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JURISDICTIONAL ISSUES, CONFLICT OF LAWS OR ALTERNATIVE DISPUTE RESOLUTION OF DISPUTES THAT RELATED TO THE INFRINGEMENT OF THE INTELLECTUAL PROPERTY RIGHT ON THE SOCIAL MEDIA PLATFORMS

ABSTRACT

The Internet has revolutionized not only every-day life, but also showed the need to redefine many legal terms, including some of the key ones, considered so far as fully sufficient to describe and explain international relations. One of the key categories, that demands alterations, is the idea of statehood. Such a need results from the fact of the territorial character of states, as they are defined, among others, through a territorially established international space, that can be physically placed and described. In the very opposition to "territorially" regulated state relations, the cyberspace is defined as "aterritorial". Therefore, regarding the limitlessness of the Internet, its aterritoriality and its common presence, the intellectual property rights in their traditional sense, or, to be more particular, its territorially described context of regulating social and international relations, needs to be verified or amended in respect of the new electronic dominium.

Key words: intellectual property rights, private international law, jurisdiction, conflict of laws, alternative dispute resolution

INTRODUCTION

The concept of intellectual property rights can be defined very broadly, as legal rights which result from intellectual activity in the industrial, scientific and artistic fields. In most of the countries worldwide, the intellectual property is protected by laws. There are two main reasons for protection of intellectual property rights. The first is to give statutory expression to the moral and economic rights of creators in their creations and such rights of the public in access to those creations. The second is to promote, as a deliberate act of Government policy, creativity and the dissemination and application of its results and to encourage fair trading which would contribute to economic and social development. As such intellectual property is traditionally divided into two branches: industrial property and copyright and related rights.

Taking into consideration this fact and that today we live in a "digital" society, the traditional concept of intellectual property, described above, is faced with new legal challenges. The main question which arises from this emerging society context is the question of the influence of the social media[1] in everyday life and especially in the protection of intellectual property rights. It is undisputable that no one can deny the power of the social media, however the issue of controlling this power is rather concerning.

With the penetration of the Internet and the social media in our lives, we are now immersed in what referred to be cyberspace.[2] This new situation demands for a possibility for the rights holders to ask protection of their intellectual property rights. It is widely known that the value of the intellectual property rights in practice depends on whether the owner of the rights is capable of undertaking necessary measures to prevent others from infringing its rights.[3]

However, the traditional method of resolving legal conflict- court litigation- is largely organized on territorial basis. Each country has its own courts which apply their own law. The territorially based dispute resolution model faces number of challenges when applied to disputes arising on Internet, where the activity occurs with little (or no) regard to the physical boundaries. This has transformed the Internet from "no man`s land", where no laws were seen to apply to "every man`s land", where the law of all states apply at the same time. The main reason for this is

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[1] Social media is "media created online and is a term used to describe the online interaction of individuals and exchange of user-generated content/information." It is distinct from and defined against traditional media such as print media and television where the publication of information goes one way. In social media, with the advance of Web 2.0 technologies, such information flows from multiple sources. Everyone with an Internet connection can be a publisher. - Source Scheirer L. Bianca, Intellectual property issues in social media, Social Media Law Paper 3.1, 2011, p. 3.1.1

[2] Svantesson Borje Jerker Dan, *"Private International law and the Internet"*, Wolters Kluwer Law&Business,2012, p 1

[3] Barik Maja, Merki za sproveduvanje na pravata od intelektualna sopstvenost vo zemjite od Zapaden Balkan (Hrvatska I Makedonija vo Fokus), Magisterska Teza, SOIP 2010 Skopje, p 83

the fact that the usage of the Internet in the poorest regions is still considered very rare, but it is still used by the majority of the world`s population. On the other hand, the Internet instead of being controlled of any country`s jurisdiction, is now within each and every country`s jurisdiction at the same time.[4]

Therefore, in the past years, much attention has been brought to private international law and alternative dispute resolution means, in order to overcome these complex issues that the Internet poses.

The private international law is one of the traditional legal branches in the states from the European and American legal circle, which has been separated from the general civil law in the 19th century in the period of liberal capitalism.[5] Most of the legal scholars consider that it is very difficult and in a way dangerous to define the private international law, because of the lack of consistency what is the subject of the private international law.[6] However it is fair to conclude that "the private international law is a branch of the internal law of every country, which legal norms directly or indirectly regulate the substantive and procedural civil relations with foreign element."[7] In the common law oriented jurisdictions the private international law is referred as conflict of laws and is defined as "the body of law that seeks to resolve certain questions that result from the presence of a foreign element in legal relationships". The private international law, contrary to what the label suggests is not international law strictu sensu i.e. it does not constitute a set of rights and obligations between States. On the contrary it aims to regulate conduct between private parties. The rules for these relations are not to be found in some universal principles, supra national norms, but in the law of certain states.[8] The term private international law is being criticized as inaccurate also for the usage of the word "private" due to the fact that it stems from a division of the law that no longer exists. The relevance of the private international law for resolving the problems that arise out of the "borderless" Internet is due to its subject matter. Namely the private international law includes: conflict of laws, conflict of jurisdictions, citizenship and legal status of the foreigners .[9]

However, the private international law even though is invoked to solve the issue regarding the Internet and intellectual property law is not a new branch, rather it has a long tradition in legal systems. With the advent of the Internet, cross border relationships have intensified, emerging the

[4] Ibid, p 2-3
[5] Гавроска Поликсена, Дескоски Тони, Меѓународно приватно право, Правен Факултет Јустинијан Први, 2011, p 23
[6] Varadi Tibor, Knežević Gašo, Pavić Vladimir, Bordaš Bernadet, MEĐUNARODNO PRIVATNO PRAVO trinaesto izdanje, Pravni Fakultet Univerziteta u Beogradu, 2010 Beograd, p 43
[7] Гавроска Поликсена, Дескоски Тони - ibidem, p 25
[8] Vardai Tibor, Knežević Gašo, Pavić Vladimir, Bordaš Bernadet - ibidem, p 44
[9] For further reference on Private international law see: Гавроска Поликсена, Дескоски Тони, Меѓународно приватно право, Правен факултет Јустинијан Први, 2011

infringement of intellectual property rights from one state to multi state infringement and raising more complex questions of jurisdiction and applicable law.

Once solved the problem with private international law we are looking at the other side of the coin, the alternative dispute resolution. The term "alternative dispute resolution (ADR)" in its widest sense refers to all procedures aimed at resolving disputes between private parties outside of the court system, typically but not necessarily with the help of neutral third party." There are several methods of ADR which are used as contemporary dispute resolution mechanisms, and are discussed bellow.

1.1 Jurisdictional focus

The jurisdiction is a primary and basic question in every case involving the Internet. The jurisdictional rules are always evolving and this evolution has always responded to the changing social constructions of the space, distance and community. The Internet collapses our traditional notions of location and the significance of geography for sovereignty and regimes of law.[10]

The term jurisdiction carries out more than one meaning: the amenability of a defendant to process in such a way as will give the court authority to decide the controversy which that process seeks to agitate and particular territorial or law area or law district.[11] The jurisdiction can be divided into personal (jurisdiction over the defendant) and subject matter (jurisdiction over the matter of the dispute). Furthermore the personal jurisdiction is divided into general and specific referring to whether the defendant is resident of the forum or has infrequent or minor contact there.

The rules regulating jurisdictional claims are mainly location focused. In relation to industrial property disputes, the issue of jurisdiction must be approached from the perspective that such rights are based on registration in a particular geographical area.[12]Regarding the copyright cases, the rules of the forum in which the copyright case is heard determines the outcome of the case. The parties to international copyright contract often include choice of forum clause, but also governing law clause to control the forum`s choice of law. However, the evolving principle of territoriality has affected the contemporary choice of forum rules. In connection with the above mentioned it is indisputable that the forum law will govern the availability and scope of personal jurisdiction and other procedural incidents affecting the cost, efficiency and completeness of the litigation such as discovery, jury trial and enforcement of judgments.[13]

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[10] Dr. Zekos I. Georgios, *"State Cyberspace and personal cyberspace jurisdiction"*, International journal of law and information technology, vol 15, no.1, Oxford Journals 2007 p 15-19
[11] Svantesson B.J. Dan - ibidem, p 8
[12] Ibid p. 9
[13] Goldstein Paul, Hugenholtz Brent, International copyright, Oxford University Press, 2010, p 115

For the parties the question of jurisdiction is important for several reasons:

- A party may want the dispute to be heard in its home state for practical reasons (confidence, familiarity with the local court system, and minimization of expenses);

- The choice of forum determines which court will adjudicate the matter, which in turn decides which choice of law rules will apply, which in turn determines the applicable law;

- When a party disputes court`s jurisdiction it often does so with the question of applicable law in mind. Furthermore it must be noted that even in the case when the court determines that a foreign substantive law is applicable, it passes this decision in accordance with its own procedural rules, which in certain cases can be determinative (rules regulating admissibility of evidence, jury trial etc.)[14]

The first issue a court will consider in cross border dispute is whether it has jurisdiction to hear the dispute? In the European Union, the principal instrument governing jurisdictional issues is the Brussels II Regulation.[15] It provides in exclusive jurisdiction for the courts of Members States in which the registration has been applied for, has taken place or is under terms of a Community instrument or an international convention deemed to have taken place, regarding the registration or validity of patents, trademarks, designs or other similar rights deposited or registered. [16] A number of other articles of Brussels II Regulation, while not making explicit reference to intellectual property, are important in terms of determining jurisdiction over disputes that are involving intellectual property issues including those that arise on the Internet. The Article 2(1) lays down the general jurisdictional principle: "the persons domiciled in a Member State shall whatever their nationality may be sued in the courts of Member states". The Article 5(3) provides that "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 light of the latter, the European Court of Justice in the decision of "Mines de Potasse" implied that a plaintiff can sue under, Brussels II Regulation in multiple courts to seek redress, namely in all places where damages was suffered and the place where infringement occurred.[17]

In the Republic of Macedonia, the general rule for determining jurisdiction is prescribed for the cases when the defendant has residence, respectively headquarters in the Republic of

[14] Svantesson B.J. Dan - ibidem, p 9
[15] COUNCIL REGULATION (EC) No 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility
[16] Article 22 (4) from Brussels II Regulation
[17] WIPO, *"Intellectual property on the Internet: Survey of Issues"*, 2002, p 84-85

Macedonia.[18] Furthermore the exclusive jurisdiction exists in disputes for registration and validity of the industrial property rights if the application has been filed in the Republic of Macedonia.[19] The Law on Private International Law of the Republic of Macedonia, provides the same rule regarding the tort liability as the Brussels II Regulation, namely the lex loci delicti commisi rule.[20]

The global accessibility of the Internet makes difficult the localizing of the place where the infringement and damages occurred. In the copyright context it would seem reasonable to accept that the damage is suffered, at the very least, in the places where the unlawful material was downloaded as such downloads represent lost business for the plaintiff. Regarding the place where the infringing act occurred, from the plaintiff`s point of view it is preferable if the court which is seized finds that it has jurisdiction over claims for all damages arising out of the Internet activity which is the subject matter of the complaint, irrespective of the various countries in which these damages have been suffered. In the trademark context an extra level of difficulty arises due to the nature of exclusive rights given to mark owners. Therefore, due to the borderless and geographical independence of the Internet, an Internet user who deals with a mark on Internet will certainly be liable for infringement in the jurisdiction of the mark.[21] The case law practice[22] for trademark infringement disputes online set up a standard of assessment, whether the website has been passive or active. A "passive" website, where a defendant has simply posted information on the Internet available to those who are interested and absent additional contact with forum state or citizen, would not be enough to support jurisdiction. An "active" site by entering into contract with residents of a foreign jurisdiction that involve the knowing and the repeated transmission of computer files over cyberspace would be sufficient to establish jurisdiction anywhere the site is accessed.[23]

The second issue a court will consider in cross border dispute is whether it can decline jurisdiction to hear the dispute? In general, the courts of the states following the civil law traditions have less decretory power to decline jurisdiction than those deriving from common law traditions due to the principle of lis alibi pendens (suit pending elsewhere).[24] The possibility granted to the courts deriving from common law traditions is the so called doctrine of "forum non conveniens". As its name implies, this doctrine applies in situations where it would be appropriate, for a case to be

[18] Private International Law Act of the Republic of Macedonia (Official Gazette of the Republic of Macedonia 87/2007, 156/2010), art. 52 (1)
[19] Ibid, art. 67
[20] Private International Law Act of the Republic of Macedonia, (Official Gazette of the Republic of Macedonia 87/2007, 156/2010) art. 33 (1)
[21] Svantesson B.J. Dan- ibidem, p 61
[22] Zippo Mfg. Co. v. Zippo Dot Com Inc. (1996), Maritz Inc. v. Cyber Gold Inc., 947 F. Supp 1328 (E.D. Mo. 1996), Cybersell Inc. v. Cybersell Inc. (1997)
[23] Zekos I. Gregorios - ibidem, p 27
[24] Svantesson B.J. Dan - ibidem, p 10

heard in different forum.[25]The forum non conveniens is generally invoked by the defendant, who also bears the burden of demonstrating that some other forum is both available and more appropriate; if the defendant demonstrates this, then the burden shifts to the plaintiff to demonstrate that "there are special circumstances by reason of which justice requires that the trial should nevertheless take place in this country".[26]

The above explained management of problems regarding cyberspace jurisdiction are not even close to providing solution for the vast number of problems arising out of the intellectual property issues online. The final solution would be one which eliminates the variety of factors used to justify the selected jurisdiction. Furthermore it would be a solution that eliminates the possibility of forum shopping, while providing uniform application. As one of the final solutions proposed recently is the concept of universal cyberspace jurisdiction. This means that any state whose people are affected in any way by electronic action will have jurisdiction to decide and this decision will be enforced by an international convention on recognition and enforcement of foreign court decisions.[27]

1.2 Substantive law issues and problems

The question of the substantive law is always discussed together with the question of jurisdiction. Namely if the court finds that it has jurisdiction over the case, it will turn to the question which law to be applied.

One important distinction between the jurisdiction and the applicable law is that, while the jurisdiction rules can point to more than one forum, the rules regarding the choice of law usually appoint only one applicable law. However in the context of the Internet, this might be very difficult to achieve.[28]

The choices of law rules, like the rules regarding the jurisdiction, are primarily focused on location. Prof. Jürgen Basedow[29] gives the following survey of choice of law issues that can be applied in the intellectual property context and in connection with the Internet:

1. Lex loci protectionis – is the law of the country for which protection is sought, not the law of the country where protection is sought. There is a possibility for lex loci protectionis and lex fori to be identical, in the case where the legal action is taken in the courts of the country of

[25] Goldstein Paul, Hugenholtz Brent - ibidem, p 120
[26] Ibid
[27] Zekos I. Gregorios - ibidem, p 37
[28] Svantesson B.J. Dan- ibidem, p 12
[29] Basedow Jürgen, Foundations of Private international law in intellectual property, Intellectual property in the Global Arena, 2010, p 12-14

protection. This rule governs the existence of intellectual property rights, their validity, scope, limitations and exceptions, duration, transferability, as well as the infringement;

2. Lex originis – this principle refers to copyright, because there is no need for registration and deposit of the copyrighted work. Therefore the law of the origin is considered to be the law of the first publication of a copyrighted work, or the law governing the personal status of the author. However in our point of view this is not applicable in the practice because it is contrary to the principle of national treatment of foreign authors, provided in the Berne Convention Article 5 (2);

3. Lex contractus – this is the general choice of law rule regarding contract which emphasizes the principle of party autonomy (remark from the author of this text); It applies in cases of the contractual relations regarding transfer and licensing of the intellectual property rights. Here, we can distinguish three different settings: where no contract between the parties prescribes the applicable law (in this case the law of the country in which the work is being exploited is to be applied); where a contract between the parties effectively specifies the law that is to govern the contract (the law of the contract is the governing law); where a contract exist, but the law of the contract conflicts with the law that would apply in the absence of the contract (this problem is resolved in favor of copyright law rules over contract rules).[30]

The above mentioned list of issues gives a general overview of the choice of law problems. However, since the subject of this Research Paper is the protection of the intellectual property rights from infringement, we would like to emphasize the choice of law rules referring specifically the cases of infringement.

The choice of law rule as regards to trademarks and patents is the leading principle lex loci protectionis[31], even though the Paris Convention and the Bern Convention do not state this explicitly. Regarding the copyright, the Article 5 (2) from the Berne Convention explicitly provides that "the extent of protection, as well as the means of redress afforded to the author to protect its rights, shall be governed exclusively by the laws of the country where protection is claimed". In other words, the Berne Convention refers the country where protection is claimed not in sense of the country where the court proceedings are brought, but to the law of the country in which the infringement occurred.[32]

Professor Basedow discusses that the even though lex loci proectionis principle is challenged by the existence of the ubiquitous infringements (multi state infringements), the

[30] Goldstein Paul, Hugenholtz Brent - ibidem, p 130-151
[31] Rome II Regulation, article 8
[32] WIPO 2002- ibidem, p 87-88

solutions presented in the academic writings have not indicated viable alternatives. Some guidelines or principles suggest the applications of the law of the closest connection to these types of infringements. The determining factors of the closest connection indicate the residence and the center of main interest of the parties, the place of performance of the activities giving rise to the infringement and the principal markets towards which the parties have their activities.[33]

Where an action for multi state infringement of intellectual property rights is taken to the US court, the court may either decline jurisdiction or accept the case and decide it under the American law. The probability of the court to accept the jurisdiction and decide the case under the foreign law is very low. On the contrary in the European Union, the courts will assess the cases if the infringer is domiciled in the Union, without the possibility of applying the forum non conveniens, and the court will apply the lex loci protectionis of every country affected, whether a member state or a third state in accordance with the Articles 3 and 8 of the Rome II Regulation. In order to avoid chaos in such multi state infringement litigation, the court may, under its national rules of civil procedure, split the whole litigation into as many separate procedures as there are states involved.[34]

In the Republic of Macedonia, in line with the national treatment provided in the Paris Convention, Bern Convention and the TRIPS Agreement, the Law on Industrial property and the Law on copyright and related rights, provide that the foreign physical and legal persons, respectively authors enjoy the same protection as the domestic, which means that they enjoy the protection under the Macedonian law.[35]

The Private international law Act of the Republic of Macedonia (Official Gazette of the Republic of Macedonia 87/2007, 156/2010) in the Article 33-g provides only the applicable law for non contractual liability for damages (which we consider to be the infringement of intellectual property rights) which derives from breach of the law of industrial property - the applicable law would be the law where the damage has occurred. Furthermore, the Law does not provide anything regarding the copyright and related rights.

We would like to stress out that, from the above mentioned it is evident that the rules of applicable law regarding the infringement of the intellectual property rights are pre determined by the principles of territorial nature of the intellectual property rights, national treatment, minimum standards, most favored nation etc., however we must make some remarks regarding these rules. Namely, the choice of law rules governing the intellectual property rights has been developed in

[33] Basedow Jürgen – ibidem, p 27
[34] Ibid, p 27-28
[35] Law on copyright and related rights (Official Gazette of the Republic of Macedonia 115/10, 140/2010, 51/2011, 146/2013) art 188 (2), Law on industrial property (Official Gazette of the Republic of Macedonia 21/09, 24/2011, 41/2014), art. 5 (2)

line with the necessities of the intellectual property as a separate and independent branch of the law regulating specific relationships spawned by human creativity, such as technical innovations, works of music or literature or certain designs. It is true that all of the three great international intellectual property treaties (The Paris Convention, The Berne Convention and the TRIPS Agreement) place emphasis on the harmonization of the substantive provisions, but nevertheless they do not exclude the private international law approach.[36] Therefore, we believe that the private international law approach should be amended in line with the new developments in the field of intellectual property rights. The fact that the dominant choice of law rule (lex loci protectionis) does not provide the adequate solution for all of the problems, especially those arising out of the infringement of the intellectual property rights online, should be indicative enough. In our view there are 3 main principles that ought to guide judges making decision which interpretation of the choice of law rule to adopt: fairness (the most appropriate solution of the dispute at hand), consequence focus (the option that will have most favorable consequences in the future), harmonizationalism (the option that is most commonly in line with the international best practice).[37]

1.3 Alternative dispute resolution

The term alternative dispute resolution (ADR) is used in this Article in its widest sense. ADR is an umbrella term that refers, generally to alternatives to the court adjudication of disputes . It is also known as "appropriate dispute resolution" and in some international contexts is called "amicable dispute resolution".[38] The most common types of ADR are: negotiation, mediation, mini trial and also arbitration, which some of the authors separate as a specific branch.

Before, going further into explaining the different forms of ADR, we feel the need to explain what motivated the states to support this new concept of alternative? Namely, there are two causes of this decision: the external evaluation-the failures of the court protection and the internal evaluation – the functioning and the reputation of the state. However these reasons should not be interpreted in a way that the courts do not fulfill their tasks, but only serve as a scientific criticism towards their performance.[39]

The origins of this concept are considered to be in the USA, in which it has developed as a result of: 1. The slowness, 2. The expensiveness, 3. The formality and 4. The unforseeability of the outcome of the court dispute.[40] The various mechanisms of ADR are not mutually necessary

[36] WIPO 2002 - ibidem, p 82
[37] Svantesson B.J. Dan - ibidem, p 103
[38] Haley-Nolan m. Jacqueline, Alternative dispute resolution 3rd edition, Thompson West, p 2
[39] Kneževic Gašo, Pavić Vladimir - ibidem, p 184-187
[40] Ibid, p 188

exclusive in any particular conflict, but can be used sequent or in a customize combination, or as an adjunct to court litigation.[41]

The main characteristics for all the ADR methods are: party autonomy, flexibility, neutrality, focused on the interests of the parties, easier managing of the dispute, economic nature of the dispute. These characteristics made their impact in the development of the ADR. Respectively, the efficiency in the ADR proceedings made ADR flexible and tailored to fit the dispute which is to be resolved. The fact that the efficiency of the ADR proceedings has lowered the level of complexity does not mean that it has eliminated the due process safeguards. On the contrary, the numerous safeguards that exist can be classified as the following: all of the ADR Agreements are supported by the parties, the third parties involved as facilitators must be impartial and independent, the parties must be duly notified about the proceedings, the parties must be given an equal chance to present their case, the eventual decision should be made on the basis of the facts presented in the proceedings, the decisions should be justified and there should always be a possibility for an external appeal mechanism.[42]

ADR has traditionally played modest role in the resolution of intellectual property disputes. This is mainly determined by the territorial nature of the intellectual property rights and the existence of exclusive competence of the court for certain types of intellectual property disputes. Furthermore, the protection of the intellectual property was perceived as public policy and it seemed inappropriate to involve private parties in the dispute settlement.[43] However, nowadays ADR is gaining increasing importance in intellectual property disputes, especially those involving the Internet.

1.3.1 Arbitration

The arbitration, in essence constitutes a consensual dispute resolution mechanism by virtue of which the parties to an agreement to arbitrate oblige themselves to comply with the decisions that a third party make in relation to the dispute submitted to it.[44] The main features of the arbitration procedure, are more or less the same as those of the ADR methods in general, however, we believe that some of them should be mentioned and explained here:

- The arbitral awards are readily enforceable in most countries in the world –the recognition and enforcement of foreign arbitral awards is facilitated by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which

[41] WIPO 2002 - ibidem, p 88
[42] Ibid, p 95
[43] Ibid, p 94

[44] Cook Trevor, Garcia Alejandro, International intellectual property arbitration, Wolters Kluwer, 2010, p 23

provides that the contracting state scan deny recognition and enforcement under very restrictive grounds;

- Autonomy to choose the decision makers – this is the most obvious manifestation of the party autonomy principle, which grants the parties substantial liberty to determine the qualifications, experience and expertise of the decision makers;

- The Arbitration is much faster and cheaper then litigation – even though the fees of the arbitration proceedings are nominally more expensive than those of court proceedings, compared with the length of the proceeding, the arbitration is a more expeditious then litigation

- Confidentiality – this point is especially important for intellectual property disputes due to the fact that they usually involve trade secrets, knowhow and confidential information that will lose its value once disclosed to the public.[45]

The question of whether an issue can be submitted to arbitration or not is a question of arbitrability. However in the intellectual property disputes it does not constitute a safe assumption in all cases. The reasons for this are that even though the party autonomy is one of the most important principles generally accepted worldwide, when it comes to public policy, the party autonomy finishes. Therefore in most legal systems, due to public policy issues, the parties cannot agree to arbitrate, because the cases that tackle the issue of public policy are most often subject to exclusive court competence. There is also one other difference when we discuss the issue of arbitrability and that is the difference between domestic and international arbitration, where sometimes all types of intellectual property disputes can be submitted to arbitration. The question of inarbitrability, depending of the stage of the dispute can be solved either by raising an objection for inarbitrability, by appearing in front of a court, claiming lack of jurisdiction of an arbitral tribunal or by submitting an action for setting aside of the arbitral award. However, the main source of doubts in the respect of arbitrability is caused by the lack of guidance of in the national legislation.[46]

The international arbitrations are governed by different norms such as: mandatory rules, the parties' agreement, chosen rules of arbitration, international arbitration practice and applicable law rules. These norms can be classified as norms governing the conduct of the proceedings, norms governing the substantive issues arising from or in connection with the contract, set of norms governing the arbitration clause. In general the parties can shape the conduct of the proceedings as they see fit, by means of resorting to institutional rules of arbitration. In relation to the substantive

[45] Ibid, p 24-46
[46] Ibid, p 50-54

issues, it is fair to be said that it is the most important and complex issue to determining the applicable law. The last question should be viewed in connection to the arbitration agreement itself. Namely, the arbitration agreement can be concluded, in writing as an agreement or a clause and represents formal legal act.[47]Usually the parties expressly stipulate the law that governs submission agreements, and most legal systems are prepared to accept that choice, but in the absence of choice of law a problem may occur.[48]

In most cases the arbitral tribunals/arbitrators are appointed after the parties agreed that their dispute is arbitrable. The arbitrators are appointed by the parties and the phase of appointing the arbitrators represents one of the most crucial steps in any arbitration. In great majority of arbitration cases the parties appoint one or three arbitrators (two of whom would be chosen by the parties).[49] However in the dispute IBM v Fujitsu[50], the arbitral tribunal was constituted by a two member panel, which is not very common. The number of arbitrators varies from very different factors such as the complexity of the dispute, the value of the dispute, the need for speedy resolution etc. What is most important for the parties especially in intellectual property disputes is that the arbitrators possess the necessary knowledge in the field of intellectual property rights, as well as technical/legal expertise. The naming of the arbitrators can be done in the arbitration clause or by a separate submission to the arbitration institution. If the parties fail to agree on the appointment of an arbitrator, the institution will appoint an arbitrator from the list of arbitrators in scope of that institution.[51]

After all conditions are met, the arbitration procedure begins. Most arbitration rules and national acts do not set out in detail how arbitral proceedings should be conducted. However, most of the institutional arbitrations have their own set of guidelines upon which the proceedings are managed and concluded. Upon the conclusion of the arbitration proceedings the tribunal passes a decision which the losing party should perform willingly. In general in the case of refusal of the willing performance of the losing party, the winner in the arbitration dispute has two options: to

[47] Гавроска Поликсена, Дескоски Тони - ibidem, p 490

[48] For further info see: Cook Trevor, Garcia Alejandro, International intellectual property arbitration, Wolters Kluwer, 2010, p 23

[49] Haley-Nolan m. Jacqueline - ibidem, p 195

[50] In 1976 Fujitsu launched an IBM-compatible operating system. In 1983, IBM asserted that Fujitsu software infringed IBM`s copyright protection. Due to the disagreement of the parties, in 1995 IBM started an arbitration procedure against Fujitsu. A 3 member panel was established by an agreement between the parties, however in 1987 the presiding arbitrator resigned. Instead of appointing a new presiding arbitrator, the parties agreed that the tribunal can function with only 2 members

[51] Cook Trevor, Garcia Alejandro - ibidem, p 142

enforce some of the methods of pressure, or to address to the courts in order to conduct the procedure for enforcement.[52]

Described in brief, the above mentioned is the essence of the arbitration proceedings. This proceeding can be very attractive for resolving multi jurisdictional or global intellectual property disputes. Contrary to a court litigation where a multi jurisdictional case can be rejected in some jurisdictions, the arbitration can provide suitable solution for the problem. The opposite situation would require from the intellectual property right holder to start legal proceedings in every single country where the wrongdoing occurred. The existence of an arbitration agreement would eliminate this obstacle and will provide single procedure, reduction of costs and time needed to resolve the conflict, while obtaining potentially enforceable award in most countries of the world.

The extensive use of the arbitration is mainly done in the field of contractual relations regarding the intellectual property rights. However, even in the non contractual field, it is increasingly common for the parties to submit their multi state infringement disputes to a single arbitration proceeding. One of the most frequently used arbitration institutions in the field of intellectual property disputes is the WIPO Arbitration and mediation centre whose role has increased the past decade. Namely, it deals both with contractual and non contractual disputes with experience in dispute resolution and has specialized knowledge in intellectual property disputes. It is also considered to be the leading dispute resolution service provider for disputes arising out of the abusive registration and use of Internet domain names. The successfulness of this institution regarding is proven by the number of cases that are submitted in the past decade amounts to 23 000 cases in total, out of which one is from the Republic of Macedonia. [53]

1.3.2 Mediation

The mediation, also known by the name of conciliation, is defined as voluntary, non binding, confidential and flexible procedure in which a neutral intermediary, the mediator, endeavors, at request of the parties to a dispute to assist them in reaching a mutually satisfactory settlement of the dispute, or to provide a neutral evaluation of the parties ` respective positions.[54] Apart from the arbitration, the mediation is today the most spread and used ADR method. As a confirmation of this standpoint is also the fact that in some countries such as the Republic of Macedonia there is a specific Law on Mediation[55], even though the procedure for mediation is also prescribed in the main procedural civil and criminal acts.

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[52] Гавроска Поликсена, Дескоски Тони - ibidem, p 494
[53] http://www.wipo.int/amc/en/center/background.html, Last visit 26.04.2015
[54] WIPO 2002 - ibidem, p 89
[55] Official Gazzette of the Republic of Macedonia no. 78/2006, 12/2011, 12/2011

The basic characteristics of the mediation, in general are: contractual nature (it is connected to the proposal of one party for mediation which emphasizes the principle of party autonomy, typical for contractual relations), non accusatorial proceedings (the participants in the mediation proceedings are equal and there is no classical position of offence-defense), non adjudicative method of dispute resolution (the cause of the mediation is not the verdict, but one of the following three outcomes: settlement of the parties, decision for stopping the procedure, statement from one of the parties that it gives up from pursuing the procedure).[56]

Deriving from the concept of mediation implemented in one state, the level of education, skills, competences etc. can be determined. Namely if the state accepts the mediation as "private business" than anyone with business capability can be a mediator. However if the state accepts the mediation as a "quasi public", then it may require the mediator to fulfill the following conditions: to have a University Degree, to be specialist in a certain field, to have experience in the field of mediation, to poses some skills, to have acquired certain title (attorney at law, professor, judge) in order to be a mediator. The basic characteristics of the mediator, no matter of the concept of understanding the mediation are: impartiality and neutrality.[57]

In order for the case to be heard in front of a mediator it must be mediable. The concept of mediability differs from the concept of arbitrability, due to the fact that basically anything that generates dissatisfaction can be brought in front of a mediator.[58]This means that also the intellectual property disputes, involving infringement of the rights, can be brought without any problems in front of a mediator which will determine in accordance with its competences about the positions of the parties.

The mediation proceedings is divided in several parts, different from those in arbitration proceedings, such as: opening of the session, gathering of facts and information, determining the interests of the parties, valuation of the opinions and conclusions.[59] The effect of the mediation proceedings is substantive only in case of accomplishing a settlement between the parties. The stopping of the proceeding and the giving up of the mediation have only procedural implications. Therefore, the next step after finishing the mediation would be for the parties to conclude a new agreement, which can be concluded in a form of judicial or extrajudicial settlement. The form of settlement is chosen by the parties, but many authors among which Prof. Knežević consider that it is

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[56] Knežević Gašo, Pavić Vladimir - ibidem, p 227-228
[57] Ibid, p 227
[58] Ibid, p 235
[59] Ibid, p 232

better to be done as judicial settlement because of the status that it acquires, and that is the status of enforcement document.[60]

Unlike the arbitration, which starts to used as an alternative to court litigation regarding intellectual property dispute, the mediation is not used that often. In our opinion, the main reason for this is the fact that the parties are afraid that the agreement which they will reach through the process of mediation will not end up with a settlement, but will evaporate in thin air.

Apart from the above mentioned two most commonly used forms of ADR, there are also some other forms which are know, but are rarely used, especially in terms of intellectual property disputes.

CONCLUSION

The communications infrastructure provides for the new information economy much of what the rail tracks of the nineteenth century were to the industrial age. Modern telecommunications technologies are a vastly more complex, fluid and global platform than the railroads, highways and ocean lanes of yesteryear's economy, but they make possible the great leaps forward of the digital era. However, predicting the future is notoriously difficult. The existence of the Internet and the course of its development are very difficult to foreseen, because of its rapid pace.

With the continued growth of social media, it has become increasingly important for individuals and businesses to augment their plans to protect their intellectual property by developing a strategy for addressing violations of IP and other rights that take place on social media websites. There is a wide range of concerns especially due to the fact that by using the social media, not all users distributed original content, not all users remained their selves, but adopted identities of others, used the social media platforms to harass their real world enemies etc. It is therefore very important to bear in mind that not all infringements are of equal concern. Some of them are short life; others are very influential and read by many people. For these reasons the companies are introducing social media monitoring in order to obtain real time information and react urgently.

In order to be able to control the Internet, and the social media the Governments in the world are faced with another challenge: How to regulate the Internet relationships? With the emergence of the social media, another problem occurs: How to protect the intellectual property rights on social media?

This Article shows that it is not easy to find the appropriate regulation, but there is a trend of moving forward. Especially in the countries like Republic of Macedonia, this is not an easy task at

[60] Ibid, p 237-238

all. Republic of Macedonia has relatively long tradition of protection the intellectual property, which was developed in line with the international concepts. Therefore, we must emphasize that the Macedonian regulation in this field does not differ much from the European. And here we have to emphasize again the fact that the USA is to be considered the leader in regulating the relations on line (meaning e-commerce, privacy issues, free speech and infringement).

Furthermore, the basic principles of intellectual property law such as territoriality and specialty are another obstacle for the law makers. However, in our opinion the co - existence of rights, could be seen as one of the possible solutions for this problem. The principle should be shaped in a way that would safeguard the intellectual property rights owners as well as the service providers. The application, of the co-existence principle would reduce the risk of confusion by introducing disclaimer statements and would demand usage in "good faith". Moreover, the conduct of the participants would be sanctioned by the above explained take down mechanisms, which in our opinion should be improved and unified for all social media providers.

When the protection of the intellectual property rights on the social media is discussed, we also have to refer to the jurisdictional issues that arise out of the multi state infringement. This is a very interesting phenomenon, which occurs regularly on the Internet because of the nature of the relations at hand. Therefore, we have discussed the difference between the American and European concept of accepting, respectively declining jurisdiction. This issue was also viewed in the Macedonian legislation in order to determine a general conclusion that the jurisdiction is in fact easier to determine than the applicable law. The latter especially due to the lex loci protectionis rule.

The nature of social media is both a curse and a blessing for rights holders. The blessing is that content that violates rights might be deleted from social media sites before they have been widely viewed, downloaded or shared. In this respect is also the need of finding "alternative" means for the dispute resolution processes. Namely nowadays, the mechanisms that are under the ADR umbrella are far more useful than the classical ligation procedures. This is due to the fact of their basic characteristics but most important thing is the possibility to choose the people that will adjudicate the eventual dispute. Finally, the non binding ADR methods can only contribute in reaching faster agreement between the rights holders and the social media providers and therefore are very commonly recommended by the courts itself.

The protection of the intellectual property rights on the social media is only possible by changing, respectively amending the conscious of the participants in the online world. This is a long term process which would require educational trainings, seminars, workshops etc. which would help us raise the level of knowledge about the intellectual property rights, the basic rules of Internet, the consequences of infringement and would result in finding the optimal solution of protection.

Only in such case we can discuss about real implementation of the intellectual property rights without having fear of being “copied”.

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