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TWO RECENT CROATIAN DECISIONS ON COPYRIGHT INFRINGEMENT: CONFLICT OF LAWS AND MORE

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I. The Two Decisions

This comment focuses on two recent decisions from the Croatian commercial courts, both of which concern copyright infringement claims with an international element. Besides the conflict-of-law issues raised in the proceedings, there are also certain questions on substance that merit discussion here.

A. *Sten Eric Odman v. Adris Grupa d.d.*

The first case, *Sten Eric Odman v. Adris Grupa d.d.*, was brought before the Commercial Court in Rijeka in 2002.¹ It concerned an alleged copyright infringement by a Croatia-based company through the unauthorised use and alteration of the

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¹ *Trgovački sud u Rijeci*, P-749/2002 (unpublished). The decision discussed in this comment is the first-instance decision of 12 October 2007.

III. Commentary on the Two Decisions

A. General Account

These two first-instance judgements were both resolved in favour of plaintiffs, finding for infringement. Both cases are also currently pending on appeal before the High Commercial Court. Regardless of the fact that neither case is final and both decisions may be altered, they offer plenty of motives for scientific analysis. An additional reason for analysis is that appeal proceedings are not expected to be completed earlier than year or so subsequent to the appeal. In fact, typical first-instance proceedings before the Croatian courts generally take several years, as did *Odman v. Adris Grupa d.d.*, whereas the surprisingly short proceedings in *Freistaat Bayern v. Croatiaknjiga d.o.o.* are an exception in Croatian case law. The latter decision, bearing obviously political implications, may not be a perfect conflict-of-law study. In the light of these circumstances, it is surely remarkable how the Zagreb Court upheld the defendant's argument on the application of Croatian law to rule in favour of the plaintiff on the substance. Precisely due to the specific facts of the case, it raises issues that are atypical yet still valuable for both practical and scientific purposes.

Another problem with the two judgements is the effectiveness of the substantive rulings. The Rijeka Court judgment is more convincing than the Zagreb Court judgment in this respect. This is partially due to a thorough examination and establishing of relevant facts, so that the Rijeka Court's substantive conclusions were better elaborated. Yet, the conflict-of-law analysis was omitted by the Rijeka Court, and, where it might have been developed, the identity of competing substantive laws would have enabled the Rijeka Court to leave this issue unresolved. The Zagreb Court should be complimented for starting with the conflict-of-law issue and seriously attempting to resolve it, although that was probably triggered by the parties' active role in trying to prove the applicability of certain laws. However, its judgment still shows a profoundly insufficient understanding of conflict-of-laws in copyright field and, to a certain extent, a lack of consistency in some of its substantive determinations.

Viewing the two sets of fact patterns as a whole, the following issues were raised before the courts: (1) copyright infringement, (2) authorship, (3) the right of action, (4) transfer of the right, and (5) the term of a copyright. The above enumerated issues will be given separate consideration from a conflict-of-law perspective. In addition, certain substantive law problems will be given proper attention to give the reader a full insight into the judgments. The jurisdictional issues, which really posed no problems in the two cases, will not be dealt with in the present paper.

B. Infringement

At the outset, it is necessary to define a crucial notion for understanding the conflict-of-law rules relevant to intellectual property rights – the principle of territoriality.

Territoriality, as used in this note, means that the effects of a certain intellectual property right in an individual country are regulated under that country's laws. Hence, an intellectual property right in one country is independent from other parallel rights that might exist in other countries.⁹ This principle can be traced back to early international treaties in the field of intellectual property. The Berne Convention is the particularly relevant here. Its provisions on national treatment, notably Article 5(2), have been the object of vigorous debate, dividing the scholars into two groups: the materialists and the conflictualists. The materialists believe that the national treatment clause is only a mechanism for ensuring equal treatment of foreigners in relation to protection of their copyrighted works in countries other than the country of origin. The conflictualists believe that the national treatment clause also embodies a conflict-of-law rule requiring application of the law of the country in/for which protection is claimed. For reasons beyond the scope of this article, the materialist's position is very convincing.¹⁰ Nevertheless, it seems that the Zagreb Court favoured the conflictualist approach when attempting to determine the applicable law using the Berne Convention rules. However, the Court's reasoning would have been more credible if, instead of Article 6bis(3), which deals with moral rights, it had invoked Article 5(2). That is because the act of publishing and offering for sale 'Mein Kampf' can be characterised as an unauthorised exercise of economic rights rather than a violation of moral rights.

Aside from this imprecision, and even if one accepts the conflictualist approach, a lawyer will instantly notice the use of the expression 'in which the protection is claimed' (in Croatian: 'u kojoj se zaštitita traži') in the Zagreb Court's judgment. This is in fact the correct translation of the original French text of the Berne Convention ('où la protection est réclamée'), which today is commonly interpreted as 'for which the protection is claimed.' The move against a purely linguistic interpretation of this provision seems to be induced by the same development that narrowed the previously strict territoriality concept that served as a barrier to international jurisdiction in matters of intellectual property right infringement. Under this development, the concept of territoriality now enables the courts of one country to decide infringement cases concerning an intellectual property right protected in another country, yet it still bars the application of the law of the first country to the infringement of an intellectual property right protected in the other country. As a consequence of its literal reading of the Berne Convention, the Zagreb Court concluded that its own domestic law applied. Reference to the *lex fori* under these circumstances, to the best of this commentator's knowledge, has no precedence in Croatian case law or Croatian scholarly opinions. When interpreting Article 5(2) of the Berne Convention, scholars in Croatia construe it as

⁹ This is one of essentially four meanings of territoriality identified in scholarship. See, CORNISH W./LLEVELYN D., *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, London 2003, pp. 26-27; WADLOW CH., *Enforcement of Intellectual Property in European and International Law*, London 1998, p. 9.

¹⁰ See, e.g., VAN EECHOUDE M.M., *Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis*, The Hague/London/New York 2003, especially pp. 48 and 92.

calling for the application of the law of the country for which the protection is claimed (*lex loci protectionis*).¹¹ Coincidentally, in the case at hand the Zagreb Court's conservative, territorialistic approach did not produce a result any different from a hypothetical application of the *lex loci protectionis* rule, because under the cases' facts both rules refer to Croatian law. Yet, it might have been that the plaintiff's claims also referred to copies of the book offered for sale by the defendant in one or more countries other than Croatia (in Bosnia and Herzegovina, for instance) where the Court's *lex fori* approach would have violated the territoriality principle.

These notes may not be as pertinent to the Rijeka Court's reasoning, since the Court never revealed how the application of Croatian law was justified. The fact that the Court referred to Swiss law in relation to authorship reveals the Rijeka Court's awareness of the international element to the case and the conflict-of-laws issues begging for resolution. Perhaps due to parties' failure to develop the conflict-of-law potential of the case, the Rijeka Court opted for a more lenient approach and only slightly touched upon the issue. Unlike in the matter before the Zagreb Court, the parties before the Rijeka Court did not discuss the applicability of Croatian law. The question that instantly comes to mind – whether Croatian law upholds *fakultatives Kollisionsrecht* as some case law might suggest, or requires the application of conflict-of-law rules *ex officio* as the scholars unanimously agree – is beyond the scope of this comment. It may be concluded that, perhaps coincidentally, the Rijeka Court's application of Croatian law to infringement is in line with the country of protection rule, given that the statement of claim concerns the defendant's actions in only Croatia.

C. Authorship

Authorship was disputed before the Rijeka Court, and the predominant part of the Court's reasoning was devoted to it. The Court began by stating that the author is the person who creates the work, and by the act of creation he or she becomes the original holder of the copyright. It is interesting that when the Court cites the wording contained in the provisions of the Croatian Copyright Act of 2003, and the previous version of 1999, it does not mention any law, but generally refers to legal scholarship. According to the general position in Croatian law, legal scholarship is not a direct source of law. Hence, it would have been safer for the Court to find grounds for its authorship decision in a relevant provision of law. Since the person whose authorship is to be determined is a foreign citizen and the work was created in a foreign country, the governing law question is the first to be resolved. Indeed, when dealing with the presumption of authorship the Rijeka Court simultaneously referred to the Croatian Copyright Act of 1978 and the Swiss Federal Copyright Act of 1922. The Court stated that these two acts, which were in force at the time the work was created, provide exactly the same rule on the presumption of authorship: the author shall be the person whose name and surname or pseudonym

¹¹ See SAJKO K., *Međunarodno privatno pravo*, Zagreb 2005, p. 279; HENNEBERG, I., *Autorsko pravo*, Zagreb 1996, p. 34.

appears on the work, unless proven otherwise. Being identical, the provisions practically eliminate the need to decide between them. The Court embraced this as a way out, leaving the conflict-of-law analysis at the initial level. In principle, the Rijeka Court was faced with the question of applicable law. It looked into Swiss law and Croatian law, but it is possible to only hypothesize which law the court used to decide the case. Most probably Swiss law was taken into consideration as the *lex originis*, while the Croatian law was considered either as the *lex fori* or the *lex protectionis*. It is almost certain that the Court would not consider both laws as applying cumulatively, and the fact that the Court actually looked into the Swiss law at all may be seen as an indication of its preference for the *lex originis*. If so, this would not be an isolated court decision in that direction in the comparative case law.

There are authorities supporting *locus originis* as a connecting factor for issues of authorship, such as some French and U.S. decisions. On the other hand, the country of origin principle (*Ursprungslandprinzip*) is strongly opposed by German case law and directly conflicts with the provisions of the Swiss Federal PIL Act of 1987. The position against the application of the *lex originis* is strengthened with the argument on legal certainty, which is claimed to be endangered if objects of intellectual property right protection in a single country fall under different legal regimes. It is supported by that fact that it is becoming increasingly difficult to ascertain the facts relevant for establishing the place of origin.¹² The *locus protectionis* approach is considered to offer a more suitable solution, as the coherence of a national intellectual property law may be weakened by *dépeçage*. The Rijeka Court eventually decided correctly on the applicable substantive rule, but it remains unclear what would have been the result if the substantive rules of Swiss and Croatian laws differed.

D. Right of Action and Transferability of Intellectual Property Rights

An interesting point in relation to the Zagreb Court's judgment is the issue of the law applicable to the right of action: the Court simply applied the Croatian Copyright Act to ascertain whether the State of Bavaria can take the role of the plaintiff in this particular dispute. Bavaria presented itself as the copyright holder, and copyright holders under Croatian law are entitled to an action for unauthorised copyright use. In order to decide on the defendant's objection, the Court had to answer the question whether the State of Bavaria became a holder of copyright over 'Mein Kampf', i.e. whether it lawfully acquired a copyright on the basis of

¹² This is even more so given the difference in connecting the unpublished and published works. Thus, e.g. TROLLER K., 'Chapter 22: Industrial and Intellectual Property', in: LIPSTEIN K. (ed.), *Volume III: Private International Law, International Encyclopaedia of Comparative Law*, Tübingen/Dordrecht/Boston/Lancaster 1994, p. 9.; GOTTSCHALK E., 'The Law Applicable to Intellectual Property Rights: Is the *Lex Loci Protectionis* a Pertinent Choice-of-Law Approach?', in: GOTTSCHALK E. ET AL. (eds.), *Conflict of Laws in a Globalized World*, New York 2007, p. 205.

confiscation. This issue was characterised as falling under the broader notion of transferability of copyright. The judgment's substantive reasoning follows the conflict-of-law reasoning but it mentions only the means of legal redress and the copyright term. Therefore, absent the Court's express statement on this point, the application of Croatian law to the right of action and the legality of transfer might be understood as a consequence of either the *lex fori* rule or the *lex causae* rule. A likely construction would be that the Court considered these matters so closely related to the means of redress that they fell under the same conflict-of-law rule.

In conflict of laws, nonetheless, there is no straightforward solution for the right of action issue. It is different from the capacity to sue (*locus standi*), which is by its very procedural nature governed by the forum's law. Conversely, the right of action or *Aktivlegitimation* is substantive in nature, i.e. deriving from the substantive rules defining the rights. When an intellectual property right is granted through a legislative act, there is a person with whom this right is vested; this person is usually given a legal remedy to protect its right before the courts. For these reasons, the right of action issue should be decided under the same applicable law rule as the main issue (the *lex causae*, i.e. in intellectual property cases the *lex protectionis*).

The issue of intellectual property right transferability is also an important one in conflict-of-laws. Due to the implications and significance for the country of protection, transferability of an intellectual property right, and the legal grounds for transfer in particular, are often said to be governed by the *lex protectionis*.¹³ One may conclude that although it did not explicitly resolve these matters, the Zagreb Court unintentionally succeeded in properly subjecting the issue of whether the confiscation is a permissible mode of copyright transfer to the Croatian law, because under the facts of the case Croatian law is both the *lex fori* and the *lex protectionis*.

Whether the Court gave good reasons for its substantive ruling on who held the copyright is another theme. Bavaria's claim was based on an alleged 1925 publishing contract between Adolf Hitler, as the author, and the Franz Eher Nachfolger GmbH, as the publisher. Bavaria was not in possession of the contract and tried to prove its existence with a 1964 statement from Mr. Berg, certified by the Bavarian State Ministry of Finance. The transfer of publishing rights to the State of Bavaria was effectuated through a Document of the State of Bavaria administrative body of 1948 (*Übertragungsurkunde Nr. 1918*). A second line of proof included two documents: (1) a Munich court judgment from 1948 (*Spruch der Spruchkammer München I-3568/48*) ordering the expropriation of all Hitler's property in Bavaria that was unidentified at that time, and (2) a transfer document (with the attachment) issued by the Munich administrative body in 1965 (*Übertragungsurkunde Nr. 86; Anlage zur Übertragungsurkunde Nr. 86*) whereby

¹³ In a case with a similar fact pattern in Sweden, the Swedish Supreme Court held that the question of the extent to which a copyright might be transferred by confiscation was to be decided under the law of the country for which the protection was sought. See, *Högsta Domstolen*, B 4367-97, decision of 21 December 1998, *GRUR Int.* 1999, no. 7, pp. 625-626.

the Hitler's copyright to 'Mein Kampf' was expressly mentioned as a part of the property confiscated and retroactively transferred to Bavaria as of 24 January 1949.

The Zagreb Court was obviously convinced by Bavaria's claim that all mentioned documents were public documents with apostilles having legal effect in the Republic of Croatia. Doing nothing more than simply listing these documents, the Court concludes that they provide sufficient grounds for finding that the State of Bavaria held the copyright to 'Mein Kampf'. It fails to address the issue of whether foreign documents have legal effect in the proceedings before the Croatian court.

The Court might have reached a different conclusion by analysing the actual legal effects and contents of these documents. From a formal point of view, the effect of an apostille under the Hague Apostille Convention, which applied to the documents in question, is to certify the authenticity of the signature, the capacity in which the person signing the document has acted, and the identity of the seal or stamp that it bears; it does not extend to the content of the public documents.¹⁴ Under Croatian law, the foreign apostilled document is presumed to be truthful, unless proven otherwise under the condition of reciprocity. Nonetheless, pursuant to the Croatian PIL Act of 1982 that is presently in force, foreign court judgements are subject to a special recognition procedure before they have any legal effect in Croatia. The recognition procedure also pertains to decisions by authorities other than courts, provided that in the country of origin these decisions have the same legal effect as court decisions and they regulate matters of private law (including property matters). Some Croatian scholars argue that probative value should be given to legalized or apostilled foreign court decisions even if they have not been formally recognized.¹⁵ It is our opinion however that recognition, as a preliminary question, would be required for all aforementioned documents, with the exception of the statement by Mr. Berg. Because this is not the proper place to develop this argument in much detail, it suffices to say that a ruling creating, changing, or terminating certain legal relationship, such as that in the case at hand, needs to be verified against the conditions for recognition before it can have effect in Croatia. Otherwise, even rulings not recognizable in Croatia would still affect parties' rights and obligations by being back-doored through other proceedings.

As for Mr. Berg's statement, its relevance for these proceedings depends on whether Croatian law, applicable to modes of copyright transfer, allows publishing contracts to be proven with oral statements. Even if the answer is yes, which is by no means established, the persuasiveness of Mr. Berg's statement is questionable. Specifically, his claims that such a cumbersome contract transferring exclusive publishing right for all present and future editions in all languages was actually made is extremely suspect, taking into consideration Hitler's absolutely uncontrol-

¹⁴ The Conclusions and Recommendations of the Special Commission of the Hague Conference on Private International Law on the Practical Operation of the Hague Legalization Convention (2003), http://hcch.e-vision.nl/upload/wop/lse_concl_e.pdf, point 22.

¹⁵ VUKOVIĆ Đ / KUŠTEK E., *Međunarodno građansko postupovno pravo*, Zagreb 2005, p. 200.

lable character and his political powers, as noted by a 1971 Italian court case with similar facts. Moreover, the Italian court pointed out that the statement did not reveal the duration of the contract or the content of its 1935 modifications, thus leaving several relevant facts unproven.¹⁶ Again, even if the existence of the publishing contract is deemed established, it has to be verified whether the subsequent 1948 administrative decision offends the Croatian public policy. The defendant has emphasised in its appeal that the 1978 Croatian Copyright Act, used by the Court for the purpose of proving that confiscation is admissible, does not prescribe any other grounds for acquiring copyright except by virtue of a contract or succession. Invoking the Croatian Constitution might have added some persuasiveness to the argument against giving effect to the document in question.¹⁷ According to the Constitution, the inviolability of ownership is one of the highest values in the Croatian legal order, and property may, in the interest of Croatia, be restricted or expropriated by law upon payment of compensation equal to its market value. Against this background, one could argue that the confiscation of a copyright is contrary to the Croatian public policy. This argument also applies to the two other documents that formed the plaintiff's second line of proof. Contrary to what the Zagreb Court ruled and the defendant claimed, the Croatian Copyright Act of 1978, in force at the time of the first publication in Croatia (in 1999), should be irrelevant. Because the content of public policy may change over time, it requires that the values shared by the society at the time the recognition decision is rendered are taken into account. Hence, the Court would have to look to the Croatian Constitution in addition to the Copyright Act currently in force.

E. Term of Protection

Regarding the term of the copyright, the Zagreb Court employed a technique analogous to what it used to resolve the infringement issue. Satisfied that the conflict-of-law solutions were provided by the Berne Convention, the Court invoked Article 7(8) and concluded that Croatian law, as the *lex fori*, was applicable. As a result, the Court rejected the defendant's contention that this issue should be governed by German law. This again seems to be correct only in its outcome because of the simple fact pattern in the case at hand. Together with the existence and scope of the copyright, the term of protection is actually a core copyright issue, and as such is said to be governed by the *lex loci protectionis*. In addition to applying Croatian law, the Court verified through Article 7(8) of the Berne Convention that the term of protection under Croatian law, which it found to be 70 years *post mortem auctoris*, was not longer than the term under German law.

In relation to the term of protection, the Court made a peculiar argument to hold that protection will terminate in 2015. Namely, the Court held that under the

¹⁶ *Pretura di Bologna*, decision of 20 April 1971, *GRUR Int.*, no. 2, 1972, pp. 57, 58.

¹⁷ *Official Gazette RC*, no. 41/2001 (consolidated version), *Official Gazette RC* no. 55/2001 (corrigendum).

Croatian Copyright Act of 2003, which is in force today, all works that had copyright protection at the time the Act became effective enjoy 70 years of protection following the author's death. According to the former Copyright Act of 1978, the term of protection expired 50 years after the author's death. Consequently, under the 1978 Act the copyright over 'Mein Kampf' would have expired at the beginning of 1996. This was specifically provided in Article 81 of the 1978 Act, which was amended only once in 1993 without relevance to the copyright term.¹⁸

The modification of the Act that affected a copyright term occurred through an amendment that went into force on 19 July 1999.¹⁹ The 1999 Amendment extended the term of protection (for economic rights) to 70 years *post mortem auctoris*, at the same time providing in Article 29 that this extension applied to the works that still had copyright protection when the Amendment entered into force. Applying these rules to the facts of the case, the copyright term in relation to 'Mein Kampf' expired at the end of 1995, and, consequently, the 1999 Amendment could not have extended the copyright term. However, the Zagreb Court's conclusion went the other way and, quite unexpectedly, relied on the provisions of 1978 Act, as amended in 1993, to conclude that moral rights are perpetual and never ceased to exist in relation to 'Mein Kampf'. Hence, the economic rights still subsisted in Hitler's universal successor in title – the State of Bavaria.

The Court further stated that unlike the Copyright Act amended in 1999, which did not intend to retroactively apply the Act to works that no longer enjoyed protection, the 2003 Copyright Act intended to provide such retroactive effect.²⁰ It is an odd conclusion since the wordings of both provisions are exactly the same. The Court found its support in the provisions that retroactively cover rights of phonogram producers and database rights, which do not impose the requirement that the rights were still valid when the 2003 Act entered into force. Stating that it is unlikely that the legislator would have provided absolutely retroactive protection to such neighbouring rights and only limited retroactivity to 'copyright, by its nature a superior right'²¹ to the two other rights, the Court held that the legislator must have intended the same treatment for copyright. To uphold this assertion the Court cited the Explanations to the Final Proposal of the Copyright and Related Rights Act of 2003.²²

There are at least three fundamental mistakes the Court made. The first is that the Court confused the moral and economic aspects of copyright. It is inconsistent to claim that because moral rights subsist in a book its author has economic rights under the new act, even though those economic rights had previously terminated and the new act only extends the terms of works still protected by economic

¹⁸ The Amendment Act is published in *Official Gazette RC* no. 58/1993; the consolidated version is published in *Official Gazette RC*, no. 9/1999.

¹⁹ *Official Gazette RC*, no. 76/1999.

²⁰ *Trgovački sud u Zagrebu*, P-2946/2007, judgement of 18 February 2008, pp. 5-6.

²¹ *Ibid.*, p. 5.

²² The Explanations are published in GLIHA I, *Zakon o autorskom i srodnim pravima*, Zagreb 2004, pp. 101-192.

rights at the time it entered into force. This holding is not only the result of misunderstanding of the fundamentals of copyright, but also a purely unreasonable mistake. Because, if economic rights are linked with moral rights in their duration, why would one then need the special provision on duration of economic rights, let alone a transitory provision to that effect.

Second, an equally unacceptable mistake is the Court's statement that the moral rights in 'Mein Kampf' had been transferred to the State of Bavaria. Croatia is one of the legal systems that recognize the moral rights of an author, and it has always been extremely protective of them. Croatia not only invalidates any attempted transfer of moral rights (it is only admissible to a limited extent if occurring *mortis causae*), but it also renders any act of waiver on the part of the author without legal effect.

Finally, the Court's third problematic premise is its claim that the Explanations to the Final Proposal of the Copyright and Related Rights Act of 2003 reveal the legislator's intent to retroactively protect all works, regardless of when their original term expired. In fact, the Explanations to the transitional provision in Article 202 claim the exact opposite: they simply restate the provision related to the copyright and emphasize the condition that the works must not have entered into the public domain. Besides, the Explanations clarify the fact that the special retroactivity provided to rights of phonogram producers and database rights is due to international obligations owed by the Republic of Croatia because of Article 14(6) of the TRIPS Agreement and Article 14 of the European Union Directive 96/9/EC on the legal protection of databases. This plainly distinguishes the rationale behind the unlimited retroactivity given to those two rights from the limited retroactivity for other copyrights. Therefore, the Croatian law currently in force does not enable the revival of any economic rights related to 'Mein Kampf'.

IV. Final Remarks

The two cases discussed here pose rather difficult conflict of laws questions that courts of many countries struggle with. This is especially so because of the very old convention rules and non-adapted statutes, on the one hand, and the increasingly growing market for intellectual property rights that has been boosted by technological progress, on the other. Although the two fact-patterns discussed here are not among the most complex ones, the basic dilemmas remain the same. It is to be hoped that the appellate courts will shed light on the problematic and vague segments of the lower courts' reasoning and, thus, bring more understanding in Croatian law not only to conflict-of-law issues in general, but also to those issues related specifically to copyright.