The alternatives to a mosaic approach (Mosaikbetrachtung) when deciding the applicable law
<table>
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<th>Abbreviation</th>
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<td>ALI</td>
<td>American Law Institute</td>
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<td>CLIP</td>
<td>Conflict of Laws in Intellectual Property</td>
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1. Introduction

The Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) was introduced by the European Union to define applicable law to non-contractual obligations in civil and commercial matters. As stated on the EU’s official website, Europa, the purpose of the regulation is not to “harmonise the substantive law of the signatories in the field of non-contractual obligations”, but only the conflict-of-law rules, in order to guarantee that “the rules determining the applicable law will always be the same”, regardless of where in the European Union an action is brought. ¹ With effect from January 2009, the Rome II Regulation is applicable for events occur after its came to force (20 August 2007), as stated in Article 31 of the Regulation.

The general rule of the Regulation is lex loci damni, the law of the country where the direct damage occurs, contained in Article 4 of the Regulation². Article 4(1) of the Regulation states that “the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur.” Exception for this general rule is stated in Article 4(2), for parties who have their habitual residence in the same country. Article 4(3) “should be understood as an ‘escape clause’ from Article 4(1) and (2)”,³ where the tort/delict is “manifestly more closely connected” with another country. The rule defines the place of the tort as the place of direct damage, not the place of action or place or places of indirect damage. Article 4 is applicable for torts in general, unless the Regulation has specific rules or no choice of law has been made pursuant to Article 4.⁴

³ Ibid.
However, it is unclear from the text of the Article 4 that which law shall be applied in case of a single action causes damages in several countries.\textsuperscript{5} In the Explanatory Report accompanying the 2003 Commission Proposal of the Rome II Regulation, the intended approach in such case is that when the damage is sustained in more than one country, this principle requires that “the laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as “Mosaikbetrachtung” in German law”.\textsuperscript{6} It means that if the harm occurs in multiple countries, the law of each country shall be applied separately to determine the damage.

The mosaic approach is a response from the lex loci declit principle, which some believe it as the “simplest and most convenient solution”, applying the law of the place of the tort when a single action causes damage in several countries.\textsuperscript{7} However, one of the basic problems with the law of the place of the tort is how to localise a tort which has made up elements occurs in more than one place. The lex loci damni principle does not have this difficulty as the place of the tort will be the place where the direct damage occurs. It achieves legal certainty by defining the place of the tort is the place of direct damage, not the place of the action or the place of consequent damage. Nevertheless, the mosaic approach has certain disadvantages, and it is not always sufficient and practical enough in all circumstances, especially when dealing with non-contractual obligations related to action conducts in the Internet, such as ubiquitous intellectual property infringements and defamation. Therefore, alternative approaches are being studied and suggested, and this paper will examine some of them. Popular alternative approaches for the mosaic principles are the approach suggested by the American Legal Institute (ALI) and the European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP); the law at the place of habitual residence of the claimant; the law of the place of origin; and the law of the place where the damage is maximized.\textsuperscript{8} In this paper, I will discuss the mosaic approach, the proposal from the ALI and CLIP Principles, and other alternatives. There are advantages and disadvantages with each of these approaches.


\textsuperscript{6} The proposal for a Regulation of the Parliament and Council on the Law Applicable to non-Contractual Obligations (“Rome II”)

\textsuperscript{7} Ahern, John, and Binchy, William, op. cit, p.135

2. The mosaic approach

As mentioned above, the lex loci damni rule enhances the court decisions' foreseeability and strikes a relative balance between the interests of parties.\(^9\) This rule is considered as a shift from fault to strict liability, as well as a shift from punishment towards compensation.\(^10\) Beside its advantages, the mosaic principle lying in the Rome II Regulation has several weaknesses. It is not clear from the text of the Article 4 that when the damage occurs in several countries, whether there will be a single tort with more than one applicable law, or it will be a collection of individual torts with separate applicable law. Furthermore, it is also unclear whether it will be different if the damage in multiple countries is suffered by a single party and multiple parties. The answers of these questions may have impact on the way how Article 4(3) should be applied. On the one hand, if the action is viewed as a single tort with multiple applicable laws, the court may tend to find out that the law of the country where the action took place is more closely connected than with the multiple laws of the places have damage. On the other hand, if the Article should be interpreted as a collection of multiple torts, the court may be less likely to find for any individual tort that Article 4(3) is engaged.\(^11\)

Furthermore, under the mosaic approach, the tortfeasor's interest is not fully taken into account. Generally, the tortfeasor can foresee where the damage will occur, but not in all circumstances. Hence, the tortfeasor may have to confront with unexpected law.\(^12\) In addition, the mosaic approach does not only potentially multiply the applicable laws, but also the expense and the uncertainty in proving the damage.\(^13\)

Applicable law in case regarding infringements of intellectual property is regulated by Article 8, with the principle *lex loci protectionis*, the law of the country in which protection is claimed. Article 8(2) of the Rome II Regulation states that in case of infringement of a unitary Community intellectual property rights, the applicable law shall be the law of the country in which the infringing action was committed. However, the fact that copyrighted materials can

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10 Kramer, Xandra E, op. cit, p.13
11 Ibid.
12 Ibid.
13 Ahern, John, and Binchy, William, op. cit, p.135
easily uploaded from anywhere with Internet connection makes choosing applicable law based on the committed place less meaningful and persuasive. Moreover, courts generally do not apply foreign intellectual property law, even if the decision may have some extraterritorial effects.\(^\text{14}\) It will be more problematic when there are two or more contradict decisions, especially for Internet based businesses as each change may have effect in a world wide scale.

Moreover, the Article does not give any answer to multi-states and ubiquitous infringement cases.\(^\text{15}\) As the Regulation does not provide a special rule for Internet infringement, the choices of applicable law from the Member States are different.\(^\text{16}\) Some states apply one single law, either lex loci or the law of the country where the infringing act was committed; while others apply the law of the country where the infringing act has effects. Applying the general rule, the mosaic approach, in such case will be very costly as the infringements will be regarded as separate in each country and each law where the damage is produced will be applied. The ability of simple and quick distribution pirated intellectual property via the Internet makes the infringement occurs world-wide easily. In theory, the right holders will be burdened with the duty to plead for all jurisdictions concerned by applying the mosaic approach.\(^\text{17}\) If these costs are expected to be undertaken by the right holders, it will incentivize infringing acts.\(^\text{18}\) In addition, as ubiquitous infringements are often conducted under the environment of cloud computing, it is not easy to determine where the damage has effect, as the location of the cloud computing’s servers cannot be considered as a relevant factor.

Another aspect that the mosaic approach is noticed for being insufficient is defamation.\(^\text{19}\) Despite the fact that the Rome II regulation excludes non-contractual obligations arising from defamation from its scope as stated in Article 1(2)(g), scholars have discussed and suggested for

\(^\text{18}\) Kojima, Ryu, op. cit., p.15
reforming the Regulation to include defamation.\textsuperscript{20} The mosaic approach is often applied in defamation cases, as there is no uniform concept of whether and when infringing personal privacy is justified, even between European countries, and such distributive application is expected to fit in that absence. However, the general practicality of this approach is at doubt. Defamation in many cases is caused by the mass media, and applying the laws of all the places where the publication was distributed is not an easy task for the court. Additionally, when there is more than one person responsible for the wrongful conduct, typically the journalists and the editor in chief, applying the mosaic approach may lead to different decisions of internal redress, due to different systems' regulations.\textsuperscript{21}

3. The proposal from the ALI and CLIP projects

In May 2007, the ALI approved the final draft of the ALI Principles.\textsuperscript{22} Unlike the Rome II Regulation, the ALI Principles do not have the authoritative force. They are only a set of rules that scholars, lawyers, courts can resort to in questions of conflict-of-laws issues. Moreover, while the Rome II Regulation regulates conflict-of-laws in general, the ALI Principles only focus on conflict-of-laws issues in intellectual property law. In Europe, The Max Planck Institutes' CLIP is a similar project. The CLIP and the ALI Principles, together with Japanese’s Transparent Proposal, are expected to give an outcome to the debate of territoriality or universalism in intellectual property law.\textsuperscript{23}

For cases of ubiquitous infringement, instead of applying all the laws of the countries where the damage occurs, both projects suggest that the judges are permitted to choose a single applicable law. Section 321 of ALI Principles lists four factors which the court can base on to decide which law or laws shall be applied:

(1) When the alleged infringing activity is ubiquitous and the laws of multiple States are pleaded, the court may choose to apply to the issues of existence, validity, duration, attributes, and infringement of intellectual property rights and remedies for their

\textsuperscript{20} Ibid.
\textsuperscript{21} Ibid, p.10
\textsuperscript{22} Frohlich, Anita B, op. cit., p.888
\textsuperscript{23} Metzger, Axel, op. cit., p.3
infringement, the law or laws of the State or States with close connections to the dispute, as evidenced, for example, by:
(a) where the parties reside;
(b) where the parties' relationship, if any, centered;
(c) the extent of the activities and the investment of the parties; and
(d) the principal markets toward which the parties directed their activities. 24

Similarly, Article 3:603 CLIP Principles allows the courts to apply one single law to the issues of ubiquitous intellectual property infringement. 25 However, there are fundamental differences between Article 3:603 CLIP Principles and Section 321 of the ALI Principles. While Article 3:603 CLIP Principles only allows one single applicable law in issues of infringement and remedies, Section 321 of the ALI Principles is also applicable for the existence, validity, duration, and attributes. 26 Some are afraid of such flexible approach from the ALI Principles will be problematic in the issue of patented software, as the requirements for granting software patents in the United States is relatively lower than in Europe. Whether a software patent granted in the United States will be enforced world-wide if the United States' law is the most closely related to the case? Another difference is that from the list of criteria according to which the closest connection should be determined, Section 321 of the ALI Principles is believed to be more favourable toward the rightholders, while Article 3:603 CLIP Principles is more toward the defendant. Under Section 321 of the ALI Principles, the rightholder's national law will be chosen two conditions are fulfilled: the rightholder and the infringer have their habitual residence in different states, and the home state of the rightholder is also his centered market. 27

This approach proposed by the ALI and the CLIP has its practicality advantage. A rightholder can bring all of his world-wide claims against the infringer in a single court, and the court is permitted to apply a single law to the dispute. 28 The applicable law will be chosen from the gathered evidences, and it can adapt to fit the nature of the case. Its flexibility leaves space for

24 §321 of the ALI Principles
25 Metzger, Axel, op. cit., p.21
26 Ibid.
27 Ibid.
evolving in the future, together with the development of technology, especially the Internet, which has been developed in a rapid and unpredictable rate. However, such flexibility fails to streamlining choice of laws in intellectual property infringement. Moreover, this approach contains legal uncertainty and lack of foreseeability problems as parties can not foresee which law shall be applied.

4. Other alternatives

4.1 Law of the habitual residence of the claimant

At the first glance, applying law at the habitual residence of the claimant, which is supported by several German and Austrian scholars, seems to be a convenient solution. The interest of the claimant, both in defamation and intellectual property infringement cases, is expected to be best encompassed and represented at his habitual residence. They will be judged in a legal system that they are familiar with. It will also enhance the protection of the right holder in ubiquitous infringement.

Arguments against this approach include whether the claimant or not the claimant really lives there or it just his formal domicile. In the globalization era, it is not unusual for somebody to have a formal domicile in one place but actually lives and works in other country. Such case makes the pro-domicile arguments lost their persuasive. Moreover, applying the law at the claimant's domicile deprives foreseeability to the tortfeasor.

4.2 Law of the place of origin

Unlike the approach that applying the habitual residence of the claimant, the approach of applying the law at the place of origin (the place of distribution in defamation issues and the place where the infringing work was uploaded in ubiquitous infringement) offers a better balance between the interests of both the claimant and the tortfeasor. Applying one single law will also

29 Frohlich , Anita B, op. cit., p.893
31 Thiede, Thomas and McGrath, Colm P., op. cit., p.12
32 Ibid.
avoid the complexity of applying multiple laws in a distributive basis. Foreseeability of the applicable law is not really a concern when applying this approach, as a person or a company should foresee the application of the law where he conducts the infringement or where the distribution is intentionally and foreseeably distributed.33

The ALI Principles do not take into account country of origin in its approach. There are two main reasons explain this decision. First, it may be difficult to determine the country of origin, due to the complexity of digital network. With a certain level of knowledge, the uploader can easily hide or fake his address. In addition, one infringed work can be uploaded in several countries. For instance, it should not make any difference to choose the applicable law when the uploader uploads the infringed work in his business trip in several countries. Second, applying this principle may lead the uploader to choose a country with weak intellectual property law to conduct his activity. 34 The level of protection for intellectual property is varied in different countries, and less developed countries tend to have weaker intellectual property protection than developed one.

4.3 Law of the place where the results of the exploitation of intellectual property are maximized

This approach takes into account the balance with general principle. From the economics point of view, applying the law of the place where has the most sustained damage seems reasonable for both the claimant and the infringer. This approach does not have the problem of unbalance foreseeability for different parties from other approach, such as the law at the place of the habitual residence.

There are few questions have to be asked before applying this approach. One of the questions is at which point the damage will be determined as maximized? Whether it will be when the action was filed to the court or when the oral argument is concluded? 35 Moreover, which law

33 Ibid, p.16
34 Frohlich , Anita B., op. cit., p.892
will be applied when damage in another country has become bigger while the action is pending? The answers may vary, however, one of the possible answer is the results shall be decided at the filing action, and if the situation is substantially change after that, it should be treated as a distinct case.\textsuperscript{36} In this situation, this approach loses some of its advantages, as the case has to be brought to more than one court and there is more than one applicable law.

5. Conclusion

The rapid development of technology keeps law struggle to keep pace with. Few decades ago, it is hard to imagine any case can cause damage in a world wide scale. However, the Internet has changed the big picture completely. The Internet has become an integral and irreplaceable part of our life. Cloud computing, high speed connection, together with many more technologies; make communicating, sharing and doing business much easier than they used to be. The borderless Internet also spreads information in a wider scale in a shorter time. It is an ideal environment for producing, copying and distributing intellectual property, both legally and illegally.

Territoriality has been the leading approach for intellectual property protection since the beginning.\textsuperscript{37} However, due to the complexity and wide range damage in the Internet intellectual property infringement, deciding the applicable law is not an easy task. The mosaic approach, or Mosaikbetrachtung in German law, is the chosen approach in the Rome II Regulation on the law applicable to non-contractual obligations. When the same conduct directly causes damage to different assets located in different countries, the law of each country will be applied in a distributive basis. The mosaic approach guarantees the damage in each country will be compensated by the law of that country. It helps to achieve legal certainty, as in some case, what is protected in some countries did not get the same protection in other countries. Trade secret protection is a vivid example in which determining the damage by applying one single law may not be sufficient enough.

However, the mosaic approach is not the most suitable and practical approach toward

\textsuperscript{36} Ibid.
\textsuperscript{37} Metzger, Axel, op. cit.
intellectual property infringements in the Internet. The number of the countries where the damage occurs may go up to over 200 countries, and the claimant will be burdened with the duty to plead for all jurisdictions concerned as well as all the followed costs. Therefore, alternative solutions have been suggested. Of all the alternative approaches, the proposal from the ALI Principles and the CLIP is the most promising and practical one. In theory, the benefit from applying this approach outweighs its disadvantages.

Despite the fact that these principles do not have authoritative enforcement, they can still be used as a reference for the court. An example is that while Article 4 Rome I Regulation does not provide a special rule on license and transfer agreements, the court can apply the factors mentioned in the CLIP Principles to decide.\(^{38}\) Hence, if this approach can prove its advantage in practice, it will give the law makers a hint to reform the current law.

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\(^{38}\) Metzger, Axel, op. cit., p.23
References


Metzger, Axel. "Applicable Law under the CLIP Principles: A Pragmatic Revaluation of
