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Intellectual Property Rights Protection over the Internet

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ABSTRACT

With the advancement of the technology and the ever-present nature of the Internet our understanding of the intellectual property rights over the Internet as well as private international law has been revolutionized. Previously the private International Law of intellectual property was easier to understand and had physical space and boundaries unlike the present scenario. Due to the ever-present nature of the Internet, new challenges came in the way of lawmakers, judges and even the States. So, it is important to address these changes and examine how we can deal with these changes. There is a high possibility in this digital age that a material which is protected by Intellectual property laws in a certain state would end up downloaded in other states and viewed by multiple people in various States. So, it's evident that the intellectual property rights infringer could be sitting in a whole other state while the owner of the intellectual property rights will be miles apart from the infringer and where the real loss is take place. So, it is important for the safety of the owner of the Intellectual Property to have certain rules when it comes to the jurisdiction rules that already exist and need some solutions with the advancement of technology. The main question that arises is who has jurisdiction over the matters of cyberspace? The main aim is to recognize the shortcomings in the present jurisdictional rules and provide jurisdictional solutions to overcome these shortcomings. The proper functioning of the system can only be there when there are certain set of effective jurisdictional rules for Intellectual Property Rights over the Internet and how to deal with the infringement when the infringer is miles apart and didn't even enter the State where the harm occurred.

I. INTRODUCTION

Intellectual Property Rights has a very important role to play and it is very complex. Private international law unlike the name suggests are not regulated internationally instead it is a set of rules between various private parties. So, every state has private international law rules which these states follow and regulate. When it comes to European Union, the governing

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authority is Council Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and commercial Matters known as the Brussels I Recast. Any proceedings held before the court of EU Member after January 10, 2015 comes under The Brussels I Recast. So, the Brussels I Recast is applicable to all the parties to the conflict which comes under EU and its Member States.

The main motive of private international law is to determine the territoriality. In order to determine the territory, the geographical location is used and according to it the jurisdiction is ascertained. Territoriality is the laws followed by a certain state within its boundaries of jurisdiction. The plaintiff can file a case under a court and if the court does not have a jurisdiction over the region than the plaintiff must submit his case in front of the court which has jurisdiction over the place.²

II. INTELLECTUAL PROPERTY RIGHTS AND INFRINGEMENT

The “Intellectual Property Rights” covers many intangible assets such as IP patent, Copyrights, trademarks, trade secrets, domain names etc.³ With the advancement and exchange of so much information via Internet many countries recognized the need for intellectual property rights all around the globe. According to *Ginsnurg and Lucas*: “Each country determines, for its own territory and int=dependently from any other country, what it is to be protected as intellectual property, who should benefit from such protection, for how long and how protection should be enforced.”⁴

Law varies from country to country and from agreements made by countries. The owner of the Intellectual property rights have the right to decide whether other people can use, sell, distribute or reproduce their asset or not. It is against the law to use the owner’s assets without his/her consent.

III. IMPACT OF THE INTERNET IN INTELLECTUAL PROPERTY RIGHTS

The modern emergence of the Internet in the whole matter of Intellectual Property Rights has led to an exceptional growth in the cases related to Intellectual Property and how to protect it. It operates by definition on a cross-border basis. Internet is a tool that helps a person cross boundary of the states while sitting in the safety of their house. It has no limit to where a person can reach with it. The possibilities that the Internet brought with it are both positive and

² Council Regulation (EC) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters 1215/2012 [2012] OJ L 351

³ James J. Fawcett, Paul Torremans, *Intellectual Property and Private International Law* (Oxford 2011) 535.

⁴ J. Ginsburg. A. Lucas, ‘The Role of Private International Law and Alternative Dispute Resolution’ in WIPO, *Intellectual Property on the Internet: A Survey of Issues* (Geneva 2003) 283.

negative aspects. It gives a platform to everyone and opens an online market with possibilities beyond borders on one hand and on the other hand it makes it very hard to keep in check the piracy, copying and copying. With the advancement in technology and 4G the data could be downloaded in a matter of seconds and one would not be able to distinguish the difference between the original and copied data. According to the research done by *Populus*, 38% of respondents have indulged in some form of intellectual property rights infringement over the Internet. According to professor Ian Hargreaves “there was no doubt that a great deal of piracy is taking place, but reliable data is surprisingly thin on the ground...as with online piracy, the scale of infringement is problematic and sources and methodology for much research are not open to scrutiny”⁵

“The technologies of the digital system allow users to duplicate, manipulate and morph content – perfectly, instantly and infinitely – in ways that may be largely undetectable, thereby greatly expanding opportunities for confusion, fraud and infringement of intellectual property rights.”⁶

When infringement is identified the next step is to identify the infringer, which is very difficult task. The Internet makes it possible for a person to be anonymous. There are various tools online that helps a person to hide his location. The technology makes it possible to purchase a domain of a different country without being a resident of a place. To be able to extract the IP address from the sites is another task and usually is not accessible to a common man. The ruling in the case *Promusicae v. Telefonica*⁷ is that a civil court may order ISPs to know the data which is linked to copyright infringement but ISPs are not obligated to do the same.

IV. JURISDICTION AND THE INTERNET

In the case *Carrick v Hancock*, Lord v Russell of Killowen CJ stated that “the jurisdiction of a court was based upon the principle of territorial dominion, and all the persons within territorial dominion owe their allegiance to its sovereign power and obedience to all laws and to the lawful jurisdiction of its courts”.

With the use of Internet the boundaries makes little to no sense to identify jurisdiction because of the ubiquitous nature of the Internet. The issues covered by the Brussels I Recast are closely related to the infringements that takes place within the territory of EU and its Member States. The reform in the Brussels I Recast can help in the development of the rules of jurisdiction

⁵ Populus, ‘Public attitudes towards Intellectual Property Rights. Populus Polling Presentation’ (September 3013)

⁶ Department for Business, Innovation and Skills, An Independent Report by Professor Ian Hargreaves, ‘Digital opportunity: review of intellectual property and growth’ (18 May 2011)

⁷ Case c-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU [2008] ECR I-271

concerning the Intellectual Property Rights Infringement over the Internet.

V. BRUSSELS I RECAST

This Practice Note considers the general rule set out in Article 4 of Regulation (EU) 1215/2012, Brussels I (recast)⁸ when determining the relevance of a defendant's domicile to the jurisdiction of the court. It explores when that might be derogated from while providing links through to detailed coverage on specific rules. In other words this article states that if a person is domiciled in a Member State can be sued in the courts of that Member State. Although there are certain exceptions to this in Article 7 (2) and Article 24 (4) of the Brussels I Recast, which makes it possible for a person domiciled in a Member state to be sued in the courts to other Member State.⁹

According to the Article 7 (2) of the Brussels I Recast “A person domiciled in a Member State may, in another Member State, be sued in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.”

In *Kalfelis v Bankhaus Schroder*, the ECJ stated that there should be three basic requirements to ascertain a claim in tort under Article 7 (2) of the Brussels I Recast are: “an autonomous independent concept” which establishes the “liability of the defendant” and must not be a “matter relating to contract.”¹⁰

According to the Article 24 (4) of the Brussels I Recast the courts of a Member State shall have exclusive jurisdiction, regardless of the domicile of the parties, in relation to certain proceedings. The proceedings which are strictly related to the validity and registration issues are the only cases which come under this article. In *Dujinstee* case, the ECJ stated that if the dispute isn't related the existence of the deposit or registration or validity of the patent, then the case should not be given special jurisdiction. So these are the main articles in Brussels I Recast that are essential for the cases linked with intellectual property infringement over the Internet.

In the case *GAT v Luk*,¹¹ the ECJ took on a wider interpretation of Article 24 (4) of the Brussels I Recast in which a special jurisdiction is conferred to all proceedings that is related to the validity or registration of a patent, no matter if the issue is raised by an action or plea in

⁸ Arthurs Harry. W & Kreklewich, Robert, 'Law, Legal Institutions, and the Legal Profession in the New Economy' [1996] Osgoode Hall Law Journal, 16

⁹ Council Regulation (EC) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters [2012]

¹⁰ Case 189/87 *Kalfelis v bankhaus Schroder Munchmeyer Hengst & co* [1998] ECR 05565

¹¹ Case 4/03 *GAT v LuK* [2007] ECR I-6509, para 31

objection.

VI. PROBLEMS REGARDING THE APPLICATION OF JURISDICTIONAL LAWS

The first and foremost thing is that the Brussels I recast doesn't have any individual jurisdictional laws that refer to Intellectual Property Rights Infringement over the Internet.¹² Also, the implementation of the current jurisdictional rules that covers Intellectual Property Rights Infringement over the Internet is challenging. The cases like *Pinckney*¹³, *Hejduk*¹⁴ and *Wintersteiger*¹⁵ showcases that the cases of Intellectual Property Rights Infringement over the Internet are very different than that of case related to torts committed over the Internet. So in the light of these cases it becomes more important to have special jurisdictional rules which connect both virtual behavior as well as a territoriality. To determine the jurisdiction based on the fact where the defendant is domiciled can be restrictive. To be able to track and find the defendant when it comes to anonymity on Internet and then only restrict a case to a certain court is also problematic.

Although, the application of the rules of exclusive jurisdiction can be tricky considering Intellectual Property Rights Infringement over the Internet because it creates a legal barrier to the application of special and general jurisdiction.

Jurisdictional Solution in the case of intellectual property rights infringement over the Internet

The issue of jurisdiction in the case of Intellectual property rights infringement over the Internet with regard to the application of Brussels I Recast is important to address. The amendment of the Brussels I Recast would be a logical step so that the overall betterment could be achieved. The recast should also bring under its umbrella new participants such as ISPs – hosting servers which will help the court. Indeed, private international law should focus on the exceptional circumstances in which infringements of intellectual property rights may be committed. When it comes to Article 4 of Brussels I Recast it is advisable to have a uniform solution for all of EU.¹⁶ There should be a right balance between data protection and IP protection. According to General Data Protection Regulation which will succeed data Protection Directive 95/26, the regulation will have a direct effect throughout the EU. Now, there will be one single data protection law valid across the EU. Companies no longer will have to face the fact that

¹² Brussels I Recast, Art 24 (4)

¹³ Case C-170/12 *Peter Pinckney v Kdg Mediatech AG* [2013]

¹⁴ Case C-441/13 *Pez hejduk v EnergieAgentur.NRW GmbH* [2015]

¹⁵ Case C-170/12 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH* [2012]

¹⁶ Commission, 'Proposal for a Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data' COM (2012)

the Member States implement and interpret directive 95/46 differently.

According to me, Article 8 (1) should go through an amendment so that it allows a wider interpretation of the term “essentially the same legal and factual situation” as stated in the CLIP Principles. Although CLIP Principles temperate the limiting interpretation of Roche *Nederland BV v. Primus*¹⁷ by letting the intellectual property rights owner to combine multiple defendants’ claim in front of the court where one is domiciled under Article 4 and other 8 (1) of the Brussels I Recast. There can be jeopardy where incompatible judgments can take place in the context of “essentially the same situation of law and fact.” Section 206 (1) of the ALI Principles¹⁸ states that it is not suitable to combine claims against resident and non-residents defendants, as it could lead to an unpredictable approach for everyone involved. According the Brussels I Recast the rules of jurisdiction should be very predictable and should be based on a close correlation between court and action so that there could be the sound administration of justice.¹⁹ The accessibility of a website and the place where the owner or advertiser is established can be a basis of jurisdiction in the case of intellectual property rights infringement over the Internet. It is more foreseeable and also is sound to the administrative justice.

Also, the application of exclusive jurisdiction in the case of intellectual property rights infringement over the internet should be rejected. Reasons to reject the same is mentioned below:

1. the rules of jurisdiction are based on the substance of the dispute rather than on the issue of jurisdiction as required in the case of intellectual property rights infringement over the Internet;
2. Contradiction of the recent cases in *Pinckney*, *Hejduk* and *Wintersteiger*, where the jurisdiction was based on the defendant’s domicile and jurisdiction must always be available on this ground;
3. creates a legal barrier to the application of the general and special jurisdiction;

From my standpoint, when there are issues that arises due to the validity of registered intellectual property rights in between of infringement proceedings with regard to intellectual property rights infringement over the Internet, should be considered by specialized courts: patent or design or trademarks courts. In such situation one specialized court would be able to handle such complex issues as the infringement and validity of intellectual property rights. It

¹⁷ Case C-539/03 Roche Nederland BV v Primus, Goldenberg [2006] ECR I-6535

¹⁸ CLIP Principle, Art.2:206 (2)

¹⁹ Council Regulation (EC) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2012] OJ L 351, preamble 15,16

is more economical and feasible way.

VII. BREXIT: JURISDICTION AND ENFORCEMENT OF JUDGMENTS

The UK's exit from the European Union lead to many uncertainties to the trade relations and litigations and jurisdiction as well. As a result of transitional provisions in the Withdrawal Agreement between the UK and the EU, the UK remained subject to Regulation (EU) 1215/2012, Brussels I²⁰ (recast) during the implementation period, which began on exit day and ended on IP completion day (i.e 31 December 2020, at 11 pm). When it comes to the Brussels I Recast, UK will cease to be the part of it and no longer be in its jurisdiction. The Member States cannot apply its jurisdiction rules that are mentioned in Brussels I Recast Regulation for disputes involved defendant domiciled in UK. The implementation of judgments delivered in UK will not be ruled by this regulation. Some regulations which don't have an effect on the defendant's domicile of a Member State are still applicable.²¹

VIII. CONCLUSION

The development and advancement of the Internet and its growing importance has many benefits but it comes with some cons as well. The importance of Intellectual Property Rights Protection across the globe is necessary. In order to suit the new virtual world, it is mandatory that we adopt new rules and ideas for an ideal solution to Intellectual Property Rights Protection over the Internet. Adapting the Brussels I Recast is an essential step needed to keep up with the new virtual world. We can also wrap up by saying that the jurisdictional rules under the adapted version of Brussels I Recast in the case of intellectual property rights infringement over the Internet for sound justice system. Intellectual property rights infringement occurs in the Internet space, the jurisdictional rules should be based on the territory court sized and the connection requirements between the parties or circumstances of the dispute. This clearly means that the territorial connection is relevant when it comes to Intellectual Property rights infringement over the Internet. However, these connections should be modified in the light of their applicability. Indeed, as noted by Fawcett, the Internet is not outer space; there are territorial connections with various States.

²⁰ Brussels I Recast, Art. 27

²¹ Case C- 523/10 *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*. [2012] WLR (D) 117; ; Case C-170/12 *Peter Pinckney v KDG Mediatech AG* [2013] ECR 2013 -00000, Opinion of AG jaaskinen; Case C-441/13 *Pez Hejduk v EnergieAgentur.NRW GmbH*. [2015]