

Party autonomy in infringement of copyright: Beijing IP Court Judgement in the Drunken Lotus

China is one of few countries that permits the parties to choose the applicable law governing cross-border infringement of intellectual property disputes. Article 50 of the Chinese Law Applicable to Foreign-Related Civil Relations 2010 (Conflicts Act) provides that the parties could choose Chinese law (*lex fori*) after dispute has arisen to derogate from the default applicable law, i.e. *lex loci protectionis*, in IP infringement disputes.

This choice of law rule was applied by the Beijing IP Court in its 2017 decision on Xiang Weiren v Peng Lichong (“Drunken Lotus”), (2015) Jing Zhi Min Zhong Zi 1814. The claimant published his painting “Drunken Lotus” in 2007. In 2014, the defendant exhibited his artwork entitled “Fairy in Lotus” in Mosco and Berlin, which allegedly had infringed the claimant’s copyrights. Although the parties did not enter into an explicit choice of law agreement, both parties submitted their legal arguments based on Chinese Copyright Law, which was deemed an “implied” *ex post* choice of Chinese law. Beijing IP Court thus applied Chinese law to govern the infringement dispute.

This case reveals a number of interesting points. Party autonomy may provide a practical alternative to *lex loci protectionis* in infringements occurring in multiple jurisdictions. In the Drunken Lotus case, applying *lex loci protectionis* would result in the application of two foreign laws, Russian and German law, respectively to the infringement occurred in Russia and Germany. In the even worse scenario, where a copyright is infringed in the internet, the territoriality nature of copyrights may result in multiple, similar but independent, infringements occurring in all countries where the online information is accessed, causing more difficulties for the claimant to enforce their rights based on multiple applicable laws.

However, there may be no convincing argument to limit the choice to the *lex fori*. If party autonomy is justifiable in IP infringement, which is controversial, it would be appropriate for the parties to choose any law. The only justification of such a

limitation probably stems from judicial efficiency and pragmatism. It would be more convenient for the court to apply its own law. Also in practice, it is very common that when the litigation is brought in China and especially where both parties are Chinese, the parties naturally rely on Chinese law to support their claims or defences without being aware of the potential choice of law questions. It renders “implied” *ex post* choice exist very frequently and make it legitimate for Chinese court to apply Chinese law in most circumstances. It is also likely that allowing the parties to choose the *lex fori* could be an attractive reason for the claimants, especially those in multi-jurisdiction infringement disputes, to bring the action in China, granting Chinese court a competitive advantage versus other competent jurisdictions.

Furthermore, the Chinese law only permits party autonomy in infringement of IPRs. Any issues concerning substance of IPRs, including ownership, content, scope and validation, are exempt from party autonomy (Art 48 of Contracts Act). These issues are usually classified as the proprietary perspective of IPRs, exclusively subject to the *lex protectionis* to the exclusion of party autonomy. However, before a court could properly consider the infringement issue, it is inevitable to know at least the content and scope of the disputed IPR in order to ascertain parties’ rights and obligations. In other words, the substance and infringement of IPRs are two different, but closely related, issues. Applying party autonomy means the court should apply two different laws, one for the substance and the other infringement, causing *depacage*. The necessity to decide the content of IPRs may largely reduce the single law advantage brought by party autonomy in multi-jurisdictional infringements. In the Drunken Lotus case, Chinese court simply applied Chinese law to both the content and infringement issues, without properly considering substance and infringement classification.