

Research article

УДК: 341.9

DOI:10.17323/2072-8166.2024.1.213.245

# Copyright Owners, National Treatment and Current Developments in Private International Law

---



**Jan Hodermarsky**

Masaryk University, 70 Veveří Str., Brno 611 80, Czechia, hoder.john@gmail.com,  
<https://orcid.org/0000-0002-6585-8783>

---



## Abstract

The question of initial ownership is a preliminary question in all copyright claims. It is thus of fundamental importance for the success of any copyright claim. The confrontation of the principle of territoriality vis-à-vis the universality principle finds its reflection in the choice of a connecting factor for the question of initial ownership of copyright. Proponents of universality tend to apply the *lex originis* rule, which takes into consideration legal relations existent in the State of the origin of the work. On the other hand, there are proponents of the strict territoriality principle who apply *lex loci protectionis* conflict-of-laws rule to the whole copyright statute, including the ownership question, which leads to *de facto* violation of legitimate expectations of copyright holders. One of the often-mentioned arguments of *lex loci protectionis* proponents against the use of *lex originis* is that *lex originis* is not able to comply with the national treatment principle enshrined in most international copyright instruments. The purpose and aim of the article is to analyze whether the *lex originis* conflict-of-laws principle indeed contradicts the national treatment principle. For that purpose, the Russian judicial practice is analyzed, for Russia is one of few countries using the *lex originis* principle, which has also had an opportunity to develop an advanced judicial practice in this regard. Most EU countries prefer the *lex loci protectionis* connecting factor to determine the initial copyright owner, which, however, presents a substantial hindrance to the single market. In order to not touch the dogmatically settled *lex loci protectionis* principle and at the same time enable free movement of services within the single market, the EU has introduced a home country rule in its secondary law, which is a material copyright law derogation made in favor of the functioning of EU single market. Compliance of this phenomenon with the national treatment principle is also analyzed in this article. The author concludes that the conflict-of-laws principle *lex originis*, as well as the home country rule, are indeed incompatible with the national treatment principle. It is further concluded that it is through the *lex originis* principle that the essence of national

treatment is realized. In order to interpret international copyright treaties *secundum ratione legis*, the question of copyright ownership should be explicitly excluded from the scope of national treatment, thus from the scope of *lex loci protectionis*.

---



### Keywords

national treatment principle; copyright conflict-of-laws rules; initial ownership of copyright; *lex originis*; *lex loci protectionis*; initial copyright holder; territoriality principle; universality principle.

---

---

**Acknowledgments:** The research was carried out within the project “Conflict-of-laws Dimension of National Treatment Principle” (MUNI/A/1471/2022) supported from the funds of targeted support for specific university research provided by the Ministry of Education, Youth and Sports of the Czech Republic in 2023.

**For citation:** Hodermarsky J. (2024) Copyright owners, national treatment and current trends in private international law. *Pravo. Zhurnal Vysshey shkoly ekonomiki*=Law. Journal of the Higher School of Economics, vol. 17, no. 1, pp. 213–245 (in English). DOI:10.17323/2072-8166.2024.1.213.245

Научная статья

## Обладатели авторского права, национальный режим и современные тенденции развития в международном частном праве



Ян Годермарский

Масариков университет, Чехия 611 80, Брно, ул. Вевержи, 70, hoder.john@gmail.com, <https://orcid.org/0000-0002-6585-8783>



### Аннотация

Вопрос о первичном обладании авторским правом является предварительным вопросом во всех исках о защите авторских прав. Поэтому он имеет принципиальное значение для успеха любого авторско-правового иска. Противостояние принципа территориальности и принципа универсальности находит свое отражение в выборе коллизионной привязки для решения вопроса о первичном приобретении авторских прав. Сторонники универсальности склоняются к применению формулы привязки *lex originis*, которая позволяет учитывать правоотношения, существующие в стране происхождения произведения. С другой стороны, есть сторонники принципа строгой территориальности, которые применяют формулу привязки *lex loci protectionis* ко всему авторско-правовому статусу, в том числе и к вопросу о первичном приобретении, что фактически приводит к нарушению легитимных ожиданий правообладателей. Одним из часто упоминаемых аргументов сторонников *lex loci protectionis* против использования *lex originis* является то, что *lex originis* противоречит требованиям принципа национального режима, закрепленному в большинстве международных соглашений по авторскому праву.

Целью и задачей данной статьи является анализ того, действительно ли коллизийный принцип *lex originis* противоречит принципу национального режима. Для этого анализируется российская судебная практика, поскольку Россия — одна из немногих стран, использующая принцип *lex originis* и уже сформировавшая в этом вопросе развитую судебную практику. Большинство стран ЕС предпочитают для определения первичного правообладателя формулу привязки *lex loci protectionis*, что, однако, существенно препятствует функционированию единого рынка. Чтобы не трогать догматически устоявшийся принцип *lex loci protectionis* и в то же время обеспечить свободное движение товаров и услуг в рамках единого рынка, ЕС ввел в свое вторичное право правило *home country rule*, которое представляет собой материальное ограничение авторского права, сделанное в пользу единого рынка ЕС. Соответствие этого феномена с принципом национального режима также анализируется в настоящей статье. Статья приводит к выводу, что коллизийный принцип *lex originis*, также как принцип *home country rule*, действительно являются противоречащими принципу национального режима. Далее в статье делается вывод о том, что сама идея национального режима реализуется именно посредством принципа *lex originis*. Для того, чтобы толковать международные договоры по авторскому праву *secundum ratione legis*, вопрос о правообладании авторским правом следует выводить из-под действия принципа национального режима, то есть из-под действия *lex loci protectionis*.



### Ключевые слова

принцип национального режима; коллизийные нормы авторского права; первичное правообладание авторским правом; *lex originis*; *lex loci protectionis*; первичный правообладатель авторского права; принцип территориальности; принцип универсальности.

**Благодарности:** исследование выполнено в рамках проекта «Коллизийный размер принципа национального режима» (MUNI/A/1471/2022) поддержанного из средств целевой поддержки специфических университетских исследований, предоставленной Министерством образования, молодежи и спорта Чешской Республики в 2023 году.

**Для цитирования:** Годермарский Я. Обладатели авторского права, национальный режим и современные тенденции развития в международном частном праве // Право. Журнал Высшей школы экономики. 2024. Том 17. № 1. С. 213–245 (на англ. яз.). DOI: 10.17323/2072-8166.2024.1.213.245

## Introduction

Copyright is of considerable economic importance and is, therefore, often the subject of transactions that are not exceptionally cross-border in today's globalized world. In contrast, there is no uniform international copyright law. International treaties represent only a certain degree of harmonization. At the international level, there is a need to deal with conflict-of-laws issues, which are rather difficult to grasp because of the potentially ubiquitous nature of copyright works (intangible goods). The ubiquitous nature means that intangible goods (as opposed to tangible goods) are not spatially bound to one place

but exist simultaneously everywhere and thus can potentially be used everywhere at the same time. On the other hand, the territorially limited nature of copyright is sometimes neglected and practically obscured through the fact that copyright arises simultaneously at the moment of creation of the work in all the states of the Berne Union, i.e., practically in all countries of the world, without the need of any formal steps such as registration.<sup>1</sup>

The entrenchment of the abolition of the need for formal steps in international copyright treaties, together with the development of modern technology, create an (apparent) impression that copyright is an absolute right that exists universally throughout the world, just like rights to tangible property. The prohibition of requirements of formal steps for copyright protection was a consequence of the idea that an author in one country should be recognized and protected as such in other countries. However, the existing international treaties do not contain a straightforward definition neither of the author nor of who can qualify as the copyright owner. Despite this fact, practically all international copyright treaties provide for the so-called national treatment principle, which mandates all contracting countries to treat foreign “authors” and/or “copyright holders” not worse than they treat their nationals (national authors and copyright holders). Notions of authorship and regulation of first ownership of copyright differ significantly across various legal orders; it might appear to be conclusive that without a proper unified definition of authorship and first ownership, the national treatment principle partly goes in vain. Perhaps the other way around, the lack of definition of authorship and initial copyright ownership might have, in combination with the national treatment principle, its own unique sense and rationale.

For the lack of a unified material definition of initial ownership of copyright on the international law level, it is indispensable to look at this question from the conflict-of-law point of view. As for the selection of the applicable law to determine who the initial copyright owner is, there are two main approaches — *lex loci protectionis* and *lex originis*. While *lex loci protectionis* principle (law of State for which the protection is sought) is easy for courts and collective management organizations (hereinafter referred to as CMOs) to apply, *lex originis* (law of origin of the work, usually law of the State of first publication) presents more trouble as far as its application is considered, but at the same time it is something that the globalized world is truly in need of and what many right-holders tend to implicitly expect (oftentimes naively) to be present and applied when their works pass the borders of their own country.<sup>2</sup> Apart from the

---

<sup>1</sup> Art. 5(2) of the Berne Convention (Paris Revision of 1971).

<sup>2</sup> Such a rule is applied by Russia, Belorussia, Kazakhstan, Uzbekistan, Kyrgyzstan, Portugal, Greece, Romania or USA. This being said, most of the European countries apply the *lex*

above-mentioned conflict-of-laws solutions, there is also a de-facto *lex originis* solution on the material law level, the so-called home country rule, which is gradually becoming more present in the secondary EU copyright law. It is practically a pragmatic “*lex loci protectionis* conflict-of-laws rule bypass” on the material law level, which enables the proper functioning of the EU digital single market.

The aim of the present article is to analyze whether the national treatment principle has direct or indirect implications for conflict-of-laws rules of initial ownership of copyright, whether it limits the legislation of sovereign states — contracting parties to international treaties — in any way when it comes to a conflict-of-laws solution of initial copyright ownership. In other words, it shall be analyzed whether the *lex originis* conflict-of-laws rule contradicts the national treatment principle enshrined in international copyright treaties. For that purpose, the Russian judicial practice is analyzed, for Russia is one of few countries using the *lex originis* principle, which has also had the opportunity to develop an advanced judicial practice in this regard. Similarly, it shall be analyzed whether the above-mentioned home country rule, which is used in secondary EU law and practically bypasses the *lex loci protectionis* in a certain way, is in conflict with the national treatment principle. This analysis should offer certain thoughts on the meaning of the national treatment principle and thus contribute to and encourage further discussions on possible future developments of international instruments in the field of copyright.

## 1. Initial Owner of Copyright

The primary entity endowed with the ability to dispose of an exclusive author’s right is determined solely by the legislator’s will. At the international level, sufficient regulation of authorship and initial copyright ownership does not exist, *a fortiori* with respect to its regulation in employment relationships [Telec I., Tůma P., 2019: § 58 Zaměstnanecké dílo, marg. no. 29]. Such an entity has no other means of proving to a foreign sovereign that he is the owner of the copyright than to invoke the provisions of a particular legal order directly. There is no internationally recognized presumption on which such a subject could rely, such as that of possession in the case of tangible things. In this context, one must distinguish the presumption under Article 15(1) of the Berne Convention 1971 (hereinafter referred to as RBC), which identifies the author but not the (primary) rightholder. Rightholders are derived from the person

---

*loci protectionis* principle for the copyright ownership question. Such a connecting factor leads to the outcome that in every country the copyright owner is determined by the material law of each respective country. This in turn leads to *de facto* violation of legitimate expectations of copyright holders, for once the work crosses borders, the owner of copyright may change as well.

of the author and his status at the moment of creation of the work. The RBC is silent on the issue of ownership as such, leaving the regulation to the Member States of the Union [Masouyé C., 1978: 109–110]. Moreover, there is disagreement as to the meaning of Article 15(1) RBC, as there is no consensus on whether a legal person could also benefit from such a presumption if it were to be named as author in the work in the usual manner [Leška R., 2019: 312].

Internationally, the only thing that can be assumed with relative certainty in terms of initial ownership is that the copyright in work created by the creator without any external input, incentives, or instructions will belong to the creator. However, in the case of relationships in which several persons are involved in the creation of a work (employer and employee; hiring party and hired party; film producer, director, actors, etc.), no uniform formula can be followed internationally with regard to the distribution of copyright between those entities. Each legal system has its own unique features, which often imply a very different initial distribution of copyright. In the past, the Treaty on the International Registration of Audiovisual Works attempted to address this problem, at least for audiovisual works, through a presumption of copyright ownership by the person registered in the international register.<sup>3</sup> However, the applicability of the Treaty was suspended in 1993, and it can now be considered dead.

At the moment of creation of a work in an employment or similar relationship, a bundle of national authors' subjective rights arises in accordance with the principle of territoriality. It is up to the lawmaker of each State to decide who is entitled to such a right, and thus, the rights created in each State may follow their own independent fate, regardless of rights created in other states [Troller A., 1952: 220]. National legal orders adopt different schemes to balance the interests of hiring parties on the one hand, and employees and hired parties on the other. Transfer of a right may be *ex lege* envisaged in the form of *cessio legis*, or such transfer may be provided for in the form of a rebuttable presumption, a licenselike limitation (limited in time and/or scope) of the right belonging to the creator in favor of the employer may be statutorily foreseen, or in extreme cases, the status of the creator, including all relevant rights, may be granted without any limitation to either the employer or the employee. Copyright may be “distributed” *ex lege* from the moment of creation of the work among several entities, typically in such a way that one en-

---

<sup>3</sup> Art. 4(1) of the Treaty on the International Registration of Audiovisual Works reads: “Each Contracting State undertakes to recognize that a statement recorded in the International Register shall be considered as true until the contrary is proved, except (i) where the statement cannot be valid under the copyright law, or any other law concerning intellectual property rights in audiovisual works, of that State, or (ii) where the statement is contradicted by another statement recorded in the International Register.”

tity owns the moral right and another owns the economic component of the copyright. It is not excluded that the property right will be further fragmented in various ways among several entities. Different legal orders may create different constructions of how to express which entity will effectively dispose of copyright immediately after its creation, corresponding to their conception of the nature of copyright.<sup>4</sup>

If each country were to apply its own law to the question of who is the initial copyright owner, this would lead to a situation where the initial copyright owner under U.S. law could not distribute and exploit the work in Germany if German law designates a different entity as the initial copyright owner based on the factual circumstances under which the work has been created.<sup>5</sup> For this reason, the question of the law governing initial ownership has great practical implications.

However, the determination of the objective copyright law, which decides to whom the copyright to a work initially belongs, is also relevant to other legal successors (in terms of singular or universal succession) since such successors derive their rights from the initial copyright owner. The answer to this question is, therefore, of fundamental importance in two basic respects. It is important for the successor in title that the entity from which the right is to be acquired is the owner of the right in question under the applicable law. Otherwise, in the sense of the principle *nemo plus iuris ad alium transferre potest quam ipse habet*, the “successor in title” would find himself in a situation where no right had, in fact, been transferred to him. Indeed, in the area of copyright law, in most jurisdictions, there is no legal exception to *bona fide* acquisition from an unauthorized person. The second aspect is profit-oriented. It is of great importance to a person who has been granted a copyright and intends a cross-border copyright transaction whether he whether he also enjoys the status of acquirer in the transaction’s target (foreign) state. It is because the jurisdictions for which the person is the actual rightholder will ultimately determine the amount of royalties he gets for granting the right to a third party.

The predictability of the law that will determine the initial owner of copyright is fundamental to the stability of cross-border copyright law regulation. Indeed, suppose it happens that another entity is the initial owner under the applicable law in different jurisdictions regarding the same work. In that case, it is the most substantial hit for legitimate expectation and legal certainty, both

---

<sup>4</sup> For example, Canadian law attributed until 2012 initial ownership of copyright to engraving, photograph or portrait, the plate or other original to the person by whom the work was ordered, but under the condition that the work was made for valuable consideration, and the consideration was paid (Section 13(2) Copyright Act (R.S.C., 1985, c. C-42)), cf. [McKeown J., 2010: 229 et seq.].

<sup>5</sup> Cf. [Ulmer E., 1975: 41–42].

for the domestic initial owner and its eventual title successors. Furthermore, the determination of the initial copyright owner is also relevant for third parties (users) who intend to use the work based on the expiry of the term of protection and rely on the falling of the work into the public domain. The length of the term of protection of a work is generally determined by the nature of the initial copyright owner — whether it is a legal or natural person. In the case of a natural person, the owner's death is usually highly relevant.

The question of who is the initial copyright owner is also very relevant to the Collective Rights Management Organizations (CMOs), which play an essential role in today's copyright and related rights protection. Principally, they are tasked with collecting and distributing royalties in relation to the rights of remuneration. They often also manage and protect authors' and performing artists' other rights and interests.<sup>6</sup> Rights can be assigned to them by law or by agreement. In this regard, CMOs are competent to initiate legal proceedings (and apply for enforcement measures) with an aim to defend the rights managed by them according to their statutes. Usually, they manage and represent the rights in their own name and for the account of the rightholders. In principle, they defend rights of all authors and performers, including foreign ones. This inherently implies that the CMOs need to determine the applicable law *in casu* in order to find out who the rightholder actually is, so that they can distribute to him the revenue.<sup>7</sup> What needs to be stressed here is that especially when it comes to the rights for the management of which the CMOs are statutorily responsible (i.e., are obliged by law to defend them), it is the works that the CMOs are aware of at first, not their rightholders. They begin to search for the rightholder, usually thereafter.<sup>8</sup>

## 2. National Treatment Principle and its Conflict-of-laws Dimension

The principle of national treatment, sometimes also called the assimilation principle, is enshrined in Article 5(1) (and (2)) RBC or Article II of the Universal Copyright Convention 1971 (hereinafter referred to as UCC). It can also be found in Article 3(1) TRIPS, which refers to the regulation in other international treaties relating to intellectual property. However, it is also contained in many bilateral treaties. The national treatment principle is imperative to the national legislator to grant foreign authors copyright protection

---

<sup>6</sup> Cf. Art. 4 of the Directive 2014/26/EU.

<sup>7</sup> Cf. Art. 11(4) of the Directive 2014/26/EU.

<sup>8</sup> That can be deduced also from the wording of Art. 13(1) al. 2 of the Directive 2014/26/EU, which states inability to identify the rightholder as one of the reasons for which distribution and payment of revenues can take longer than 9 months from the end of the financial year.



no less favorable than that presented by a given State to its own citizens [Boguslavskij M.M., 1973: 27]; [Nonnenmacher G., 1971: 39]; [Ricketson S., Ginsburg J., 2005: 34]. It is a prohibition of discrimination against foreign subjects in the national territory. This principle is generally more favorable than the principle of reciprocity since it allows protection to be granted even to works that are not protected in the State of origin.

There is a doctrinal consensus on the alien law relevance of the national treatment principle.<sup>9</sup> The principle of national treatment suppresses the application of alien law to foreign authors. Whether the principle of national treatment also has a conflict-of-laws relevance is a question to which neither doctrine nor legal practice finds an unequivocal answer [Lutkova O.V., 2018: 134]; [Stieß K., 2005: 158]; [Peinze A., 2002: 114]. The principle of national treatment is often thought to be limited to its alien law meaning.<sup>10</sup> Neuhaus argues that the RBC was not about recognizing rights to intangible goods acquired abroad but only about granting foreigners the same protection to foreign intangible goods as domestic ones, and thus, the Berne Convention does not contain private international law norms, but only alien law norms [Neuhaus P., Drobnig U., von Hoffmann B., Martiny D., 1976: 193]. He then adds that subsequent revisions and additions have not made any changes to this. The CJEU has also expressed the view that the principle of national treatment as such does not directly imply a conflict-of-laws rule in the case of *Tod's*.<sup>11</sup> However, a good part of the doctrine sees the principle as having a conflict-of-laws dimension in addition to its alien law dimension.<sup>12</sup> The reason for the existence of different doctrinal approaches regarding the conflict-of-law meaning of the national treatment principle is primarily due to the unclear wording of Article 5(2) RBC, on which it is difficult to find a consensus on its true meaning and thus to proceed uniformly in its application *secundum rationem legis*. Article 5(1) RBC would be sufficient to express the principle of national treatment as it is defined in the UCC or other international instruments. RBC is, however, of the highest importance for this analysis, for UCC makes itself not applicable when it comes to Berne countries,<sup>13</sup> and TRIPS makes in this regard solely a reference to the Berne Convention.

---

<sup>9</sup> Seldom some authors consider the principle to have exclusively conflict-of-laws dimension, for example [Desbois H., 1966: 874].

<sup>10</sup> Cf. for example [Krupko S.I., 2014: 129-130]; also Gössl argues for a systematic, teleological and historical interpretation in favor of solely alien law dimension [Gössl S., 2014: 201 et seq.].

<sup>11</sup> Judgement of the Court (Second Chamber) of 30 June 2005, *Tod's SpA and Tod's France SARL v. Heyraud SA* (C-28/04), para. 32.

<sup>12</sup> For example [Schaafsma S., 2022: 39].

<sup>13</sup> Appendix declaration relating to Article XVII UCC.

According to one doctrinal approach, Article 5(2) RBC is merely a further refinement of the national treatment principle, from which the conflict-of-laws principle *lex loci protectionis* already inherently follows itself [Desbois H., 1966: 875].<sup>14</sup> The argument for such a conflict-of-laws dimension is that the same treatment of foreigners can only be achieved by applying the same (substantive) law to nationals [Drexel J. in: J. von Hein, 2018: Internationales Immaterialgüterrecht, marg. no. 251]. *Renvoi*, after the application of the conflict-of-laws rule *lex loci protectionis* is therefore to be excluded [Drexel J. in: J. von Hein, 2018: Internationales Immaterialgüterrecht, marg. no. 251]; [Stieß K., 2005: 158]. Such a conclusion is also supported by the fact that Article 8(7) RBC, as an exception to the national treatment principle, unquestionably refers directly to substantive law. Therefore, Article 5(2) RBC must also refer to substantive law [Stieß K., 2005: 160]. By this reasoning, it can be concluded that the national treatment principle inherently contains a conflict-of-laws dimension, irrespective of the specific formulation of that principle in an international instrument.

The opposite conclusion has been reached by British legal practice,<sup>15</sup> according to which Article 5(2) RBC constitutes a conflict-of-laws reference to *lex fori* (according to a grammatical interpretation, since the provision in question reads “*où la protection est réclamée*”), the reference being conceived as a *Gesamtverweisung*<sup>16</sup>, with the consequence that national conflict-of-laws rules also come into play, which may subsequently determine the applicable law, for example, by an all-encompassing conflict-of-laws rule *lex loci protectionis* [Peinze A., 2002: 133–134]. In such a case, the conflict-of-law dimension of Article 5(2) RBC could be rejected [Beckstein F., 2010: 161]. The existence of Article 14bis(2)(a) RBC also suggests that the conflict-of-laws dimension as for the question of initial ownership in the sense of the *lex loci protectionis* does not derive from Article 5, as the Article 14bis(2)(a) RBC would then be redundant [Neuhaus P., Drobnič U., von Hoffmann B., Martiny D., 1976: 200].

However, proponents of *lex loci protectionis* as a connecting factor for the question of initial ownership claim this approach to be the only admissible regarding the national treatment principle and the territoriality principle. From certain point of view, the territoriality principle can be seen as an antonym to universality principle. Talking nowadays about universality we do not mean absolute<sup>17</sup> universality

<sup>14</sup> Cf. also [Ulmer E., 1975: 33]; [Fawcett J., Torremans P., 2011: 676].

<sup>15</sup> Cf. Court of Appeal, Civil Division, 21. 1. 1999, [1999] All E.R. 769–804 (Bauzeichnungen II).

<sup>16</sup> By this term the German legal doctrine of international private law describes a situation that the law determined by the conflict-of-laws norm (in this case *lex fori*) includes again also conflict-of-laws norms of such a legal order, not only its substantial norms.

<sup>17</sup> Absolute universality in the sense of Montevideo Convention (1889) would mean extraterritorial application of copyright law, cf. Art. 2 of the Montevideo Convention.

but rather a relative one. There is no dispute in the modern intellectual property theory that copyright is governed by the principle of territoriality (*largo sensu*), which means that copyright law operates only within the territory of a given State and that “domestic law can only penalise conduct engaged in within national territory.”<sup>18</sup> However, this broad (*largo sensu*) conception of territoriality allows for applying the *lex originis* principle to determine initial ownership. On the other hand, territoriality *stricto sensu* means the application of *lex loci protectionis* to the whole copyright statute, including the question of initial ownership [Troller A., 1985: 139]; [Boguslavskij M.M., 1973: 16].<sup>19</sup> In this sense, territoriality *stricto sensu* has a conflict-of-laws dimension, i.e., inherent conflict-of-laws implications. Territoriality *stricto sensu* is, however, of a purely dogmatic nature. Thus, claiming the *lex originis* principle to conflict with the territoriality principle is also only dogmatic.

Much more delicate argumentation is necessary to deal with the argument that the application of a principle other than *lex loci protectionis*, and that to the entire copyright statute (including ownership question), makes it impossible to comply with the obligation of national treatment regarding foreigners and thus *de facto* leads to their discrimination [Drexl J. in: J. von Hein, 2018: Internationales Immaterialgüterrecht, marg. no. 251].<sup>20</sup> Ricketson and Ginsburg speak in this sense of a “denial of substantive national treatment” [Ricketson S., Ginsburg J., 2005: 1298]. The national treatment principle is therefore told to exclude the diversity of conflict-of-laws rules among the signatory States in the sense that it commands the application of the State of protection principle (*lex loci protectionis*) [Desbois H., 1966: 875].<sup>21</sup> And consequently, the *lex loci protectionis* enshrined in Art. 5(2) RBC shall not allow for application of *renvoi* in the national law [Drexl J. in: J. von Hein, 2018: Internationales Immaterialgüterrecht, marg. no. 251]; [Stieß K., 2005: 158]. Such a position is often inferred

<sup>18</sup> Cf. Judgment of the Court of Justice of the European Union (Third Chamber), 14 July 2005, C-192/04, Lagardère Active Broadcast v. Société pour la perception de la rémunération équitable (SPRE), Gesellschaft zur Verwertung von Leistungsschutzrechten mbH (GVL), para. 46.

<sup>19</sup> See also [Troller A., 1952: 53]. In this sense uses the term “strict territoriality” also Heinze [Heinze C., 2021: 134]. Fentiman uses in this sense notion “strong view of territoriality” [Fentiman R., 2005: 138].

<sup>20</sup> Further also [Basedow J. et al., 2013: 233]; [Desbois H., 1966: 874]; [Kyselovská T., Koukal P., 2019: 148].

<sup>21</sup> Cf. also [Ulmer E., 1975: 33]. In this sense, J. Fawcett and P. Torremans argue that if the conflict-of-laws principle *lex loci protectionis* could not be deduced from the principle of national treatment *per se*, the use of the word “consequently” in Article 5(2), second sentence, would not make any sense [Fawcett J., Torremans P., 2011: 676]. On the contrary, the word “consequently” can also be understood in the sense that the second sentence of Article 5(2) follows on from the first sentence, whilst the first sentence defines the minimum rights of the author and is therefore an alien law norm [Gössl S.L., 2014: 201-202].

from the wording of Article 5(2) RBC, which states that the “*enjoyment and exercise of rights*” are to be independent of protection in the work’s country of origin. It is pointed out that no rights arise from the conflict-of-laws rules as such but that these are merely rules for determining the substantive law, and consequently, only the application of the same substantial law may give rise to the same enjoyment and exercise of rights in its true sense [Drexl J. in: J. von Hein, 2018: Internationales Immaterialgüterrecht, marg. no. 251]; [Kyselovská T., Koukal P., 2019: 159–160].<sup>22</sup>

On the other hand, the principle of national treatment requires treating in the same way situations that are essentially the same [Papaux A., 2006: 217].<sup>23</sup> To preserve scientific positivism, the principle of equal treatment should refrain from value judgments.<sup>24</sup> Only in this way achieving a proper equal treatment of foreigners is possible. Equality at the level of conflict of laws is, therefore, in this sense, the ideal state. To demand substantive equality at the expense of equality at the conflict-of-laws level means a denial of international private law, and that means legal chaos [Krupko S.I., 2014: 136].

To search for the *ratio* of the national treatment principle, it is worth looking at the historical method of interpretation. First, there is no mention of conflict-of-laws method of regulation in the conference acts from 1884 to 1886 [Peinze A., 2002: 127].<sup>25</sup> Nor do the conference acts of the subsequent revisions indicate an intention to regulate conflict-of-laws issue [Peinze A., 2002: 131]. In the Berne Convention, the principle of national treatment was already enshrined in the original 1886 Act. Still, its granting was subject to the fulfillment of formalities in the country of origin. Notably, the actual text of the Berne Convention from 1886 (not amended) was explicitly based on the *lex originis* principle regarding initial ownership (Art. 2(2)).<sup>26</sup> The origi-

---

<sup>22</sup> Fawcett and Torremans deem exactly this to be the reason for inadmissibility of renvoi [Fawcett J., Torremans P., 2011: 679]. In this sense also Windisch: “Wenn die nationale Rechtsordnung bereits eine einheitliche materiellrechtliche Regelung für In- und Ausländer, für nationale und internationale Sachverhalte enthält, dann ist kein Raum mehr für eine Kollisionsnorm, die eine Isolierung internationaler Sachverhalte voraussetzt [...]” [Windisch E., 1969: 107].

<sup>23</sup> “L’égalité de traitement [...] [exige] de traiter de la même façon des situations essentiellement semblables.” [Papaux A., 2006: 217].

<sup>24</sup> Papaux aptly states that “[...] le principe de l’égalité de traitement doit éviter de procéder par jugements de valeur.” [Ibid].

<sup>25</sup> Preparatory materials may serve as an additional means of interpretation of an international treaty (cf. Article 32 VCLT), which is, however, resorted to only when the text of treaty has not been clarified by the general rule of interpretation in Article 31 VCLT [Čepelka Č., 1986: 65].

<sup>26</sup> Cf. Art. 2(2) of the Berne Convention 1886: “La jouissance des droits d’auteur est subordonnée à l’accomplissement des conditions et formalités prescrites par la législation du pays d’origine de l’œuvre [...]”

nal Convention did not contain a prohibition of formalities for the existence of protection. For adequate international copyright protection, it was therefore necessary that a copyright arising from registration in one Union State should also be recognized in other Union States. The central idea of the preparatory conferences preceding the creation of the Berne Convention was that all authors who published their work for the first time in a contracting State should be assimilated to domestic authors in all other contracting states while subjected to the least possible burden of formalities [Desbois H., Françon A., Kéréver A., 1976: 10]. *Lex originis*, therefore, governed the question of the establishment of protection.<sup>27</sup> It can be concluded that the person who acquired the copyright in *locus originis* had to be recognized as the owner of the copyright in the other Union States since it is his rights that the Berne Convention is intended to protect, provided that he complies with the “*conditions et formalités prescrites par la législation du pays d’origine*.” It was not merely a question of granting protection to the work as an object of protection, but of ensuring the “*jouissance des droits d’auteur*,” which are subjective in nature and therefore tied to a specific person.<sup>28</sup> It was irrelevant how the law of the State of origin regulated the conditions for copyright acquisition.

The wording of the mentioned provision was changed in 1908 in the Berlin Revision of Berne Convention [Bergé J.-S., 1999: 76 et seq.]; [Desbois H., Françon A., Kéréver A., 1976: 150]. The Berlin Act incorporated into the Berne Convention the infamous clause stating that “*enjoyment and exercise are independent of the existence of protection in the country of origin of the work*” (principle of independence).<sup>29</sup> This was due to the at-times more difficult identification and correct application of *lex originis* [Schaafsma S., 2022: 101–102]; [Chow D., Lee E., 2012: 102]. The determination of foreign law was inconvenient, and there was concern about its misinterpretation [Schaafsma S., 2022: 101–102]. Ease of application prevailed over the rationality of private international law.<sup>30</sup>

---

<sup>27</sup> Lipszyc in this sense talks about “*subordination of the principle of national treatment to compliance with the conditions and formalities of the lex originis*” [Lipszyc D., 2010: 367]. It has also been argued that this was the reason why the original Berne Act provided only a partial and limited application of the principle of assimilation [Desbois H., Françon A., Kéréver A., 1976: 13–14].

<sup>28</sup> In this sense, see for example, [Shershenevich G.F., 1891: 119]; also [Troller A., 1952: 29 (including footnote no. 25)], which states in the context of the Washington Convention that its Art. IX does not apply to the personal status of the work.

<sup>29</sup> Cf. Art. 4(1) of the Berlin Act.

<sup>30</sup> Cf. [Desbois H., Françon A., Kéréver A., 1976: 151]: “*Ce n’est pas en vertu de considérations d’ordre public, et en particulier à cause des entraves qu’oppose à la circulation des œuvres un droit exclusif, ou un régime de licences obligatoires qui comporte une rémunération, que, dans la Convention de Berne, la loi applicable est celle du pays où la protection est*

Some note that with the principle of independence, the *lex originis* principle to determine the initial owner/author has been definitively abandoned [Bergé J., 1999: 76 et seq.].<sup>31</sup> This view can be accepted, except for the issue of initial ownership, for the principal idea of the RBC has not changed with the Berlin Revision. It is indisputable that the assessment of the characteristics and notion of work has thus become independent of the place of origin and, therefore, entirely subject to the law of *locus protectionis*.<sup>32</sup> However, it is questionable whether it is not necessary to distinguish from the qualitative requirements for the subject matter of protection the issue of initial ownership, which is different from the other conceptual features of a copyrighted work. It is argued that the abolition of formal requirements has made copyright truly universal and that applying one single law to the question of ownership is essential.<sup>33</sup> As to the question of the initial owner, it is not relevant to ask whether the conceptual characteristic is fulfilled and whether the work is therefore protected as such, but to whom the protection belongs. The RBC and other international conventions to safeguard intellectual property seek to protect not intangible goods as such but rights concerning those goods [Windisch E., 1969: 12]. Although the RBC is based on the independence of protection in the State of protection from protection in the State of origin, such independence cannot be understood in the sense that its common objective of providing the beneficiary with adequate rights within the meaning of national law also in States outside the country of origin would be denied [Windisch E., 1969: 13]. Masouyé's commentary on Article 5 RBC confirms that the second sentence of Article 5(2) RBC is merely an assertion of the independence of protection from the State of origin and that the applicable law is to be determined by national rules of private international law [Masouyé C., 1978: 34]. Ficsor also makes the same conclusion [Ficsor M., 2003: 42]. One must, there-

---

demandée. — Des raisons qui tiennent à l'opportunité, à la commodité, tendent plus exactement compte de la solution de conflit de lois qui est conservée et consacrée par l'art. 5, al. 1. Le juge saisi aura plus de facilités pour appliquer sa loi nationale qu'une législation étrangère. Solution de facilité ... sinon de paresse, objectera-t-on. Elle a du moins l'avantage d'éviter des recherches difficiles et des divergences d'interprétation, susceptibles de se multiplier entre les juridictions des différents pays de l'Union, appelées à se prononcer sur le sens et la portée de législations étrangères."

<sup>31</sup> Nonnenmacher in this sense states: "En 1908, lors de la Conférence de révision de Berlin, fut admis le principe de l'indépendance des droits; [...] Par voie de conséquence, le droit d'auteur n'est plus soumis à une loi permanente mais à une loi qui change d'un pays à l'autre." [Nonnenmacher G., 1971: 66].

<sup>32</sup> Cf. [Despagnet F., 1909: 196-197], who critically remarks that "il n'est ni logique ni juste que la Convention protège au dehors une œuvre juridiquement inexistant dans son pays d'origine [...]. La simplicité d'une réforme est payée trop cher, lorsque s'achève au détriment de la logique et de la justice."

<sup>33</sup> Cf. [Kur A., Maunsbach U., 2019: 49].

fore, conclude with a restrictive interpretation of today's Article 5(2) RBC, which speaks of the independence of the exercise of protection in the country of origin. The independence of protection has to be understood only regarding the inadmissibility of formalities, which RBC does not prohibit in the country of origin.<sup>34</sup> Such a conclusion is logical in view of the formal structure of the provision in question. Indeed, the existence of a semicolon between the norms needs to be justified. If the independence of rights from the State of origin were to be taken absolutely, it would be logical to put a period between the norms in question, not a semicolon.

The principle of national treatment shall make the particular sovereign territories, where the territorially limited copyright laws are in force, accessible to foreigners [Windisch E., 1969: 103]. The meaning and purpose of the RBC, and hence the principle of national treatment contained therein, is to provide foreign authors with the same protection as a given law grants to its own authors. It is, therefore, immanent for a State to achieve this objective by choosing an appropriate conflict-of-laws rule to determine the initial rightholder, and it undoubtedly cannot be the *lex loci protectionis*.<sup>35</sup> Otherwise, one could imagine a situation *ad absurdum* where a Member State of the Berne Union declares in its national legislation that the author and copyright owner of all copyright is the State and all rights belong to the State. There would be no conflict with the Berne Convention, as all "rights to works" would be formally guaranteed by the State. However, foreign authors would hardly be able to claim protection for "their" works for the territory of such a state. Such an approach would barely fulfill the *ratio* and purpose of international treaties for the protection of authors' rights.

Moreover, the applicable law can always prescribe the national treatment to foreigners. It is logical that the applicable law has, at the moment when the national treatment is to be provided, already been determined [Schack H., 2019: 495, 522]. Therefore, ownership is a preliminary question of the national treatment.<sup>36</sup> Equal treatment of foreign citizens as its own citizens is required, and the provision is silent as to what law is to be applied to ensure this equal

---

<sup>34</sup> Cf. [Fawcett J., Torremans P., 2011: 683-684].

<sup>35</sup> Nonnenmacher aptly states: "quels que soient les mérites du système sur le plan de la simplicité [...] un principe de la territorialité aussi absolu qui implique une indépendance de droits et le non-respect des droits acquis est une négation du droit international privé et comme telle n'est pas admissible. Il est incompatible avec les efforts d'unification que poursuivait (ou prétendait poursuivre), du moins au départ, la Convention de Berne." [Nonnenmacher G., 1971: 70].

<sup>36</sup> Drobnig similarly says: "[...] die Frage der Erstinhaberschaft ist kein Problem der Schutzgewährung, sondern eine Vorfrage dazu." [Neuhaus P., Drobnig U., von Hoffmann B., Martiny D., 1976: 200].

treatment.<sup>37</sup> H. Schack states that with the principle of national treatment, each State is relied upon to protect its own interest and the interest of its citizens sufficiently and according to the appropriate law, and that law need not necessarily be the law of *locus fori* or the law of the State of protection [Schack H., 2009: 138].

The principle of national treatment is a general concept. Its precise content must always be examined in the context of the specific wording of the international treaty in question. In the UCC, for example, the principle of national treatment is formulated more simply than in the RBC [Loewenheim U., 2021: § 63 Grundlagen, marg. no. 44]. The straightforward and uncomplicated formulation<sup>38</sup> of the principle of national treatment in the UCC leads some authors to the conclusion that the principle in UCC does not contain any conflict-of-laws dimension, although they see the conflict-of-laws dimension in the RBC.<sup>39</sup> One can see the disharmony in the formulations of granting foreign authors equally favorable protection and, on the other hand, the non-application of foreign law. If foreign authors are to be granted protection in foreign countries, foreign law must be applied to determine who is such a foreign author.<sup>40</sup> In this sense, it is formally rather significant whether one speaks of granting national treatment to an “author” (rightholder) or only to a “national” or even to a “work.”<sup>41</sup> It has already been stated that international treaties seek to protect not intangible goods as such but rights in relation to those goods. This being said, it is not necessary to discuss the national treatment of “work” anymore. Peinze claims that the states of the Berne Union have agreed to grant foreign authors (in *locus originis*) the same treatment as they grant to domestic authors without touching the principle of territoriality [Peinze A., 2002: 116].

<sup>37</sup> Cf. [Gössl S.L., 2014: 203].

<sup>38</sup> Art. II UCC — “[...] works of nationals of any Contracting State and works first published in that State shall enjoy in each other Contracting State the same protection as that other State accords to works of its nationals first published in its own territory [...]”

<sup>39</sup> Cf. [Peinze A., 2002: 134] (footnote no. 520).

<sup>40</sup> Cf. [Pauli D., 2012]: marg. no. 1 — “[...] die Verbandsstaaten der Berner Übereinkunft verpflichtet werden, ausländischen Urhebern einen Basisurheberrechtsschutz zu gewähren.” In a similar sense also [Ascensão J., 1997: 655] — “[...] quem não é tutelado por direito de autor no país de origem da obra não pode aspirar a essa tutela nos outros países da União de Berna [...]”

<sup>41</sup> Cf. [Vivant M., Bruguière J.-M., 2013: 65]. About “work” as a beneficiary of the national treatment principle speaks for example Henri Desbois ([Desbois H., 1966: 876]). Most authors, however, talk in the context of national treatment principle about author as of the subject who should benefit from the treatment, for example [Arn M. in: R. von Büren, L. David, 1998: 61]; [Fawcett J., Torremans P., 2011: 675]; [Ricketson S., Ginsburg J., 2005: 1297]. More generally about “foreign intellectual property owners” talks [Goldstein P., Trimble M., 2016: 13]. Nonnenmacher adds in this context that “[b]ien que fondamentalement ce soit l’auteur qui est protégé dans la Convention de Berne, et l’œuvre dans la Convention de Genève, en pratique cette différence de terminologie est peu sensible.” [Nonnenmacher G., 1971: 47].



In light of the above-mentioned, it is evident that we need to deal with the difference between various international instruments in using either the term “author” or “national” to describe the subject who enjoys the national treatment. While the RBC in Article 5(1) operates with the imperative of granting national treatment to a foreign author, in the case of Article II(1) UCC or Article 3(1) TRIPS, the benefiter of national treatment is a national. The question is to what extent the difference in the use of “national” and “author” in this context is relevant to national treatment as such. However, it is evident that, just as it is necessary to determine who is a national to grant national treatment to a national, it is similarly essential to determine who is an author to grant national treatment to an author. If granting national treatment to a foreign “national” meant that the status of the author should be granted to “anyone” on the basis of *lex loci protectionis*, then the examination of potential conflict between the mentioned international treaties would be required.

There should be no dispute that the principle of national treatment sets out the conditions under which foreigners may demand national standards. Its relevance is, therefore, in the field of intellectual property the same as in other areas of law [Krupko S.I., 2014: 30]. The principle of national treatment was a trade-off in a situation where the international community could not agree on a unified substantive regime, nor could it unify conflict-of-laws rules that would provide for predictable and fair cross-border use of the protected subject matter. Therefore, from the theoretical point of view discussed above, once the applicable law is determined based on the conflict-of-laws rule, the subjective rights granted by such identical objective law should be guaranteed uniformly to foreign and domestic authors [Goldstein P., Trimble M., 2016: 57]. The national treatment principle should thus not limit the conflict-of-laws solution of the initial ownership question. It prohibits the contracting States from enacting two different conflict-of-laws rules for initial ownership based on some particular criteria, as that might constitute discrimination against foreigners at the conflict-of-laws level. To conclude, the unfortunate ambiguous formulation of Article 5 RBC should not be a reason to misinterpret the rationale and logical nature of national treatment principle. To what extent this theoretical conclusion holds regarding the practical application of *lex originis* rule shall be shown in the following chapter.

### **3. Applicable Law on Example of Russian Case Law**

This part shall show how the *lex originis* conflict-of-laws rule for ownership question has been applied in practice in Russia. Russian law applies *lex originis* rule to determine copyright ownership (Art. 1256(3) of the Russian

Civil Code).<sup>42</sup> To all other copyright aspects there is, in principle, the *lex loci protectionis* rule to be applied, i.e. the national treatment principle, as stated in Art. 1231(2) of the Russian Civil Code.<sup>43</sup> This provision is not to be confused with the alien law provision in Art. 1256(1) of the Russian Civil Code, which sets the conditions for the protection in Russia of works as such (regardless of who the rightholder is).<sup>44</sup>

Russian judicial practice had to deal with the question of copyright ownership in conflict-of-laws context quite many times thanks to the Russian Author's Society (Russian CMO) that acted in the name of rightholders *inter alia* in order to obtain compensation for musical works' authors from cinemas for public screening of movies with soundtracks. Russian law (Art. 1263(3) of the Russian Civil Code) grants authors of musical works (both sound and text) used in movies a right to remuneration for every public screening of the movie.

The remuneration right for public screening of audiovisual work in which a musical work is used has been enshrined in Art. 1263(3) of the Russian Civil Code since the very beginning, i.e. since Part Four of the Russian Civil Code entered into force in 2008. In the original text of the provision, it was necessary that the author of musical work is its composer.<sup>45</sup> It is evident that the legislator originally did not intend this right to be alienable. Should a dif-

---

<sup>42</sup> Art. 1256(3) of the Russian Civil Code states, that "When a work is granted protection in the territory of the Russian Federation in accordance with international treaties of the Russian Federation, the author of the work or other initial rightholder shall be determined according to the law of the state in the territory of which the legal fact, that served as the basis for the acquisition of copyright, took place."

<sup>43</sup> Art. 1231(2) of the Russian Civil Code states: "When an exclusive right to a result of intellectual activity or means of individualization is recognized in accordance with an international treaty of the Russian Federation, the content of the right, its effect, limitations, the procedure for its exercise and protection shall be determined by this Code regardless of the provisions of the legislation of the country where the exclusive right arises, unless such international treaty or this Code provides otherwise."

<sup>44</sup> Regarding foreign legal entities and their enjoyment of copyright in Russia the Supreme Court of the Russian Federation in its Ruling of the Plenum of the Supreme Court of the Russian Federation of 23 April 2019, No. 10 "On the Application of Part Four of the Civil Code of the Russian Federation" in point 30 aptly states that "Copyright of foreign legal entities recognized as authors of works in accordance with the legislation of the country of origin of the work is protected in the Russian Federation in accordance with the provisions of Article 1231 of the Civil Code of the Russian Federation. At the same time, such legal entities shall have intellectual rights to the work as provided for by Russian law. When determining the term of copyright protection of foreign legal entities, the court, based on the analogy of the law (paragraph 1 of Article 6 of the Civil Code of the Russian Federation), shall apply the rules provided for in Article 6 of the Introductory Law."

<sup>45</sup> Art. 1263(3) of the Russian Civil Code (in force as of 1 January 2008) — "When an audiovisual work is publicly performed or broadcast or transmitted by cable, a composer who is the author of a musical work (with or without text) used in the audiovisual work shall retain the right to remuneration for the specified types of use of his musical work."

ferent subject than the composer be determined as author by application of Art. 1256(3), he would not be granted the remuneration right in Russia. In 2014, the provision was modified and the condition of the author being necessarily the compositor of the musical work in question was left out. This allowed the *lex originis* principle, enshrined in Art. 1256(3), to come into play, presumably without any restrictions. The right was, however, still claimed by the majority of doctrine to be inalienable.<sup>46</sup> This right was said to remain with the respective musical work's author, even if the copyright as such is assigned to the producer. It was for a long time classified by doctrine as "another right" that was economical and, factually, a compound of economic rights [Krashennikov P.V., 2014: 228]. However, unlike the economic right, it was deemed to be inalienable. The infamous provision in question has been subject to several constitutional claims<sup>47</sup> and has been a regular basis for claims of the Russian CMO before a court.

The remuneration right in Art. 1263(3) has definitely been proclaimed alienable by the recent Russian Intellectual Rights Court (IRC) decision.<sup>48</sup> For demonstration purpose, however, let us analyze judicial practice from the time when the nature of the right was still disputable. Let us assume inalienability for this demonstration. Thus, as for Russian subjects (other than actual music composers), they are not able to obtain the mentioned remuneration right in any way because of its inalienability. The only ones who could possibly make it to the ownership of this right (while not being the actual music composer of the work) would be foreign subjects by application of Art. 1256(3).

IRC had a chance to express its view on the application of the mentioned provisions of Art. 1256(3) and 1263(3) of the Russian Civil Code when the owner of the Moscow cinema Bulvar did not pay remuneration to the Russian Author's Society (RAS) for the soundtracks played in the screened movies in the cinema. The Cinema owner claimed that regarding films of US origin, US law should apply as far as the copyright ownership is concerned. Also, the US

---

<sup>46</sup> Cf. for example [Krashennikov P.V., 2014: 227].

<sup>47</sup> Cf. Decision of the Constitutional Court of the Russian Federation (Opreделение) of 16 May 2023, No. 1031-O "On the request of the Court of Intellectual Rights to check the constitutionality of paragraph 3 of Article 1263 of the Civil Code of the Russian Federation"; Decision of the Constitutional Court of the Russian Federation (Opreделение) of 30 September 2010, No. 1354-O-O "On refusal to accept for consideration the complaint of Limited Liability Company "Cinema on violation of constitutional rights and freedoms by paragraph 3 of Article 1263 of the Civil Code of the Russian Federation"; Decision of the Constitutional Court of the Russian Federation (Opreделение) of 27 May 2010, No. 690-O-O "On refusal to accept for consideration the complaint of citizen Lyubimov Pavel Grigorievich on violation of his constitutional rights by paragraph 3 of Article 1263 of the Civil Code of the Russian Federation".

<sup>48</sup> Ruling of the Intellectual Property Rights Court (Postanovlenie) of 1 August 2023, No. C01-848/2022 in case No. A07-30376/2018.

law does not provide for any special remuneration right for the musical works used in movies, but also, according to its work-for-hire doctrine, there is *de iure* no “musical work used in a movie” author at all. The whole copyright to the movie — including the music therein — belongs to the producer.

The case got up to the IRC two times. On the first occasion, the IRC remanded the earlier decisions of the first instance court and the appellate court, stating that RAS cannot claim remuneration for a public screening of audiovisual works without indicating who the rightholder of the remuneration right is just by saying the audiovisual works as such.<sup>49</sup> Knowing the rightholder *inter alia* is essential to know whether the rights in question still exist.

After this decision, RAS indicated the respective rightholders (musical works’ authors) according to the Russian law, claiming that it is Article 14bis(2)(a) RBC which makes the Russian law applicable.<sup>50</sup> The case found its way again to the IRC, where the cinema owner argued that soundtrack composers in the USA are not recognized as music authors (because of the work-for-hire doctrine) and that there is no practice of collecting such rewards in the USA. That should imply that such entities should not be paid in Russia, either. This argument is logical from the point of view that the producers are getting paid already for the screening of the movies; as such, why should they get paid twice just because music is included in their films? Is it justified for a cinema to pay less money for a film without music in it? Is a movie without a soundtrack less worth it?<sup>51</sup>

In this regard, the court stated that foreigners (both individuals and legal entities) whose works enjoy legal protection in the Russian Federation are to be granted the same scope of rights that the Russian law grants to authors of works created in the Russian Federation and pointed out Art. 5(1) RBC. The scope of protection includes, in particular, the right to remuneration provided by Art. 1263(3) of the Russian Civil Code. Nonetheless, it was emphasized that Art. 14bis(2)(a) RBC applies only to ownership of cinematographic works as such, not to the musical works used therein. For the musical works used

---

<sup>49</sup> Ruling of the Intellectual Property Rights Court (Postanovlenie) of 6 February 2017, No. C01-1174/2016 in case No. A41-4299/2016.

<sup>50</sup> Art. 14bis(2)(a) RBC — “Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.”

<sup>51</sup> Cf. Decision of the Constitutional Court of the Russian Federation (Opredelenie) of 16 May 2023 No. 1031-O “On the request of the Intellectual Rights Court to check the constitutionality of paragraph 3 of Article 1263 of the Civil Code of the Russian Federation”. IRC made a request to the Russian Constitutional Court for a constitutionality review of Art. 1263(3) claiming that the norm violates the equality of participants in the intellectual rights business and that it puts composers and RAO in an unreasonably privileged position, and imposes an excessive economic burden on cinema operators. The Constitutional Court found, however, the provision to be inline with the Russian Constitution stating that the economic burden imposed on cinemas is their entrepreneurial risk.

audio-visually, it is Art. 1256(3) that shall apply, i.e., the *lex originis* principle. The court also stated that as the right enshrined in Art. 1263(3) is economic, the remuneration may also be paid to a legal person who has acquired the right from the author by contract or by the law of the country of origin.<sup>52</sup> That means that the existence of the right as such is subject to *lex loci protectionis* because it has to be granted in terms of national treatment, but who is the beneficiary of it, shall be determined by *lex originis*. This conclusion was once more repeated by the IRC in a different case in 2020.<sup>53</sup>

The conclusion of IRC may *prima facie* seem to be compliant with the national treatment principle. But is it not strange that a US movie rightholder gets paid twice by the cinema while a Russian rightholder (cinema producer) only once? Of course, the RBC is based on the minimal standards principle, i.e., the states of the Union are free to grant greater rights to foreigners than they provide to their citizens, so this may seem harmless. Everyone wants to have rights, while no one wants to have obligations. Nonetheless, let us imagine a hypothetical analog situation where the producer is not getting paid but has to pay some fee because he is the copyright owner. In other words, what if it is not a right but an obligation the rightholder has to “sustain”? In such a case, would not such the copyright owner demand national treatment in the sense that he does not want to pay anything more than the national copyright owners have to pay in regard to a similar work? It has to be stressed that someone’s right corresponds to someone else’s obligation. If we conclude that there is a discrimination in regard to obligations, it must be concluded that there is also discrimination on the other side. That implies that the *lex originis* principle contradicts the national treatment principle.

In addition, the mentioned decision has been discussed in the IRC Journal<sup>54</sup> where it is stated that since the right to remuneration is not enshrined in any international instrument, it cannot be assumed that a foreign author of a musical work would expect to be granted such a right on the territory of the Russian Federation if his home country does not guarantee a similar right [Intellectual Rights Court, 2018: 43]. Moreover, suppose foreigners enjoy on the Russian Federation’s territory a right not guaranteed to Russian citizens in the other country. In that case, such a situation establishes an unequal position of Russian citizens in respect of their rights in another country compared

---

<sup>52</sup> Ruling of the Intellectual Property Rights Court (Postanovlenie) of 25 July 2018, No. C01-1174/2016 in case No. A41-4299/2016.

<sup>53</sup> Ruling of the Intellectual Property Rights Court (Postanovlenie) of 29 December 2020, No. C01-1390/2020 in case No. A56-24059/2019.

<sup>54</sup> It is, however, not an official comment of IRC, but a draft document made available for public discussion at the Research Council of the Court. The recommendations of the Council have not yet been published online.

to foreigners on the territory of the Russian Federation [Intellectual Rights Court, 2018: 43]. The absence of an analogous norm in the applicable law (the *lex originis*), which would keep a remuneration right separated from the rest of economic rights, implies that it must be assumed that such a right is assigned to the acquirer (producer) together with the rest of the economic right, so the document published by IRC [Intellectual Rights Court, 2018: 43]. But the question is, is this not a reciprocity *par excellence* that is explained in the commentary on the decision? The reciprocity principle is incompatible with the principle of national treatment, except for exceptional cases provisioned in RBC [Majoros F., 1971: 59]; [Boguslavskij M.M., 1973: 32]. There has already been some discussion in the past as to whether and to what extent the mere existence of a right in the place of origin should be a condition for granting a particular right in the country of protection.<sup>55</sup> It was, however, concluded that such a condition contradicts the national treatment. However, the issue in question is not whether the right as such should be granted, but rather to whom such a right should be granted, or more precisely, whether it should be set apart from the rest of the copyright for the benefit of someone who does not have such a right in the country of origin since the copyright as a whole belongs in *locus originis* to a different entity.

Let us now get back to the latest judicial practice and thus the legal *status quo*. As already mentioned above, according to the latest IRC decision, the remuneration right enshrined in Art. 1263(3) is alienable. The reason for this change was the accession of Russia to the World Trade Organization.<sup>56</sup> Alienability on its own, however, would not suffice for its exquisite coexistence with the national treatment principle. In addition to that, the right would have to be automatically transferred together with the economic right as such, regardless of whether such a transfer happens *ex lege* or *ex contractu*. If it was not the case, a US movie right-holder would under the same circumstances (contract with music composer stating transfer of economic rights without explicitly mentioning remuneration right) get paid twice by the cinema while a Russian rightholder (cinema producer) only once, because the work-for-hire doctrine implies transfer of all the rights that there are, i.e. including remuneration right. That means that if the two cinema produc-

---

<sup>55</sup> Cf. [Dittrich R., 1986: 67].

<sup>56</sup> Ruling of the Intellectual Property Rights Court (Postanovlenie) of 1 August 2023, No. C01-848/2022 in case No. A07-30376/2018 — “The qualification of the right to remuneration as a property right and as part of the exclusive economic right is conditioned by the negotiation process for the accession of the Russian Federation to the World Trade Organization, within the framework of which such qualification was agreed upon and subsequently enshrined in paragraph 10.1 of the joint resolution of the Plenum of the Supreme Court of the Russian Federation and the Plenum of the Supreme Arbitration Court of the Russian Federation of 26.03.2009 No. 5/29 “On Certain Issues Arising in Connection with the Enactment of Part Four of the Civil Code of the Russian Federation””

ers, Russian and American one, having the very same contracts with composers of music in their films, would be treated differently in Russia due to Art. 1256(3). Whether the remuneration right gets automatically transferred together with the “rest” of economic rights, is still disputable.

IRC claims that due to the conception of single indivisible exclusive right<sup>57</sup>, it can only pass to other persons in its entirety. As the exclusive right includes the right to remuneration, then, as a general rule, it is to be transferred together with the exclusive right. Consequently, the composer’s right to remuneration may allegedly also be alienated as part of the exclusive right to a musical work.<sup>58</sup> On the other hand, the Constitutional Court claims that the right to remuneration is retained by the author even when the exclusive right does not belong to him.<sup>59</sup>

In this context, it might be opportune to point out Art. L311-7 al. 1 and 2 of the French Code of Intellectual Property, which provides that the remuneration for the private copies of works shall be collected in favor of the authors “in the sense of the present code.”<sup>60</sup> France applied the *lex originis* principle until 2013, and this legal provision was supposed to be an exception to the general rule regarding remuneration rights. The French law-maker was probably aware of the potential legal issues associated with “importing” authors from different foreign legal orders (just like the Russian law-maker in the initial version of Part Four of the Russian Civil Code). However, there arises the question — in what situations shall we apply *lex originis*, and in which not? This question is no longer relevant in French law as France has overridden the judicial practice, which established the *lex originis* principle, with the ABC News International decision.<sup>61</sup> Since then, the initial copyright ownership question is governed by the *lex loci protectionis* conflict-of-laws rule.

#### 4. Home Country Rule in EU Law

Despite the issues with the application of *lex originis* demonstrated in the Russian example, the ubiquity of the online environment requires a differ-

<sup>57</sup> Cf. [Bliznets I.A., 2015, 74].

<sup>58</sup> Ruling of the Intellectual Property Rights Court (Postanovlenie) of 1 August 2023, No. C01-848/2022 in case No. A07-30376/2018.

<sup>59</sup> Decision of the Constitutional Court of the Russian Federation (Opredelenie) of 16 May 2023, No. 1031-O “On the request of the Intellectual Rights Court to check the constitutionality of paragraph 3 of Article 1263 of the Civil Code of the Russian Federation”.

<sup>60</sup> Art. 311-7 CPI — “*La rémunération pour copie privée des phonogrammes bénéficie, pour moitié, aux auteurs au sens du présent code, pour un quart, aux artistes-interprètes et, pour un quart, aux producteurs. La rémunération pour copie privée des vidéogrammes bénéficie à parts égales aux auteurs au sens du présent code, aux artistes-interprètes et aux producteurs [...].*”

<sup>61</sup> Cass. 1e civ., 10 avril 2013, n° 11-12.508, 11-12.509 et 11-12.510.

ent approach than the strict application of *lex loci protectionis*. Recently adopted EU directives 2019/790 (Digital Single Market Directive) and 2019/789 (Broadcast Online Transmission Directive), which react to the needs of the online environment and are also of significant relevance for CMOs' practice, make use of the so-called home country rule, which was presented for the first time in 1993 in the Satellite Broadcasting Directive 93/83/EEC (Art. 1(2)(b)).

This home-country principle aims to strengthen the uniformity of the internal market. The Satellite Broadcasting Directive was the first to use the home country rule (also called *Sendelandprinzip*).<sup>62</sup> It is not a conflict-of-laws rule but rather a corrective (unification) of the substantive copyright law to ease the free movement of services within the EU [Schack H., 2019: 541]. Its effects are the same.<sup>63</sup> Although the home country rule is not a conflict-of-laws rule, it has significant consequences for copyright owners in the protecting country, whose rights cease to be “opposable against all.”

The essence of this principle is that broadcasters only need to acquire a license from the rightholder for the territory of the country where the work is to be broadcast via the satellite. There is, therefore, no need to acquire the appropriate rights for all the territories in which the resulting broadcast signal can be received. The only relevant conduct from the copyright point of view is the uplink [Ricketson S., Ginsburg J., 2005: 1306]. The ability to receive the signal does not constitute communication to the public. By introducing this principle, the EU has prioritized the functioning of the single internal market over individual interests, thereby negating the Bogsch theory within the EU single market, according to which it is necessary to acquire a license for the territory of each country in which the resulting signal is available [Birkmann A., 2009: 104].

The Satellite Broadcast Directive provides in Article 2 that the author shall have “*exclusive right [...] to authorize the communication to the public by satellite.*” The State from which the transmission “towards the satellite” is made will *de facto* decide by its legislation which entity has the right to consent to the communication of the work to the public, i.e., who is the author/rightholder, with effect for all EU Member States. Only the entity designated by this law will be rewarded for the consent. Rightholders, according to the law of “receiving States” (if they differ from those designated under the law of the place of broadcast), will remain unremunerated and without the possibility to prohibit the broadcasting of “their” works on the territory of those particular States.

---

<sup>62</sup> Sometimes it is also referred to as *Herkunftslandprinzip*, cf. [van Eechoud M., Hugenholtz B., van Gompel S., Guibault L., Helberger N., 2009: 313].

<sup>63</sup> Some authors even imprecisely describe the principle as a conflict-of-laws rule, cf. for example [Posch W., 2008: 99-100].



The same home country rule principle (as in Directive 93/83/EEC) is also used in Digital Single Market Directive 2019/790<sup>64</sup> and Broadcast Online Transmission Directive 2019/789<sup>65</sup>. According to Article 8(2)(a) of Directive 2019/790, when out-of-commerce works are made available by cultural heritage institutions, “*the name of the author or any other identifiable rightholder*” must be indicated. Similarly to Directive 93/83/EEC, the entity in question (the rightholder) will be determined by the law of the State “*where the cultural heritage institution undertaking that use is established*” (Article 9(2) of Directive 2019/790), with effects for the entire EU single market. It can be assumed that the making available of such works will mostly take place on the Internet. The same is the case for the exception for digital uses of works for teaching purposes, which entails the obligation to indicate the name of the author of the work used (Article 5(1)(b) of Directive 2019/790). Moreover, in this case, Member States may, in their national law provide for fair compensation for rightholders for such digital uses of works (Article 5(4) of Directive 2019/790). Who is the rightholder and thus who will get the compensation shall be determined, yet again, according to the law of the country “*where the educational establishment is established*.” This leads again to a situation where only the rightholder, under the law of the place of the educational institution, will be remunerated. In contrast, rightholders under the laws of other Member States will not receive any fair remuneration, even though the intangible asset will be available in digital form in each Member State for educational purposes.

The aim of the Satellite Broadcasting Directive 93/83/EEC was to create a pan-European audiovisual space for satellite broadcasting. In practice, however, the creation of a pan-European audiovisual area has not happened, as the Directive does not prohibit territorial licensing of rights, and that resulted in the application of territorial restrictions by technical means such as signal encryption [van Eechoud M., Hugenholtz B.P., van Gompel S., Guibault L., Helberger N., 2009: 313]. It is not effectively possible on the Internet. We can see that the need for *lex originis*/home country rule is increasing, and the problems with the diverging substantial laws for the ownership question arise more and more often. We cannot end this part without asking ourselves — is the home country rule reconcilable with the national treatment principle? It is at least as reconcilable as the *lex originis* conflict-of-laws rule. Nevertheless, maybe a little less?

---

<sup>64</sup> Directive (EU) 2019/790 of the European Parliament and of the council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

<sup>65</sup> Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC.

Let us imagine that the author of book B transferred the copyright to his book for the territory of Portugal to a third party. And now, why should the author of book A, which was made available online for teaching purposes by a company established in the Czech Republic, be remunerated for his book being available on the territory of Germany, whilst the author of book B, which was also made available online for teaching purposes on the territory of Germany, but by a company established in Portugal, not? Remember that the national treatment principle is called the first principle of non-discrimination [Drexl J. in: J. von Hein, 2021: Rom II-VO Art. 8 Verletzung von Rechten des geistigen Eigentums, marg. no. 53]. Is this not discrimination *par excellence*? Author B legitimately expected to be remunerated for the factual “use” of his book in Germany, as in Germany, he did not transfer his copyright to anyone, and he is thus the copyright owner. The applicable law is, in both cases, German law, so different applicable laws cannot justify the factual different treatment of both authors. Both authors are treated differently based on the provisions of German law, and this different treatment is not justified. As stated above, the national treatment principle prohibits alien law rules from discriminating against aliens. The home country rule should be considered non-compliant with the national treatment principle. The German law, transposing the Directive, actually considers, by applying the *lex loci protectionis* conflict-of-laws principle, both authors A and B as authors of their respective books. Although both of these books are *de facto* (not *de iure*) “made available” on the territory of Germany, only one of the authors will be remunerated for it because, according to Portuguese law, one of the authors is no longer the copyright holder.

## Conclusion

It has been shown that from the theoretical point of view, *lex originis* fulfills the *ratio* of national treatment much better than *lex loci protectionis*. To interpret international copyright treaties *secundum ratione legis*, the question of (initial) ownership should be excluded from the coverage of *lex loci protectionis*. Taking into account the legal status in the country of origin of the work means respect towards foreign legal orders and thus to private international law. It is a natural evolution in the globalized world.

On the other hand, the Russian judicial practice shows that the *lex originis* principle needs to be revised regarding its compliance with national treatment principle. A reconciliation of these two elements is required. It has also been shown that home country rule as an artificial bypass to *lex loci protectionis* conflict-of-laws rule does not improve the situation regarding conflict with national treatment. CMOs have to take into account in their work the growing internationalization and the rules governing transnational relations. And so

should the lawmakers. EU law tries to bypass territoriality and the diverging substantial copyright laws using the home country rule, which in turn harms copyright owners designated by *lex loci protectionis*, i.e., copyright owners designated by the national law in the country of protection.

It is about the right time to reconsider introducing another — explicit and obligatory — exception to national treatment on the international law level in regard to copyright ownership conflict-of-law solution, so that socio-economic reality can finally in this regard find its reflection in international copyright law. Moreover, to avoid, at least partly, internal decisional disharmony, it would be more than opportune to introduce substantial norms in international instruments, which would determine the question of ownership. A great scholar Francesco Ruffini stated already almost one hundred years ago that it is a natural evolution to pass from *lex loci protectionis* to a uniform private law which will regulate international relationships uniformly [Ruffini F., 1927: 124].<sup>66</sup> It would considerably make the work of CMOs easier and unforeseen results of international copyright transactions would be suppressed.

---



#### Список источников

1. Близнач И.А. Право интеллектуальной собственности. М.: Проспект, 2015. 896 с.
2. Богуславский М.М. Вопросы авторского права в международных отношениях. М.: Наука, 1973. 336 с.
3. Крашенинников П.В. Авторские и смежные с ними права: постатейный комментарий глав 70 и 71 Гражданского кодекса Российской Федерации. М.: Проспект, 2014. 480 с.
4. Крупко С.И. Коллизионно-правовые аспекты регулирования интеллектуальной собственности. Хозяйство и право. 2014. № 11. С. 129–136.
5. Луткова О.В. Специальные коллизионно-правовые принципы регулирования трансграничных авторских отношений. Lex Russica. 2018. № 2. С. 129–139.
6. Суд по интеллектуальным правам. Справка к заседанию Научно-консультативного совета при Суде по интеллектуальным правам по спорным вопросам соотношения положений части четвертой Гражданского кодекса Российской Федерации с некоторыми положениями частей первой, второй, третьей Гражданского кодекса Российской Федерации. Журнал Суда по интеллектуальным правам. 2018. № 19. С. 28–43.
7. Шершеневич Г.Ф. Авторское право на литературные произведения. Казань: Типография императорского университета, 1891. 313 с.

---

<sup>66</sup> “Et ainsi, par une évolution successive de la loi nationale de l’auteur, on passe à la loi du pays d’origine de l’œuvre, puis à la loi du lieu où la protection est réclamée; cette dernière s’efface à son tour et il s’établit une sorte de droit commun universel, applicable aux rapports internationaux de droit privé. Nous n’en sommes pas encore là; le mouvement est seulement ébauché.” [Ruffini F., 1927: 124].

8. Ascensão J.O. *Direito Autoral*. 2. ed. Rio de Janeiro: Renovar, 1997, 754 p.
9. Basedow J. et al. *European Max Planck Group on Conflict of Laws in Intellectual Property. Conflict of Laws in Intellectual Property: The CLIP Principles and Commentary*. Oxford: Oxford University Press, 2013, 560 p.
10. Beckstein F. *Einschränkungen des Schutzlandprinzips: die kollisionsrechtliche Behandlung von Immaterialgüterrechtsverletzungen im Internet*. Tübingen: Mohr Siebeck, 2010, 380 p.
11. Bergé J.-S. De la loi applicable à la définition du titulaire du droit d'auteur. *Revue Critique de Droit International Privé*, 1999, p. 76 ff.
12. Birkmann A. *Die Anknüpfung der originären Inhaberschaft am Urheberrecht*. Baden-Baden: Nomos Verlag, 2009, 310 p.
13. Chow D., Lee E. *International Intellectual Property, Problems, Cases, and Materials*. 2nd ed.. St. Paul: West Academic Publishing, 2012, 800 p.
14. Čepelka Č. *Právo mezinárodních smluv. Vídeňská úmluva o smluvním právu (1969) — s komentářem*. Praha: Státní pedagogické nakladatelství, 1986, 185 p.
15. Desbois H. *Le droit d'auteur en France*, 2e éd. Paris: Dalloz, 1966, 974 p.
16. Desbois H., Françon A., Kéréver A. *Les conventions internationales du droit d'auteur et des droits voisins*. Paris: Dalloz, 1976, 452 p.
17. Despagnet F. *Précis de droit international privé*. 5e éd. Paris: L. Larose & L. Tenin, 1909, 1250 p.
18. Dittrich R. Der Grundsatz der Inländerbehandlung der RBÜ und die sogenannte soziale Hälfte — Zugleich ein Beitrag zur Methode, die RBÜ auszulegen. In: R. Dittrich. *Festschrift 50 Jahre Urheberrechtsgesetz*. Wien: Manz Verlag, 1986, pp. 63–94.
19. Fawcett J., Torremans P. *Intellectual Property and Private International Law*. Second Edition. Oxford: Oxford University Press, 2011, 1056 p.
20. Fentiman R. *Choice of Law and Intellectual Property*. In: J. Drexler, A. Kur. *Intellectual Property and Private International Law — Heading for the Future*. Portland: Hart Publishing, 2005, pp. 129–150.
21. Ficsor M. *Guide to the Copyright and Related Rights Treaties administered by WIPO*. Geneva: World Intellectual Property Organization, 2003, 317 p.
22. Goldstein P., Trimble M. *International Intellectual Property Law: Cases and Materials*. 4th ed. St. Paul: West Academic Publishing, 2016, 820 p.
23. Gössl S. *Internetspezifisches Kollisionsrecht? Anwendbares Recht bei der Veräußerung virtueller Gegenstände*. Baden-Baden: Nomos, 2014, 330 p.
24. Heinze C. *Transition and Continuity in the Private International Law of Intellectual Property*. In: N. Bruun, G. Dinwoodie et al. *Transition and Coherence in Intellectual Property Law*. Cambridge, UK: Cambridge University Press, 2021, pp. 133–144.
25. Kur A., Maunsbach U. *Choice of law and Intellectual Property Rights*. *Oslo Law Review*, vol. 6, iss. 1, 2019, pp. 43–61.
26. Kyselovská T., Koukal P. *Mezinárodní právo soukromé a právo duševního vlastnictví: kolizní otázky*. Brno: Masarykova univerzita, 2019, 392 p.
27. Leška R. *Presumption of Authorship under the Berne Convention and its Application in the Online Environment*. In: Y. Gendreau (ed.). *Le droit d'auteur en action: perspectives internationales sur les recours*. Montreal: Les Éditions Themis, 2019, pp. 307–318.
28. Lipszyc D. *Historical appearances and disappearances of formalities: from Berne to national laws*. In: L. Bently, U. Suthersanen, P. Torremans (eds.). *Global*

Copyright. Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace. Cheltenham: Edward Elgar, 2010, pp. 367–394.

29. Loewenheim U. Handbuch des Urheberrechts. 3. Aufl. München: C.H. Beck, 2021, 2883 p.

30. Majoros F. Les arrangements bilatéraux en matière de droit d'auteur. Paris: A. Pedone, 1971, 130 p.

31. Masouyé C. Guide de la Convention de Berne pour la protection des œuvres (Acte de Paris, 1971). Genève: Organisation Mondiale de la Propriété Intellectuelle, 1978, 258 p.

32. McKeown J. Canadian Intellectual Property Law and Strategy. New York: Oxford University Press, 2010, 437 p.

33. Neuhaus P., Drobnič U., von Hoffmann B., Martiny D. Die Immaterialgüterrechte im künftigen internationalen Privatrecht der europäischen Gemeinschaften. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 40. Jahrg., 1976, H. 2, p. 189–232.

34. Nonnenmacher G. Le cinéma et la télévision face au droit international privé. In: *Collected Courses of the Hague Academy of International Law*, 1971, vol. 134, pp. 1–108.

35. Papaux A. Introduction à la philosophie du « droit en situation ». Genève/Zürich/Bâle: Schulthess, 2006, 240 p.

36. Pauli D. *Berner Übereinkunft*. Baden-Baden: Nomos, 2012, 384 p.

37. Peinze A. *Internationales Urheberrecht in Deutschland und England*. Tübingen: Mohr Siebeck, 2002, 425 p.

38. Posch W. *Bürgerliches Recht. Band VII. Internationales Privatrecht*. 4. Aufl. Wien: Springer, 2008, 216 p.

39. Ricketson S., Ginsburg J. *International Copyright and Neighbouring Rights. The Berne Convention and Beyond*. Oxford/New York: Oxford University Press, 2005, 1540 p.

40. Ruffini F. *De la protection internationale des droits sur les œuvres littéraires et artistiques*. Paris: Librairie Hachette, 1927, 188 p.

41. Schaafsma S. *Intellectual Property in the Conflict of Laws. The Hidden Conflict-of-law Rule in the Principle of National Treatment*. Cheltenham: Edward Elgar Publishing, 2022, 608 p.

42. Schack H. *The Law Applicable to Unregistered IP Rights After Rome II*. *Ritsumeikan Law Review*, 2009, no. 26, p. 129–144.

43. Schack H. *Urheber- und Urhebervertragsrecht*. 9. Aufl. Tübingen: Mohr Siebeck, 2019, 766 p.

44. Stieß K. *Anknüpfungen im internationalen Urheberrecht unter Berücksichtigung der neuen Informationstechnologien*. Frankfurt am Main: Peter Lang, 2005, 301 p.

45. Telec I., Tůma P. *Autorský zákon. Komentář*. 2. vyd. Praha: C. H. Beck, 2019, 1320 p.

46. Troller A. *Das internationale Privat- und Zivilprozessrecht im gewerblichen Rechtsschutz und Urheberrecht*. Basel: Verlag für Recht und Gesellschaft, 1952, 294 p.

47. Troller A. *Immaterialgüterrecht. Band I*. 3. Aufl. Basel: Helbing Lichtenhahn Verlag, 1985, 548 p.

48. Ulmer E. *Die Immaterialgüterrechte im internationalen Privatrecht*. Berlin: Carl Heymanns Verlag, 1975, 124 p.

49. Van Eechoud M., Hugenholtz B., van Gompel S., Guibault L., Helberger N. *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*. Alphen aan den Rijn: Kluwer Law International, 2009, 374 p.
50. Vivant M., Bruguière J.-M. *Droit d'auteur et droits voisins*. 2e éd. Paris: Dalloz, 2013, 1118 p.
51. Von Büren R., David L. (eds.) *Schweizerisches Immaterialgüter- und Wettbewerbsrecht*. Zweiter Band. Basel/Genf/München: Helbing & Lichtenhahn Verlag AG, 1998, 378 p.
52. Von Hein J. *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 12, Internationales Privatrecht II (Internationales Wirtschaftsrecht, Art. 50-253 EGBGB)*. 7. Aufl. München: C. H. Beck, 2018, 2788 p.
53. Von Hein J. *Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 13, Internationales Privatrecht II (Internationales Wirtschaftsrecht, Art. 50-253 EGBGB)*. 8. Aufl. München: C. H. Beck, 2021, 2899 p.
54. Windisch E. *Gewerblicher Rechtsschutz und Urheberrecht im zwischenstaatlichen Bereich*. Berlin: J. Schweitzer Verlag, 1969, 244 p.



## References

1. Ascensão J. (1997) *Direito Autoral*. 2.ed. Rio de Janeiro: Renovar, 754 p.
2. Basedow J. et al. (2013) *European Max Planck Group on Conflict of Laws in Intellectual Property. Conflict of Laws in Intellectual Property: CLIP Principles and Commentary*. Oxford: Oxford University Press, 560 p.
3. Beckstein F. (2010) *Einschränkungen des Schutzlandprinzips: die kollisionsrechtliche Behandlung von Immaterialgüterrechtsverletzungen im Internet*. Tübingen: Mohr Siebeck, 380 p.
4. Bergé J.-S. (1999) *De la loi applicable à la définition du titulaire du droit d'auteur*. *Revue Critique de Droit International Privé*, no. 5, pp. 76 ff.
5. Birkmann A. (2009) *Die Anknüpfung der originären Inhaberschaft am Urheberrecht*. Baden Baden: Nomos Verlag, 310 p.
6. Bliznets I.A. (2015) *Intellectual Property Law. Textbook*. Moscow: Prospect, 896 p. (in Russ.)
7. Boguslavskij M.M. (1973) *Copyright Issues in International Relations*. Moscow: Nauka, 336 p. (in Russ.)
8. Chow D., Lee E. (2012) *International Intellectual Property, Problems, Cases, and Materials*. 2nd ed. St. Paul: West Academic Publishing, 800 p.
9. Čepelka Č. (1986) *Právo mezinárodních smluv. Vídeňská úmluva o smluvním právu (1969) — s komentářem*. Praha: Státní pedagogické nakladatelství, 185 p. (in Czech)
10. Desbois H. (1966) *Le droit d'auteur en France*. 2e éd. Paris: Dalloz, 974 p.
11. Desbois H., Françon A., Kéréver A. (1976) *Les conventions internationales du droit d'auteur et des droits voisins*. Paris: Dalloz, 452 p.
12. Despagnet F. (1909) *Précis de droit international privé*. 5e éd. Paris: L. Larose & L. Tenin, 1250 p.
13. Dittrich R. (1986) *Der Grundsatz der Inländerbehandlung der RBÜ und die sogenannte soziale Hälfte — zugleich ein Beitrag zur Methode, die RBÜ auszulegen*. In: R. Dittrich. *Festschrift 50 Jahre Urheberrechtsgesetz*. Wien: Manz Verlag, pp. 63–94.

14. Fawcett J., Torremans P. (2011) *Intellectual Property and Private International Law*. 2nd ed. Oxford: Oxford University Press, 1056 p.
15. Fentiman R. (2005) Choice of Law and Intellectual Property. In: J. Drexl, A. Kur. *Intellectual Property and Private International Law — Heading for the Future*. Portland: Hart Publishing, pp. 129-150.
16. Ficsor M. (2003) *Guide to the Copyright and Related Rights Treaties administered by WIPO*. Geneva: World Intellectual Property Organization, 317 p.
17. Goldstein P., Trimble M. (2016) *International Intellectual Property Law: Cases and Materials*. 4th ed. St. Paul: West Academic Publishing, 820 p.
18. Gössl S. (2014) Internetspezifisches Kollisionsrecht? Anwendbares Recht bei der Veräußerung virtueller Gegenstände. Baden-Baden: Nomos, 330 p.
19. Heinze C. (2021) Transition and Continuity in the Private International Law of Intellectual Property. In: N. Bruun, G. Dinwoodie et al. *Transition and Coherence in Intellectual Property Law*. Cambridge: Cambridge University Press, pp. 133–144.
20. Intellectual Rights Court (2018) Statement to the meeting of the Research Advisory Council of the Intellectual Property Rights Court on controversial issues of relation of the provisions of Part 4 of the Civil Code of the Russian Federation with provisions of Parts 1 2 and 3. *Zhurnal Suda po intellektual'ny'm pravam*=Journal of the Intellectual Rights Court, no. 19, pp. 28–43 (in Russ.)
21. Krashennikov P.V. (2014) Copyright and Related Rights: Article-by-article Commentary on Chapters 70 and 71 of the Civil Code of the Russian Federation. Moscow: Prospekt, 480 p. (in Russ.)
22. Krupko S.I. (2014) Conflict of Laws aspects of Intellectual Property Regulation. *Hozjajstvo i pravo*=Economy and Law, no. 11, pp. 129–136 (in Russ.)
23. Kur A., Maunsbach U. (2019) Choice of Law and Intellectual Property Rights. *Oslo Law Review*, vol. 6, iss. 1, pp. 43–61.
24. Kyselovská T., Koukal P. (2019) Mezinárodní právo soukromé a právo duševního vlastnictví: kolizní otázky. Brno: Masarykova univerzita, 392 p. (in Czech)
25. Leška R. (2019) Presumption of Authorship under the Berne Convention and its Application in the Online Environment. In: Y. Gendreau (ed.). *Le droit d'auteur en action: perspectives internationales sur les recours*. Montreal: Les Éditions Themis, pp. 307–318.
26. Lipszyc D. (2010) Historical appearances and disappearances of formalities: from Berne to national laws. In: L. Bently, U. Suthersanen, P. Torremans (eds.). *Global Copyright. Three Hundred Years Since the Statute of Anne, from 1709 to Cyberspace*. Cheltenham: Edward Elgar, pp. 367–394.
27. Loewenheim U. (2021) *Handbuch des Urheberrechts*. 3. Aufl. München: C.H. Beck, 2883 p.
28. Lutkova O.V. (2018) Special conflict of laws principles for the regulation of cross-border copyright relations. *Russkij zakon*=Lex Russica, no. 2, pp. 129–139 (in Russ.).
29. Majoros F. (1971) *Les arrangements bilatéraux en matière de droit d'auteur*. Paris: A. Pedone, 130 p.
30. Masouyé C. (1978) *Guide de la Convention de Berne pour la protection des œuvres (Acte de Paris, 1971)*. Genève: Organisation Mondiale de la Propriété Intellectuelle, 258 p.
31. McKeown J. (2010) *Canadian Intellectual Property Law and Strategy*. New York: Oxford University Press, 437 p.

32. Neuhaus P., Drobnič U., von Hoffmann B., Martiny D. (1976) Die Immaterialgüterrechte im künftigen internationalen Privatrecht der europäischen Gemeinschaften. *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 40. Jahrg., H. 2, pp. 189–232.
33. Nonnenmacher G. (1971) Le cinéma et la télévision face au droit international privé. In: *Collected Courses of the Hague Academy of International Law*, vol. 134, pp. 1–108.
34. Papaux A. (2006) *Introduction à la philosophie du «droit en situation»*. Genève/Zürich/Bâle: Schulthess, 240 p.
35. Pauli D. (2012) *Berner Übereinkunft*. Baden-Baden: Nomos, 384 p.
36. Peinze A. (2002) *Internationales Urheberrecht in Deutschland und England*. Tübingen: Mohr Siebeck, 425 p.
37. Posch W. (2008) *Bürgerliches Recht. Band VII. Internationales Privatrecht*. 4. Aufl. Wien: Springer, 216 p.
38. Ricketson S., Ginsburg J. (2005) *International Copyright and Neighbouring Rights. The Berne Convention and Beyond*. Oxford/New York: Oxford University Press, 1540 p.
39. Ruffini F. (1927) *De la protection internationale des droits sur les œuvres littéraires et artistiques*. Paris: Librairie Hachette, 188 p.
40. Schaafsma S. (2022) *Intellectual Property in the Conflict of Laws. The Hidden Conflict-of-law Rule in the Principle of National Treatment*. Cheltenham: Edward Elgar, 608 p.
41. Schack H. (2009) The Law Applicable to Unregistered IP Rights after Rome II. *Ritsumeikan Law Review*, no. 26, pp. 129–144.
42. Schack H. (2019) *Urheber — und Urhebervertragsrecht*. 9. Aufl. Tübingen: Mohr Siebeck, 766 p.
43. Shershenevich G.F. (1891) *Copyright in Literary Works*. Kazan: University Press, 313 p. (in Russ.)
44. Stieß K. (2005) *Anknüpfungen im internationalen Urheberrecht unter Berücksichtigung der neuen Informationstechnologien*. Frankfurt am Main: Peter Lang, 301 p.
45. Telec I., Tůma P. (2019) *Autorský zákon. Komentář*. 2. vydání. Praha: C.H. Beck, 1320 p. (in Czech)
46. Troller A. (1952) *Das internationale Privat- und Zivilprozessrecht im gewerblichen Rechtsschutz und Urheberrecht*. Basel: Verlag für Recht und Gesellschaft, 294 p.
47. Troller A. (1985) *Immaterialgüterrecht. Band I*. 3. Aufl. Basel: Helbing Lichtenhahn Verlag, 548 p.
48. Ulmer E. (1975) *Die Immaterialgüterrechte im internationalen Privatrecht*. Berlin: Carl Heymanns Verlag, 124 p.
49. Van Eechoud M., Hugenholtz B., van Gompel S., Guibault L., Helberger N. (2009) *Harmonizing European Copyright Law: The Challenges of Better Lawmaking*. Alphen aan den Rijn: Kluwer Law International, 374 p.
50. Vivant M., Bruguière J.-M. (2013) *Droit d'auteur et droits voisins*. 2e éd. Paris: Dalloz, 1118 p.
51. Von Büren R., David L. (eds.) (1998) *Schweizerisches Immaterialgüter- und Wettbewerbsrecht. Zweiter Band*. Basel/Genf/München: Helbing & Lichtenhahn Verlag AG, 378 p.



52. Von Hein J. (2018) Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 12, Internationales Privatrecht II (Internationales Wirtschaftsrecht, Art. 50-253 EGBGB). 7. Aufl, München: C. H. Beck, 2788 p.

53. Von Hein J. (2021) Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 13, Internationales Privatrecht II (Internationales Wirtschaftsrecht, Art. 50-253 EGBGB). 8. Aufl. München: C. H. Beck, 2899 p.

54. Windisch E. (1969) Gewerblicher Rechtsschutz und Urheberrecht im zwischenstaatlichen Bereich. Berlin: J. Schweitzer Verlag, 244 p.

---

**Information about the author:**

J. Hodermarsky — PhD Student.

**Информация об авторе:**

Я. Годермарский — аспирант.

Статья поступила в редакцию 15.11.2023; одобрена после рецензирования 10.01.2024; принята к публикации 02.02.2024.

The article was submitted to editorial office 15.11.2023; approved after reviewing 10.01.2024; accepted for publication 02.02.2024.