Copyright and International Contracts Concerning Audiovisual Works: Freedom of Contract v. State of Protection

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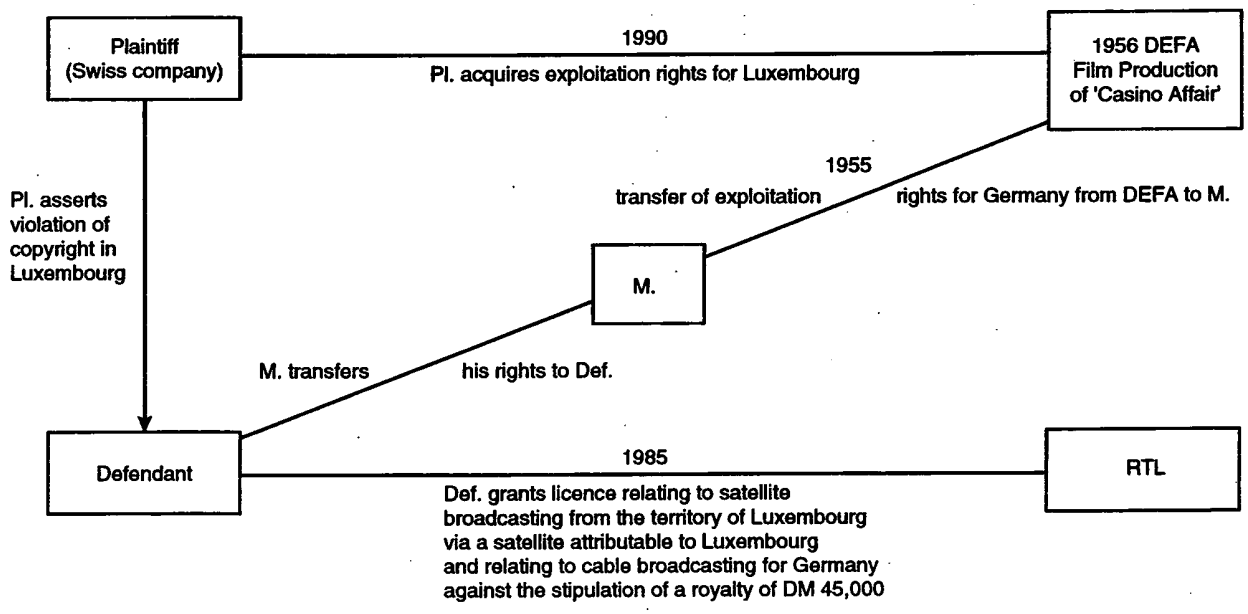
The law of international copyright contracts is characterised by the conflict between the principle of the freedom of contract and the principle of the state of protection. Whereas the content of the first principle permits the parties to establish the contractual stipulations as they think fit, the latter principle subtracts the law of copyright from the disposition of the parties in consideration of the fact that copyright is granted by a state in the public interest.[1]

The Judgment in the "Casino Affair" Case

The plaintiff, a Swiss company, asserted that the defendant committed a copyright infringement with regard to rights in the film "Casino Affair" which the plaintiff had acquired for the territory of Luxembourg.[2] The film was made in 1956 in the former German Democratic Republic, now the eastern provinces of Germany. In a co-production contract of 1955 the DEFA Studio of East Berlin granted the exploitation rights for West Germany to M. In January 1985 the defendant company, who asserted to have acquired its rights from M, concluded a licence for the satellite broadcasting from the territory of Luxembourg via a satellite attributable to Luxembourg and from the feeding into cable systems in the Federal Republic of West Germany and West Berlin with the broadcaster RTL. RTL paid to the defendant a total royalty for three broadcasts of DM 45,000.

The plaintiff asserted to have acquired the exploitation rights for the territory of Luxembourg from the DEFA-Außenhandel by means of a contract concluded in 1990. In a letter of 1992 the plaintiff agreed to the transaction by means of which the defendant had granted RTL a licence for the territory of Luxembourg and claimed the payment of the royalty which was paid to RTL plus interests. The plaintiff claimed:

(1) the defendant should be required to make a payment of DM 45,000 plus interest;



1 Arnold Vahrenwald, "Recht in Online and Multimedia", looseleaf, Luchterhand, Supplement May 1998, nos 6.3.4.1. and 6.3.4.2.

2 Germany, Federal Supreme Court of October 2, 1997, reference IZR 88/95, Multi Media Recht ("MMR") 1998/35.

(2) the defendant should refrain from transactions concerning the broadcasting exploitation rights for the territory of Luxembourg;
(3) the defendant should provide the plaintiff with information about the dispositions concerning exploitation rights beyond the licence contract of 1985.

It was held:

(1) claims which appertain to the rights-holder of an exclusive copyright licence in a case of an infringement have to be assessed mandatorily according to the laws of the state where protection is sought (the principle of the state of protection);
(2) the laws of the state where protection is sought are decisive not only for the evaluation of the scope of protection of the copyright but also for the assessment of authorship and initial ownership of the copyright in a cinematographic work. They are further decisive for the assessment whether the powers conferred by copyright are transferable;
(3) the cable transmission of broadcasts from abroad are subject to the laws of the state where the transmissions takes place.

In its reasoning the Court explained that the Court of Appeal had wrongly decided the case on the basis of German law. Since the plaintiff based its claims exclusively on the argument that the defendant had infringed his exclusive rights in Luxembourg, the scope of the rights which appertain to the plaintiff can, according to German international private law, only be assessed according to the law of the state where protection is claimed (the principle of the state of protection). According to this principle it has to be evaluated which actions fall within the scope of the rights as exploiting acts. Also, from the point of view of the international agreements concerning the protection of authors, the author does not enjoy a unitary copyright which is subject to a single legal regime, but a bundle of different national copyrights.

The general principle applicable in tort law according to which the law of that state is applicable where the unlawful conduct was committed is not applicable in the case of copyright infringement. Against the plaintiff's view in the case of a violation of the copyright a choice of the applicable law by the rights-holder or an agreement concerning the applicable law is inadmissible—in contrast to international tort law.[3] The legal order which determines the effect of protection of the intellectual property right is deprived of the disposition by the parties.[4]

The plaintiff based his exclusive rights on the contract with DEFA-Außenhandel of 1990. **The Court decided five important issues:**

(1) The question who is the author and initial copyright owner has to be decided in application of the law of the country of protection.

(2) Also, the law of the state where protection is claimed decides on the question whether the powers of the owner of the copyright are transferable. Accordingly, the law of Luxembourg is the applicable law concerning the question whether the authors of the film which was made in 1956 could then dispose of the right of broadcasting via satellite.[5] It results that for the co-producers of the film at the time of the conclusion of the contract on December 10, 1955 to be competent to dispose fully of the broadcasting rights, it has, subsequently, to be examined by way of (supplementary) interpretation of the contract whether the contract regulates to whom the broadcasting rights shall appertain. In this regard it has to be considered that at that time—before the launch of the first satellite in 1957—there were no broadcasting satellites and even this possibility (if it was foreseen at all) had not yet entered contractual practice.[6] In addition, at that time no compulsory legal contractual rule existed in Germany which would have regulated the transferability of rights in unknown types of use which might have been observed in the case of the applicability of German law as applicable to the contract beside the laws of the state of protection.

(3) It was held that the claim for an abstention was not well founded. In the Supreme Court's view the Court of Appeal did assume incorrectly that the defendant infringed the exclusive broadcasting rights for the territory of Luxembourg, for the reason that it granted, without authority, broadcasting rights to RTL concerning this territory.

The Court held the legal question whether a certain conduct can be qualified with regard to the conflict of laws as a copyright infringement, with the corollary that the German law will, as a connecting point, refer to the law applicable in the state of protection, has to be assessed on the basis of German law. The question whether an activity constitutes a copyright infringement in the material sense has to be answered by the law applicable in the state of protection in application of the rules concerning the conflicts of laws.

Differing from the Court of Appeal the Federal Supreme Court held that the mere disposition of the copyright as such cannot be considered as constituting an infringing activity. The disposition by an unauthorised person in the powers given by copyright or which

3 See German Federal Supreme Court of September 24, 1986, BGHZ 98/263, 274, with reference to Art. 5 no. 3 of the EEC Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.
4 See German Federal Supreme Court of June 17, 1992, BGHZ 118/394, 397 *et seq.*, "Alf".
5 See, *e.g.* German Federal Supreme Court of October 15, 1987, GRUR 1988/296, 298, "GEMA Assumption".
6 See, with regard to the practice of international co-production contracts, E.U. Directive 93/83 of September 27, 1993 [1993] O.J. L248/15, Recital 19 and Art. 7(3).

the copyright affords, is no use of the work itself; it does not affect the relation between the author and his work. The disposition concerning the proprietors' powers by an unauthorised person can be qualified as an unlawful activity of use only from the point of view of a possible participation (contributory infringement).

According to the judgment the law of the state of protection is not only decisive for the evaluation of the problem whether an activity constitutes contributory copyright infringement but also for the decision whether a claim for an injunction of an action which, in the state of protection, will be considered as a contributory infringement, and whether a preliminary claim against an imminent threat of a copyright violation can be enforced. Also in this respect the law of Luxembourg will be relevant in the court's view.

(4) It was held that the sentencing of the defendant for the payment of DM 45,000 by the first instance Court could not be sustained. The claim was based on the fact that the defendant as an unauthorised person would have concluded a licence contract concerning the broadcasting rights for the territory of Luxembourg in a contract of January 21, 1985 which the plaintiff approved on July 22, 1992. In this regard the plaintiff claimed a right which can be analysed as a claim for unjust enrichment through a vindication of the copyright.[7] This claim is subject to the law applicable in the state where protection is claimed, similar to claims for copyright infringement where the vindication took place.[8] In this case it has to be considered that DEFA-Außenhandel will, together with the grant of exploitation rights, have transferred obligatory claims arising from tortious violations of this right.

If the plaintiff should, in principle, be entitled to claim money based on unjust enrichment, the decision concerning the amount of this claim has to take into account that a claim for unjust enrichment in one country based on a vindication of the copyright abroad can only be realised in so far as the vindication affected the rights of the plaintiff abroad.[9]

In this respect the plaintiff could not claim something which the defendant obtained by reason of a disposition over the right to a cable transmission of the film in Germany, even if he has a claim for unjust enrichment according to the laws of Luxembourg. The broadcasting by cable of broadcasts from abroad is subject to the law of the state where the cable broadcasting takes place; the answer to the question of which law is applicable to the basic broadcasting remains irrelevant.[10] The owner of the rights of cable broadcasting was uncontestedly not the plaintiff but the defendant.

(5) Concerning the plaintiff's claim for information the Court established that the claim for information related only to the defendant's disposition of rights in the territory of Luxembourg, and the claim had to be assured according to the laws of Luxembourg since this is the law of the state where protection was sought.[11] The Court considered whether this claim for information which was based on copyright infringement, constituting a remedy according to the national law of Luxembourg which was the state of protection, could also be based on the violation of the duty to perform contractual obligations in good faith, Article 242 of the German Civil Code. However, taking into account the state of the proceedings, the Court held that it did not have to decide on the issue whether the relationship etstablished through the special connection between the rights-holder and the infringer of the copyright created a duty in the sense of Article 242 of the Code.

International Contracts Relating to Audiovisual Products and Copyright

The national rules of the international civil law may contain special provisions applicable to contracts regulating copyright issues. This is, for example, the case in the Swiss regulation of the international civil law. The relevant German law does not contain special provisions applicable to copyright contracts, so general principles are applicable.

It is the purpose of the rules contained in the international private law to determine the law which is applicable to a contract with a connection with the law of a foreign state. In contrast to the determination of the law applicable in the case of the violation of the copyright, the establishment of the law applicable to a contract aims at the avoidance of conflicts which may arise from the applicability of different national legal systems to copyright contracts.

Principle of the state of protection

Copyright law is subject to the principle of territoriality. This means that national copyright law is applicable only within the national territories to which the laws extend. Thus the copyright owner does not own an "international" copyright but a bundle of copyrights each of which depends upon the relevant national law. The coming into being, the scope and the termination of the copyright are determined according

7 See Art. 816(1) of the German Civil Code which states "Article 816 (Disposition by an Unauthorised Person) (1) If an unauthorised person disposes of an article which is effective with regard to the authorised person, he is obligated to return what he has received through the disposition".

8 See, *e.g.* German Federal Supreme Court of February 23, 1995, GRUR 1995/673, 676, "Mauer-Bilder"; Münchner Kommentar (2nd ed.), no. 26 before Art. 38 EGBGB, "Introductory Law to the German Civil Code".

9 See, also concerning the claim for damages for copyright infringement, according to Article 97 of the German Copyright Act, German Federal Supreme Court of July 10, 1986, GRUR 1987/37, 39, "Video licence contract" with further references.

10 General opinion, German Federal Supreme Court of June 4, 1987, GRUR 1988/206, 208, "Cable television II".

11 See, for example, Austrian law, the Austrian Supreme Court of September 18, 1990 [1991] *Medien und Recht* 112, 113, "Balance of terror".

to the principle of the state of protection. This means that the principle of the country of protection determines in particular the following issues:

(1) the initial ownership of copyright;
(2) the scope and effects of copyright which may exceed the minimum protection of the Berne Convention;
(3) the transfer of the copyright;
(4) the violation of the copyright;
(5) the enforcement of the copyright.

The parties' power to regulate in their contracts these issues differently from the relevant national laws which are applicable by reason of the principle of the state of protection (*lex loci protectionis*) is limited.

The following cases may illustrate the above-mentioned principles.

Initial ownership of copyright

In the case of "Casino affair", the German Federal Supreme Court held[12]: "The law of the state where protection is claimed does not only decide on the effect of the protection of copyright but also on the question who is the author and initial owner of the copyright in a film." The initial ownership of copyright in films has been decided by national legislators. Whereas the circle of persons who count as authors is small according to German law (where it does not include the composer of the film music or the writer of the script who are considered as authors of pre-existing works),[13] Italian law comprises a larger circle of persons under the authors of a film, which includes also the scriptwriter and the composer of the music[14] and in application of the United States "Work for Hire" doctrine even a Commissioner may be considered as the initial author.[14a]

Scope and effects of copyright

The scope and effects of the copyright have to be decided in application of the state of protection. The claims which a person whose copyright has been infringed have to be determined according to the law of the state where protection is sought.[15] This means that the general principle of tort law, according to which the jurisdiction at the place where the criminal activity occurred is applicable, is not relevant for the purpose of the determination of the jurisdiction concerning copyright infringement. This means also that in the case of a copyright infringement the parties cannot choose the applicable law or make an agreement concerning the applicable law: "The legal order which determines the scope of protection of intellectual property rights is beyond the power of disposition of the parties."[16]

Transactions in copyright

The question whether the rights granted by the copyright are transferable is decided by application of the principle that the law of that state will be relevant for this purpose which is applicable in the territory where protection is sought.[17] This means that, in the case of an international copyright contract, the national copyright law of each state where protection is sought will be applicable concerning the question whether the transaction is effective.

Example 1: Transferability of copyright

The U.S. copyright owner of a film transfers his copyright globally to his Italian contractual partner. In the contract the parties stipulate that the law of the U.S. state of California shall be applicable to the contract. Will the contract be effective in Germany where the law provides in Article 29 of the Copyright Act[18] that, apart from the case of a succession, the copyright cannot be transferred? Concerning the effectiveness of the transaction made by the parties with regard to Germany, a court is unlikely to apply the law of the U.S. state of California, because the parties may not, by contractual stipulation, deviate from the particular rules established by national copyright law. The reason behind this regulation is that, in the view of the German legislator, the copyright is inseparable from the individual creator of the work and his personality, so that only the economic exploitation rights may be transferred. Accordingly, in German copyright law the Italian partner would not be considered as having acquired the copyright in the film. However, the interpretation of the contract would lead to the assumption that the parties intended the creation of an exclusive copyright licence, so that the Italian partner would, for German territory, be considered as the exclusive licensee of the U.S. copyright owner. With regard to Italy, in application of the Italian Copyright Act[19] transactions in the proprietary aspects of copyright are lawful.

Example 2: Exploitation rights concerning future technologies

The U.S. copyright owner of a film which was produced and shown in the cinemas in 1980 transferred

12 "Casino affair", n. 1 above, with reference to the prevailing view of German legal writers.
13 See Art. 89(3) of the German Copyright Act.
14 Art. 44 of the Italian Copyright Act states: "The author of the subject, the author of the scenario, the composer of the music and the artistic director shall be considered as co-authors of a cinematographic work".
14a See section 101 of the United States Copyright Act, "Work for Hire".
15 German Federal Supreme Court, "Casino affair", n. 1 above.
16 "Casino affair", n. 1 above.
17 *ibid.*
18 Art. 29 of the German Copyright Act states: "The copyright may be transferred in execution of a disposition in a will or to joint heirs by means of a repartition of the inheritance. Apart from these cases the copyright cannot be transferred."
19 Art. 107 of the Italian Copyright Act states: "The rights of utilisation belonging to the authors of intellectual works, as well as the connected rights having a patrimonial character, may be acquired, alienated or transferred under all methods and forms allowed by law, subject to application of the rules contained in this chapter." According to Art. 110 of the Act the transfer of rights of utilisation must be established in writing.

the exploitation rights globally, including rights in future exploitation methods, to an Italian purchaser in 1985. The parties agreed that the law of the U.S. state of California should be applicable to the contract. Did the Italian purchaser acquire the rights in digital uses of the film for German territory? According to the law of the state of California, clauses which concern the grant of exploitation rights in unknown technical uses are valid. However, with regard to the individual national territories the parties may not have the power to go beyond the regulation of the transferability introduced by the relevant legislator (principle of state of protection).

Whereas the grant of exploitation rights concerning future technologies is lawful according to Californian law, the German law establishes in Article 31(4) of the Copyright Act that the grant of exploitation rights concerning as-yet-unknown types of use and related obligations are without effect. The reason behind this regulation is that the German legislator wanted the author to retain any profits from future technical uses of his work, thus preventing distributors and future purchasers of rights, who were not at all involved in the creative process of the making of the work, from making "windfall" profits. Accordingly, the Italian purchaser could not acquire the right to exploit the film by digital communication technologies in German territory, because these technologies were unknown at the time of the conclusion of the contract in 1985. The stipulations concerning the grant of rights in future uses remained without effect with regard to the territory of Germany.[20]

Example 3: Extra-contractual rights

A British film producer grants an exclusive licence for the exploitation of his film to an Italian distributor. The contract between the British producer and the British composer of the film music which related to the global exploitation of the film stipulated the payment of a lump sum to the composer for the composition of the film music. Can the composer rely on Article 46(4) of the Italian Copyright Act[21] and claim an additional payment from the persons who show the film in public in Italy? Article 46(4) of the Italian Copyright Act does not, in fact, concern the contractual duties of the producer with regard to the composer of the film music, but instead concerns the duties of the operator of a cinema who shows the film and upon whom the law imposes an additional duty of payment for the benefit of the composer, irrespective of any contractual arrangements between the composer with the producer or the distributor with the cinema operator. Whether U.S. composers would also be able to rely on Article 46(6) of the Italian Copyright Act appears questionable. The answer may be affirmative if the rule falls under the "national treatment" principle. It might be argued that the principle of "national treatment", according to the Berne Convention and TRIPs, concerns only the protection of intellectual property,[22] but not the configuration of obligations relating to their exploitation.

However, the view seems preferable to consider that the statute based rights of certain film authors in an additional remuneration belongs to the scope of the rights which the legislator established by means of the copyright. Also in this sense the rights of authors which are mandatorily administered by collecting societies would fall within the scope of the copyright. Accordingly, all film authors who are nationals of other member states of Berne or of TRIPs will be able to claim "national treatment" according to Italian law.[23] In order to avoid problems deriving from a different scope of copyrights in different states, international contracts might contain a clause by means of which authors authorise the relevant rights-holders to claim any extra-contractual rights abroad, including rights administered by collecting societies.

Example 4: Moral rights

Moral rights[24] are not part of the commercial aspect of copyright and they are generally considered as personality rights. Would a contractual clause be effective by means of which an Italian major actor in a contract with his producer waives his moral rights in a film? Assuming that the contract provided that the law of the U.S. state of California would be applicable to the agreement, what is the situation in English, French, German or Italian law? First it is questionable whether the principle of the state of protection is applicable at all in the case of moral rights, because the issues of the determination of the scope of the right and the effectiveness of transactions in these rights is not so much a question of copyright (in the literal sense of the word, the exclusive right to reproduce a work) but of the personality right (a person's right in his name and the inviolability of his body, health and honour). In this

20 See Arnold Vahrenwald, "From Copyright Licences to Risk Bargains" [1996] 8 ENT.L.R. 332.

21 Art. 44 to 50 of the Italian Copyright Act concern cinematographic works. Art. 46(4) of the Italian Copyright Act states: "The authors of music, of musical compositions and of the words which accompany music shall be entitled to collect directly from persons publicly showing the work a separate payment in respect of such showing. In the absence of agreement between the parties, the payment shall be fixed according to the provisions of the Regulations."

22 See Art. 3(1) of TRIPs, according to which each member shall accord to the nationals of other members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property.

23 See, for Germany, Wilhelm Nordemann in Fromm and Nordemann (eds), *Urheberrecht* (8th ed., Kohlhammer, Stuttgart, 1994), No. 2 to Article 6 of the German Collecting Societies Act, who, giving up their opinion asserted in earlier editions of the work, consider that even though the text of the law in Art. 6(1) of the Act expressly obligates collecting societies to act in the interests of Germans, this duty would, in application of the duty of "national treatment" according to the Berne Convention, also relate to nationals from other member states in those cases where the administration of rights through collecting societies is mandatory.

24 In the case of films, in particular the right of paternity (to be named as an author) and the right of integrity (the right to object to deformations and distortions of the work).

sense the Italian Copyright Act refers to these rights in Chapter III, section 2 as "Protection of rights in the work concerning the defence of the personality of the author". Accordingly, international private law would, concerning the applicability of the law, focus on principles of tort law. But even assuming the applicability of the principle of the law of the state of protection, it turns out for example, that according to German law the general waiver would be without effect. Only with regard to a particular individual violation of the moral rights may the author, according to German law, waive his rights for the benefit of the violator.[25] In contrast, the waiver of moral rights is effective according to the principles of English copyright law[26] whereas Italian law considers the moral right as "inalienable".[27]

Copyright infringement

In application of the principle of the state of protection it has to be decided with regard to the relevant national law whether the activity of a licensee falls within the scope of the exploitation rights afforded by copyright.[28] However, if the licence is limited by contractual stipulations, the question whether there is a breach of contract has to be decided by reference to the law applicable to the contract. But in application of the principle of the state of protection, it has to be decided whether an activity counts as a contributory infringement.[29]

Enforcement of copyright

The possibilities to enforce the copyright depend upon the law of the state of protection. Thus the question whether the infringed person avails him or herself of protection by preliminary measures has to be decided in application of the principle of the state of protection.[30] Likewise, the claims based on the copyright infringement are subject to the law of the state of protection, since this is the law of the country where the intellectual property right was affected. However, taking into account the harmonisation of intellectual property laws through TRIPs, member states have to provide for the following remedies:

- preliminary measures;
- injunctions;
- damages;
- right of information (optional);
- disposing and destruction of infringing articles and of materials and implements used to produce them; and
- indemnification of the defendant.

25 See, *e.g.* Art. 41(4) of the German Copyright Act.
26 A typical waiver caluse is contained in the conditions of engagement for Directors of the U.K. Producers Alliance for Cinema and Television (PACT), cl. 3.3.
27 Art. 22(1) of the Italian Copyright Act.
28 "Casino affair" n. 1 above.
29 *ibid.*
30 *ibid.*

Freedom of Contract

In application of the principle of the freedom of contract the parties to the copyright contract are free to determine the content of the agreement and, in particular, to choose the law applicable to the contract. However, the law applicable to the contract has to distinguish between the law which governs the proprietary and personal aspect of copyright in their essences which, according to German jurisprudence, are determined by the state of protection.

Special case: International copyright contracts according to Swiss law

The Swiss Code concerning the International Private Law states in Article 122:

> (1) Contracts relating to intellectual property rights are subject to the law of that state where the person who transfers the right or who grants a right for its use has his ordinary place of residence.
> (2) The choice of the law is possible.
> (3) Contracts between employers and employees concerning intellectual property rights, which were created by an employee within the fulfilment of his contractual obligations, are subject to the law, which is applicable to the contract of work.

It has been asserted that subsection (1) of Article 122 of the Code would confirm the principle that the law of the state is applicable where the party has its place of residence which performs the characteristic obligation, even though the Article does not contain an express reference to this principle.

However, it seems that the characteristic performance would, in the case of exclusive copyright licences, be connected with the exploitation of the copyright so that the opposite view may be justified, leading to the inapplicability of the statutory regulation contained in Article 122(1) of the Code in the case of copyright licences.[31] The possibility of conceiving of the characteristic contractual performance in different ways makes evident the necessity of establishing clearly the law applicable to the contract in the contractual instrument in an express clause.

The special regulation concerning intellectual property in employment contracts in Article 122(3) of the Code is based upon the view that the employee merits protection. The parties of employment contracts are not free to choose the applicable law. They have to observe Article 121 of the Code, which states in subsection (1) that the employment contract is subject to the laws of that state where the employee generally performs his duties.

31 Keller and Kren-Kostiewicz in *IPRG-Kommentar* (Schultheß, Zurich, 1993), nos. 53 and 54 to Art. 122.

Final Observations

According to the principle of the freedom of contract the parties may choose the law applicable to their contract. This choice will generally not affect issues which concern the initial ownership and scope of the copyright, the transferability of the copyright or the possibilities of its enforcement in the different states to which the contract relates. At least this is the position of German jurisprudence according to the judgment "Casino affair". Concerning the enforceability of copyright, the Federal Supreme Court held that the power to institute legal proceedings belongs to the scope of the exploitation rights of the copyright which follows the law of the state of protection so that, accordingly, it could not be limited by means of contractual stipulations between the parties to the contract with effect against third persons.

But it has been observed that this broad concept of the state of protection principle may lead to considerable problems, particularly with regard to infringement issues. Instead of leaving[32] the choice of the applicable law to the infringer it might be conceivable to consider the state of origin of a work as the connecting factor. However, this again may lead to uncertainty, for example, if it is not clear which state may qualify for this purpose. With this regard it has been suggested to take into consideration the state where the work was produced and where the producer established his company.[33] Also the differences arising from the regulation of the initial ownership of the copyright in audiovisual works within the national legal systems may cause problems so that it has been argued to focus instead on the state of protection of the state of origin of the work.[34]

It has been argued that the principle of the state of protection was sanctioned by the Berne Convention and the principle of the national treatment, Article 5.[35] Article 14(2)(a) of the Convention expressly states that ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed so that the state of protection principle could be said to have received a particular endorsement with regard to audiovisual works. But it is also asserted that since the Berne Convention refrains from the adoption of the principle of the state of protection it leaves the national state free to establish in its international private law the principle of the state of origin.[36]

Whereas the principle of the state of protection seems to make considerable inroads to the principle of the freedom of contract, it has to be differentiated between the law applicable to the contract which, in the absence of a choice by the parties, will generally be the law of the state with which the contract has the closest connection and the law which regulates basic copyright issues. These basic copyright issues may be regulated in application of the law of the state of protection or the state of origin, depending upon the international private law of a state.

Taking into account that audiovisual exploitation contracts often relate to the global market, it might be counter productive if the parties would have to observe the regulations of basic copyright issues in the national laws of the states to which their contract relates. This might particularly affect Europe with its fragmented market structure in national states. In consequence it might be recommendable to treat as many problems arising from copyright contracts by means of the law applicable to the contract in order to avoid the splitting up of the issues according to the laws of the national territories to which the contract relates.[37] Thus it has been suggested, to treat issues like the initial ownership of the copyright and its transferability according to the law applicable to the contract, and issues like the subsistence and scope of copyright at least on a case by case approach.[38] But it should be seen that basic issues of copyright were regulated by the national legislators in the interest of the authors who thus should merit protection in the case where a powerful contractual partner suggests the choice of a law applicable to the contract which disfavours their position.

In conclusion, it appears that the recourse to national courts in the case of problems relating to international copyright contracts in the audiovisual sector has a potential of risks deriving from the application of the state of protection principle. These risks concern in particular the issues of the initial ownership of the copyright, the scope and effects of the copyright, its transferability and enforcement. A limitation of these risks may be attempted through a comprehensive regulation of possible conflict areas in the contract.

32 Haimo Schack, "Urheberrechtsverletzung im internationalen Privatrecht" [1985] GRUR Int. 523–525.
33 Muriel Hosselin-Gall, "Les Contrats d'Exploitation du Droit de Propriété Littéraire et Artistiquè" [1995] GLN Joly, Paris at 290.
34 Haimo Schack, "Urheber- und Urhebervertragsrecht" [1997] J.C.B. Mohr, Tübingen at 384.
35 Wilhelm Nordemann in Fromm and Nordemann, note above, notes 1 and 2 before Art. 120.
36 Haimo Schack, "Urheber- und Urhebervertragsrecht" [1997] J.C.B. Mohr, Tübingen, at 375 and 378 with reference to the international private laws of Portugal and Romania.
37 See Felix Locher, "Das internationale Privat- und Zivilprozeßrecht der Immaterialgüterrechte aus urheberrechtlicher Sicht" [1993] Schultheß, Zurich at 42.
38 Felix Locher, note above, at 49, 50 and 58.