

Trimble on Advancing IP Policies in a Transnational Context

Marketa Trimble (University of Nevada William S Boyd School of Law) has posted *Advancing National Intellectual Property Policies in a Transnational Context* on SSRN.

The increasing frequency with which activities involving intellectual property (“IP”) cross national borders now warrants a clear definition of the territorial reach of national IP laws so that parties engaging in the activities can operate with sufficient notice of the laws applicable to their activities. Legislators, however, have not devoted adequate attention to the territorial delineation of IP law; in fact, legislators rarely draft IP statutes with any consideration of cross-border scenarios, and with few exceptions IP laws are designed with only single-country scenarios in mind. Delineating the reach of national IP laws is actually a complex matter because the reach depends not only on substantive IP law, but also on conflict of laws rules. Yet until recently conflict of laws rules had rarely been considered or drafted with IP issues in mind. In some countries, such as Switzerland, Poland, and China, legislators have reviewed conflict of laws rules in light of IP laws and passed conflict of laws statutes with IP-specific provisions; the European Union has IP-specific provisions in its instruments on conflict of laws as well. In the United States, state conflict of laws rules provide no IP-specific rules, nor does the Restatement (Second) of Conflict of Laws, which federal courts apply when deciding federal question cases.

This article argues that because of the rising importance of cross-border IP activities and the increasing need for clear territorial delineation of IP laws it is important for legislators to give equal consideration to cross-border and single-country scenarios when drafting legislation, and to calibrate the territorial scope of national IP laws with conflict of laws rules to achieve the desired territorial reach of national IP policies. The article analyzes the interaction of IP laws and conflict of laws rules and reviews from both the IP law and the conflict of laws perspectives the various tools that are available to define the territorial reach of national IP laws. The fact that legislators deal with numerous “moving pieces” (particularly the conflict of laws rules of foreign

countries) when they design the territorial reach of national laws should not discourage the legislators from striving to improve certainty about the territorial reach of national laws. Depending on the degree to which the “moving pieces” limit legislators’ ability to improve the certainty, countries may wish to negotiate and enter into international agreements in order to set uniform conflict of laws rules and define the limits of the territorial reach of national IP laws.

The paper is forthcoming in the *Maryland Law Review*.