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INTELLECTUAL PROPERTY RIGHTS IN THE INTERNET: EXTRATERRITORIAL RECOGNITION OR NEW CONFLICT OF LAW RULES?

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The article is devoted to the new tendencies of application of mechanisms of private international law in intellectual property cases. The author explores conflict of law rules applicable to intellectual property relations, and shows the change of the traditional territorial approach to the disclosure of the legal content of intellectual property rights. The settlement mechanism for disputes arising from violations of intellectual property rights in domain names serves as the basis of the research. It is concluded that conflict of law rules on intellectual property demand new localization factors if corresponding relations take place in the Internet. The author proposes to adhere to the most flexible concept of the territorial nature of intellectual property rights in disputes on intellectual property settled by online procedures alternative to litigation in national courts.

Key words: intellectual property; private international law; conflict of law rules; applicable law; territoriality; extraterritoriality; criterion of closest connection; domain names; trade marks.

ПРАВА ИНТЕЛЛЕКТУАЛЬНОЙ СОБСТВЕННОСТИ В ИНТЕРНЕТЕ: ЭКСТЕРРИТОРИАЛЬНОЕ ПРИЗНАНИЕ ИЛИ НОВЫЕ КОЛЛИЗИОННЫЕ ПРАВИЛА?

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Посвящена новым тенденциям применения механизмов международного частного права в делах по интеллектуальной собственности. Исследованы коллизионные правила, применимые к отношениям интеллектуальной собственности. Показано изменение традиционного территориального подхода к раскрытию правового содержания прав интеллектуальной собственности. За основу исследования взят механизм урегулирования споров о нарушениях прав интеллектуальной собственности в доменных именах. Сделан вывод о необходимости новой коллизионной привязки для отношений интеллектуальной собственности, складывающихся в интернете. Автор предлагает придерживаться максимально гибкого понимания территориального характера прав интеллектуальной собственности при рассмотрении споров по вопросам интеллектуальной собственности с помощью онлайн-процедур, альтернативных разбирательству в государственных судах.

Ключевые слова: интеллектуальная собственность; международное частное право; коллизионные нормы; применимое право; территориальность; экстерриториальность; критерий наиболее тесной связи; доменные имена; товарные знаки.

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Global information infrastructure based on the Internet and other virtual communication networks raise complex problems of legal regulation of intellectual property relations, especially in cases where these relations include foreign elements. Placing the product on the website, distribution of goods embodying trademarks through the online store and other variants of cross-border use of intellectual property rights pose the key question of private international law ruling: the right of which state to apply?

Conflicts of law rules for intellectual property do exist. As of now it is not a question whether to apply them in such specific area of legal regulation as intellectual property. National laws on intellectual property and intellectual property rights based on them alike do not have extraterritorial effect. It means that grounds, conditions of protection and process of enforcement of intellectual property are determined by domestic law and does not depend on rules and actions abroad. From the practical point of view this situation can be reduced to the very simple solution of *lex fori*. However the two-side paradigm of private international law including a place of filing a lawsuit and a place of a relation (violation of intellectual property rights, creation of a work, occurrence of protection, recognition of rights, etc.) cannot always be successfully accomplished by the rule *lex fori*. In order to estimate intellectual property relations properly courts have to consider at least the law of the state where the key elements of an intellectual property relation are located. Otherwise these relations would not exist or would be different.

In particular one of the fundamental principles of private international law demands that if legal concepts requiring legal qualifications are unknown or known under another name or with other content and cannot be identified through interpretation by the law of the court they can be qualified under the foreign law. This principle (called *qualification*) is enshrined in Article 1094.2 of the Civil Code of the Republic of Belarus [1]. It not only helps to find an applicable law but also expresses *ratio legis* for relations with a foreign element. Transnational relations cannot be considered by courts only through the prism of their domestic legal system excluding foreign law at the place of occurrence, change and development of these relations.

Conflict of law rules on intellectual have been actively introduced in the legislation of private international law from the beginning of the 2000s. Before that strong necessity to apply foreign laws on intellectual property despite of the principle of territoriality was shown by case law.

Judicial practice shows slow but inevitable process of penetration of conflict of laws rules into the legal field of intellectual property. The most famous case on that subject was launched on the suit of several Russian and American media companies and other persons to the «Russian Kurier» (a weekly newspaper published in the United States in Russian). The plaintiffs were ITAR-TASS (a Russian news agency), Iter-Tass USA, Inc. (a subsidiary of the ITAR-TASS news agency established in the USA), the Russian media corporations "Argumenty and Facty", "Komsomolskaya Pravda", "Moscow News", "Moskovsky Komsomolets", the Russian Union of Journalists, Heslin Trading Ltd. (an Israeli company, who published a monthly magazine in Israel "Balagan"), Fromer and Associates, Inc. (a US company to whom the "Komsomolskaya Pravda" transferred a right to distribute its materials in the USA) and some other persons and entities. Defendants were Russian Kurier, Inc. (a US corporation which published on a weekly basis a newspaper in Russian "Russian Kurier", O. Pogrebnoy, president, owner and sole shareholder of the Russian Kurier, Inc., and the chief editor of the newspaper "Russian Kurier", Linco Printing, Inc. (a US corporation who printed the newspaper "Russian Kurier").

Without any permission from the copyright holders O. Pogrebnoy gave Linco Printing, Inc. materials of the plaintiffs. He just cut out pieces from several newspapers, pasted them on the layout of his newspaper and sent it to print. The defendant even used the entire view including lines, graphics and other elements. As a matter of fact the defendant did not add self-created materials other than advertisements.

The case was considered at first instance and passed through the appeal process. Violation of copyright was apparent. But the legal reasoning (*ratio decidendi*) was vague. The defendants stated that the plaintiffs' copyright is invalid because they were claimed improperly according to the US law. The defendant pointed out two main problems: improper plaintiffs and non-compliance with rules of copyright registration according to the US law.

The most interesting problem in the context of conflict of laws was the status of the plaintiffs and the contested works. The registration issues were solved according to materials norms and mainly under the Berne Convention [3]. This convention is based on the principle of refusal from the registration and other formality requirements.

Almost without any special disputing the majority of works were considered in the *Russian Kurier case* as Berne Convention works protected in all Berne Union countries. Nevertheless the defendants disputed the possibility of their protection in the US referring to various provisions of the Russian copyright law. It is not necessary and it is not even possible to pose a conflict of laws question. According to the traditional territorial approach it is enough to consider works to be conventionally protected and then courts can decide cases on their domestic laws. The defendants in the Russian Kurier case posed that question and the court did not dismissed it. Moreover the court

applied foreign law and came to the following conclusions. Exceptions to copyright protection for facts and events of informational character in the Russian law does not apply to the work in question, since the latter contains commentary, analysis, and other creative activities of the elements as it appears from the Russian copyright law, commentary to it and Russian case law.

The Russian plaintiffs proved the existence of their copyright under the Russian law despite of the statement in the Russian copyright law that only a natural person can be the author and has to transfer his rights to other persons on the basis of a written transaction. The plaintiffs asserted their rights on the basis of exemptions in the Russian law for works of hire works published in media and periodical editions.

For damages the court applied the US law, including regulations on copyright registration. Statutory compensation amount (so called *statutory damages*) have been assessed only on 28 works that had been duly registered. Total 500,000 USD was awarded to the recovery from the Russian Kurier and O. Pogrebnoy. The printing company Linco was fined 3934 USD as by printing newspapers.

Because of the absence of conflict of laws norms in the US copyright law and the Berne Convention the court was forced to formulate their own ruling. The court even complained that the question of applicable law had been largely ignored yet. The court highlighted two kinds of relations and used for them different methods of localization. It applied the rule of *the place of origin* for the recognition of copyright and the rule of *the place of violation* for the enforcement demand. The first rule was obviously influenced by the rules of the Berne Convention (for example Article 5 of this convention). However, it is important that the court assumed and allowed the question about the choice of an applicable law.

Some private international law specialists consider results of the Russian Kurier case as the revolution in international copyright because "Having rejected the territorial interpretation of national treatment, copyright law has inherited all the flexibility, but also the confusion, of the modern interest analysis" [4, p. 915]. Conflict of laws ruling in the field of copyright presents easy transition from the traditional territorial interpretation of the national treatment principle to a more flexible approach in order to gain international protection of intellectual property rights. The appearance of conflict of laws ruling in the Russian Kurier case is very important because the difference between the Russian and the US law was determinative for its outcome.

The court was guided by flexible private international law method – the criterion of the closest connection, rather than by precise rules of localization in the Restatements of laws. In the Russian Kurier case the Court of the State of New York formulated the conflict rules not of the state but of the federal common law because only in this way the uniform application of the federal copyright law in Section 17 of the US Code is possible. In the Russian Kurier case other mechanisms of private international law have been used. For example it concerns the mechanism of qualification – the court took into account domestic commentary and practical application of the Russian law for its application.

Changes of the traditional approach in fact denying conflict of laws ruling are caused by necessity to prove unhindered movement of goods containing intellectual property objects. The goal of universal marketability of intellectual property rights has been drastically challenged by the Internet. Some attempts to deepen conflict of laws rules show that in such circumstances ordinary methods of localization are not very useful.

One of the most detailed set of conflict of laws norms for intellectual property relations was prepared by The European Max Planck Group on Conflict of Laws in Intellectual Property. It is a group of scholars in the fields of intellectual property and private international law. It was established in 2004 and has regularly met to discuss the problems of intellectual property in the domain of private international law. The group has drafted a set of principles on conflict of laws in intellectual property as a pattern of legal regulation and independent advice to European and national law makers. The Group has prepared a document called Principles on Conflict of Laws in Intellectual Property (CLIP). On 31 August, 2011 the Group advanced the Final Text of CLIP [5].

CLIP specially mentions so called *ubiquitous media such as the Internet* proposes for the relations connected with them special rules. For example according to Article 3:603 of CLIP in disputes concerned with infringement carried out through ubiquitous media such as the Internet, the court may apply the law of the state having the closest connection with the infringement if the infringement arguably takes place in every state in which the signals can be received. This rule also applies to existence, duration, limitations and scope to the extent that these questions arise as incidental questions in infringement proceedings. In determining which state has the closest connection with the infringement CLIP suggest to take into account all relevant factors, in particular: the infringer's habitual residence; the infringer's principal place of business; the place where substantial activities in furtherance of the infringement in its entirety have been carried out; the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety. There could be another factors which the court can consider as localization factors.

CLIP is very liberal in method of ruling. It recognizes wide freedom of choice (in private international

law so called *party autonomy*). According to CLIP notwithstanding the law applicable pursuant to the above mentioned conflict of laws rules, any party may prove that the rules applying in a state or states covered by the dispute differ from the law applicable to the dispute in aspects which are essential for the decision. The court shall apply the different national laws unless this leads to inconsistent results, in which case the differences shall be taken into account in fashioning the remedy. Thus in non-contractual relations one of the parties can affect the process of choice of applicable law. This situation cannot be compared with the private international law mechanism of mandatory rules because only the difference between applicable law and law of another state is crucial.

In rest CLIP adheres to the common approach of the sources of conflict of laws for intellectual property relations and establishes as a general rule *lex loci protectionis*. According to Article 3:102 of CLIP the law applicable to existence, validity, registration, scope and duration of an intellectual property right and all other matters concerning the right as such is the law of the state for which protection is sought.

The principle *lex loci protectionis* has become very popular in modern private international law. It is stated in the preamble of Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), "Regarding infringements of intellectual property rights, the universally acknowledged principle of the *lex loci protectionis* should be preserved" [6]. It is interesting to compare precise wordings in Article 8 of the Rome II and in Article 1132 of the Civil Code of the Republic of Belarus. It is quite clear that "the law of the country *for which* protection is claimed" in the former and "the law of the country *where* protection is claimed" in the latter are different methods of localization and can lead to different destinations. The Belarusian conflict of laws rules are more restrictive. The European approach means that if a suit was filed in one country and a violation has occurred in another country it is possible that a plaintiff seeks enforcement his intellectual property rights not necessarily in the country of a court but also in other countries through mechanisms of legal assistance and judicial cooperation. For example he could demand compensation, seizure of counterfeit goods, authorship recognition and realization of other moral rights on grounds of recognition and enforcement of a foreign court decision. A suit can be filed not at the place of infringement of intellectual property rights or at the place where a rightholder needs to act. According to the general rule of jurisdiction a lawsuit is filed at the place of habitual residence of a defendant. Even in the beginning of 2000s E. Geller said about "…increasingly frequent cases where the forum country and the protecting country are not identical" [7, p. 330]. Relying on a wide range of cases this author explored various stages of transnational infringement. He posed very important private international law questions: where to localize infringement; where it has occurred and where to stop it; flexible territoriality versus extraterritoriality for injunctive relief.

Attempts to localize intellectual property relations by conflict of laws rules in the Internet cases are very are cumbersome and almost useless. Nevertheless these relations originally have multinational nature and inevitably belong to the private international law domain.

The World Intellectual Property Organization (WIPO) has for a long time doing research on interaction of intellectual property and private international law. In September, 2015 WIPO published a next report entitled Private International Law Issues in Online Intellectual Property Infringement Disputes with Cross-Border Elements: An Analysis of National Approaches (the Report) [8].

An unquestionable positive feature of the report is very rich statistical data methodology. In the second-half of both 2013 and 2014, the WIPO Secretariat administered a questionnaire to experts in 25 countries: Argentina; Australia; Belgium; Brazil; Canada; Chile; China; Colombia; Denmark; Germany; India; Israel; Republic of Ireland; Italy; Republic of Korea; Malaysia; Mexico; The Netherlands; New Zealand; Nigeria; Russian Federation; Singapore; South Africa; Switzerland; and the United Arab Emirates. The experts were asked to provide several (3–5) leading judgments (between three to five cases), involving private international law aspects in online intellectual property disputes. However, in spite of its WIPO origin the report has an author. It was prepared by professor *Andrew F. Christie*, Melbourne Law School, University of Melbourne. It is stated in a special remark to the report that the views expressed in this study are those of the author and do not necessarily reflect those of the WIPO Secretariat or any of the Organization's Member States. Thus the report can be considered a subjective author's opinion and critics object namely to *A. Christie*.

One of them is professor *Marketa Trimble*, William S. Boyd School of Law, University of Nevada. She arrived at conclusions that are different from the conclusions in the report. In her paper Undetected Conflict-of-Laws Problems in Cross-Border Online Copyright Infringement Cases she pointed out that empirical studies that rely on existing court cases, such as those in the report and her own tend to underreport conflict of laws problems that intellectual property rights holders face when they encounter online infringements. *M. Trimble* correctly said that "The absence of phenomena may point to problems that result in an ignorance or avoidance of the phenomena – problems that would go undetected if statistics were evaluated only on phenomena present in the statistics" [9].

As a matter of fact the report shows that private international law issues not so common in online intellectual property infringement disputes with cross-border elements. The report states that the issue of applicable law was expressly addressed in just over one-quarter (29 %) of cases. In 16 cases directly addressing the issue, local law was identified as the applicable law, and was applied, in 14 of them. In the two cases where foreign law was identified as the applicable law, it was applied in one case, but not applied in the other case due to the court declining to accept jurisdiction over the matter. In the one case in which the law applied was foreign, the particular law in issue was about unjust enrichment. In all but one of the 40 cases in which the issue of applicable law was not directly addressed, it appears that the court simply assumed that the applicable law was local law. In the exceptional case, the issue was not addressed because the court found it did not have jurisdiction over the matter and thus did not need to decide the issue. Overall, the applicable law was local law in almost all (95 %) of the evaluated cases.

The author of the report, *A. Christie* proposes that WIPO shall provide various educative activities and further research and develop *soft law* understanding as "… a set of harmonized private international law rules for application by national courts to transnational intellectual property disputes". We agree with *M. Trimble* that these solutions are somewhat naive and far removed from the practice of civil litigation in national court especially in perspective of enforcement. She pointed out: "…the need to prove damages under foreign-country law, might be the primary limitation on the territorial scope of parties' copyright enforcement actions". It is worth of mentioning for better understanding of the importance of private international law issues in intellectual property relations with cross-border elements that correlation of *lex fori* and foreign law is necessary at least to avoid the *ordre public* triggering at the place of enforcement of foreign judgments on remedies.

Addressing the conflict of laws problems that arise in transnational intellectual property relations is necessary but not the only one mechanism of private international law which courts shall use. They do have these obligations at least due the rules of civil procedure. However in online intellectual property infringement disputes alternative ways are more popular and convenient than national court litigation. Both authors do not mention this aspect. They indicate very important legal problems of online intellectual property disputes to be solved and did not notice that it is better to rely on self-regulation practices of the Internet instead of transferring them into offline disputes.

M. Trimble says about the necessity "…to harmonized standards for safe harbors for internet service providers (which would need to be adjusted in light of the latest technological advances), 92 improved access to evidence, and other forms of judicial cooperation". We can assume this statement as a demand of international treaties on legal assistance. It is possible but somewhat rough method of legal regulation regarding online relations. Initiatives of the Hague conference of private international law is mentioned in the report but the corresponding draft treaty under the auspices of this organization does not go too far (Article 5.1 k) l) only states what kind of judgments on intellectual property issues can be recognized and enforced) and is still debating [10].

A. Christie did not consider private international law problems in arbitration or quasi-arbitration in online intellectual property disputes. However he mentioned as a possible solution the development of the soft law on online intellectual property infringement. He turned to the WIPO Joint Recommendation on Protection of Marks on the Internet Given (the Recommendation) and identified this document like a model for a copyright equivalent of the WIPO soft law. The determination of the applicable law itself is not addressed by the Recommendation [11]. The Recommendation contains generalized rules of proper behavior and allowable actions concerning intellectual property rights of others in a specific internet environment. Its provisions often contain references to applicable law as Article 7 stating that there shall be liability in a state under the applicable law when a right is infringed, or an act of unfair competition is committed, through use of a sign on the Internet in that state. But the most important and frequently used in practice provisions of the Recommendation (evidences of commercial effect in a state in Article 3, features of bad faith in Article 4) are self-sufficient.

Online arbitration and other bodies considering intellectual property disputes usually do not pose conflict of laws questions, do not apply national laws and render decisions on the Internet standards.

The WIPO Arbitration and Mediation Center (the Center) offers alternative dispute resolution options and is recognized as the global leader in the settlement of domain name disputes under the WIPO designed Uniform Domain-Name Dispute-Resolution Policy (often referred to as the "UDRP") receiving cases from trademark owners from around the world. UDRP applies primarily to international domains such as *.com*, *.net*, *.org*, *.xyz*, *.top*, and *.win*. In addition, 74 country code top-level domains (ccTLD) have now appointed the WIPO Center as service provider for their domain name disputes.

Supporting [12] or denying [13] a complainant's demand the panels of the Center follow the rules and concepts of the Recommendation usually without any special legal reasoning. UDRP and UDRP Rules are considered to be sufficient [14]. Nevertheless

sometimes panels touch the problem of applicable law. In *Jupiter Investment Management Group Limited v. N/A, Robert Johnson* the panel even in outlined the controversial history of this issue and stated its position [15]. It was decided that copyright of the complainant could have been infringed but the panel noted that an assessment of whether a registrant's activities constituted an infringement according to some national intellectual property laws was both unnecessary and undesirable. The panel quoted similar comments in *Delta Air Transport NV (trading as SN Brussels Airlines) v. Theodule de Souza* in relation to the question of trade mark infringement and *High Tech Computer Corporation v. LCD Electronic Systems SRL* in relation to both copyright infringement and trade mark infringement and disagreed with another approach in *TPI Holdings Inc. v JB Design*. The Panel said that the finding of copyright infringement in this case was not necessary in order to come to a finding of bad faith.

We share expectations of *A. Christie* that WIPO will develop special rules (in the meaning of the author as *WIPO soft law*) in relation to online infringements of copyright and other intellectual property rights. UDRP mechanism of dispute settlement is effective due to the possibility of prompt and easy enforcement of intellectual property rights by cancellation of the domain name registration or its transfer to the complainant. Thus the main task for WIPO is to clarify legal grounds for corresponding technical aspects. It is necessary to ensure that service providers, registrars and other professional participants of the internet infrastructure will take necessary actions to implement decisions against web sites, pages and other internet areas infringing intellectual property rights. Our hypothesis is that the key issues (especially for copyright and related rights) in the possible *WIPO soft law* will shift from the notion of bad faith and commercial use to existence and ownership of intellectual property rights and grounds for their free use. It is quite likely and desirables that the modern UDRP approach of flexible concept of the territorial nature of intellectual property rights will be maintained. The majority of cases under UDRP shows that it is enough to prove intellectual property rights in one jurisdiction in order to consider infringement in domain name registration. This approach is quite contradictory. It is especially evident in matters where parties have different nationality and the intellectual property rights are not supported by the law of one of the parties. However, this method can provide effective means of combating the widespread practice of piracy on the Internet. Moreover, the importance and value of determination of national jurisdiction and applicable law outside of the national segments of the Internet (ccTLD) are not clear. In our opinion the future private international law for online intellectual property relations with cross-border elements shall mainly rely not on a conflict of laws rules but on a set of material law analogous to *lex mercatoria* for international commercial relations.

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