Co., 24 F.3d 1088, 1095 (9th Cir.) (en banc), cert. denied, 115 S. Ct. 512 (1994); 2 GOLSTEIN, supra note 24, § 16.3, at 683). By analogy, the court argued that if U.S. courts can entertain actions under the copyright laws of foreign nations, the High Court of Singapore would be capable of doing the same. *Id.* at 703. Further, the court stated that, even if it were to accept Creative’s interpretation of 28 U.S.C. § 1338(a), the statute could not prevent a foreign nation, not bound by the acts of Congress, from applying U.S. copyright law if it so wished. *Id.*

148. *Creative*, 61 F.3d at 703-04 (citing Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508-09 (1947)). Private interest factors include: (1) relative ease of access to sources of proof; (2) the availability of compulsory process for attendance of unwilling witnesses, and cost of obtaining attendance of willing witnesses; (3) possibility of viewing subject premises; and (4) all other factors that render trial of the case expeditious and inexpensive. *Id.* at 703 (citing *Gulf Oil*, 330 U.S. at 508-09).

The public interest factors include: (1) administrative difficulties flowing from court congestion; (2) imposition of jury duty on the people of a community that have no relation to the litigation; (3) local interest in having localized controversies decided at home; (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; and (5) the avoidance of unnecessary problems in conflicts of law. *Id.* at 703-04 (citing *Gulf Oil*, 330 U.S. at 508-09).

149. *Id.* at 703.

150. *Id.* As all of the records and the majority of the witnesses involved in the manufacture of the alleged “Sound Blaster clones” were located in Singapore, the court found that the first private interest factor—the relative ease of access to sources of proof—weighed in favor of dismissal. *Id.*
dismissal of this controversy in the U.S. court system would help expedite resolution in Singapore. 151

In the middle and on the other side of the scale, the majority placed the private factors of ability to view the subject premises, availability of compulsory process for attendance of unwilling witnesses and reduction in the cost of obtaining attendance of willing witnesses. 152 Ability to view the subject premises weighed in favor of neither retention nor dismissal, because there were no premises to view. 153 At the same time, because the majority of the expert witnesses for the case resided in California, the factor of attendance of witnesses weighed in favor of retaining the action. 154

Overall, the majority focused on two important facts. First, the court found that both of the primary parties and the majority of the witnesses were located in Singapore. 155 Second, the court found the key infringing conduct took place in Singapore. 156 Primarily driven by these two conclusions, the majority held that the district court did not abuse its discretion when it found that private interest factors weighed in favor of dismissal of the action. 157

The majority likewise upheld the district court’s determination that public interest factors favored dismissal of the action. 158 The court found that the public interests promoted by not imposing jury duty on the people of a community that have no relation to the litigation and by allowing people of a community to decide localized controversies weighed in favor of dismissing the action. 159 The court reasoned that, because the case neither involved the piracy of American-made products nor substantially involved American companies, the United States’s interest in resolving the dispute was minimal. 160

At the same time, the court viewed the public interest in reducing administrative difficulties flowing from court congestion to be neutral because Singapore and U.S. courts are equally burdened. 161 As the court found that application of foreign law was inevitable regardless of forum, it

151. Id.
152. Id.
153. Id.
154. Id.
155. Id. “Both primary parties, the key infringing conduct, and the bulk of the witnesses are located in Singapore . . . .” Id.
156. Id.
157. Id.
158. Id. at 703-04.
159. Id. The majority characterized this action as “essentially a dispute between two Singapore corporations” and not a case involving “the piracy of American made products or substantively involving American companies.” Id. at 704. Additionally, the court decided that the presence of Aztech Labs, a California corporation and wholly-owned subsidiary of a Singapore corporation “influences [the court’s] analysis very little.” Id.
160. Id.
161. Id. The majority did not disagree with the district court’s finding that both the U.S. and Singapore judiciaries are overburdened. Id.
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considered the public interest in having a diversity case tried in a forum familiar with the action's governing law to weigh in favor of neither side.162 Nevertheless, the majority concluded that the district court did not abuse its discretion in determining that the sum of public interest factors favored dismissal of Creative's copyright infringement claim.163

B. Judge Ferguson's Dissenting Opinion

In his dissenting opinion, Judge Ferguson implicitly agreed that the principle of forum non conveniens can apply under § 1338(a) of the U.S. Copyright Act.164 He contended, however, that the district court failed to properly exercise its discretion because it ignored the unique nature and complexity of American copyright law in its forum non conveniens analysis.165

First, Judge Ferguson addressed the majority's decision not to consider the adequacy of Singapore as an alternative forum in light of the principle of national treatment.166 According to Judge Ferguson, the majority erred by not considering the principle of national treatment and the adequacy of Singapore as an alternative forum.167 Further, Judge Ferguson found that the majority erred by concluding that the High Court could provide remedies under the U.S. Copyright Act.168 He noted that the majority did not rely on any High Court decision or other Singapore authority; in fact, the majority knew only that Singapore was a non-signatory to the Berne Convention.169

162. Id. Additionally, an application of foreign law at some point during litigation of this claim was inevitable, regardless of which court eventually adjudicated the claim. Id.
163. Id.
164. Id. (Ferguson, J., dissenting). Judge Ferguson did not address Creative's first argument that the forum non conveniens doctrine is inapplicable to the U.S. Copyright Act. See id. at 704-09 (Ferguson, J., dissenting). The fact that he began his dissenting opinion by stating the grounds of forum non conveniens upon which a district court may dismiss an action, implicitly indicated that he agreed with the majority on this point. See id. at 704-05 (Ferguson, J., dissenting).
165. Id. at 705-09 (Ferguson, J., dissenting).
166. Id. (Ferguson, J., dissenting). Judge Ferguson noted that national treatment requires that foreign authors who are granted U.S. copyrights must be treated the same as U.S. authors. Id. at 705 (Ferguson, J., dissenting). For the purposes of a forum non conveniens analysis, Judge Ferguson found that the principle of national treatment distinguishes copyright cases from other types of cases. Id. (Ferguson, J., dissenting).
167. Id. at 706 (Ferguson, J., dissenting). Judge Ferguson advocated that, following the principle of national treatment, the courts should allow foreign copyright owners the same opportunity to litigate their case in the United States when the alleged infringement takes place in the United States. Id. (Ferguson, J., dissenting). He therefore concluded that national treatment requires that infringement occurring in the United States be adjudicated in the United States. Id. (Ferguson, J., dissenting).
168. Id. (Ferguson, J., dissenting).
169. Id. at 706-07 (Ferguson, J., dissenting). Judge Ferguson further noted that the record before the court did not contain any reference to a Singapore
Second, Judge Ferguson argued the majority erroneously found that public and private interest factors weighed against retention of the action. Judge Ferguson noted that abuse of discretion is the appropriate standard of review for a dismissal on forum non conveniens grounds. This standard is met when a district court fails to balance the relevant factors. The dissenting judge found that the district court's actions rose beyond the level of this standard, because the court "utterly ignored" the relevant public interest in having U.S. federal courts apply U.S. copyright law to resolve alleged domestic infringement. According to Judge Ferguson, U.S. copyright law was the only law that would apply in this case and to find otherwise is error.

Finally, Judge Ferguson pointed out that the majority failed to consider the relevant public importance of copyright protection of computer products imported and distributed domestically within the United States. He found that because the public good was furthered by copyright protection, the relation of the jury community to the case should be maintained, thus strongly favoring retention of the case in the federal statute or opinion authorizing the type of legal approach that the majority suggests the High Court of Singapore will follow. Id. at 706 (Ferguson, J., dissenting). Therefore, Judge Ferguson found that Singapore is an inadequate and inapplicable forum for protecting Creative's U.S. copyrights. Id. (Ferguson, J., dissenting). Additionally, Judge Ferguson noted that the subject matter of this dispute—twelve U.S. copyrights entitled to protection by American courts against infringement occurring in the United States—made this case exactly the type of case that would not be appropriate for dismissal under Piper. Id. at 706-07 (Ferguson, J., dissenting) (citing Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 n.22 (1981)).

170. Id. at 707-09 (Ferguson, J., dissenting).
171. Id. at 707 (Ferguson, J., dissenting).
172. Id. (Ferguson, J., dissenting). Judge Ferguson stated: If a district court properly analyzes and considers all relevant factors and its balancing of these factors is reasonable, its forum non conveniens dismissal "may be reversed only when there has been a clear abuse of discretion." A district court, therefore, abuses its discretion when it fails to balance the relevant factors.

Id. (Ferguson, J., dissenting) (quoting Gates Learjet Corp. v. Jensen, 743 F.2d 1325, 1334 (9th Cir. 1984), cert. denied, 471 U.S. 1066 (1985)).

173. Id. (Ferguson, J., dissenting). Judge Ferguson pointed to the societal importance of copyright protection of computer products imported and distributed in the United States, the interest of the United States in resolving this matter and the relation of the jury community to this action. Id. (Ferguson, J., dissenting). After considering these factors, he concluded that public interest weighed strongly in favor of retaining this case in the U.S. courts. Id. (Ferguson, J., dissenting).

174. Id. at 706-07 (Ferguson, J., dissenting).
175. Id. (Ferguson, J., dissenting) (citing 133 Cong. Rec. H1293-05 (daily ed. Mar. 16, 1987)). Furthermore, Judge Ferguson noted that U.S. copyright law has yet to fully resolve questions about the extent of protection available for computer software and computer products in general. Id. at 707-08 (Ferguson, J., dissenting).
IV. Analysis

The *Creative* majority narrowly interpreted U.S. copyright law, to the point that it failed to consider the law's unique nature and complexity. While the majority facially applied the forum non conveniens test accurately, its analysis overlooked the general principles at the very heart of copyright protection: public interest factors, national treatment and territoriality, and the location of the "infringing conduct." Since the applicable law was the U.S. Copyright Act and the situs of the alleged copyright infringement was the United States, Judge Ferguson found that the district court erred. He concluded there was a strong public interest in having American courts resolve such a localized controversy. Additionally, Judge Ferguson found that no copyright law other than the U.S. copyright law would need to be applied in this case. Thus, there would not be any conflicts of law problems if the federal courts retained this action.

176. *Id.* (Ferguson, J., dissenting).

177. *Id.* at 707 (Ferguson, J., dissenting). Judge Ferguson analogized the facts of *Creative* to the facts in *Gates Learjet Corp. v. Jensen*. *Id.* (Ferguson, J., dissenting). In *Gates*, the court held that the district court abused its discretion by failing to properly weigh the public interest factors. *Gates*, 743 F.2d at 1325. Although the case involved trademark litigation, *Gates* is applicable because the same public interest factors are considered in a forum non conveniens analysis. The *Gates* court found that the district court failed to weigh Arizona's interest in having the controversy "resolved at home." *Creative*, 61 F.3d at 707 (Ferguson, J., dissenting) (citing *Gates*, 743 F.2d at 1336). Further, the *Gates* court found that Philippine law was not applicable, even though the situs of the alleged trademark and tradename infringement was the Philippines. *Id.* (Ferguson, J., dissenting) (citing *Gates*, 743 F.2d at 1336). "A proper understanding of the applicable law and the relative interest, in fact, suggests that Arizona has the more substantial interest in this litigation." *Id.* (Ferguson, J., dissenting) (quoting *Gates*, 743 F.2d at 1336).

Since the applicable law was the U.S. Copyright Act and the situs of the alleged copyright infringement was the United States, Judge Ferguson found that the district court erred. *Id.* (Ferguson, J., dissenting). He concluded there was a strong public interest in having American courts resolve such a localized controversy. *Id.* (Ferguson, J., dissenting).

Additionally, Judge Ferguson found that no copyright law other than the U.S. copyright law would need to be applied in this case. *Id.* (Ferguson, J., dissenting). Thus, there would not be any conflicts of law problems if the federal courts retained this action. *Id.* (Ferguson, J., dissenting).

178. *Id.* at 705 (Ferguson, J., dissenting).

179. *Id.* at 704-09 (Ferguson, J., dissenting). The doctrine of forum non conveniens is a responsive and flexible method for determining when a case may be more appropriately tried elsewhere. Paxton Blair, *The Doctrine of Forum Non Conveniens in Anglo-American Law*, 29 COLUM. L. REV. 1, 1 (1929) (noting forum non conveniens is part of inherent powers possessed by every court of justice).

180. *Creative*, 61 F.3d at 707-09 (Ferguson, J., dissenting).

181. *Id.* at 699.

182. *Id.* Moreover, Creative's complaint alleged all of Aztech Labs's infringing conduct occurred in the United States. *Id.* at 705 (Ferguson, J., dissenting). The district court also acknowledged that "Creative's complaint focuses on
promote the public benefit received from the labor of creators. If Aztech and Creative disputed the sanctity of a new computer technology's copyright; Creative felt that protection of the copyright would encourage creation of more original technological creations and further the public good. Nevertheless, rather than focus on the publicly beneficial effects which would arise from appropriate resolution of the dispute, the Ninth Circuit focused on the nationality of the disputing parties. If the court had appropriately framed the dispute, it would have found that public interest factors weighed in favor of retention of the dispute in the federal court system.

Similarly, if the court would have framed the debate in light of the public welfare concerns behind the United States copyright laws that Creative sought to enforce, it would have found that the public interest in community jury duty was strong. In this instance, the public interest in having localized controversies decided locally was strong. The United States courts are neither empowered to protect nor capable of protecting all copyrights throughout the world. At the same time, however, the United States courts are "[s]tated simply, ... the most well-suited forum for adjudicating the rights bestowed by United States copyrights."

Creative based its claim upon an alleged violation of the United States Copyright Act: Aztech's importation and distribution of its sound cards in the United States. By sending this case to Singapore, the Ninth Circuit arguably abrogated its responsibility to adjudicate rights found under United States copyright law.

Aztech's distribution of Sound Galaxy cards in the United States." Id. (Ferguson, J., dissenting).

183. Id. at 706, 708 (Ferguson, J., dissenting) (including general public good flowing from copyright law in forum non conveniens analysis); see U.S. Const. art. I, § 8 (providing Congress with power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries"); United States v. Paramount Pictures, 334 U.S. 131, 158 (1948) (noting sole interest of United States and primary object of copyright law in general benefits conferred on public); Fox Film Corp. v. Doyal, 286 U.S. 123, 127 (1932) (finding reward to copyright owner secondary to public benefit).

184. Creative, 61 F.3d at 699 (finding dispute over twelve registered U.S. copyrights of Creative's sound cards).

185. Id. at 699-704 (focusing on parties' nationality).


188. Creative, 61 F.3d at 706 (Ferguson, J., dissenting).

189. Id. at 705 (Ferguson, J., dissenting). "I must admit that I am astounded when I read that it is not convenient to try an American copyright case in an American court for copyright infringement that takes place solely in America." Id. (Ferguson, J., dissenting). The dissenting judge found that Singapore law is
Second, the majority also appears to have lost sight of the principles of national treatment and territoriality. The majority consistently referred to the dispute as "between two Singapore corporations." The widely accepted principles of national treatment and territoriality were adopted to avoid discrimination against foreign parties in a foreign court system. The doctrine of forum non conveniens, however, inherently treats nationals differently from non-nationals. For example, Creative's choice of forum was afforded less deference because it is a foreign plaintiff. If it had found that the dispute was between two U.S. corporations, the court likely would have retained the action—without even considering that the underlying cause of action in either situation was identical. The principles of national treatment and territoriality are supposed to limit exactly such unfounded parochial treatment. Partly through its failure to adhere to the principles of national treatment and territoriality, the majority reached an inappropriate conclusion in its forum non conveniens analysis.

Third, the majority in Creative appears to have made a hasty determination as to the location of the "infringing conduct." The majority found that the "key infringing conduct" occurred in Singapore. This conclusion possibly contradicts the lower court's finding. Because the standard of review on a forum non conveniens motion is abuse of discretion inadequate to protect Creative's U.S. copyrights which were infringed in the United States. Id. at 706 (Ferguson, J., dissenting).

190. Id. at 704; see also London Film Prods., Ltd. v. Intercontinental Communications, Inc., 580 F. Supp. 47, 49 (S.D.N.Y. 1984) (finding obvious interest of foreign nations who have dealings within court's jurisdiction securing compliance with this nation's laws); Peter L. Flecher, Subject Matter of Copyright and Jurisdiction, in CURRENT DEVELOPMENTS IN COPYRIGHT LAW 1988, at 7, 65 (Patents, Copyrights, Trademarks and Literary Property Course Handbook Series No. 249, 1988) ("Federal Judicial as well as Congressional control over copyrights is essential to promoting our system of intellectual and creative freedom and protection."); Toraya, supra note 45, at 1183 (finding intellectual property rights are "peculiarly expressive of a nation's political, socioeconomic and cultural interests").

191. For a further discussion of the principles of national treatment and territoriality, see supra notes 43-56 and accompanying text.

192. For a further discussion of the treatment of foreign plaintiffs under a forum non conveniens analysis, see supra notes 118-21 and accompanying text.

193. Creative, 61 F.3d at 703.

194. The majority admits that "[t]his is not a case . . . substantially involving American companies." Id. at 704. In such a case, the majority felt the United States's interest in resolving this dispute was stronger. Id.

195. For a further discussion of the principles of national treatment and territoriality, see supra notes 43-56.

196. Creative, 61 F.3d at 704-09 (Ferguson, J., dissenting).

197. Id. at 704-05.

198. Id. at 702-03.

199. Indeed, the district court judge acknowledged, "Creative's complaint focuses on Aztech's distribution of Sound Galaxy cards in the United States." Reply Brief for Appellant at 1, Creative Technology v. Aztech Systems Pte, Ltd., 61 F.3d 696 (9th Cir. 1995) (No. 93-16997).
tion, the Ninth Circuit should have afforded the district court's findings of fact greater deference. 200

Further, this conclusion seems to contradict the other forum non conveniens cases cited by the majority. In these cases, the alleged wrongs occurred entirely in a foreign country. 201 The wrong, however, alleged by Creative—importation—constitutes infringement of United States copyrights under 17 U.S.C. § 501(a). 202 Thus, the alleged wrong occurred in the United States. 203

As a result, the laws of the United States should have been applied to the dispute. Under widely accepted principles, courts apply the copyright law of the state in which the infringement occurs, rather than the law of either the author's national state or the state in which the work was first published. 204 Accordingly, the laws of the United States should have been applied to this controversy.

The United States has a strong interest in interpreting its own laws. 205 The Creative case involved interpretation of United States law, which also argued in favor of resolution of the dispute in the United States. 206 Ultimately, the


201. Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981) (Scotland); Lockman Found. v. Evangelical Alliance Mission, 930 F.2d 764 (9th Cir. 1991) (Japan); Contact Lumber Co. v. P.T. Moges Shipping Co., 918 F.2d 1446, 1449 (9th Cir. 1990) (Philippines); Update Art, Inc. v. Modiin Publishing, Ltd., 843 F.2d 67 (2d Cir. 1988) (Israel). In all of these forum non conveniens cases, the alleged wrong occurred in a foreign country, not in the United States.

202. Section 501(a) provides, in pertinent part: "Anyone who violates any of the exclusive rights of the copyright owner . . . or who imports copies or phonorecords into the United States . . . is an infringer of the copyright . . . ." 17 U.S.C. § 501(a) (1994).

Aztech markets its sound cards in the United States through Aztech Labs, Inc., a California corporation. Creative, 61 F.3d at 699. If these sound cards are copies of Creative's copyrighted works, Aztech is in violation of 17 U.S.C. § 501(a) for importing copies into the United States.

203. Importation and distribution of the alleged infringing goods occurred in the United States; on the other hand, the predicate act of infringement—in the form of designing, developing and manufacturing the goods occurred—in Singapore. Creative, 61 F.3d at 698-99.

204. Id. at 700-01 (citing Subafilms, Ltd. v. MGM-Pathe Communications, Co., 24 F.3d 1088, 1097 (9th Cir.) (en banc), cert. denied, 115 S. Ct. 512 (1994)).

205. See generally Stanley E. Cox, Razing Conflicts Facades to Build Better Jurisdiction Theory: The Foundation—There Is No Law but Forum Law, 28 Val. U. L. Rev. 1, 2 (1994) (proposing that courts only exist to "interpret, create and apply their own government's laws").

mately, this interest should tip the forum non conveniens balance in favor of retaining this case in American courts.

Fourth, the court's erroneous determination of the location of the "infringing conduct" undermined its weighing of the public interest factors in the forum non conveniens analysis.\textsuperscript{207} If the infringing conduct occurred in the forum state, the public interest factors of imposing jury duty on the people of a community and of having localized controversies decided at home would weigh more strongly in favor of the forum court.\textsuperscript{208} Because it erroneously found that the key infringing conduct occurred in Singapore, and not in the United States, the majority inappropriately concluded that public interest factors favored resolution of the dispute in Singapore.\textsuperscript{209}

V. IMPACT AND CONCLUSION

Although the parties in \textit{Creative} may find an adequate resolution of their dispute in Singapore,\textsuperscript{210} the Ninth Circuit's decision in \textit{Creative} re-

\textsuperscript{207} Creative, 61 F.3d at 703-04.

\textsuperscript{208} Id. The dissent, in arguing that the majority ignored the public interest in having U.S. federal courts resolve this U.S. copyright controversy, analogized this case to \textit{Gates}. \textsuperscript{209} Id. at 707.

\textsuperscript{210} For a further discussion of copyright protection in Singapore, see supra notes 69-73 and accompanying text.

Also, Creative submitted evidence showing Aztech was distributing $500,000 of allegedly infringing software per month in the United States. Creative, 61 F.3d at 705 (Ferguson, J., dissenting).

In addition, Singapore was rated number one in the world in 1993 in administration of justice by the World Economic Forum. Karuppiah et al., supra note 1, at 448. Criteria for this rating includes access to judicial efficiency of cases and the accountability of the judiciary to the public. \textsuperscript{209} Id. Interestingly, the majority in Creative acknowledged none of the specific advantages of resolving this controversy in Singapore. Creative, 61 F.3d at 698-704.

On October 24, 1995, the High Court of Singapore ruled in favor of Aztech in this copyright infringement suit. Jennifer Lien, \textit{Aztech Wins Lawsuit Against Creative}, \textit{Business Times (Singapore)}, Oct. 25, 1995, at 1. Judicial Commissioner Lui Trong Quee held that it was "highly improbable" that Aztech gained access to Creative's source-code in its Sound Blaster card. \textsuperscript{209} Id. at 2. A source-code is the software embedded in the sound card. \textsuperscript{209} Id. In so ruling, the Judicial Commissioner believed that Aztech created the software for its Sound Galaxy entirely through its own original research and development. \textsuperscript{209} Id.

On October 26, 1995, the High Court ruled that Creative must pay Aztech's legal costs of the copyright infringement case. Creative Ordered to Pay Aztech's Legal Costs, \textit{The Straits Times}, Oct. 27, 1995, at 48. To date, a hearing to determine
mains disquieting. Foremost, the decision will impact the ability of parties to enforce "international copyrights" in the United States. The case provides precedent for restrictive jurisdictional prerequisites and frequent dismissals on forum non conveniens grounds. Today, courts and United States copyright holders seek expanded subject matter jurisdiction in the area of United States copyright law. Instead of furthering this desire, the Court of Appeals for the Ninth Circuit in Creative limited its jurisdiction by dismissing the case on the grounds of forum non conveniens.

Additionally, the decision compounds existing pressures on the already fragile international copyright system. For example, copyrights of computer software are increasingly problematic today. As computer software technology becomes increasingly sophisticated, the gap between the wealthy and poorer countries will inevitably widen due to the inherent disparity of resources. Will the developing countries honor the claims of foreign authors in the field? Or, will developing countries encourage the growth of a black market? United States copyright holders face an uncertain future in enforcing their rights in American courts because the principle of forum non conveniens does not concern itself with the details of the laws of the alternative forum.

The Ninth Circuit in Creative Technology, Ltd. v. Aztech Systems Pte, Ltd. dismissed a United States copyright infringement case on the grounds of forum non conveniens. The majority held that either the plaintiff could pursue an adequate alternative remedy under the Singapore Copyright Act or have the High Court of Singapore apply United States copyright law.

Aztech's legal cost has not been set. Aztech estimates its legal costs to be one million (U.S. dollars) for the three years of litigation, a two week trial and eight experts. Creative to Appeal Against Copyright Ruling, BUSINESS TIMES (SINGAPORE), Nov. 24, 1995, at 22. These rulings, however, may not be the last installment in this continuing saga. On November 24, 1995, Creative filed a Notice of Appeals against the High Court's decision in this copyright infringement action. Singapore High Court Action Between Aztech Systems and Creative Technology, PR NEWswire, Nov. 24, 1995.

211. For a discussion of Creative's inability to enforce its international copyright in the United States, see supra notes 143-49, 166-69 and accompanying text.

212. There has been a liberal trend in applying the doctrine of forum non conveniens. See McAllen, supra note 111, at 240 (meaning courts are more likely to grant forum non conveniens dismissals).

213. For a discussion of the majority opinion in Creative, see supra notes 134-63 and accompanying text.

214. Strong, supra note 2, at 200.

215. Id.

216. Id.

217. Id.

218. Id.

219. For a further discussion of the two-part forum non conveniens analysis, see supra notes 134-63 and accompanying text.

220. For a further discussion of the facts and the holding of Creative, see supra notes 122-63 and accompanying text.
right law to this copyright infringement case. The dissent argued that
the distinctive character and intricacy of United States copyright law tips
the private and public interest factors of a forum non conveniens analysis
in favor of retaining this case in a United States district court.

The copyright system today helps to protect more creative work in a
larger number of countries than ever before. Without equally strong
enforcement mechanisms, however, "international copyrights" continue to
be of questionable value. The needs of international copyright holders
and the threat of potential infringers require a predictable enforcement
system. Establishing a uniform system to determine proper venue of copy-
right infringement cases would be one step in the direction of a strength-
ened copyright enforcement system. Such a system would help copyright
holders determine the proper venue for their copyright infringement
claim, while avoiding the wasting of valuable time and resources in a fo-
rum that ultimately will not even hear the merits of their case.

Lynn Carino

221. For a further discussion of the majority opinion in Creative, see supra
notes 134-63 and accompanying text.

222. For a further discussion of the minority opinion in Creative, see supra
notes 164-77 and accompanying text.

223. For a discussion of the scope of international treaties and signatories to
international treaties on the subject of copyright protection, see supra notes 42-56
and accompanying text.