Stig Strömholm, Copyright and the Conflict of Laws: A Comparative Survey

Heymanns Verlag 2010, 88 p., ISBN 978-3-452-27300-0

by **Rita Matulionyte,**
Dr., LL. M. IP, lecturer, Leibniz University of Hanover, Germany

Recommended citation: Rita Matulionyte, Book review – Stig Strömholm, Copyright and the Conflict of Laws: A Comparative Survey, 2 (2011) JIPITEC 158, para. 1.

1 Two decades ago there was barely any discussion on private international law (PIL) and intellectual property (IP). In recent years, however, the debate has been increasing, and numerous more or less extensive studies, publications, and academic proposals have been published worldwide. One could argue that IP lawyers, seeing the problems of enforcement of IP rights in an international context and at the same time facing little hope of further international harmonization of substantial IP law, have moved to the until recently neglected area of international private law with the expectation that some useful work can be done in this field.

2 The author of the book reviewed here, Prof. (em.) Dr. Dr. Dr. h.c. mult. Stig Strömholm, a former rector of the University of Uppsala, has perfectly realized the increasing importance of this field of law. Prof. Strömholm's book focuses on one of the most complicated sets of issues – conflict of laws (or applicable law) to copyright. The book's stated goal is to provide a survey of law in the field concerned, leaving the critical analysis of the existing legal framework and the development of alternatives for the discussion ex post. The study is divided into four chapters: (1) an introduction, (2) an introduction to the international and European legal framework, (3) an overview of the selected national laws, and (4) a summary of historical and more recent doctrinal discussion in the field.

3 After a short introduction in chapter 1, chapter 2 starts with an overview of substantial law provisions of the 1886 Berne Convention on the protection of literary and artistic works. It briefly explains and provides some historical comments on provisions dealing with the no-formality rule, the national treatment principle, the minimum protection requirement, protected types of works, the fixation requirement, the notion of publication, provisions on cinematographic works, moral rights, and *droit de suite*. The national treatment rule as found in Article 5(2) of the Berne Convention, which is recognized to be the most important and nonetheless controversial provision related to conflict of laws in international law on copyright, is construed by the author as clearly directing to a single applicable law:

There can be no doubt that the principle of the country of protection must be considered the expression of a choice (...) of one possibility among a number of potentially applicable laws: the solution adopted by the Convention implies that in respect of the issues set out in the text (...) the Convention indicates a single legal system and gives it exclusive applicability (para. 22).

4 On the other hand, it is not necessarily seen as a conflict-of-laws rule *sensu strictu* (para. 25). Also, following the majority opinion, the author suggests that the choice-of-law rule is implemented in Article 14bis(2)(a) of the Convention, which addresses the protection of cinematographic works.[1] Further on, the notion of the country of origin (Art. 2(7) of the Berne Convention) is explained. Interestingly, the author points to the term of protection as the only exception from the national treatment principle and as the only case where country of origin plays a role (para. 58). One could point out that a similar "reciprocity rule" exists in respect of *droit de suite* right (Art. 14ter(2)) and industrial design (Art. 2(7)2nd sentence).

5 As a next step, a short account is given of the substantial provisions of other international conventions – the 1952 Universal Copyright Convention, TRIPS, WIPO Copyright Treaty, 1961 Rome Convention on Neighboring Rights, and 1974 Satellite Convention. As far as PIL issues are concerned, the author only mentions that "the problems of private (and procedural) international law (...) are essentially of the same character as those raised by the Berne Convention" (p. 31). Regarding European law, early European multilateral treaties (1960 European Television agreement, 1958 Paris Agreement on the exchange of television programs) and numerous EU directives harmonizing certain issues of copyright law are mentioned. Regarding private international law, the author rightly argues that Article 2(b) of the Satellite Broadcasting and Cable Retransmission Directive[2] contains a provision that "amounts in terms of its practical result to a choice of law rule" (para. 49). Regretably, the most important recent developments in the field, namely, the Rome I Regulation[3] and Rome II Regulation,[4] are only mentioned without any substantial comments.

6 Chapter 3 contains a comparative overview of selected national laws (i.e., Swedish, German, French, and UK) on copyright and conflict of laws. It starts with an overview of Swedish law in the field, which is a worthy contribution since the legal situation in this jurisdiction is little known for an international audience. As one issue, the chapter comments on the question surrounding which law is applied to international copyright contracts: Under Article 60 of the Swedish Copyright Act, there seems to be no agreement as to whether it is sufficient to apply to such contracts general Swedish PIL or whether, as a precondition, the work in the dispute should be protected under Swedish law (para. 52). For an international reader it may also be interesting to read about the Swedish International Copyright Regulation of 1994, which sets rules concerning the application of the Copyright Act "in respect of other countries." While outlining the provisions of this Act, the author discusses the provisions on alien law (i.e., to which foreign works the Act applies), a reciprocity rule in respect of duration of rights, and a complicated non-mandatory choice-of-law rule for cinematographic works. From the overview, however, it seems that the regulation does not contain choice-of-law rules *sensu strictu*.

7 The overview of German law starts by rightly pointing to the country-of-protection rule as a well-established rule of conflict of laws to all issues related to copyright disputes. The author then makes a comment that, in regard to this country-of-protection rule, "there is agreement in principle between German law and the position which we have found to be adopted by Swedish law" and then moves to the overview of provisions on alien rights in German law. The former conclusion, however, might sound surprising for some readers since the earlier chapter on Swedish law makes no mention at all of a country-of-protection rule and seems to focus on alien law instead. The outline of the French legal situation focuses also on the rules of alien law (e.g., protection of foreign works first communicated in France but not protected in the country of origin or, *vice versa*, French works communicated abroad for the first time). Regarding rules on the conflict of laws, the author vividly and pointedly suggests that a great number of complicated cases related to conflict of laws issues and the extensive application of public policy and mandatory rules have made French lawyers "prisoners of an almost impenetrable maze." Finally, a short look is given at the British law. Here, the provisions of the UK Copyright, Designs and Patents Act of 1988 on such issues as the qualification for protection, geographical application of the Act, and the fixation requirement as overtaken from the Berne Convention are discussed. It is rightly concluded that "British copyright legislation does not contain any explicit choice-of-law rules for international situations." However, one could have expected at least a mention of the UK Private International Law (Miscellaneous Provisions) Act of 1995, which supposedly applies to copyright cases as well.[5] In regard to the chapter in general, it is interesting to note that primary attention here is paid not to the rules of conflict of laws *sensu strictu*, but rather to alien law. It might be true, as the author claims, that the rules on conflict of laws to copyright in France are still not clearly distinguished from alien law (*droit des étrangers*); however, at least in Germany, the distinction between them seems to be rather clear. The author thus seems to adapt a broader notion of conflict of laws, which includes alien law.

8 The last chapter takes a look at several of the most important works on copyright and conflict of laws in early and contemporary European and foreign legal doctrine. First, the proposal on IP and PIL of 1975 by Eugen Ulmer, an internationally acknowledged German scholar, is analyzed in detail. The author of the reviewed book claims that the legal situation as described by *Ulmer* "can still be characterized without much hesitation as an essentially correct description of the basic principles of European law, or at least continental European law, as it stands today." Also, the author follows *Ulmer's* proposal that "the body of private international law rules [for copyright disputes] are not necessary." Rather, "solving a number of problems concerning details [of the international conventions] should be based upon the foundations laid, directly or indirectly, by the great conventions" (para. 85). Further, an account of the critics of *Ulmer's* proposal, mainly *Neuhaus*, is given. The universal approach suggested by the latter is strongly criticized by the author. In particular, *Neuhaus'* claim on "protectionist" policies of the state and a pledge for "liberty" in intellectual property law, as well as his dis-

tinction between the existence of right and its legal protection (i.e., enforcement), are all rejected.

9 The author then moves to a more recent French treatise, *Authors' Rights and Conflict of Laws* (Droit d'auteur et conflicts de lois), by Jacques Raynard (1990). After providing a short summary of an extensive monograph, the author rightly questions whether *Raynard's* method, based on the classification of copyright as "a right *in rem* of the same kind as a right to property," is of real importance when proposing a practical solution for the conflict of laws (para. 94). The author greets the eventual adherence of *Raynard* to the principle of territoriality and the principle of the country of protection. As a third doctrinal source, a relatively more recent British monograph by James J. Fawcett and Paul Torremans, *Intellectual Property and Private International Law* (Oxford 1998), is briefly described (paras. 97-99).

10 At last, in the final pages of the book, the discussion on conflict of laws in regard to new digital technologies is given some attention. The reports of Jane C. Ginsburg from the United States and André Lucas from France, as prepared at the request of WIPO in 1998/2001, are briefly presented. The author summarizes the main points of the reports well. Regarding the discussion that followed these reports over the previous ten years, it is only mentioned that "an intense discussion concerning jurisdiction in international intellectual property litigation, the choice of law in different kinds of controversies (...) is going on among individual legal scholars both in international organizations and research institutes." Also, the author mentions and briefly describes the first draft of the ALI Principles (for which *Ginsburg* was one of three reporters and *Lucas* was an adviser). One should add, however, that the final version of the ALI Principles was already issued in 2008, and their content on some issues differs quite substantially from the first draft.[6] In this context one could also add that a European counterpart has been under preparation by the European Max Planck Group for Conflict of Laws and Intellectual Property (CLIP). The first drafts of the CLIP Proposal were made available in 2009, with an expectation to finalize the project in 2012.[7]

11 In the concluding part, the author concludes with astonishment – but correctly – that "in spite of different points of departure and equally different approaches and methods, the spokesmen [i.e., scholars] (...) have arrived at the relatively unanimous practical conclusions," i.e., the "law of the protecting country" (para. 108). The author supports this outcome of the discussion and suggests that new technologies shall be "considered as sufficiently specific but also sufficiently well defined and well delimited, to be given a special treatment without overflooding the whole field of international intellectual property law" (para. 108). He recognizes that in order to achieve a complete effectiveness in the system, an international agreement covering virtually all states is needed, though this is improbable, if not impossible, in the foreseeable future.[8] Therefore, the author argues, "it seems almost certain that further development of technical protection devices and measures is necessary to complete protection by the ordinary methods."

12 In summary, the book provides a short general overview of the *de lege lata* situation in the field of conflict of laws and copyright without overloading it with details, specific problems, and numerous legal sources in the field. The book is an introduction to both the basics of copyright law and the rules on conflicts of law; it covers both international and several well-selected national jurisdictions in less than 100 pages. By introducing the works of the most prominent scholars from different jurisdictions during the last 50 years, the book makes the reader familiar with the historical development of the debate and lends understanding to the status of the current discussion. The book is obviously far from being comprehensive or exhaustive (this was not its goal), and a reader familiar with the field may miss specific references to existing legal practice, detailed analyses of the problems, or updates of current developments. At the same time, however, it contains a good selection of the most important legal and doctrinal sources that can be used by a beginner in the field and may serve as a first reference for further research.

■

1 In addition, the author notices the choice-of-law rule in Art. 11bis of the Berne Convention, which regulates a copyright exception on the reporting of current events; this provision has been overlooked in most studies in the field.

2 Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, *OJ L 248, 6.10.1993, p. 15–21.*

3 Regulation (EC) No 593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), *OJ L, 4.7.2008, p. 6-16.*

4 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), *OJ L 199, 31.7.2007, p. 40–49.*

5 See Fawcett, James J. & Torremans, Paul, Intellectual Property and Private International Law 619 (Clarendon Press 1998).

6 E.g., instead of the "market effect" rule suggested as a main rule for IP disputes in the first draft, the final text suggests a traditional territoriality principle and the lex loci protectionis rule instead; see sec. 301 of American Law Institute, Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes (American Law Institute Publishers, St. Paul, MN 2008).

7 For available drafts and recent updates, see <www.cl-ip.eu>, last accessed on 20 May 2011.

8 Here one can point to the new initiative of the International Law Association on private international law and intellectual property started in 2010, which may lead to further progress

at the international level; for updates, see <http://www.ila-hq.org/en/committees/index.cfm/cid/1037>, last accessed on 20 May 2011.