The SDNY Grants Google's Motion to Dismiss the Google Book Search Case

Many thanks to Cristina Mariottini, Senior Research Fellow, Max Planck Institute Luxembourg

After eight years of intense litigation, on November 14th, 2013 the U.S. District Court for the Southern District of New York granted Google's motion to dismiss *The Authors Guild, Inc., et al. v. Google Inc., also known as the Google Book Search Case. This litigation, which captured for such a long time the attention of publishers, authors, libraries and internet users, quite interestingly* included in its different stages unusual procedural passages such as the court's rejection of an amended settlement agreement and the uncertification of a class, and eventually it ended with a rather surprising departure from the SDNY's earlier approach in this case to "fair use" in copyright.

I. Judicial History

In September 2005, the Authors Guild filed a class action lawsuit in the Southern District of New York against Google over Google's scanning of over 20 million library books from several research libraries without the prior authorization of rightsholders. The following month, the Association of American Publishers filed another lawsuit against Google for copyright infringement, seeking injunctive relief. Google responded that its use was a "fair use" because they were only showing "snippets" for books where they did not have permission from a rightsholder. In the spring of 2006 the parties began settlement negotiations, and two years later, in October 2008, Google announced an agreement to pay $125 million to settle the lawsuit. The settlement agreement also included licensing provisions, allowing Google to sell personal and institutional subscriptions to its database of books. However, in November 2009, after the Department of Justice filed a brief suggesting that the initial agreement may violate U.S. anti-trust laws (in fact, as the Department of Justice observed, it "[gives] Google control over the digitizing of virtually all books covered by copyright in the United States"), the parties filed an Amended Settlement Agreement (ASA). Among the changes it

encompassed, the ASA limited the scope to foreign books that are registered with the U.S. Copyright Office or published in the UK, Canada, or Australia; it granted the rightsholder the ability to renegotiate the revenue share and provided Google with added flexibility in discounting; and it created a fiduciary to hold payments due to orphan works: if the rightsholder was never ascertained, the funds would be distributed cy-près instead of redistributed among rightsholders.

However, severe criticism was raised against the ASA by authors, publishers and other stakeholders according to which, in spite of these "improvements", the ASA continued to impose a de facto compulsory license with respect to worldwide digital book copyrights under the guise of an intellectual property class action. Such worldwide coverage was the result of the fact that – regardless of the wording in the agreement – the ASA was not simply limited to authors and publishers in the United States, Canada, the United Kingdom and Australia but, rather, it also extended to international authors who registered with the U.S. Copyright Office (in this regard cf. the Memorandum of law in opposition to the Amended Settlement Agreement on behalf of the Federal Republic of Germany of January 28th, 2010). Subsequently, on March 22nd, 2011 supervising Judge Chin issued a ruling rejecting the settlement, stating that the ASA was "an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court" and that it would "release Google (and others) from liability for certain future acts". Eventually, Judge Chin urged that the settlement be revised from "opt-out" to "opt-in". Despite a series of status conferences that were held throughout 2011, an amended "opt-in" settlement was not reached, and the ASA was simply rejected. In 2012 Judge Chin recertified the class represented by the Authors Guild, and the case was scheduled to go to court by July 2013. However, in July 2013, the Second Circuit overruled the class certification and remanded the case to the District Court for consideration of the "fair use" issues. In holding that it "believe[d] that the resolution of Google's fair use defense in the first instance will necessarily inform and perhaps moot our analysis of many class certification issues" the appellate court provided clear indication that it deemed that Google's "fair use" defense was grounded and that, once the lower court addressed the Author Guild's claim from a "fair use" perspective, it would find that no class needed to be certified as there was no claim to be brought.

II. Upholding the "Fair Use" Doctrine

The “fair use” doctrine is codified in § 107 of the Copyright Act (17 U.S.C. § 107), which provides that in order to assess the fair use of a copyrighted work certain factors must be considered, including:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

Judge Chin’s analysis of the four factors in the Google Book Search decision may be summarized as follows:

Factor No 1. *Purpose and character of the use*: Google Books serves several important educational purposes: Google’s use of the copyrighted works is highly transformative. Google Books digitizes books and transforms expressive text into a comprehensive word index that helps readers, scholars, researchers, and others find books. Google Books is also transformative in the sense that it has transformed book text into data for purposes of substantive research. Words in books are being used in a way they have not been used before. Google Books has created something new in the use of books. Google Books does not supersede or supplant books because it is not a tool to be used to read books. Instead, it adds value to the original and allows for the creation of new information, new aesthetics, new insights and understandings. Fair use has been found even where a defendant benefitted commercially from the unlicensed use of copyrighted works. Google does not sell the scans it has made of books; it does not sell the snippets that it displays. Google does, of course, benefit commercially in the sense that users are drawn to the Google websites by the ability to search Google Books. Even assuming Google’s principal motivation is profit, the fact remains that Google Books serves several important educational purposes.

Factor No 2. *Nature of the copyrighted work*: While works of fiction are entitled to greater copyright protection, the vast majority of the books in Google Books are non-fiction.

Factor No 3. *Amount and substantiality of the portion used in relation to the copyrighted work as a whole*: Google scans the full text of books. On the other hand, courts have held that copying the entirety of a work may still be "fair use". As one of the keys to Google Books is its offering of full-text search of books, full-work reproduction is critical to the functioning of Google Books. Moreover, Google limits the amount of text it displays in response to a search.

Factor No 4. *Effect of the use upon the potential market for or value of the copyrighted work*. Google does not sell its scans, and the scans do not replace the books. To the contrary, a reasonable fact finder could only find that Google Books enhances the sales of books to the benefit of copyright holders. Google Books provides a way for authors' works to become noticed, much like traditional in-store book displays.

Overall, in granting Google's motions for summary judgment and for dismissal Judge Chin held that Google Books has given scholars the ability, for the first time, to conduct full-text searches of tens of millions of books. Google Books preserves books, in particular out-of-print and old books, and it gives them new life. It generates new audiences and creates new sources of income for authors and publishers. As Judge Chin eventually stated in his conclusions, "Indeed, all society benefits".

III. The Aftermath of the SDNY's Dismissal of the Google Book Search Case

The SDNY's decision left many commentators puzzled, especially with a view to Judge Chin's major change of heart with regard to this case. On the one hand, Judge Chin had expressed major skepticism about the Google Book Project in his highly-publicized 2010 ruling that rejected the ASA which, in spite of its undisputable deficiencies, would at least have created a market for the scanned books. On the other hand, in complying with the Second Circuit Court of Appeals' indication that Google had a compelling "fair use" defense that would end the case without the aggravation of going through a full class action, Judge Chin appears to have been suddenly struck by the transformative and beneficial powers of the Google Book Project, and accordingly granted Google a sweeping "fair use" blessing.

As a result of the Second Circuit's ruling vacating the class certification, from a res judicata point of view the SDNY's decision may be deemed as binding only

upon Authors Guild and the named plaintiffs (affecting only the books whose copyrights are owned by Authors Guild, in addition to those of the three named plaintiffs: Betty Miles, Joseph Goulden, and Jim Bouton), thus greatly narrowing its impact on the community of authors and publishers. From a case-law standpoint, by being a lower court's ruling, the decision may be considered as persuasive but certainly not authoritative by other courts, which further limits its impact in similar cases. Moreover, it is likely that the Authors Guild will appeal the decision, just as it is currently doing in *Authors Guild v. HathiTrust* (2012), a lawsuit in which the Authors Guild claimed that the HathiTrust digital library had violated copyright, and the SDNY (represented by a judge other than Judge Chin) ruled against the Authors Guild, finding that HathiTrust's use of books scanned by Google was "fair use" under U.S. copyright law. And while it is unlikely that the Second Circuit reverses Judge Chin's decision, one may still hope that the appellate court will at least set narrower boundaries to Judge Chin's far-reaching construction of the "fair use" doctrine.

Note from editor. The decision has also been commented by Prof. Pedro de Miguel Asensio (Universidad Complutense de Madrid) in his blog. He discusses the background to the case and focuses on its implications from a European perspective, an issue he had already considered in the light of the failed 2008 legal settlement in this case (see here). Although the November ruling only deals with the interpretation of US copyright law, Prof. de Miguel reflects on the consequences that diverging standards on digitization of books and the offering of related services such as Google Books between the US and the EU may have on authors' protection, access to culture and the availability of very powerful research tools. Furthermore, he refers to the comparison between the fair use analysis under US law and the EU system of exceptions and limitations to copyright, in connection with international harmonization in this field.

Report on the Application of

Regulation (EC) 1393/2007

The European Commission presented today its findings on the application of EU rules governing the 'service of documents' in civil justice proceedings, i.e., Regulation (EC) No 1393/2007. According to the report European rules have helped speed up the service of documents between EU countries, despite an ever increasing caseload. Delivery times for judicial documents have fallen in Austria, Belgium, Finland, Germany, Greece and Portugal.

To further improve the functioning of these rules, the Commission intends to follow up on today's report with a public consultation to be carried out in the course of 2014.

Click here to access the Report.

Greek Book on Service of Process Abroad

Dr. Apostolos Anthimos has published Service of Process Abroad: A Practical Guide (Domestic Law • Bilateral Treaties • Hague Service Convention • Regulations 1348/2000 & 1393/2007) in Greek.

> *This book grew out of the experience of the author's engagement with cross-border legal practice for nearly two decades. It gives the full picture on serving Greek proceedings to litigants abroad. A purely practical approach has been opted: Its main purpose is the immediate access to key information on a state by state basis. This is accomplished by a clear-cut description of the applicable law and the presentation of the reported case law for each country separately.*
>
> *The existing legislative framework is summarized in the introductory chapter. The analysis is based on the 4-level model, well known for many countries around the globe, i.e., domestic provisions (Article 134 Greek Code of Civil*

Procedure), bilateral agreements, the Hague Service Convention, and EC-Service Regulations 1348/2000 & 1393/2007.

The main part of the book elaborates each country separately. The material varies, depending on socio-economic ties and factors. For instance, Germany, Italy, Cyprus, the UK, USA, and Australia are strongly represented on the respective chapters, in comparison with many African, Asian and Latin American legal orders, where no conventional link or case law has been traced. All chapters have the following structure: First, the connecting factors on the legislative level, plus any existing declarations from the state in question. Secondly, the elaboration of Greek case law on the service of process to litigants with residence or seat in the respective country.

The annexes of the book host all bilateral conventions signed by Greece on the matter, the text of the Hague Service Convention, coupled with the declarations made by Greece, and the text of EC-Regulation 1393/2007. The case law coverage is fully updated, and includes all decisions reported until October 2013.

The publisher is Sakkoulas Publications (Thessaloniki, 2013, XX + 325 pages, ISBN/ISSN: 978-960-568-042-8, Price: EUR 28).

US Supreme Court Rules on Forum Selection Clauses

By Verity Winship

Verity Winship is Associate Professor, Richard W. and Marie L. Corman Scholar at Illinois University College of Law

The US Supreme Court just issued a unanimous decision in *Atlantic Marine Construction Co. v. U.S. District Court for the Western District of Texas* about the effect of forum selection clauses in US federal courts. The Court has considered

these clauses only three times before, and this is the first opinion on the subject in 25 years. In this case, the parties agreed that suits would be litigated in the state of Virginia. The plaintiff, however, brought suit in federal court in Texas. Among other things, the defendant moved to transfer the case to federal court in Virginia based on a statutory provision (28 USC 1404(a)). The parties did not dispute the validity of the clause, but disagreed about whether it mandated transfer to the designated forum.

The Supreme Court held that forum selection clauses should have controlling weight absent "extraordinary circumstances unrelated to the convenience of the parties." US courts ordinarily consider both private and public interest factors in determining whether a case should be transferred among federal courts. The Court concluded that the presence of a valid forum selection clause changes the analysis. First, plaintiff's choice of forum receives no weight. Second, courts should not consider the convenience of the parties, but only public factors, which "will rarely defeat a transfer motion." Third, although transferred cases normally get the choice-of-law rule of the pre-transfer court, the Court established an exception for cases filed outside the contractually designated forum in an attempt to limit forum shopping. Although the statutory provision at issue governs movement among courts in the US federal system only, the Court indicated that the same analysis applies to motions to dismiss for *forum non conveniens* when the designated forum is a US state or non-US court.

Scherer on Effects of Award Judgments

Maxi Scherer (Queen Mary, University of London) has posted Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road? on SSRN.

> *This article examines and critically assesses the 'judgment route' in international arbitration. The 'judgment' route refers to a growing trend in*

many jurisdictions to grant effects to foreign judgments relating to international arbitral awards, such as judgments setting aside, confirming, recognizing or enforcing an arbitral award (called 'award judgments' for the purposes of the article). Although there is abundant commentary on the effects of set aside judgments, very little attention has been paid to the other equally important situations where courts confirm, refuse to set aside or simply recognize or enforce an award. This article aims to fill this gap. It is submitted that national courts often err when they grant effects to foreign award judgments. On a theoretical level, the judgment route ignores the distinctive, ancillary nature of award judgments: award judgments differ from other judgments insofar as they relate to a prior adjudication — the award — and thus need to be treated differently. Moreover, on a practical level, the judgment route risks encouraging forum shopping and the multiplication of parallel proceedings, and it increases the likelihood of conflicting decisions. On the basis of these findings, the article concludes that the judgment route taken by courts in many jurisdictions is often the wrong road.

The article was published in the *Journal of International Dispute Settlement*, Vol. 4, No. 3 (2013), p. 587.

ECtHR Rules on Return of a Child to Her Country of Origin under the Hague Abduction Convention

On 26 November 2013, the Grand Chamber of the European Court of Human Rights (ECtHR) delivered its judgment in the case of X v. Latvia (application no. 27853/09).

The case concerned the procedure for the return of a child to Australia, her country of origin, which she had left with her mother at the age of three years and five months, in application of the Hague Convention on the Civil Aspects of

International Child Abduction, and the mother's complaint that the Latvian courts' decision ordering that return had breached her right to respect for her family life within the meaning of Article 8 of the European Convention on Human Rights (ECHR).

The Court considered that the ECHR and the Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980 had to be applied in a combined and harmonious manner, and that the best interests of the child had to be the primary consideration. In the present case, it considered that the Latvian courts had not complied with the procedural requirements of Article 8, in that they had refused to take into consideration an arguable allegation of a "serious risk" to the child in the event of her return to Australia.

It may be worth noting that since the case concerned the relationship between Australia (as requesting State) and Latvia (as requested State), the special regime applying between member States of the EU bound by the Brussels IIbis Regulation was inapplicable. This explains that the obligations that Article 8 of the ECHR implies for the requesting State applied in this case, contrary to what was the case in Povse v Austria, where the incidence of the Brussels IIbis Regulation was at stake.

H/T: Patrick Kinsch

Sanga on "Choice of Law: An Empirical Analysis"

Sarath Sanga, Yale Law School, has recently published an empirical study on the use of choice of law clauses in the US (in the area of contract law). The paper can be downloaded free of charge via SSRN. The abstract reads as follows:

> *I propose a new measure to study the law and economics of choice of law: "relative use of law." Relative use of law measures the extent to which a state's laws are disproportionally over- or under-utilized in contract. It is constructed*

by normalizing the distribution of choice of law clauses by the extent of contracting activity within each jurisdiction.

Using this measure, I study choice of law by analyzing the nearly 1,000,000 contracts that have been disclosed to the Securities and Exchange Commission between 1996-2012. These are all contracts that companies registered with the SEC deem "material." I find that from 1996 to 2012, (1) only two states are relatively over-utilized: Delaware (an extreme outlier) and New York, and (2) there has been significant and robust convergence both in firms' choice of law and relative use of law toward Delaware, New York, and Nevada.

I offer hypotheses for this convergence that are based on (1) lock-in effects of the choice of state of incorporation and (2) positive network effects of using the same law. I present suggestive evidence that lock-in effects explain convergence toward Delaware and Nevada, while network effects explain convergence toward New York.

Cartel Damage Claims, Non-Exclusive Jurisdiction Clauses and the "One-Stop Shop" Presumption: What Do Rational and Reasonable Businessmen Really Want?

Many thanks to Polina Pavlova, Research Fellow at the MPI Luxembourg.

On November 19th the England and Wales Court of Appeal (Civil Division) ruled on the scope of a contractual non-exclusive jurisdiction clause in the context of a damage claim for breach of EU competition law (*Ryanair Ltd v Esso Italiana Srl* [2013] EWCA Civ 1450). The Court opted for a narrow interpretation of the clause

and decided against the inclusion of a purely tortious cartel damage claim in its scope.

The dispute at issue arose between the Irish airline Ryanair and the Italian jet fuel supplier Esso Italiana. The parties had concluded a fuel supplying contract containing the following clause:

> *For the purposes of the resolution of disputes under this Agreement, each party expressly submits itself to the non-exclusive jurisdiction of the Courts of England.*

After a decision of the Italian Competition Authority finding that Esso Italiana participated in a jet fuel cartel, Ryanair initiated proceedings in London seeking damage recovery from it. The claims were based on breach of contract and of statutory duty.

The Commercial Court held that it had jurisdiction under the agreement. Justice Eder based his reasoning on the presumption that reasonable and rational businessmen would generally intend one-stop adjudication and that in the given case there was "an almost complete overlap" between the contractual and the tortious claim. He relied on the so called *Fiona Trust* doctrine (see *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40) and *The Angelic Grace* case-law (*The Angelic Grace* [1995] 1 Lloyd's Rep 87), both dealing with the parallel issue of interpretation of arbitration clauses.

The Court of Appeal, however, reversed this decision, stating that any "one-stop shop" presumption requires a parallel contractual claim. Where such a claim has no prospects of success, as was the case with Ryanair's contractual claim, Lord Justice Rix saw no reason to presume that the parties would have wanted a dispute purely based on breach of competition law to be covered by the contractual jurisdiction agreement. Despite the evident relevance of Article 23 of the Brussels I Regulation, at no point did he refer to European procedural law.

This interpretation might come as a surprise. Against the background of the *Provimi* judgment (*Provimi Ltd v. Aventis Animal Nutrition SA* [2003] WHC 961), the decision not to extend the presumption in favour of one-stop adjudication to tortious cartel damage claims was not an inescapable outcome. In *Provimi*, the High Court ruled on the scope of a contractual jurisdiction clause and decided that an interpretation under Swiss, German and French law excluded claims

based on breach of competition law. The reasoning of the High Court in *Provimi* was, however, generally interpreted as implicitly suggesting that English law would favor a different, broader interpretation of jurisdiction clauses. In the aftermath of the *Ryanair* judgment, such an assumption seems rather questionable.

At first sight, the *Ryanair* decision focuses primarily on the lack of a founded contractual claim. The contract between Ryanair and Esso Italiana contained a clause imposing a price adjustment obligation in case of non-conformity with relevant "applicable laws, regulations or orders". The Court correctly observed that the parties could not have envisaged a breach of competition law to fall under this provision. An implied contractual obligation that the prices would not be inflated due to breach of competition law was also regarded as an unnecessary construction. Since in the Court of Appeal's view the justification of the one-stop adjudication presumption lies in the close connection between the tortious claim and the analogous contractual one, in the absence of a founded contractual claim the presumption was decided to be inapplicable. This conclusion was reinforced by the fact that the parties explicitly excluded claims "for indirect or consequential damages" from their agreement on jurisdiction and choice of law.

Furthermore, it is necessary to bear in mind that the case before the Court of Appeal was different from the typical situation insofar as the jurisdiction clause was non-exclusive. Such contractual terms promote forum shopping to a great extent and should, therefore, be interpreted with extreme caution. Where the parties have opted for this kind of a wider choice of jurisdiction, an intention in favor of one-stop adjudication is by no means evident. Against this background, it seems questionable whether the "*Ryanair* presumption" could be extended to exclusive jurisdictional agreements.

The specific circumstances of the case, the prospects of success of the particular contractual claim and the non-exclusive character of the particular jurisdiction clause should not, however, lead to an undervaluation of the general significance of the ruling. For the *Ryanair* judgment might set a new trend in English case-law: It remains to be seen whether it will mark the emergence of a new presumption on the intention of rational and reasonable parties – one that does not assume they would have wanted to adjudicate cartel disputes before the court designated to rule on their contractual disputes. This might be a first step towards a turnabout of the concept of the will of the reasonable contracting parties. The

underlying policy decision is revealed in the last paragraph of the judgment: The fact that the buyer wants to limit the tortious claim to one cartelist should not enable the cartel member to rely on a contractual jurisdiction clause. In other words, private enforcement of competition law should be encouraged regardless of individual jurisdiction agreements.

The narrow interpretation of the jurisdiction clause is in line with the recent developments in Europe: On July 4th, 2013, an interlocutory judgment of the Helsinki District Court in the *Hydrogen Peroxide Cartel* case also decided that cartel damage claims are not covered by jurisdiction clauses contained supply agreements.

If this approach is further pursued and a default narrow interpretation of jurisdiction (and arbitration) clauses in the context of breach of competition law is established, prorogation arguments would practically be excluded in the majority of cartel damage disputes. Unless the jurisdiction clause is clearly drafted in favour of a broad interpretation, a claimant seeking to obtain damages for breach of competition law would be able to proceed against all EU domiciled cartel members by making use of Article 6 (1) of the Brussels I Regulation. This trend is to be welcomed – it would remove significant hurdles on the way to private enforcement of competition law.

ERA-Conference on Cross-Border Debt Recovery in Legal Practice

The Academy of European Law (ERA) will host a conference on "Cross-Border Debt Recovery in Legal Practice" in Trier, Germany, on February 6 and 7, 2014. The conference is directed at lawyers dealing with civil litigation and dispute resolutions. Detailed information is available on the ERA newsletter and ERA's website.

The conference programme reads as follows:

Thursday, 6 February 2014

- 08:45 Arrival and registration
- 09:10 Welcome
  Angelika Fuchs

Chair: *Pavel Simon*

I. "BRUSSELS I" AND BEYOND

- 09:15 Jurisdiction and enforcement under Brussels I: recent CJEU case law
  Gilles Cuniberti
- 10:00 Discussion
- 10:15 The recast of the Brussels I Regulation: forthcoming changes and open issues
  Janeen Carruthers
- 11:00 Discussion
- 11:15 Coffee break

Chair: *Jens Haubold*

- 11:45 Cross-border service of documents & taking of evidence: recent CJEU case law and proposals for reform
  Pavel Simon
- 12:30 Discussion
- 12:45 Lunch

Chair: *Janeen Carruthers*

II. FACILITATING DEBT RECOVERY ACROSS BORDERS

- 14:00 The European Enforcement Order: recent CJEU and major national case law
  Jens Haubold
- 14:40 Discussion
- 14:50 European Order for Payment: a powerful tool in international debt collection
  David Einhaus
- 15:45 Coffee break

- 16:00 WORKSHOP
  Hands-on experience with the European Payment Order
  David Einhaus
- 17:00 Results of the workshop and discussion
- 17:30 End of the first conference day
- 18:15 Guided city tour
- 19:30 Conference dinner

Friday, 7 February 2014

Chair: *Remo Caponi*

III. IMPROVING ACCESS TO JUSTICE

- 09:00 Collective redress: latest developments after the Commission recommendation
  Ianika Tzankova
  09:40 Discussion
  09:50 Recovery of small claims: new ADR options, conciliation bodies and the European Small Claims Procedure, including its reform
  Xandra Kramer
- 10:30 Discussion
- 10:45 Coffee break

Chair: *Gilles Cuniberti*

IV. FREEZING OF BANK ACCOUNTS

- 11:15 The European Account Preservation Order (EAPO): upcoming changes
  Richard de Haan
- 11:45 Round table on the EAPO: Keeping the surprise effect…and protecting the debtor, plus: who carries the costs?
  - Remo Caponi
  - Richard de Haan
  - Xandra Kramer
  - Pavel Simon
- 13:00 Lunch and end of the conference

Symeonides on Issue by Issue Analysis and Depeçage

Dean Symeon C. Symeonides (Willamette University – College of Law) has posted Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect on SSRN.

This Article discusses two interrelated features of modern American choice-of-law approaches: (1) issue-by-issue analysis, and (2) dépeçage.

Issue-by-issue analysis stands for the proposition that, in choosing the law to be applied to a multistate case, a court should focus on the particular issue(s) for which the laws of the involved states would produce a different outcome, rather than on the case as a whole. Logic suggests and experience confirms that this mode of analysis is more likely to produce individualized, nuanced, and thus rational resolutions of conflicts problems than the traditional mode of wholesale choices.

Dépeçage is the potential and occasional result of issue-by-issue analysis. It occurs when the court applies the laws of different states to different issues in the same cause of action. Although this phenomenon appears anomalous to the uninitiated, in reality it is not as problematic as it appears. For example, although the majority of American courts routinely use issue-by-issue analysis, this use produces surprisingly few instances of actual dépeçage, and, in most of those cases, dépeçage is innocuous. In the remaining few cases, dépeçage can be problematic, but courts employing modern approaches have all the flexibility to avoid it — and they do.

The Article concludes that the low — and easily avoidable — risk of an occasionally problematic dépeçage is not a good reason to eschew issue-by-issue analysis in light of the clear and considerable advantages of this analysis in producing apt choice-of-law solutions.

The article in forthcoming in the *University of Toledo Law Review*.