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International Online Infringement of Artificial Intelligence-Generated Objects: A Chinese Legal Perspective*

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Online infringement of Artificial intelligence (AI) generated content essentially constitutes IP infringement and should adhere to Article 50 of Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships. However, applying Article 50 to online infringement involving AI-generated objects presents a dual interpretation dilemma. The first dilemma pertains to the interpretation of the requested place of protection. The second issue concerns the redundancy of party autonomy in the article. Therefore, Article 50 should be reinterpreted with as emphasis on maintaining the territoriality of IP rights to make it applicable to online infringement of AI-generated objects. The place where protection is sought should be understood as the forum. If there are relevant factors, the affected cyberspace can be 'collapsed' into the court's location. By employing the territoriality of IP, party autonomy should be limited to regulating the issue of damages.

Keywords
Artificially Intelligent Generators, Conflict of Law, Lex Loci Protectionis, Party Autonomy

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I. Introduction

ChatGPT and SORA, as representatives of the rapid development of artificial intelligence (AI) technology, produce generative content (Artificial Intelligence Generative Content, AIGC) that relies on global networks for dissemination. This has raised a series of international private law issues, particularly concerning the legal application of AI-generated content in online infringement cases.[1] While AIGC online infringement is not a new category of infringement, its essence remains copyright infringement. Addressing the conflict of laws requires a re-interpretation of the conflicting norms of copyright infringement within the existing framework. The challenge lies in reconciling the realities brought about by technological advancements with theoretical interpretations of conflict of laws. Different countries exhibit varying legislative tendencies based on their respective policy orientations and economic needs, which has sparked disputes over legal interpretation.

There is a scarcity of direct studies on online infringement of AI-generated objects within private international law scholarship. Indirect research on the application of copyright infringement law generally falls into two categories: unilateralism and bilateral approaches. The first category revisits copyright law itself and explores its scope. Can a country's copyright law regulate behaviour occurring outside its borders? Does copyright law possess extraterritorial effect?

According to the presumption against extraterritoriality in the US law, if copyright law does not expressly state its scope of application in the text, courts will clarify this through judicial practice.[2] The US Ninth Circuit held in Subafilms that the US copyright law does not apply to conduct that occurs outside the US territory.[3] However, 'outside' is not only a geographical concept, but also a legal one. If some of the infringing conduct occurred within the US, the US copyright law could apply.[4]

The focus of copyright law is to regulate infringement within the US, including Internet access.[5] The extraterritoriality of the US copyright law is the basis for the US courts to provide relief from global infringement under the US law.[6] In addition

1 This article focuses solely on the legal application of copyright infringement related to AIGC and does not address the issue of right attribution.

2 Restatement (Fourth) of Foreign Relations Law art. 404 (Presumption of Extraterritoriality of US Law).

3 Subafilms, Ltd. v. MGM-Pathe Commc'ns Co., 24 F.3d 1088 (9th Cir. 1994).

4 Curtis Bradley, *Territorial Intellectual Property Rights in an Age of Globalism*, 37(3) Va. J. Int'l L. 505 (1997).

5 Spanski Enters., Inc. v. Telewizja Polska, S.A., 883 F.3d 904 (D.C. Cir. 2018).

6 Alan Kirios, *Territoriality and International Copyright Infringement Actions*, 22(1) Copyright L. Symp. 1 (1977).

to determining the focus of a specific statute to extend the scope of effect, the US academics have suggested that jurisdiction indirectly governs the application of the law. For example, once the US courts have jurisdiction and the US is the place of origin (SOURCE) of the foreign tort, there is sufficient reason to justify the application of the US law to all acts.[7] The place of origin can be interpreted as the location where the work is received or accessed.[8] As long as the online material is accessed within the US, the US copyright law applies. The unilateral model of applying copyright law has been gradually consolidated in the US academic and judicial communities.[9]

Developing copyright law unilaterally and undoubtedly elevates the territoriality of copyright law to the level of regulatory law. This approach will ultimately lead to one of two extreme outcomes: either one country's copyright law will break through territorial boundaries to regulate global infringement via the Internet, or strict adherence to territoriality and the application of each jurisdiction's copyright law will result in contradictory outcomes.[10] If the Ninth Circuit's application of the law of the place of origin is adopted, it will completely break the territoriality of copyright law. In the online environment, strict adherence to the territoriality of copyright law would exacerbate the tension between territoriality and the nature of global online communication.

The second type of research model adopts the classic bilateral conflict of norms model of private international law. Our academic research on the legal application of copyright infringement primarily adopts the second model.[11] The application of the lex loci protectionis for Intellectual Property (IP) infringement has been generally recognised by the international community. However, interpreting the lex loci protectionis remains a challenging issue. The lex loci protectionis can be interpreted at two levels. From the perspective of legislative jurisdiction, it can refer to the law of the country where the right is granted. From the view of adjudicative jurisdiction,

7 Jane Ginsburg, *Copyright without Borders? Choice of Forum and Choice of Law for Copyright Infringement in Cyberspace*, 15(2) Cardozo Arts & Ent. L. J. 153 (1997).

8 Jane Ginsburg, *The Cyberian Captivity of Copyright: Territoriality and Authors' Rights in a Networked World*, 20(1) Santa Clara High Tech. L. J. 354 (2003).

9 Bradley, *supra* note 4.

10 The United States District Court for the Southern District of New York has applied the copyright laws of six countries individually. *See* London Film Prods. Ltd. v. Intercontinental Commc'ns Inc., 580 F. Supp. 47, at 48-9 (S.D.N.Y. 1984).

11 Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships [中华人民共和国涉外民事关系法律适用法] [hereinafter PRC on the Law Applicable to Foreign-Related Civil Relationships], art. 50, https://www.gov.cn/flfg/2010-10/28/content_1732970.htm. It stipulates that the law of the place where protection is sought shall apply to the liability for infringement of IP rights. Additionally, the parties may choose to apply the law of the forum by agreement after the infringement has occurred. China's legislation has already adopted the bilateralism approach to deal with the legal application of IP infringement; hence, China's domestic scholars primarily take this law as the object of study and will not specifically analyse the scope of the effectiveness of China's IP law.

meanwhile, the law of the lex loci protectionis is the law of the court.[12]

In China's judicial practice, it is often directly applicable to the lex fori.[13] From the perspective of theoretical interpretation, however, the lex loci protectionis is not directly equivalent to the lex fori or the lex loci actus. Judges need to uphold the premise of the territoriality of IP rights, the parties to the litigation and the extraterritoriality of the rules, case by case judgement.[14] Comparatively, this view balances the territoriality of IP rights with the private attributes of bilateral conflict norms.

International scholarship maintains a perspective that the requested place of protection is not equivalent to the forum. The law of the requested place of protection is the law of the place where the parties seek protection, not the law of the place that provides protection. The law providing protection may be the substantive law of the forum, or it may be an indirect indication of jurisdictional rules.[15] In the network environment, if the infringement involves multiple countries, the law of the place of origin of the infringement may be applied to analyse the establishment of the infringement and the standard of damages.[16] The application of conflict-of-infringement norms to address IP infringement treats IP rights as private rights.

However, it must be recognised that IP rights are still affected by territoriality. As an inherent characteristic of IP, territoriality is the basis of international protection for IP.[17] Even disregarding the relationship among the lex loci protectionis, the place of registration, the place of the court, and the place of infringement act, it is still difficult to delineate a clear connotation for the lex loci protectionis in the online environment. The global nature of cyber activities means they are subject to the laws of many countries.[18]

The second research model focuses on the private law attributes of copyright law. Territoriality reflects the essence of the lex loci protectionis as a connecting factor

12 Xiang Xu, *On the Conflict of Laws of IP Rights* [论知识产权的法律冲突], 6 L. Rev. [法学评论] 39 (2005); Chao Hu, *Research on the Legal Application of International Copyright Network Infringement* [国际版权网络侵权的法律适用问题研究], 8 Intell. Prop. [知识产权] 89 (2014).

13 Peng Zhang, *The Extraterritorial Legal Application of Cross-Border IP Infringement Disputes* [跨境知识产权侵权纠纷的域外法律适用], 1 Intell. Prop [知识产权] 106 (2024).

14 Xiao Song, *Rethinking the Territoriality of IP Rights* [重思知识产权的地域性], 3 Wuhan U. Int'l L. Rev. [武大国际法评论] 81 (2022).

15 Intellectual Property in the Global Arena: Jurisdiction, Applicable Law, and the Recognition of Judgments in Europe, Japan and the US 12-3 (Jürgen Basedow, Toshiyuki Kono & Axel Metzger eds., 2010).

16 Jane Ginsburg, *Extraterritoriality and Multiterritoriality in Copyright Infringement*, 37(3) Va. J. Int'l L. 587 (1997).

17 Sophie Neumann, *Intellectual Property Rights Infringements in European Private International Law: Meeting the Requirements of Territoriality and Private International Law*, 7(3) J. Priv. Int'l L. 583 (2011).

18 Vaishnavi Soni, *Effects of Artificial Intelligence on the Principles of International Law*, 3(2) Indian J. Integrated Res. L. 1 (2023).

in bilateral conflicting norms: a country's court may apply foreign law in foreign-related IP cases.[19] However, academic scholarship on the lex loci protectionis is based on human works and does not involve AIGC. Will the connotation of 'lex loci protectionis' change? China's private international law has not yet addressed whether the infringement of AIGC can be directly applied to Article 50 of Law of the People's Republic of China on the Law Applicable to Foreign-Related Civil Relationships. Article 50 should be reintepreted, emphasising adherence to territoriality and the continuation of bilateral conflict of laws, to make it applicable to the online infringement of AI-generated objects.

This research aims to improve China's conflict of laws, without breaking the existing system, Article 50 can deal with the online infringement of AI-generated objects. This paper consists of five parts including Introduction and Conclusion. Part two will review the two dilemmas of Article 50. Part three will discuss territoriality as the theoretical starting point for AI copyright online infringement conflict rules. Part four will reinterpret the party autonomy in Article 50, making it applicable to AIGC infringement. Part five will conclude the paper, stimulating the use of Article 50 within the existing theoretical system.

II. Dual Dilemma of Application of Article 50

Article 50 stipulates that liability for infringement of IP rights shall be governed by the law of the place where protection is sought, or the parties may choose by agreement to apply lex fori after the infringement has occurred.[20] At the time of its enactment, the issue of cyber infringement of AI-generated products could not have been predicted. If Article 50 is directly applied to the online infringement of AIGC, it will face two interpretative dilemmas: the requested place of protection and party autonomy.

A. Dilemmas of Interpretation of the Requested Place of Protection

Article 50 cannot be directly invoked in cases of cyber infringement of AIGC. This is due to three inherent difficulties in interpreting the requested place of protection within Article 50 itself.

19 Song, *supra* note 14.

20 Law of the Peopless Republic of China on the Law Applicable to Foreign-Related Civil Relationships [中华人民共和国涉外民事关系法律适用法], art. 50, https://www.gov.cn/flfg/2010-10/28/content_1732970.htm.

1. Difficulty of Conceptual Interpretation

The "requested place of protection" is difficult to interpret theoretically. The term "requested place" originates from Article 5(2) of the Berne Convention, which refers to "the state in which protection is requested."[21] This provision relates to the principles of automatic protection and independent protection. The automatic protection means that one country does not need to fulfil any formalities as a formal requirement when providing protection. The principle of independent protection means that it is not necessary to consider the protection of other states when providing protection. The "place where protection is sought" in Article 5(2) of the Berne Convention is not a typical connecting point, but rather reflects the territoriality of IP rights.[22] Article 5(2) is not a complete conflict norm.[23] The Berne Convention only attests that the concept was originally closely linked to territoriality. The meaning of the "requested place" can only be interpreted within the context of national conflict laws.

Within China's conflict of laws system, Articles 44 and 50 constitute a relationship between the general and the particular. Is it necessary to separate the debt of IP infringement; apply the law applicable to the infringement; and then apply the lex loci protectionis to the IP right itself? In fact, the lex loci protectionis may overlap with the place of infringement or may be distinct from it.[24] If the two overlap, the applicable law will have the same effect, so that there is no need for specific analysis. If they are separate, the law of the place of infringement and the law of the place of protection claimed by the plaintiff are possibly not identical.[25]

The true effect of the lex loci protectionis in protecting IP rights should first ensure that the IP right exists in substantive law. It is only when the parties claim protection under the lex fori that the requested place of protection can be interpreted as the forum. Judges need to make judgements by integrating the parties' requests under the bilateral conflict rulers while adhering to the premise of territoriality.[26] The requested place of protection is already a fuzzy concept in the absence of cyber infringement and AI.

21 Berne Convention art. 5(2). It states that no formalities are required for the enjoyment and exercise of these rights, regardless of whether protection exists in the country of origin of the work. Thus, apart from the provisions of the Convention, the extent of protection and the remedies available to authors for the protection of their rights depend solely on the legal provisions of the country where protection is sought.

22 Wang Li, Conflicts and Procedures in International Civil Litigation [国际民事诉讼中的冲突与程序] 113 (2024).

23 Song, *supra* note 14.

24 The lex loci protectionis usually refers to the location of the act of copyright use or infringement. *See* James Fawcett, IP and Private International Law 676 (2011).

25 In other words, the law of the place where the conduct occurs does not consider it a violation, but the law of the place where protection is sought does.

26 Song, *supra* note 14.

2. Difficulty of Network Expansion

When the Berne Convention was established, there was no Internet. At that time, courts were wary of international IP disputes and reluctant to entertain foreign IP disputes. As the Internet technology advances, IP infringement involves multiple countries and multiple media. Plaintiffs often choose to sue in a court located in one of the places where the conduct occurred. The issues courts faced were much more complex than those in the past.

Strict adherence to the territoriality principle in IP law could necessitate applying the laws of all countries where infringement occurs. To mitigate potential conflicts, a judge could limit the scope of each foreign copyright law to local matters, similar to the EU's conflict of laws approach - the Shevill rule.[27] However, using multiple foreign laws increases the burden on judges and complicates the recognition and enforcement of awards.

Can one substantive law regulate all online infringements then? If the "place of claimed protection" may be interpreted as the location where the infringement originated and is prosecuted, it may provide the optimal international remedy.[28] Allowing for the existence of a homogenisation rule would imply a certain break with the territoriality of IP rights. With the intervention of the cyber factor, the challenge of territoriality of copyright has become more acute.

3. Difficulty of Territoriality Reconciliation

IP law has been highly territorial. Each country provides independent protection under its own domestic law. As the Berne Convention is widely recognised by the international community, there is no need to specifically justify the protection of human works. However, the legitimacy of IP protection can be traced back to the classical period of Roman law. Following the Gaius Code which categorised things as tangible and intangible, IP rights are intangible.[29] Locke further developed the labour theory of property rights, the basis of IP legitimacy.[30] Labour transforms

27 The Shevill rule, also known as the Mosaic rule, states that if the infringer sues in one of the courts of the place of publication (including the infringer's domicile), the lex fori applies. However, if the suit is filed in the location of the publishing organisation's headquarters, the court has the authority to regulate all damages. *See* Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v. Presse Alliance SA, Case C- 68/93, E.C.R. I- 415 (1995).

28 Paul Geller, *Conflict of Laws in Cyberspace: Rethinking International Copyright in a Digitally Networked World*, 44(2) J. Copyright Soc'y U.S.A. 103 (1996-1997).

29 Peter Dehousse, Philosophy of IP Law 76-84 (Zhou Lin trans., 2022).

30 Knowledge products are the products of people's labour, and labour is the natural extension of man himself. The natural rights of human beings include their own ownership rights, and it is only natural that they should enjoy the property rights of knowledge products. *See* Jiming Yi, *Evaluation of the Labor Doctrine of Property Rights* [评财产权劳动学说], 3

one thing into another entirely new thing.[31] Hegel's property personality theory demonstrates the close connection between property rights and personality rights, providing a theoretical basis for moral rights in copyright.[32] Academics generally divide copyright into economic rights, moral rights and personal rights. Economic rights are transferable, while personal rights are usually not.[33] The overall attitudes towards human copyright in substantive law across various countries are broadly similar, differing mainly in the degree of protection.[34]

International law scholars have not yet reached a consensus on the legitimate basis for the protection of AIGC. The theoretical basis centred on human works cannot be applied to AIGC. They have not found a legal protection path for AIGC. AI is neither a natural person nor a legal entity and does not meet the conditions for copyright subject qualification. In the creation process of AIGC, even if some degree of randomness is introduced, AIGC results from calculations based on established processes and methods.[35] AI developers and users cannot directly determine the content generated by AI based on their free will.[36] Some believe that the "sweat of the brow" principle should be used to establish an objective standard for judging the copyright ability of AI creations.[37] At the current level of AI technology, ChatGPT and SORA can already generate complex creations that are consistent with the appearance of human works. AIGC already has a certain commercial and artistic value.[38]

Scholars have not reached a consensus on the protection standard of AIGC. The US District Court for the District of Columbia ruled in Thaler v. Perlmutter that the copyright registry refused to register an AI-generated work due to its lack of eligibility; such results are not protected by copyright law.[39] The US Copyright Office announced the direct inclusion of AIGC into the public domain.[40] From an economic

Chinese J. L. [法学研究] 95 (2000).

31 Robert Mogers, Explanation of IP Justification 93 (Jin Haijun trans., 2019).

32 Justin Hughes, *The Philosophy of Intellectual Property*, 77 Geo. L. J. 330 (1988).

33 Benedict Atkinson & Brian Fitzgerald, A Short History of Copyright: The Genie of Information 4 (2014).

34 China's Copyright Law stipulates that works are protected for 50 years, while in the United States, copyright protection lasts for 70 years.

35 Qian Wang, *On the Characterization of Content Generated by Artificial Intelligence in Copyright Law* [论人工智能生成的内容在著作权法中的定性], 35 Sci. L. [法律科学] 148 (2017).

36 Qian Wang, *Re-examining the Characterization of Content Generated by Artificial Intelligence in Copyright Law* [再论人工智能生成的内容在著作权法中的定性], 41 Trib. Pol. Sci. & L. [政法论坛] 16 (2023).

37 Jiming Yi, *Does Artificial Intelligence Creations Work?* [人工智能创作物是作品吗？], 35 Sci. L. [法律科学] 137 (2017).

38 In 2018, Christie's New York sold the AI painting Edmond de Belamy for USD 432,500. *See This AI-generated portrait just sold for a stunning $432,500*, CBC News (Oct. 26, 2023), https://www.cbsnews.com/news/ai-generated-portrait-sells-for-stunning-432500-portrait-of-edmond-de-belamy.

39 Thaler v. Perlmutter, 624 F. Supp. 3d 47, at 48-9 (2023).

40 The US Copyright Office states that the works generated entirely automatically by AI on platforms such as ChatGPT are

development perspective, a large influx of free AIGC into the market will inevitably impact the commercial value of human works. Contrary to the US attitude of no protection at all, in 2020, the Chinese courts considered AIGC to be a legal person's work and included AIGC within the protection of copyright law.[41]

There are more differences between countries with respect to AIGC than human works. The territoriality of copyright law is maximised by AIGC. Continuing to apply bilateral conflict rules risks using laws that do not protect AIGC. However, this does not mean that the dual justiciability rule needs to be applied to AI copyright infringement.[42] Even if AIGC are more territorial, they still fall within the scope of copyright law and do not rise to the level of public policy. Therefore, the conflict rules for AIGC infringement can still invoke existing conflict of laws, with a higher degree of territoriality as the connecting point.[43] The interpretation of the "place of claimed protection" cannot be directly copied from that of existing human works. In this case, foreign law should be applied with caution.

B. Dilemmas in the Application of Party Autonomy

Article 50 provides that copyright infringement disputes can be based on the parties' autonomy to determine the applicable law, but only under certain conditions: the time is limited to after the infringement, and the scope is the forum. In the legislative structure, party autonomy and the place where protection is sought have the same application order. If returning to the framework of bilateral conflict of norms, interpreting the lex loci protectionis allows for the possibility of applying foreign IP law. If the party autonomy only points to the lex fori, however, it undoubtedly increases the likelihood of using the lex fori. Party autonomy has increased the weight of the lex fori in the conflict of norms. If not, is party autonomy superfluous in the context of this regulation?

Enhancing the chances of the application of the lex fori is a desire to increase the legal interests protected by the lex fori. Does conditional party autonomy play

not protected under US copyright law. *See* Copyright Registration Guidance: Works Containing Material Generated by Artificial Intelligence, https://www.copyright.gov/ai/ai_policy_guidance.pdf.

41 Shenzhen Tencent Computer System Co. v. Shanghai Yingxun Technology Co, Shenzhen Nanshan District People's Court, Guangdong Province, Yue 0305 Minchu No. 14010 (2019).

42 The rule of double justiciability now exists only in the field of defamation law in England. When it comes to conduct occurring outside the country, the standard for establishing a tort is the overlapping application of the law of the place of conduct and the law of the forum, supplemented by the principle of closest connection. Formally, the dual justiciability rule reconciles the two main principles of the place of conduct and the place of the court. However, in practice, the effect is completely reversed in favour of the law of the place of the court. For a specific analysis, *see* Xiao Song, The Institutional Generation of Chinese Private International Law [中国国际私法的制度生成] 191-208 (2018).

43 Territoriality is still the starting point of analysis of Article 50. *See also* Song, *supra* note 14.

a complementary role if the requested place of protection is interpreted as a foreign country? In practice, there are no more than four possible relationships between the law of the requested place of protection and the agreement to apply the law of the forum. First, assuming that a judge applies a foreign copyright law to address the infringement of a foreign work in a foreign country, it does not affect the territoriality of the IP law of the forum, and there is no need to emphasise the choice. Second, if the parties choose Chinese law to regulate infringement of foreign works in foreign countries, Chinese copyright law does not provide protection because of its territoriality. The party autonomy limit of the forum law is not necessary. Third, if a Chinese or foreign work is infringed in China, Chinese law can be applied by interpreting the connecting factors without the need for additional party autonomy. Fourth, if a Chinese work is infringed in a foreign country, and if the work is protected by foreign and Chinese law, it is still necessary to synthesise the will of the parties to be judged by the court. There is still no need to bypass the lex loci protectionis and turn to party autonomy. In other words, it is sufficient for the judge to apply the lex fori by interpreting the place of protection claimed, and there is no need to apply the lex fori through party autonomy.

China's conflict of laws on IP infringement does not apply to infringement disputes over AI-generated works. There are three dilemmas in interpreting the lex loci protectionis: (1) the vague definition of the lex loci protectionis itself; (2) network infringement exacerbates the conflict between the territoriality of IP rights; and (3) the globalisation of the network and AIGC is more closely linked to policy than human works. The interpretation of the lex loci protectionis for AIGC differs from that for human works, especially if the requested place of protection has a higher degree of territoriality. The setting of party autonomy in Article 50 does not increase the possibility of the application of the lex fori. Article 50 of the Law on the Application of Foreign Civil Legal Relations is not appropriate for online infringement of AIGC.

III. Rethinking the Requested Place of Protection of Article 50

Online infringement of AIGC is not an entirely new category of infringement; it is still a matter of copyright infringement. Territoriality remains the fundamental principle in dealing with cross-border infringement of IP rights. Upholding territoriality as the theoretical starting point for conflict rules, re-interpret the place of claimed protection in Article 50.

A. Selective or One-by-One Application of Copyright Laws

The degree of territoriality in copyright law differs between human works and AIGC. AIGC exhibits a higher degree of territoriality because of the greater variation in substantive law from country to country. Because of the Berne Convention, protection of human works varies only in degree. The protection of AIGC in various countries is not merely a difference in the degree of protection but an essential difference. In the US, AIGC has entered the public market.[44] On the contrary, in the first case of AI-generated picture copyright in China, the court held that AI-generated pictures are works, and the user of the programme enjoys copyright.[45] If the applicable object is a human work, the requested place of protection in Article 50 can be interpreted as either the lex fori or foreign law.

Conversely, if the object of application is an AIGC, the requested place of protection should be interpreted with caution. First, the foreign law requested by the plaintiff may not protect the AIGC.[46] Second, even if the foreign law can provide a certain degree of protection for the AIGC, it may not be in line with China's regulations on copyright. However, the policy considerations for AIGC are more significant than those for human works. Rather than interpreting the requested place of protection as a foreign country and then switching to the law of the forum due to public policy, it is better to respect the territoriality of IP rights in each country. Interpreting the lex loci protectionis of AIGC prudently can help avoid the abuse of public policy.[47]

There are two ways to apply the law of cyber infringement while respecting the territorial nature of AI copyright. One is to apply all copyright laws involved in cyberspace, with the effect of copyright law only limited to the local area. The other is to choose one copyright law to apply, aiming to reduce the complexity of legal application and the identification of foreign law. Essentially, this raises the question: is it a one-by-one or selective conflict of copyright laws in AIGC cyber infringement?

If only the more territorial copyright of AIGC is considered, it appears appropriate to construct a "geographical block" at the stage of law application, using the copyright

44 In August 2023, the US District Court for the District of Columbia issued a decision in Thaler v. Perlmutter. The plaintiff filed suit against the US Copyright Office under the Administrative Procedure Act (APA) after the Copyright Office denied the plaintiff's attempt to register artwork generated by AI. The court denied the plaintiff's claim. *See* Thaler v. Perlmutter, 624 F. Supp. 3d 47, at 48-9 (2023).

45 Li Moumou v. Liu Moumou, Beijing 0491 Minchu 11279 (2023). This case was about the infringement of the right of authorship of works and the right of dissemination of information networks dispute.

46 *Supra* note 40. Similarly, US law does not protect AI-generated objects.

47 Public policy should act as a safety valve, judges often abuse this system. *See* Weigong Xu, *On the Function and Limitation of Public Order Reservation* [论公共秩序保留的功能与限制], 29 J. Hebei U. [河北大学学报] 79 (2004).

laws of multiple countries involved in the network.[48] The lex loci protectionis in the field of online infringement would be interpreted as "the copyright law of any country relevant to the case," due to the global nature of cyberspace. Courts may narrow the scope of law application in individual cases by considering factors such as the concentration of the Internet access in a specific country and the language of the material. To avoid differences in national copyright laws that could lead to conflicting application results, the scope of application may be limited to the local area.[49] The approach essentially creates a horizontal division of jurisdiction for each country's copyright law within the boundless cyberspace, anchored by the principle that a country's copyright law is effective only within its local area.

Practically, this means courts face pressure to classify foreign laws, which prolongs litigation and increases costs for the plaintiff, ultimately failing to safeguard the plaintiff's interests. Furthermore, if the territoriality of IP rights is upheld to reduce the pressure of foreign law ascertainment, it is not appropriate to limit the scope of res judicata to the forum. In international civil litigation, overlapping national jurisdictions are inevitable and can even lead to parallel litigation. Within a regional organisation similar to the European Union, it is necessary to consider the distribution of jurisdiction among member states, which gave birth to the determination of jurisdiction after the direct application of the lex fori.[50] While parallel litigation between sovereign states already exists, there is no need to interpret the requested place of protection as the copyright law of each country involved in the case.

The biggest challenge to applying one law is that it breaks the territoriality of copyright. However, the scope of effect of a country's law does not necessarily coincide with its national boundaries.[51] Judges have the duty to maintain the territoriality of their own copyright laws and to prevent foreign copyright laws from unduly affecting their legal system. In other words, the interpretation of the place where protection is requested in Article 50 should adhere to the territoriality of domestic copyright law. Whether the application of domestic copyright law impacts the foreign legal system

48 Beyond doctrinal interpretations of the law, the technological aspects of copyright's territoriality are evident. For example, geographic boundaries are created within the borderless Internet through Geo-Blocking, which denies access to offshore websites based on a consumer's IP address, allowing companies to "segment their markets along national borders." *See* Jacklyn Hoffman, *Crossing Borders in the Digital Market: A Proposal to End Copyright Territoriality and Geo-Blocking in the European Union*, 49(1) Geo. Wash. Int'l L. Rev. 143 (2016).

49 The court should apply foreign intellectual property laws cautiously. *See* Bradley, *supra* note 4.

50 *See* Internet and the Infringement of Privacy: Issues of Jurisdiction, Applicable Law and Enforcement of Foreign Judgments Injuries to Rights of Personality Through the Use of the Internet: Jurisdiction, Applicable Law and Recognition of Foreign Judgments, https://www.idi-iil.org/en/publications/internet-et-les-atteintes-a-la-vie-privee-problemes-de-conflit-de-lois-et-de-juridictions-travaux-preparatoires.

51 Ginsburg, *supra* note 16.

is the responsibility of the foreign judge. Interpreting the lex loci protectionis as a single country improves the efficiency of litigation; reduces the burden of foreign law ascertainment; and better meets the practical needs.[52]

B. Interpretation of the Requested Place of Protection: Forum

The adoption of a single law-applied approach to AIGC infringement means that the place of claimed protection should be interpreted more carefully to preserve the territoriality of the copyright law of the forum. The scope of interpretation of the connecting factors is more limited to: the plaintiff's residence and nationality, the defendant's residence and nationality, the web server's location, the place of uploading, the place of downloading and the court's location.[53] If the territoriality of copyright law is used as a criterion, the previous categories of connecting points can essentially be categorised as either the forum or a foreign country. Consequently, the interpretation of the lex loci protectionis is transformed into a choice between the forum or a foreign country. In the AIGC, it is not appropriate to interpret the lex loci protectionis as a foreign country.[54] The question then becomes one of justifying the interpretation of the requested place of protection in Article 50 as the forum.

First, China's independent protection of AIGC is based on its own national law, which is consistent with the Berne Convention. Currently, in the first Chinese AI copyright decision, the court held that AIGC is protected by copyright law and that the copyright belongs to the user.[55] China's copyright law neither explicitly excludes foreign AIGC from protection, nor discriminates against foreign AI. By interpreting the place of claimed protection as the forum, the Chinese courts will protect the copyright within the Chinese legal system. The application of the lex fori will not impact the copyright of the generated work in other countries.[56] The real extraterritorial impact lies in the recognition and enforcement of the judgement in a foreign country; this does not fall within the scope of the interpretation of the requested place of protection.

Second, the interpretation of the requested place of protectionupheld the territoriality of IP, as the forum did not break the bilateral framework of Article 50. Within the bilateralism framework, the unilateral interpretation method, specifically the governmental interest analysis, has been adopted only for cyber infringement

52 Sam Ricketson & Jane Ginsburg. International Copyright and Neighbouring Rights : The Berne Convention and Beyond 1325 (2022).

53 Ginsburg, *supra* note 8.

54 *See* Bradley, *supra* note 4.

55 Li Moumou v. Liu Moumou, Beijing 0491 Minchu 11279 (2023).

56 Song, *supra* note 14.

of AIGC.[57] The reason for interpreting the lex loci protectionis as the forum is that the law of the forum reflects the policy interests of the country regarding AIGC copyright. If there is a governmental interest in using the law of the forum, then it only needs to be applied, without regard to foreign law.[58] There is no active conflict of law between Chinese and foreign law because only Chinese copyright law can protect copyrights within the Chinese legal system. The protection of copyright in AIGC in each country is independent protection, and there will be no Chinese judge using foreign law to protect the copyright in Chinese AIGC. In the view of Chinese judges, the application of domestic law protects the interests related to AIGC within the national legal system, even if the works originate from a foreign country. In the field of copyright infringement related to AI products, interpreting the place of claimed protection as the lex fori does not involve a conflict between the lex fori and the foreign law. The governmental interest analysis is sufficient to justify interpreting the lex loci protectionis as the lex fori.[59]

Finally, interpreting the requested place of protection as the forum is neither an attempt to avoid the choice of law in online infringement of AIGC copyright, nor to indirectly clarify the application of the law by determining jurisdiction, nor to elevate China's copyright law to mandatory rule.[60] Jurisdiction and application of law are two sides of the same coin.[61] Jurisdiction is based on the connection between a case and a specific country and is dedicated to finding the right court for the case.[62] In the field of cyber infringement, the limits of law application are more complex than jurisdiction. Cyber infringement occurs in cyberspace and does not determine the place of conduct in a geographical area. The EU is indirectly providing for the application of law by determining jurisdiction.[63] As the EU is a regional organisation, jurisdiction and application of law need to coordinate the conflict between member states to maintain stability within the organisation. Jurisdictional conflicts between sovereign states are unavoidable, as long as the jurisdiction complies with the legitimacy standards under international law.[64] Therefore, while dealing with the choice of law for online

57 Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, 25 U. Chi. L. Rev. 227 (1958).

58 For a detailed discussion of the governmental interest analysis, *see* Xiao Song, Substantive Orientation of Contemporary Private International Law [当代国际私法的实体取向] 98-117 (2004).

59 Currie, *supra* note 57. Currie's governmental interest analysis is a kind of unilateral method suitable for modern society.

60 Song, *supra* note 14, at 253.

61 Peterson, *Proposals of Marriage Between Jurisdiction and Choice of Law*, 30(2) J. Mar. L. & Com. 245 (1999).

62 Xiao Song, *The System Construction of Extraterritorial Jurisdiction: The Boundary between Legislative and Judicial Jurisdiction* [域外管辖的体系构造: 立法管辖与司法管辖之界分], 43 Chinese J. L. [法学研究] 171 (2021).

63 *Supra* note 50.

64 Youyou Jiang, *On the Extraterritorial Effectiveness of Anti-Sanctions Laws* [论反制裁法的域外效力], 33 J. Shanghai U. Int'l Bus. & Econ. [上海对外经贸大学学报] 321 (2025).

infringement of AIGC with significant policy considerations, interpreting the place of requested protection in Article 50 as the place of the court adheres to the bilateral conflict of laws and the territoriality of copyright law.[65]

C. Methodology of the Place of Requested Protection: Space Folding

After the requested place of protection is interpreted as the forum, courts must determine how to apply the law of the forum under the conditions of cyber infringement, while avoiding the undue effects of over-application. The key lies in how to localise the affected cyberspace. Localisation does not mean a blanket expansion of the scope of application of a country's law, but rather the application of the country's substantive law in a reasonable manner to achieve the legislative purpose of the country's copyright law. A country's copyright law is intended to govern its domestic market and audience.[66] This does not mean that all infringements must occur within the country's geographical boundaries. In the online environment, copyright infringement of AIGC can affect the market for digital works in China. To maintain a global balance, infringement may be localised if the dispute is directed at that country's market or audience.[67]

Localised interpretation in cyberspace is actually simpler than in the geographical sense. The effect principle allows a state to govern part of an act that takes place outside its territory, breaking through geographical limitations to a certain extent.[68] In international civil litigation, the "effect principle" is limited, applying only when there is a direct link between the behaviour and the result, and the result is foreseeable. In online infringement, there is usually no direct link between the behaviour of a single click and the final result of the damage.[69] For example, 'A' uploads an English-language AI novel on an American website, and then a bilingual Chinese and French-language novel appears on a Chinese website. Due to the territoriality of IP rights, Chinese copyright law cannot protect the US copyright of the novel but protect its Chinese

65 Zhihui Huang, *Inspection and Improvement of the Applicable Rules of Foreign-Related Intellectual Property Rights Infringement Laws in China* [我国涉外知识产权侵权法律适用规则的检视与完善], 37 Stud. L. & Bus. [法商研究] 184 (2020).

66 Paul Geller, *Conflicts of Laws in Copyright Cases: Infringement and Ownership Issues*, 51(2) J. Copyright Soc'y USA 339 (2004).

67 Paul Goldstein, International Copyright: Principles, Law, and Practice 106-7 (2001).

68 The effects doctrine originated and developed in antitrust laws, governing foreign conduct directed at the US market that adversely affects it. *See* United States v. Aluminum Co. of Am., 148 F.2d 416, at 443-4 (2d Cir. 1945).

69 William Dodge, *Extraterritoriality and Conflicts-of-Laws Theory: An Argument for Judicial Unilateralism*, 39(2) Harv. Int'l L. J. 101 (1998).

copyright. Although the infringing behaviour is spread throughout cyberspace, the target market is clearly China. The global spread and the effects it produces in other countries are unpredictable. It is difficult to prove a direct relationship between the initial uploading behaviour and the consequences that follow after reprinting on multiple websites. Therefore, effect is not appropriate as a medium to complete the localised interpretation of online infringement.[70]

If it is not possible in cyberspace to determine the specific location of the impact of a tort based on the geographic boundaries of each country, it would be preferable to find that the cyber-world of the forum is affected. The localisation argument is completed by 'folding' part of cyberspace into the lex fori system. First, there are some elements that can fold the cyberspace into the lex fori system. For example, the website in the forum could be one of the uploading websites, the infringing work might be stored on the server in the forum or the website operator's place of registration or principal place of business could be located in the forum. In other words, the forum is one of the original places of infringement. If the initial copying can be traced back to a particular country, it means that this country is the source of all infringement.[71]

Additionally, the focus shifts from merely considering the place of uploading to emphasising the location of the audience. If the work was uploaded to a foreign website, but the registered users or subscribers who paid for the subscription were mainly concentrated in the forum, the forum was presumably the market. In this case, it is possible to integrate cyberspace into the forum because the commercial market in the forum has been affected. At this point, the copyright law of the forum applies to preserve the domestic market rather than expanding the scope of national law through cyberspace. In the digital environment, as determining where infringement 'occurs' is challenging, the geographic significance of a single place of action is no longer relevant.[72]

The space-folding approach, as an application of the requested place of protection, would not increase the burden on judges. Even if a plaintiff seeks injunctive relief, the judge will issue an injunction because the domestic market is threatened. Even if a global injunction is issued, it is not considered "long arm jurisdiction" because an injunction against online copyright infringement is directed at the entire cyberspace, not a specific jurisdiction. The question of the global effect of lex fori inevitably arises.

70 Not only in conflicts of the law, but also in jurisdiction, the effect principle is also widely criticized. *See* Andreas Lowenfeld, *Congress and Cuba: The Helms-Burton Act*, 90(3) Am. J. Int'l L. 430 (1996).

71 Ginsburg, *supra* note 16.

72 Kai Burmeister, *Jurisdiction, Choice of Law, Copyright, and the Internet: Protection Against Framing in an International Setting*, 9(3) Fordham Intell. Prop. Media & Ent. L. J. 648 (1999).

This is not a reason to avoid applying lex fori. However, the purpose of using the law of the forum is to maintain the market of the forum.[73]

IV. Rethinking the Party Autonomy of Article 50

A. Possibility of Party Autonomy

In the history of the development of the conflict of laws of torts, there are approximately three types of law selection tendencies. First, tort involves public control, so the lex fori should be applied. Second, tort law functions to regulate behaviour, so the lex loci should be applied. Third, tort law has the function of allocating damages between the parties.[74] The public control aspect of tort law is a strong public law function, which is not fully compatible with party autonomy.

In contemporary society, the public control and behavioural functions of tort law have been diluted.[75] Thus, tort law can now distribute loss more effectively, strengthening its private law nature. Consequently, the conflict of laws in torts has evolved towards flexibility and no longer strictly adheres to localisation.[76] In this regard, even the double actionable rule has become obsolete. The primary purpose of tort law is to fill the loss, not to punish, which leaves room for party autonomy. Party autonomy is the exercise by the parties, who express their desire to apply a particular law as a means of settling disputes between them. The state permits the realisation of the parties' wishes in certain circumstances by granting them the legal effects of party autonomy. The loss allocation function of tort law can be used as an opportunity to apply party autonomy, as it does not involve behaviour regulation. Since its inception in the conflict of torts law, the scope of party autonomy has been limited to the allocation of damages.[77]

Infringement claims involve the public interest, and the application of party autonomy requires balancing the interests of the individual and country.[78] IP

73 It is common for Chinese court to interpret lex loci protectionis as the lex fori. *See* Huang, *supra* note 65.

74 Alex Mills, Party Autonomy in Private International Law 397 (2018).

75 Song, *supra* note 14, at 239.

76 The Second Restatement of Conflict of Laws of the United States introduced Babcock v. Jackson and the concept of tort sui generis law. Therefore, tort conflict of law has comprehensively discarded the traditional behavioural ground connection point.

77 The Conflict of Laws Principles on IP, developed by the Max Planck Institute in Germany, limit the autonomy to damage allocation. *See* CLIP art. 3: 606(1), https://www.ip.mpg.de/fileadmin/ipmpg/content/clip/Final_Text_1_December_2011.pdf.

78 Mills, *supra* note 74, at 88.

infringement is not purely an infringement issue, but involves the effectiveness of IP rights, which is a matter of public law. Therefore, no uniform opinion exists in the international community on whether and to what extent party autonomy is allowed in IP infringement. The EU Parliament and the Council adopted Regulation No. 864/2007 on the Application of Law to Non-Contractual Debts (Rome Regulation II).[79] The Rome II Regulation expressly excludes party autonomy in the field of IP infringement because of the territoriality of IP rights.[80]

In contrast, the Principles on Jurisdiction, Conflict of Laws and Recognition of Judgements in IP and Foreign Disputes of the American Law Institute (ALI), Principles on Conflict of Laws in Intellectual Property Prepared by the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) and the Guidelines on IP Rights and Private International Law (the Kyoto Guidelines) adopted by the 79th Conference of the International Law Association have incorporated party autonomy into the conflict of laws of IP infringement to a certain extent.[81] Public law issues of IP rights must be based on the law of the place where the rights are granted, including relevant mandatory provisions such as the duration of validity of the registered rights, the content of the rights and their assignment. Without breaching the territoriality of IP rights, party autonomy may still be applicable.

If the party autonomy method can only address part of the copyright infringement of AIGC, Depeçage should be introduced. Depeçage divides a case into several issues and selects substantive law for each issue.[82] The effect of the rule is limited to the entirety of the localised tort dispute. Depeçage can reflect private international law's pursuit of conflict justice, based on the orientation towards substantive justice. After the introduction of Depeçage, IP infringement disputes are split into two major categories: infringement establishment criteria and damages. The dividing line is the territoriality of IP.[83] IP rights have historically been regarded as an integral part of public policy and thus have strict territoriality. In the field of conflict of laws on IP infringement, issues involving the validity and scope of rights are still subject to the law of the place of claimed protection. In this vein, party autonomy only regulates the issue of damages. Based on the Depeçage approach, the application of lex protectionis

79 Rome Regulation II, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32007R0864.

80 Adrian Briggs, The Conflict of Laws 252 (2019).

81 American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes, https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/us/us218en-part7.pdf; International Law Association, *Guidelines on Intellectual Property and Private International Law* (Kyoto Guidelines), 12 JIPITEC 74 (2021).

82 Willis Reese, *Depeçage: A Common Phenomenon in Choice of Law*, 73(1) Colum. L. Rev. 58 (1973).

83 S*upra* note 77.

and party autonomy approach strikes a balance in the Article 50.[84]

B. Modes of Application of Party Autonomy

In the application of the law on cyber torts of AIGC, party autonomy can increase the certainty of the legal application and facilitate agreements on damages between parties in different countries. To uphold the certainty and convenience of party autonomy, conditional party autonomy is introduced. Conditional autonomy involves three aspects: the timing of the choice of law, the manner of the choice of law, and the necessity on the choice of law connecting with the dispute.[85]

First, the timing of the election of the law, allowing for either an ex ante or ex post facto election. Ex post facto choice of law in tort is more common, while ex post facto choice of law does not usually lead to an imbalance between the plaintiff and the defendant. This is because the parties cannot agree on the choice of law if it is unfair. The reasonableness of ex post facto forum shopping does not require specific proof. The issue is whether ex ante choice of law is permissible, which implies that a contractual relationship existed before the tort was committed. Tort relationships are often torts of the stronger party against the weaker party.[86] Hence, the German legislator used to disallow ex ante choice of law. Rome II Regulation allows for the choice of law to be concluded in the course of a commercial activity subject to free negotiation between the parties.[87] Since "commercial activities" and "free consultation" in the substantive laws of different countries vary greatly, there are certain difficulties in interpretation.[88] However, the party autonomy clause should focus on its primary functions: convenience and certainty. It is not appropriate to establish overly specific interpretation clauses, and there should be no restriction on the timing of the choice of law for autonomy. The issue of damages under the ex ante choice of law has returned to the field of contract law, without apparent connection to IP rights or infringement.[89]

Second, whether the choice of law for autonomy is express or implied. The

84 Limited party autonomy in Article 50 can enhance certainty and predictability. *See* Zisheng Xiang & Siyuan Zhu, *The Principle of Party Autonomy in Intellectual Property Infringement* [论知识产权侵权法律适用中的意思自治原则], 35 J. Shihezi U. [石河子大学学报] 74 (2021).

85 Rita Matulionyte, *Calling for Party Autonomy in Intellectual Property Infringement Cases*, 9(1) J. Priv. Int'l L. 77 (2013).

86 Xiao Song, Establishment of General Conflicts of Law of Tort-Based on the Comparative Analysis of Rome II and Chinese Rules [侵权冲突法一般规则之确立-基于罗马Ⅱ与中国侵权冲突法的对比分析] 165 (2010).

87 Rome Regulation II art. 14.1. It provides that the option of party autonomy governs non-contractual obligations: (a) in agreements entered into after the occurrence of the damaging event or (b) in agreements freely negotiated between the parties in the course of their commercial activities prior to the occurrence of the damaging event.

88 Symeon Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56(1) Am. J. Comp. L. 216 (2008).

89 Xiang & Zhu, *supra* note 84.

advantage of autonomy lies in certainty, whereas an implicit choice of law does not guarantee the clarity of the expression of meaning. Moreover, Chapter I of the Applicable Law stipulates in the General Provisions that autonomy of intent shall be by express choice of law.[90] As one of the applicable scenarios in Article 50 of the Applicable Law, the conditions for the application of party autonomy in the conflict of IP infringement law should be regulated by the General Provisions. Therefore, the party autonomy in Article 50 should be explicit.

Third, the autonomous choice of law does not need to be objectively connected to online infringement of AIGC copyrights. Rome II Regulation does not limit the choice of law to whether it has a connection to the dispute. Swiss Private International Law and Chinese Applicable Law require parties to choose only the law of the forum.[91] These two countries limit the scope of the parties' choice of law because they have not introduced a Depeçage approach, which limits party autonomy to the issue of damage relief rather than extending it to the entire scope of IP infringement. This means that when faced with a more territorial standard of IP infringement, only the lex fori can be selected. If party autonomy is limited to regulating the allocation of damages between the parties, there should be no restriction on the scope of the choice of law.[92]

Additionally, if there is a prior contractual relationship and both parties have agreed on the choice of law in the commercial contract, their agreement should be respected. Therefore, it is not necessary to stipulate the scope of the choice of law to avoid conflicts. Overall, party autonomy under Article 50 is limited to regulating the allocation of loss. The choice of law can be made either in advance or after the tort, and it should be expressly stated. Finally, substantive law unrelated to the dispute can be selected.[93]

V. Summary and Conclusion

Online infringement of copyright in AIGC is more closely tied to public policy and

90 PRC on the Law Applicable to Foreign-Related Civil Relationships, art. 3.

91 Switzerland's Federal Code on Private International Law, art. 110(2), https://www.umbricht.ch/fileadmin/downloads/Swiss_Federal_Code_on_Private_International_Law_CPIL_2017.pdf; PRC on the Law Applicable to Foreign-Related Civil Relationships, art. 48.

92 Both countries' private international law provide that the parties may agree, after the damage has occurred, the law of the forum shall be applicable.

93 Huang, *supra* note 65.

more territorial than the infringement of human works. The global spread of such infringement exacerbates the conflict between the territoriality of IP rights and global infringement. This necessitates a re-interpretation of Article 50 within the framework of adherence to the territoriality of IP rights and bilateral conflict rules. The standard for establishing cyber infringement of AIGC applies to the law of the requested place of protection, which should be interpreted as the place of the court. The territoriality of the IP law of the court's location should be respected to the greatest extent possible. Parties have the right to choose the law to deal with damages; the timing of this choice is not restricted, and the choice of law should be explicitly stated. Eventually, the scope of the choice of law is not limited. In the early stages of AI development, we can still adjust the direction of future development.[94]

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94 Bart Custers, Law and Artificial Intelligence: Regulating AI and Applying AI in Legal Practice 6 (2022).