

A Possibility of Right-of-Personality Approach to Infringement of Moral Rights (summary)

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According to the broadly expended idea, the applicable law to the moral rights is considered the *lex loci protectionis*. Its rationale is the expression of the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention). The article 6bis of this Convention provides that the remedy for the moral rights should be governed "by the legislation of the country where protection is claimed". It is the case in Japan as well. The decision of Tokyo District Court decision of 31 May 2004, Case No. 26832 (*wa*) of 2002 shows this idea. However, the question of whether the Berne Convention has the choice-of-law rule has been long discussed and no unified opinion can be found. Examining the historical background and the discussions during the drafting of the Berne Convention and the wording of the articles, it should be understood that the Berne Convention does not have the choice-of-law rule. In fact, a number of legislation and legal proposals prepare its own choice-of-law rule on the author's rights (both of moral rights and economic rights) apart from the clauses of the Berne Convention.

Indeed its reasoning remains unclear but today the applicable law to moral rights is generally integrated into the applicable law to economic rights of the author and the *lex loci protectionis* is applied to the issue.

However, the adequacy of this dominant understanding should be interrogated because the nature of the moral rights is quite different from that of the economic rights. The moral rights aim to protect the spiritual interests of the author expressed on his work and it is considered as one of, or at least very similar with, the rights of personality. Standing on this understanding, the possibility if the law applied to the moral rights should be approximated to the applicable law to the rights of personality, considered separately from that of economic rights, should be analyzed.

The theory of private international law has a long discussion on the applicable law of the rights of personality. This paper therefore examines the question of the applicability of the general theory concerning the rights of personality to the question of the moral rights.

Marshaling infringements of moral rights according to the form and type, there are some catalogs: defamation of the author through the misuse or modification of the work,

reveal of hidden information (real name of pseudonymous or anonymous author and unpublished work), misuse of the name of the author, damage of the inner interest of the author arising out of the modification which however does not harm his social reputation, and determination of the name of the author.

The first type can be classified as the defamation. The Act on General Rules for Application of Laws (Act No 78 of June 21, 2006) prepares the clause for the defamation (article 19) and its connecting factor to this question is the habitual residence of the victim. The law of the habitual residence of the author, therefore, should be applied in such a case.

The second should be considered as the infringement of privacy. The applicable law to this question is actively discussed but it should be governed within the framework of the general rule on torts. The article 17 of the Act on General Rules for Application of Laws therefore determines the applicable law and it should be the law of the place where the result of the infringing act has been occurred, provided that the occurrence of the result can be foreseeable.

Another two types, misuse of the author's name and the damage of the author's inner interest, should be also classified as torts. The article 17 is therefore applied.

The determination of the author's name brings a complicated question. It is approximated to the determination of the name, which is governed by the *lex personalis* (although some discussions can be found) for the reason that it symbolizes the personality of the person. However, it is not appropriate to assimilate these two questions because the personal interest expressed by the author's name can exist with a certain work. The *lex originis*, the "national" law of the work, should be the most adequate to this type of question from the view of the closest connection.