

## *Editorial*

### **Private international law and intellectual property**

This special issue of *NIPR* is devoted to the interface between private international law and intellectual property law. These are two distinct areas of law that have gone their separate ways for some time; however, currently, they seem to be converging again. This is reminiscent of the well-known poem by the Dutch poet Martinus Nijhoff about the new bridge built near Zaltbommel in the Netherlands: ‘Two sides, that once appeared to avoid each other, are now becoming neighbours again.’ (*Twee overzijden, die elkaar vroeger schenen te vermijden, worden weer burenen.*)

Private international law and intellectual property law have, however, not always avoided one another. An important moment when they came together was in the nineteenth century during the 1880s. At this time, the two fundamental treaties on intellectual property law were established: the Berne Convention on copyright law in 1886 and the Paris Convention for the protection of industrial property in 1883. The drafters of these conventions were *inter alia* confronted with the question as to what conflict-of-law rule should apply in the context of intellectual property law. They opted for a solution which was standard practice in virtually all of the intellectual property treaties in force at that time: the so-called principle of national treatment. In short, the national treatment rule prescribes that, in every country that is party to the treaty, authors, inventors etc. shall enjoy the rights that the national law grants to its own nationals. At that time, in the nineteenth century, it was clear what was meant by this; however, currently, the opinions regarding the meaning of this principle differ to a significant extent. Is it merely a principle of non-discrimination, with no meaning in the context of conflict of laws? Or does it, besides constituting a principle of non-discrimination, also specify which national law is applicable? This is a fundamental question. The Berne Convention and the Paris Convention are, after all, applicable in essentially every country in the world today. In the event that they encompass a conflict-of-law provision, this will form the law in force all over the world and will prevail over European and domestic conflict-of-law rules. The debate in relation to this fundamental question is still ongoing. Personally, I believe that – and in the past, have attempted to explain why – the principle of national treatment in these conventions is a solution which goes back to the statute doctrine and the principle of territoriality and which contains, in a modern-day context, two rules: both a conflict-of-law rule (namely the *lex loci protectionis*) and a law of aliens rule (namely a non-discrimination rule).

Following this ‘contact moment’ in the nineteenth century, it seemed that thereafter, during the first half of the twentieth century, private international law and intellectual property law avoided each other somewhat. In legal literature, some attention was paid to the interface of these two areas of law; however, in practice there was hardly any interaction. Disputes over intellectual property were seldom international and instead were national, territorially limited disputes. These were brought before domestic courts that applied their own national intellectual property law. This territorial approach trundled on for some time. In the second half of the twentieth century, however, this ‘introverted’ character began to change.

Globalisation increased and the exploitation of intellectual property and the disputes arising therefrom also became more and more international. It goes without saying that the Internet accelerated this development dramatically. This has not gone unnoticed. Since the end of the twentieth century, increasing importance has been attached to the interface between private international law and intellectual property law. It is also commendable that *NIPR* has decided to devote a special issue to this subject and I am honoured to be the guest editor.

### **Five pictures at an exhibition**

This special issue contains five contributions that shed light on various aspects of the interface between private international law and intellectual property law.

The first contribution is by *Paul Torremans* and concerns the law applicable to copyright infringement on the Internet. The fundamental question regarding the conflict-of-law rule in the Berne Convention, as outlined above, is pivotal to Torremans' contribution. For this, he goes back to the past and then connects this with the present. Is this conflict-of-law rule still fit for use in the context of the Internet, where an infringement quickly becomes ubiquitous, or is another conflict-of-law rule necessary for this? Further, how does the Berne conflict-of-law rule relate to the Rome II Regulation, in which the European legislator included a conflict-of-law rule for the infringement of intellectual property rights (Article 8) and with a recent proposal of the European Commission on the cross-border portability of online content service in the internal market?

After the bridge has been built between the past and the present in the contribution of Torremans, the following contribution, written by myself, concentrates on a present theme concerning jurisdiction: multiple defendants in intellectual property litigation. Globalisation and more complex economic structures have led to disputes over infringements of intellectual property no longer always being a question of a one-on-one situation, in other words, one right holder (usually the plaintiff) versus one alleged infringer (usually the defendant). Today, a right holder may also be confronted by multiple infringers, for instance, various corporate entities that belong to a competing concern or, in a network of cooperating but independent entities. Is it possible to instigate civil actions against several defendants in just one court? In this context, the *forum connexitatis* in Article 8(1) Brussels I *bis* Regulation comes into play. This contribution seeks to explore, evaluate and comment on the current state of affairs in respect of this difficult provision in the context of intellectual property litigation.

Moving from the present to the future, the next contribution, from *Michael Kant*, is focused on the present and the near future. Since the 1970s, an attempt has been made to unify patent law within Europe. Finally, this has picked up pace and, in this context, a unified court has been established, the Unified Patent Court (UPC), to which, in short, the participating countries shall transfer their patent dispute settlements in respect of European patents and so-called European patents with unitary effect. This court comprises a Court of Appeal in Luxembourg, a Court of First Instance, with a central division (in Paris, Munich and London), regional divisions and local divisions (the Dutch local division in The Hague), and a Registry. It is intended that the UPC will come into existence at the beginning of 2017; however, Brexit has caused complications. In any event, the advent of the UPC also brings with it questions of jurisdiction and, accordingly, has led to an amendment of the Brussels I *bis* Regulation: this has been done by virtue of Regulation (EU) no. 542/2014 which contains a number of provisions that aim to regulate the alignment of the UPC with the Brussels I system (Articles

71a to 71d). In Kant's contribution, this is the subject of close scrutiny in an analysis that focuses on the uncertainties and schematic inconsistencies that have arisen.

These first three contributions focus on the law as it is in force. By contrast, the remaining two relate to the law which is considered to be desirable and thus refer to the future. First of all, *Mireille van Eechoud* begins with the various initiatives for international regulation and for soft law, which have come to light over the last decade. As previously mentioned, the interface between private international law and intellectual property law has, since the end of the twentieth century, been the subject of increasing interest and since then in various forums, draft rules or principles for soft law have been drawn up. In this context, in the United States the American Law Institute created a set of principles, while in Europe, under the auspices of the Max Planck Institute, a more European-orientated model regulation was drafted – the CLIP Principles. Additionally, in the Pacific similar initiatives were developed, such as the Japanese 'Transparency Principles' project and the Joint Korean-Japanese Principles. Taking these regional soft law initiatives into account, a committee from the International Law Association is currently working on an overarching synthesis in the form of guidelines that could serve as inspiration for future conventions or national law. In Van Eechoud's contribution, the various initiatives are outlined and the objectives, working methods and progress of the International Law Association's committee are discussed.

Finally, *Dário Moura Vicente* tackles the principle of territoriality, which has been and continues to be indisputably dominant in international intellectual property law. To what extent is this principle still desirable? What are the limitations to territoriality in modern times and what is the preferred scope thereof? These questions are addressed in this contribution and inspiration is drawn from the soft law initiatives dealt with in Van Eechoud's contribution, for instance, the CLIP Principles.

### **Bridging the gap**

With these five contributions, many of the aspects of the interface area between private international law and intellectual property law are explored: jurisdiction and conflict of laws; copyright and patent law; law which is in force or which is desired; past, present and future. Taken together, they paint a picture of an area of law which is evolving fast, an area which legal practitioners are being confronted with more and more, an area where more and more is being published in legal literature, where a fundamental debate is taking place, where model regulations and principles are being drafted, and where experts in private international law and experts in intellectual property law now engage in discussions with each other, in order to bridge the gap. Hopefully, the two sides that once appeared to avoid each other, now become neighbours again.

*Sierd J. Schaafsma*  
Guest Editor