217 Research Paper
20 May 2025

Cross-Border Enforcement of Copyright: A Special Emphasis on Court Decisions and Arbitral Awards

Hany Salem

SOUTH CENTRE

RESEARCH PAPER

217

CROSS-BORDER ENFORCEMENT OF COPYRIGHT: A SPECIAL EMPHASIS ON COURT DECISIONS AND ARBITRAL AWARDS

Hany Salem[1]

SOUTH CENTRE

20 MAY 2025

1 This paper is based on a thesis developed under the supervision of Prof. Stéphanie Carre, University of Strasbourg, CEIPI M2 International and European IP Law.

SOUTH CENTRE

In August 1995, the South Centre was established as a permanent intergovernmental organization. It is composed of and accountable to developing country Member States. It conducts policy-oriented research on key policy development issues and supports developing countries to effectively participate in international negotiating processes that are relevant to the achievement of the Sustainable Development Goals (SDGs). The Centre also provides technical assistance and capacity building in areas covered by its work program. On the understanding that achieving the SDGs, particularly poverty eradication, requires national policies and an international regime that supports and does not undermine development efforts, the Centre promotes the unity of the South while recognizing the diversity of national interests and priorities.

NOTE

The views contained in this paper are attributable to the author/s and do not represent the institutional views of the South Centre or its Member States. Any mistake or omission in this study is the sole responsibility of the author/s.

Any comments on this paper or the content of this paper will be highly appreciated. Please contact:

South Centre
International Environment House 2
Chemin de Balexert 7–9
1219 Geneva
Switzerland
Tel. (41) 022 791 80 50
south@southcentre.int
www.southcentre.int

ABSTRACT

In today's digitally interconnected world, copyright infringement frequently crosses national borders, presenting complex legal challenges for effective enforcement of intellectual property rights in general, and copyright in particular. This paper examines the challenges associated with cross-border copyright enforcement, particularly the critical role of Private International Law (PIL) in the recognition and enforcement of foreign court decisions and arbitral awards. Although foundational treaties such as the Berne Convention, the TRIPS Agreement, and the WIPO Copyright Treaty establish essential principles of international copyright protection, they offer very limited guidance on resolving procedural and jurisdictional issues that arise in cross-border Copyright disputes.

The analysis contends that the territorial nature of copyright law, compounded by fragmented and insufficiently developed PIL frameworks, creates legal uncertainty and inefficiency for rightsholders to secure effective remedies. To address these shortcomings, the study underscores the need for a more coherent and harmonized international PIL approach. It further explores the potential of soft law instruments - particularly the 2020 Kyoto Guidelines – as a constructive step toward resolving PIL issues related to international copyright disputes. By narrowing the gap between domestic legal systems and international enforcement mechanisms, these developments could significantly enhance legal predictability and access to justice in the global digital environment.

En el mundo actual, interconectado digitalmente, la infracción de los derechos de autor traspasa con frecuencia las fronteras nacionales, lo que plantea complejos retos jurídicos para la aplicación efectiva de los derechos de propiedad intelectual en general, y de los derechos de autor en particular. El presente documento examina los retos asociados a la aplicación transfronteriza de los derechos de autor, en particular el papel fundamental del Derecho Internacional Privado (DIP) en el reconocimiento y la ejecución de las resoluciones judiciales y los laudos arbitrales extranjeros. Aunque tratados fundamentales como el Convenio de Berna, el Acuerdo sobre los ADPIC y el Tratado de la OMPI sobre Derecho de Autor establecen principios esenciales para la protección internacional de los derechos de autor, ofrecen una orientación muy limitada sobre la resolución de las cuestiones procesales y jurisdiccionales que se plantean en los litigios transfronterizos en materia de derechos de autor.

El análisis sostiene que el carácter territorial de la legislación sobre derechos de autor, agravado por la fragmentación y el desarrollo insuficiente de los marcos de DPI, crea incertidumbre jurídica e ineficiencia para que los titulares de derechos puedan obtener recursos efectivos. Para subsanar estas deficiencias, el estudio subraya la necesidad de un enfoque internacional más coherente y armonizado en materia de PIL. Además, explora el potencial de los instrumentos de derecho indicativo, en particular las Directrices de Kioto de 2020, como un paso constructivo hacia la resolución de las cuestiones de PIL relacionadas con los litigios internacionales en materia de derechos de autor. Al reducir la brecha entre los sistemas jurídicos nacionales y los mecanismos internacionales de aplicación, estos avances podrían mejorar considerablemente la previsibilidad jurídica y el acceso a la justicia en el entorno digital mundial.

Dans le monde numérique interconnecté d'aujourd'hui, les violations des droits d'auteur transcendent souvent les frontières nationales, ce qui pose des défis juridiques complexes pour l'application effective des droits de propriété intellectuelle en général, et des droits d'auteur en particulier. Ce document examine les défis liés à l'application transfrontalière des

droits d'auteur, en particulier le rôle essentiel du droit international privé (DIP) dans la reconnaissance et l'exécution des décisions des tribunaux étrangers et des sentences arbitrales. Bien que des traités fondamentaux tels que la Convention de Berne, l'Accord sur les ADPIC et le Traité de l'OMPI sur le droit d'auteur établissent les principes essentiels de la protection internationale du droit d'auteur, ils offrent très peu d'orientations sur la résolution des questions de procédure et de compétence qui se posent dans les litiges transfrontaliers en matière de droit d'auteur.

L'analyse soutient que la nature territoriale du droit d'auteur, aggravée par des cadres de droit international privé fragmentés et insuffisamment développés, crée une insécurité juridique et une inefficacité pour les titulaires de droits qui souhaitent obtenir des recours efficaces. Pour remédier à ces lacunes, l'étude souligne la nécessité d'une approche internationale plus cohérente et harmonisée en matière de droit international privé. Elle explore en outre le potentiel des instruments de droit souple, en particulier les lignes directrices de Kyoto de 2020, comme étape constructive vers la résolution des questions de droit international privé liées aux litiges internationaux en matière de droit d'auteur. En réduisant l'écart entre les systèmes juridiques nationaux et les mécanismes internationaux d'application, ces évolutions pourraient améliorer considérablement la prévisibilité juridique et l'accès à la justice dans l'environnement numérique mondial.

TABLE OF CONTENTS

LIST OF ABBREVIATIONS

ACTA	The Anti-Counterfeiting Trade Agreement
ALI	American Law Institute
CLIP	the European Max Planck Group Commentaries on Conflict of Laws in Intellectual Property Principles
CMO	Collective Management Organizations
DSB	The Dispute Settlement Body of the World Trade Organization
DSU	The Dispute Settlement Understanding of the WTO
ERMI	Electronic Rights Management Information
FTAs	Free Trade Agreements
HCCH	The Hague Conference on Private International Law
IP	Intellectual Property
Lex arbitri	(Latin for law of the arbitration)
Lex contractus	(Latin for law of the contract)
Lex fori	(Latin for law of the forum)
Lex loci protectionis	(Latin for the law of the place where protection is claimed)
MFN	The Most-Favored-Nation Treatment Principle.
PIL	Private International Law
TFEU	Treaty on the Functioning of the European Union.
WCT	The WIPO Copyright Treaty (1996)
WIPO	World Intellectual Property Organization
WTO	The World Trade Organization
WPPT	The WIPO Performances and Phonograms Treaty (1996)
OSP	Online Service Provider

INTRODUCTION

The digital age has facilitated not only the creation and dissemination of copyrighted works across borders, but also the cross-border infringement of these works. However, effective enforcement of copyright remains a challenge in this globalized environment.

The reasons for this situation can be attributed to the differences between national laws regulating copyright. This stems from two key concepts: territoriality and national sovereignty.

On one hand the concept of “territoriality” which means that copyright protection is limited geographically[2] even with the principle of “national treatment” aims to ensure fair treatment for all creators, regardless of nationality. International protection and enforcement of copyright ultimately rely on navigating multiple national laws. On the other hand, the concept of “national sovereignty” plays a key role in intellectual property law. This means that sovereign States have the autonomy to establish their own intellectual property laws and jurisdictional reach in support of their economic, cultural, and foreign policy objectives. These policy goals often influence the level of protection afforded to intellectual property and the authority of domestic courts to handle international intellectual property disputes.[3]

Nonetheless, these concepts should not hinder international endeavors to tackle the consequences stemming from them. Considering that copyright infringements frequently surpass national boundaries and copyright agreements increasingly involve global parties, it is imperative for copyright enforcement to evolve into a global framework. Put simply, without effective mechanisms to enforce rights internationally, the fundamental essence of copyright becomes hollow, and futile.

The term enforcement in "Black's law dictionary" is defined as “**Making sure a rule or standard or court order or policy is properly followed**.”[4] the verb to enforce in the same dictionary is *“***To put into execution; to cause to take effect; to make effective; as, to enforce a writ, a judgment, or the collection of a debt or fine***”.*[5]

Therefore cross-border enforcement of copyright can be defined as the actions taken to ensure that a rule, standard, court order, or policy related to copyright protection is upheld across different national borders.

Rightsholders have a range of options available to enforce their copyrights nationally and internationally, such as judicial enforcement (civil and criminal) through court systems, administrative procedures utilizing government agencies, border measures to prevent infringing material at borders, and alternative dispute resolution (ADR) methods like mediation, conciliation, or arbitration.

This paper primarily focuses on **civil** enforcement, specifically the challenges associated with enforcing court judgments and arbitral awards in a cross-border context, as it presents the most complex set of obstacles. Given its emphasis on "**global enforcement**" achieved through court judgments or arbitral awards, the primary focus will be on international legal frameworks governing the recognition and enforcement of such decisions across borders. National laws,

---

[2] BOUCHE (N), le principe de territorialité de la propriété intellectuelle, Ph. D. Thesis. Strasbourg university, 2000, p. 24.
[3] Torremans (p), Research handbook on cross-border enforcement of intellectual property, Edward Elgar publishing, 2014, p 558.
[4] https://thelawdictionary.org/enforcement/ (accessed June 20, 2024).
[5] https://thelawdictionary.org/enforce/ (accessed June 20, 2024).

regional agreements, and bilateral treaties concerning copyright enforcement will not be extensively explored. However, these national and regional instruments may be examined in a more limited way if they directly contribute to the central themes of this paper, such as illuminating challenges or opportunities within the international copyright enforcement landscape.

The global legal framework for copyright rests on three foundational agreements. First, the Berne Convention for the Protection of Literary and Artistic Works (1886) established the cornerstone of international copyright law. It enshrines three core principles: national treatment, automatic protection, and independence of protection. These principles play a crucial role in international copyright enforcement. Nevertheless, the Berne Convention has limited provisions when it comes to directly enforcing copyright beyond national borders. Furthermore, it lacks an efficient mechanism for enforcing its minimum standards provisions.

The Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS Agreement) of 1994 goes beyond the Berne Convention in two key regards in addressing its shortcomings in cross-border copyright enforcement. Firstly, it introduces the Most-Favored-Nation (MFN) requirement, ensuring equal treatment for all WTO members. Secondly, it imposes specific enforcement procedures, providing a more robust framework to combat copyright infringement. Also, The WIPO Copyright Treaty (WCT) of 1996 was adopted to address the challenges posed by digital technology, particularly the internet.

However, the proliferation of regional and specific intellectual property (IP) agreements, especially the inclusion of IP chapters in bilateral Free Trade Agreements (FTAs), raises a crucial question: are these existing agreements sufficient to address the challenges of cross-border copyright enforcement in this increasingly complex legal landscape? On the other hand, simply establishing legal frameworks for international copyright enforcement, through multilateral, or even through regional, or bilateral agreements, is not enough to address all the issues related to cross-border copyright disputes.

Private International Law (PIL) plays a crucial role in resolving cross-border copyright disputes, as these cases always involve a foreign element. When a copyright dispute arises with a cross-border element, three key issues need to be determined: firstly, the competent court to hear the case; secondly, identifying the governing law that will be applied to the dispute; and finally, the recognition and enforcement of the outcome of the dispute, whether it is a court decision or an arbitral award. This raises another crucial question: Does the existing framework of PIL adequately address the complexities of cross-border copyright enforcement?

This paper explores the role of private international law (PIL) in copyright enforcement, particularly regarding the enforcement of court decisions and arbitral awards. This will involve investigating the relevant PIL provisions within specific intellectual property agreements and other general PIL agreements and addressing the question whether the existing framework of PIL adequately deals with the complexities of cross-border copyright enforcement.

CHAPTER 1 PRIVATE INTERNATIONAL LAW (PIL) IN CROSS-BORDER COPYRIGHT ENFORCEMENT

Private international law (PIL) principles play a critical role in international copyright litigation, as these cases always involve a foreign element.[6] When a copyright dispute arises with a cross-border element, two key issues immediately come to the forefront: firstly, determining the competent court with the legal authority to hear the case (Section 1). Secondly, Identifying the governing law that will be applied to the dispute (Section 2)

Section 1: Jurisdiction in Cross-Border Copyright Litigations

I - Jurisdiction in Cross-Border Copyright Disputes: International Legal Framework?

It might be frustrating to commence this subsection with the affirmation that, the major international agreements on copyright, TRIPS, WCT, and Berne Convention, don't have specific rules governing jurisdictional conflicts within cross-border copyright disputes. While these agreements establish minimum standards for copyright protection and enforcement, they leave the issue of jurisdiction to national laws and PIL principles.

On the one hand, the lack of a single, overarching international framework for jurisdiction in copyright disputes stems largely from the concept of "territoriality" in intellectual property. This traditional concept of intellectual property rights means that these rights are granted by individual countries.[7] Even under the national treatment principle, a work is certainly protected internationally in all the countries adhering to the said principle. However, this international protection is granted under multiple national laws. This situation is of a nature to creates complications in the digital age[8] as authors or rightsholders can have copyright protection for the same work in multiple countries. In such situations, establishing an international legal framework to determine which court has jurisdiction is necessary, though complicated.

This concept of territoriality is closely linked on the other hand, to the principle of "national sovereignty".[9] Sovereign States have the right to implement their own economic, cultural, and foreign policy objectives through their intellectual property laws and jurisdictional reach. These policy considerations often influence the level of protection granted to intellectual property and the extent to which domestic courts can exercise jurisdiction in international disputes.[10]

Apart from regional legal frameworks[11] that address private international law (PIL), there is currently no international PIL framework specifically focused on the issue of jurisdiction to address cross-border copyright disputes, **except for the Hague Conference on Private International Law (HCCH) Convention of 30 June 2005 on Choice of Court Agreements.**[12] However, it primarily deals with agreements that pre-select a competent court rather than

---

[6] PIL issues arise if a dispute, or part of the dispute, involves a foreign element. For instance, if the place of infringement is in a foreign State, the damage is incurred in a foreign State, or the parties are in different States.
[7] Torremans (p), Research handbook on cross-border enforcement of intellectual property…. Op. cit., p 558.
[8] Ibid.
[9] Kono «Jurisdiction and Applicable Law in Matters of Intellectual Property», Article found in «General Reports of the XVIII Congress of the International Academy of Comparative Law», Springer Science and Business Media B.V., 2012, P395.
[10] Ibid.
[11] For instance, the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters "Brussels 1 recast".
[12] The HCCH Choice of Court Convention, opened for signature 30 June 2005, and entered into force 1 October 2015.

providing a comprehensive approach to all jurisdictional issues in cross-border copyright disputes. Therefore, other aspects of conflicts of jurisdiction will continue to be subject to national or regional (if applicable) legal frameworks.

The HCCH Choice of Court Convention applies in international cases[13] to exclusive choice of court agreements concluded in civil or commercial matters.[14]

The Convention excludes intellectual property rights from its scope, except for copyright and related rights. This is emphasized by article 2 stating that the Convention does not apply to the validity or infringement of intellectual property rights *"*other than copyright and related rights." Therefore, copyright is explicitly included within the Convention's scope.

The HCCH Choice of Court Convention is built upon three key obligations:

1) the chosen court designated in a valid exclusive choice of court agreement to hear the dispute[15]. However, an exception exists if the agreement is deemed null and void under the law of the chosen court's State.

   Determining jurisdiction is critical for ensuring security and predictability for the parties involved. This allows them to rely on their chosen forum for resolving disputes arising from their cross-border copyright contractual relationship.

   This may also apply to agreements concluded post-dispute, even in relation to tort or non-contractual relationships, since the HCCH Choice of Court Convention does not explicitly prohibit parties from establishing an agreement to resolve a dispute after it arises. However, it might be argued that article 3 (k) excluded *"tort or delict claims for damage to tangible property that do not arise from a contractual relationship"* from its scope. Nevertheless, the term "*tangible"* property*,* affirms that tort or non-contractual cross-border copyright disputes, remain under the scope of the convention, since copyright is always "*intangible*" property.

2) Subject to certain exceptions,[16] any non-chosen court must suspend or dismiss proceedings to which an exclusive choice of court agreement applies.[17] This obligation aims to prevent any parallel proceedings.

3) A judgment given by the chosen court must be recognized and enforced[18] in other contracting States parties to the convention[19].

The most significant advantage of the convention is that it guarantees certainty and predictability for authors or rightsholders seeking to exploit their copyrights abroad. However, the convention has certain pitfalls to consider in respect of cross-border copyright disputes; the HCCH convention explicitly stated by article 7, that Interim measures of protection are not governed by it. which might undermine the aforementioned certainty and predictability in this regard. These measures, such as seizing infringing materials or blocking access to infringing

[13] According to article 1, a case is "international" where the parties are not resident in the same Contracting Party and their relationship and all other elements relevant to the dispute are not connected only with that Contracting Party. a dispute is considered international when it involves seeking the recognition or enforcement of a judgment from a court outside the member.
[14] Article 3 (N&O).
[15] Article 5.
[16] The most notable of them are; if the agreement is null and void under the law of the State of the chosen court, or it is contrary to the public order of the State of the court seized.
[17] Article 6.
[18] Subject to certain exceptions as grounds for refusal of recognition or enforcement provided for in article 9. For instance, the judgment was obtained by fraud, or if the judgment was inconsistent with a judgment given in the requested State in a dispute between the same parties
[19] Article 8.

websites, are crucial for copyright holders in civil proceedings, as they help them to preserve the status quo or to prevent further harm.

II - Soft Law in Resolving Jurisdictional Conflicts in Cross-Border Copyright Disputes

As mentioned earlier, there is currently no international legal framework that governs the issues of jurisdictional conflicts related to cross-border copyright disputes, except for the HCCH Convention of 30 June 2005 on Choice of Court Agreements, which is neither comprehensive to deal with all jurisdictional matters nor expanded, as it has very limited applicability to copyright infringement claims arising from torts (civil wrongs) rather than contracts.

Therefore, the resolution of jurisdictional conflicts concerning cross-border copyright disputes is still dependent on national laws, with potential consideration of regional agreements if applicable. for instance, within the European Union, the Regulation (EU) No 1215/2012 Brussels 1 recast, may apply only if the defendant is domiciled in a Member State,[20] otherwise, national laws will govern the jurisdictional matters.

However, in the digital age, the widespread reach of the internet can potentially lead to infringement and damage on a global scale, as websites can be accessed from anywhere. As a result, authors or rightsholders often find themselves having to navigate multiple national laws to protect their copyright, ultimately needing to engage with multiple countries' jurisdictions to ensure the enforcement of their rights. However, even if they pursue legal action in multiple jurisdictions, there is no guarantee that the judgments obtained will be recognized and enforced in the other involved countries.

This lack of legal security and predictability undermines the global efforts made to establish an international framework for enforcement of rights, as seen in the TRIPS agreement. In such complex situations, the establishment of an international legal framework to determine jurisdiction and applicable law as well, becomes necessary, albeit challenging.

To accomplish this objective,[21] several soft law initiatives have put forth normative frameworks that address the intersection of private international law (PIL) and intellectual property (IP). These initiatives aim to provide guidelines and standards for the resolution of PIL issues pertaining to IP (A). The Kyoto Guidelines stand out as a potential steppingstone for a harmonized international framework. Their recent development and comprehensive approach make them particularly noteworthy (B).

A- Paving the Way: A Look at Soft Law Instruments in Cross-Border Copyright Disputes.

Many soft law instruments offer guidance on resolving PIL issues in cross-border intellectual property disputes. The most prominent and well-established instruments include: the American Law Institute (ALI)[22] Principles, the European Max Planck Group Commentaries on Conflict of Laws in Intellectual Property Principles (CLIP Principles), and the Kyoto Guidelines.[23] While

[20] Article 6 of the regulation.
[21] GINSBURG (J.C) & TREPPOZ (E), International copyright law: U.S. and E.U. perspectives: text and cases, Edward Elgar Publishing, 2015, p. 642.
[22] The ALI is a non-profit organization in the United States that drafts influential soft law instruments aimed at promoting uniformity and improvement in legal practice.
[23] Ibid.

other initiatives exist, they may have a more limited scope or influence compared to these major resources.[24]

It's worth noting that all the aforementioned instruments are not legally binding. However, they serve as valuable resources, paving the way for a more robust international legal framework for resolving PIL issues in cross-border copyright disputes.

The first set of principles was prepared by The American Law Institute (ALI). These principles aim to assist counsel and courts by providing a framework for analyzing jurisdictional conflicts in intellectual property cases. While these principles not binding, they can also carry significant weight as a persuasive guide for legislatures grappling with how to draft laws in this complex area. This influence stems from the ALI's well-established reputation for promoting uniform laws within the United States and across Europe.[25]

The American Law Institute principles were subsequently followed by the European CLIP[26] Principles 2011. While both aim to provide guidance in resolving jurisdictional conflicts, the CLIP Principles place a greater emphasis on choice of law,[27] Notably, the CLIP Principles' preamble explicitly states that they *"may serve as a model for national, regional and international legislators".*

The most recent initiative in this regard was the Kyoto guidelines on intellectual property and private international law developed by the International Law Association (ILA) in 2020.

While both the ALI Principles and the European CLIP Principles have made significant contributions to addressing private international law (PIL) in cross-border intellectual property disputes, this paper will focus primarily on the Kyoto Guidelines on Intellectual Property and Private International Law (2020) As a model that might offer a comprehensive framework for establishing an international legal framework for cross-border copyright disputes for several reasons:

Firstly, the Kyoto Guidelines build upon the established principles of the ALI and CLIP instruments,[28] being the most recent initiative (2020), the Kyoto Guidelines constitute the most up-to-date proposal reflecting the current state of discussions on private international law and cross-border copyright disputes.

Secondly, the Kyoto Guidelines offer the most comprehensive framework. As they encompass jurisdiction, applicable law, and the recognition and enforcement of judgments, providing a holistic approach to resolving cross-border copyright disputes.

Finally, the Kyoto Guidelines explicitly address copyright issues. Therefore, it may perfectly constitute a steppingstone for establishing a robust international legal framework for resolving cross-border copyright disputes.

---

[24] For instance, the Japanese Transparency Proposal on Jurisdiction, Choice of Law, Recognition and Enforcement of Foreign Judgments in Intellectual Property and Joint Proposal by Members of the Private International Law Association of Korea and Japan.

[25] Dessemontet (F), « A European Point of View on the ALI Principles Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes», Brooklyn Journal of International Law, 2005, p855.

[26] The European Max Planck Group on Conflict of Laws in Intellectual Property (CLIP) is a group of scholars in the fields of intellectual property and private international law. Max Planck Institute for Innovation and Competition, 23 February 2016. Available from https://www.ip.mpg.de/en/research/research-news/principles-on-conflict-of-laws-in-intellectual-property-clip.html.

[27] Conflict of laws in intellectual property: the CLIP principles and commentary, Oxford: Oxford University Press, co., author: European Max Planck Group on Conflict of Laws in Intellectual Property, 2013, p. 167.

[28] Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property and Private International Law », Toshiyuki Kono, Axel Metzger and Pedro de Miguel Asensio, Editorial, JIPITEC, Volume 12, 2021, p. 4.

B- Key Provisions[29] of the Kyoto Guidelines on Jurisdiction in Cross-Border Copyright Disputes.

The **basic forum** under the Kyoto Guidelines is the Defendant's forum[30] which is the internationally accepted principle.[31]

However, the guidelines establish other alternative forums for jurisdiction resolution, depending on the subject matter of the case and the nature of the relationship between the parties. The Kyoto guidelines distinguish between four basic categories: contracts, infringements, statutory remuneration for the use of copyrighted works, and claims related solely to ownership:

1- Under the Kyoto Guidelines, for **contractual disputes** arising from IP licenses or transfers, the plaintiff has the option to initiate proceedings in the courts of the state *"where the license is granted, or the right is transferred".*[32] This alternative forum may offer advantages, such as familiarity with the relevant facts and evidence in this specific forum. However, it's important to note that the court's jurisdiction is limited to its territory. When a dispute involves parties in different countries, the plaintiff can either sue in the defendant's home court (the "basic forum") or file lawsuits simultaneously in multiple jurisdictions (parallel proceedings).[33]

2- When dealing with **cross-border copyright infringements** (civil torts), the Kyoto Guidelines offer alternative options for plaintiffs to file lawsuits. One option is the court of the State where the alleged infringer took actions to initiate or further the infringement.[34] This could be the location where the infringing content was uploaded or hosted. This court shall not be limited territoriality. in other words, this forum allows for remedies addressing all the injuries caused by the infringer's actions, even if these injuries suffered outside that State.

   Another option for the plaintiff is to bring a suit in every jurisdiction where injuries occurred. However, every jurisdiction shall be territorially limited only to the remedies related to the harm caused in its territory.[35]

   The Kyoto Guidelines offer a particularly innovative solution for complex online copyright infringements, where the act of infringement can occur in one State (where upload, host, or stream a copyrighted work), but the resulting harm can happen across numerous jurisdictions (where access to the aforementioned copyrighted work is possible).

3- When a dispute pertains to **statutory remuneration for the use of works,**[36] the plaintiff has the option to bring the claim before the courts of the State where the act giving rise to the obligation to pay occurred.[37]

---

[29] It is important to acknowledge that a comprehensive analysis of every provision within the Kyoto Guidelines is beyond the scope of this thesis. The vast amount of detail encompassed by the Guidelines would necessitate a much larger undertaking.
[30] Guideline 3.
[31] Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property. Op. cit., p. 4.
[32] Guideline 4.
[33] Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property. Op. cit., p. 15.
[34] Guideline 5 (a).
[35] Guideline 5 (b).
[36] This refers to situations where the law grants copyright holder's compensation when their works are used in specific ways, even without their direct permission, for Ex. Remuneration for private copying.
[37] Guideline 6.

The reason behind this specific solution is that such claims for remuneration do not fall under the category of contractual obligations or infringement claims.[38] However, claims made by right holders against collecting societies regarding the distribution of collected revenues are often of a different nature, commonly involving contractual aspects. It's important to note that these claims are not addressed by the Guideline in question.[39]

4- Finally, Guideline 8 of the Kyoto Guidelines offers a solution for resolving disputes related to **the ownership** of intellectual property rights. It allows plaintiffs to file lawsuits, in the state where the intellectual property right exists**,** for copyrights this could be the location where the work was created.[40]

Section 2: Applicable Law in Cross-Border Copyright Litigations

While determining jurisdiction establishes where a court can hear a cross-border intellectual property (IP) case, an equally crucial step remains: identifying the applicable law. This essentially means deciding which country's substantive law and core legal principles will be used to resolve the dispute.

To do so, we will start by considering the existing international legal framework (I), then we will explore the key provisions of soft law in this matter to resolve the more controversial issues in this respect (II).

I - Treaty Private International Law

Unlike the situation with jurisdiction, the Berne Convention dealt – though in a controversial manner – with the choice of law in some cases. The relevant articles in the Berne Convention are Articles 5(1) and (2) and Article 14(2).

On the one hand, Article 5 of the Berne Convention stipulates that:

> *"(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.*
>
> *(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country <u>where</u> protection is claimed."*

The two paragraphs are related to the crucial principles that we have seen in the first chapter: "national treatment, automatic protection, and independence of protection". These principles play a great role in establishing a robust foundation for the international copyright framework.

---

[38] Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property. Op. cit., p19.
[39] Ibid.
[40] Ibid

However, regarding private international law (PIL), there is uncertainty about whether Article 5(2) of the Berne Convention announces a choice of law rule, or simply a non-discrimination rule.[41]

The interpretation of this text is highly contested. Its wording has sparked debate. On the one hand, some scholars advocate that it establishes a choice of law rule (*lex loci protectionis)* by which the law of the country where protection is claimed must be applicable.[42]

This approach is highly adopted by nearly 180 countries.[43] The most important argument is the territorial nature of copyright, as different countries have the power to establish their own copyright laws and protections. Moreover, while not universal, *lex loci protectionis* is the dominant choice in many countries, creating a sense of familiarity and consistency in handling copyright disputes internationally. Furthermore, the principle has been established for a long time, creating a sense of tradition and established practice in international copyright law.[44]

Other arguments may be added such as fairness to foreign authors, that is applying the law of the country where protection is sought ensures that foreign authors receive the same level of protection as domestic creators. Finally, it is argued that establishing a conflict of law rule, based on *lex loci protectionis* offers greater certainty for both rights holders (authors) and users, ensuring predictability for All Parties.[45]

In contrast, on the other hand, others believe that it merely guarantees a non-discrimination principle. In other words, it simply ensures fair treatment for all creators.[46]

Furthermore, due to the ambiguous wording of the text, a relatively small number of scholars advocate for a "*literal*" interpretation of Article 5(2) of the Berne Convention. This interpretation suggests that (*where protection is claimed)* refers to the law of the court's location (*lex fori*) as it the place where protection is sought or initially granted.[47]

However, most legal scholars and courts reject the *lex fori* (law of the court's location) interpretation of Article 5(2). Their primary argument stems from the concern that it could lead to incongruous results. This could occur when the court handling the case is not situated in the country where the infringing act took place or the country where copyright protection is being sought[48]. For instance, when the court handling a copyright infringement case in the United States is not situated in the country where the infringing website is located (e.g., a French website) or the country where the copyright owner seeks protection (e.g., a British creator). In other words, this literal interpretation leads to a potential disconnect between the *lex fori* approach and the actual location of the infringement or desired protection. This would lead ultimately to unfair and inconsistent outcomes.

On the other hand, article 14bis(2)(a) of the Berne Convention sets forth a key principle regarding copyright ownership in audiovisual works stating that:

> *"Ownership of copyright in a cinematographic work* ***shall be a matter for legislation in the country where protection is claimed"***

---

[41] Ginsburg (J.C) & Treppoz (E), International copyright law: U.S. and E.U. perspectives. Op. cit., p. 652.
[42] O'halpin (O), «Modern challenges to Lex Loci Protectionis: A need for change? Jura Falconis Jg. 58, nummer2, 2022, p. 542.
[43] Ibid, p. 545.
[44] Ibid.
[45] Ibid.
[46] GOLDSTEIN (P) & HUGENHOLTZ (P.B), International copyright: principles, law, and practice, Oxford University Press, 2019., p. 121.
[47] De Boer (Th.M) & Hugenholtz (P.B), Choice of law in copyright and related rights Alternatives to the Lex Protectionis, Mireille van Eechoud ,2003 ,103.
[48] Ibid.

This paragraph dictates that the question of who holds the copyright in such works is a matter to be decided by the domestic legislation of the country where protection is claimed.[49]

The same article adds a specific rule for countries where exploitation rights don't automatically transfer to the producer by law. In these situations, authors contributors cannot prevent the producer from carrying out normal exploitation activities (like reproduction, distribution, or public performance) of the work they contributed to.[50]

There's one key exception to this rule: contributors and producers can agree on different terms regarding exploitation rights. This means they can deviate from the presumptive license granted to producers. However, whether this agreement needs to be written down depends on *"the laws of the country where the producer is located"*. However, some Berne Convention member countries can require such agreements to be in writing. This overrides this conflict rule and ensures clarity for all parties involved.[51]

The automatic permission granted to producers under Article 14 bis (2/a) (presumptive license) might be less impactful due to Article 14 bis (3). This provision allows countries to exempt key contributors from the automatic transfer of rights. These key co-authors include screenwriters, composers, dialogue writers, and principal directors. Essentially, these individuals retain their rights unless the national law specifies otherwise.[52]

In sum Article 14bis(2)(a) of the Berne Convention indicates that the legislation of the country "where protection is claimed" determines ownership. This creates a system where each country where a film is exploited can potentially determine ownership rights.

However, this system is not without limitations. A complex set of presumptions regarding ownership transfers comes into play, as outlined in subsections (b) to (e) of Article 14bis. These presumptions can affect the automatic rights granted to producers and protect the rights of key contributors like screenwriters and directors.

We can assume from these articles that the Berne Convention doesn't offer a robust solution for choice of law for different reasons.

Firstly, the above-mentioned debate regarding article 5(2) and whether it announces a non-discrimination rule or a choice of law rule.

Secondly, even if we assume Article 5(2) establishes a choice of law rule, the ambiguity of the wording *("where protection is claimed")* creates further controversy. The debate centers on which law applies (*lex loci protectionis*) which is a view, supported by many scholars and courts, and suggests that the law of the country where (for which) protection is sought governs the case. Or it is (*lex fori*) where a minority view argues for applying the law of the court's location (where the case is heard).

This debate surrounding Article 5(2) illustrates the lack of clarity within the Berne Convention's approach to choice of law. This ambiguity can lead to unpredictable outcomes for rightsholders, as the applicable law and level of protection depend on the specific jurisdiction hearing the case.

Finally, in today's digital world, copyright infringement can happen across multiple countries. For example, infringing content might be uploaded in one country and then accessed or

[49] Ibid, p. 65.
[50] Article 14bis (2/b).
[51] De Boer Th.M., & Hugenholtz P.B, Choice of law in copyright and related rights. Op. cit., p. 65
[52] Ibid.

downloaded in many others. This raises the question of which country's law should apply when dealing with such widespread infringement. The Berne Convention does not address an explicitly clear-cut solution for this digital dilemma.

This situation highlights the potential need for reform or additional clarification within the Berne Convention to ensure more consistent and predictable copyright protection across borders in the digital age. While this is unlikely, a solution may be to establish an international framework governing a choice of law rule. Soft law may provide a stepping stone in this regard.

II - PIL Soft Law and Choice of Law

Regarding soft law we will serve from the model chosen in the previous section (Kyoto Guidelines) on Intellectual Property and Private International Law (2020) regarding jurisdiction conflicts. This model may serve as a base framework for choice of law in IP matters as well.

The Kyoto Guidelines delve into various aspects of resolving choice of law issues in IP disputes across borders. They contain provisions relating to general rules, contracts, infringements, and provisions relating to exemptions and limitations of the choice of law rules.

As a rule, the Guideline makes *"matters concerning existence, validity, registration, duration, transferability, and scope*[53] *of rights"* and more generally all *"matters concerning the right as such"* subject to the law of the *"State for which the protection is sought"* (*lex loci protectionis*).[54] For copyright, the *lex loci protectionis* refers to the law of the State which recognizes the right[55,56].

What is worth mentioning in this regard is that the Kyoto Guidelines offer carefully chosen wording. Notably, they employ the term *"State **for which** protection is sought"* (*lex loci protectionis*) for the law governing the proprietary aspects of intellectual property. This stands in contrast to the wording used in Article 5(2) of the Berne Convention, which refers to the *"State **where** protection is claimed."* Which has sparked an ongoing debate about whether it establishes a choice of law rule (*lex loci protectionis*), or as some scholars say it should be interpreted literally as referring to the law of the court's location (*lex fori*).

As a rule, the ownership rights of copyright works are governed by the law of the State with the closest connection to the creation of the work.[57] However, these rights can arise simultaneously in multiple countries, making it difficult for parties to determine ownership with certainty. To address this challenge, the guideline added a presumption to promote the predictability by suggesting that the place of habitual residence of the creator at the time of creation has the closest connection to the work.[58] However, If the work is created by more than one person, they may choose the law of one of the States of their habitual residence as the law governing initial ownership.

On the other hand, this approach for copyright ownership might conflict with a country's domestic policies regarding copyright ownership. Clause 2(b) addresses this potential conflict.

---

[53] The "scope" concerns to what extent the protection of an intellectual property right reaches, typically, for instance, whether moral right, mere use, exhaustion, or renumeration right is a part of the right, and naturally also covers the limits and exceptions of the protection. (Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property. Op. cit., p. 45.)

[54] Guideline 19.

[55] Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property. Op. cit., p. 45.

[56] In legal practice in copyright this may be translated by the identification of the claimant for which States he wants to protect his rights, when he formulates his claims. Therefore, lex loci protectionis usually corresponds to the market where the right holder seeks protection. Ibid.

[57] Guideline 20(2) (a).

[58] Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property. Op. cit., p. 46.

It allows the law of the country where protection is sought (lex protectionis) to be applied in a limited way when dealing with the initial allocation of rights that are non-transferable or cannot be waived under that country's domestic law (e.g., moral rights).[59]

Regarding the law governing the contracts, the general principle is the recognition of “party autonomy” to determine the applicable law for their contractual relationship (*lex contractus*).[60] However, this freedom of choice is subject to a limitation that ensures that even if the parties choose a specific law, the more protective mandatory provisions of the law[61] that would have applied in the absence of such a choice will still govern the contract. When the parties to a contract have not explicitly chosen the applicable law Kyoto guidelines[62] distinguish between two types of contracts based on their geographic scope. For the first type, which pertains to contracts limited to a single State, the law of that State is designated as the applicable law (*lex loci protectionis*), regardless of the parties' nationality or residence. The second type of contract involves IP rights that span multiple territories. In such cases, the guidelines state that the contract should be subject to the law of the State with which it has the most substantial relationship.[63]

Regarding infringements Guideline 25 establishes a widely accepted international rule: This principle dictates that IP infringement is governed by the law of the country for which protection is sought (*lex loci protectionis*).[64] However, the same guideline provides a limited exception. It allows parties involved in an infringement dispute to choose the law applicable to the remedies they seek. This party autonomy aims to provide more flexibility and efficiency for resolving the case.[65]

Guideline 26 tackles the growing challenge of infringement across multiple countries, often through online platforms like the internet. This ubiquitous infringement can be difficult to address under traditional rules that apply the law of each affected country separately.

Guideline 26 proposes an innovative approach. It suggests that such multi-state infringements could potentially be adjudicated under a single law which has a strong connection to the dispute.[66] This departs from the territoriality principle and offers a more streamlined solution for these complex cases.[67]

The core purpose behind this solution is to facilitate the enforcement of global IP infringements and ensure that remedies for the entire global infringement could be granted under a single applicable law. However, there is an exception that allows parties to invoke another law that provides a different outcome to the dispute.[68]

These provisions may apply *mutatis mutandis* in cases of secondary or indirect infringements of intellectual property rights.

---

[59] Ibid.
[60] Guideline 21.
[61] Pursuant to the Guideline 22 which governing the case of the absence of choice.
[62] Guideline 22.
[63] the guideline instructs courts to consider a range of factors when determining the most appropriate law to govern the contract. These factors may include: - the common habitual residence of the parties - the habitual residence of the party effecting the performance characteristic of the contract - the habitual residence of one of the parties when this habitual residence is located in one of the States covered by the contract.
[64] It is the same rule that applies to proprietary aspects of intellectual property disputes. (Guideline 19.)
[65] Kyoto Guidelines « International Law Association’s Guidelines on Intellectual Property. Op. cit., p. 57.
[66] The guideline 26 contains some relevant factors to determine the applicable law (or laws) in these situations include - the place where the harm caused by the infringement is substantial in relation to the infringement in its entirety - the parties’ habitual residences or principal places of business - the place where substantial activities in furthering the infringement have been carried out.
[67] Kyoto Guidelines « International Law Association’s Guidelines on Intellectual Property. Op. cit., p. 59.
[68] Ibid.

The Kyoto guidelines introduce an innovative approach in private international law concerning collective rights management. Neither national law nor international law previously offered specific conflict rules in this regard. This is crucial in the age where the online use of music, and multi-territorial licensing has emerged as a new tool used by collective management organizations (CMO).

Regarding this matter, Guideline 27 provides various conflict resolution rules. Firstly, Guideline 27(1) establishes that the law of the State where the collective rights management organization has its actual seat of administration shall govern all matters concerning the relationship between the organization and right holders.

The advantage of such a rule is that it allows right holders to entrust their rights, governed by multiple national laws, to a single CMO. This eliminates the requirement for simultaneous application of numerous laws, enabling the CMO to establish a consistent relationship with all right holders based on its national law.[69]

Secondly, and in contrast, Guideline 27(2) retains the *lex loci protectionis* principle for matters concerning the relationship between a collective rights management organization and users.

Finally, Guideline 27(3) retains the law of the forum to govern the legal standing of a CMO before a court. This guideline specifically addresses situations where some countries might try to limit the ability of foreign CMOs to bring legal action on behalf of their rights holders in that country's courts ensuring a more uniform approach to legal standing for CMOs across borders.[70]

It is worth noting that Kyoto guidelines provide for the public policy exception,[71] and a limitation regarding mandatory provisions of the law of the forum.[72] The application of the law determined under these Guidelines can be declined only if its effects would clearly contradict the public policy of the forum or override mandatory provisions of the law of the forum.

[69] Ibid, p. 61.
[70] Ibid.
[71] Guideline 28.
[72] Guideline 29.

CHAPTER 2 RECOGNITION AND ENFORCEMENT OF CROSS-BORDER COPYRIGHT DECISIONS AND AWARDS

Without a harmonized legal framework for recognizing and enforcing foreign copyright judgments and arbitral awards, the entire international system for copyright protection and enforcement becomes ineffective. Judgments and awards are among the most important tools for enforcing copyright rights, and the inability to enforce them across borders renders the international legal framework toothless.

The territorial nature of copyright means that infringement can occur across borders. This creates a need for a mechanism to recognize and enforce judgments (Section 1) and arbitral awards (Section 2) that are issued in one country regarding copyright violations that take place or have effects in another country.

Section 1: Recognition and Enforcement of Court Decisions

I - International Legal Framework: Challenges in Enforcing Cross-Border Copyright Judgments

Since copyright protection is limited by national borders, infringements can easily happen across countries, especially via the internet. This creates a significant challenge on how to enforce judgments issued in one country against copyright violations that occur elsewhere.

Therefore, especially in the digital age, the presence of a legal framework concerning the recognition and enforcement of foreign copyright judgments is essential. This is true regardless of whether the framework exists within agreements specifically focused on intellectual property (IP) or within international agreements dealing with private international law (PIL) in general.

While agreements focused on intellectual property like the TRIPS Agreement, or copyright specifically like the Berne Convention and the WCT, play a crucial role, they lack a single rule for recognizing and enforcing foreign copyright judgments. Consequently, this issue is left to be addressed by national laws, or regional[73] agreements, or potentially by other international agreements dealing with PIL in general.

When it comes to international frameworks for PIL and IP enforcement, two noteworthy initiatives should be highlighted. Firstly, the HCCH 2019 Judgments Convention, which is the more recent convention but it unfortunately failed to encompass intellectual property rights within its scope (A). Secondly, the HCCH 2005 Choice of Court Convention, an earlier convention that focuses on a narrower domain but effectively includes copyright issues within its scope (B).

[73] For instance, the European Union Brussels Recast Regulation (EU) No 1215/2012 simplifies the process of recognizing and enforcing court judgments within member states. This applies to situations where a judgment is issued in one EU country (Member State) and needs to be recognized or enforced in another. The Recast significantly improves the system by eliminating the exequatur requirement. This means there's no longer a special procedure needed for either recognizing a judgment or enforcing it. To have a judgment recognized in another EU country, the party simply needs to provide a copy of the judgment along with a certificate issued by the original court upon request. (European Union(ed.), cross border enforcement of intellectual property rights in EU. Op. cit., p. 55.

A- The HCCH 2019 Judgments Convention: A Missed Opportunity for IP Enforcement?

Recent decades have witnessed a growing push for an international legal framework to streamline the recognition and enforcement of foreign judgments in civil and commercial matters, including those related to IP. This effort aimed to increase certainty and reduce costs associated with cross-border litigation. While the HCCH 2019 Judgments Convention[74] emerged as a promising outcome, it ultimately excluded intellectual property rights from its scope.

The Hague Judgments Convention of 2019 doesn't replace the 2005 Hague Choice of Court Convention that we have seen in chapter 3; they work together. The 2005 Convention focuses on enforcing judgments where parties agreed on a specific court beforehand (exclusive choice of court agreement).

The 2019 Convention expands on this by allowing enforcement of judgments regardless of a pre-determined court, potentially including situations with non-exclusive jurisdiction clauses. Additionally, the subject matter scope of the 2019 Convention is broader, encompassing areas that were not covered by the 2005 Convention.

The earlier drafts of the judgment convention considered IP rights within the scope of the 2017 and 2018 drafts of the convention. These drafts initially included provisions specifically addressing intellectual property (IP) enforcement.[75] These provisions covered areas like jurisdictional requirements, grounds for refusal, and enforceable remedies. However, these drafts focused primarily on the scope of international jurisdiction and didn't fully address the enforcement of non-monetary remedies for IP cases.[76]

Despite these initial attempts, HCCH delegates ultimately couldn't reach an agreement on including specific provisions for IP enforcement.

The European Union strongly advocated for including IP rights, recognizing them as a critical economic factor needing a secure legal framework for cross-border cases.[77]

However, the United States voiced opposition to this inclusion. Their concerns centered around the potential drafting of jurisdictional rules that would exclusively grant the right to hear IP cases to the country where the IP right originated. The US feared this could lead to forum shopping (strategic choice of jurisdiction) and the erosion of their domestic IP legal system by foreign laws in cases involving American parties.[78]

Due to the inability of delegates to reach a consensus, the final version of the Judgments Convention,[79] adopted in 2019, excluded intellectual property rights from its scope.[80]

Nevertheless, it is important to mention that this exclusion applies to judgments on IP issues such as copyright infringement. The convention might still apply if the dispute centers on **general contract law principles,** even if it involves copyright. For example, a disagreement

---

[74] The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters.
[75] Sebesfi (V) "The Future of the Recognition and Enforcement of Foreign Intellectual Property Judgments in Australia" UNSW Law Jl 53,2022, p. 1697.
[76] In contrast to Other legal instruments, such as the Brussels Regulation and soft law principles, already offer some mechanisms for enforcing these non-monetary remedies.
[77] Sebesfi (V) "The Future of the Recognition and Enforcement of Foreign Intellectual Property. Op. cit., p. 1697
[78] Ibid.
[79] Article 2 (m).
[80] Ibid.

over royalty payments in a licensing agreement would likely fall under the Convention.[81] In contrast, if the judgment is directly based on the substantive rules governing intellectual property law as opposed to general contract law, the Convention does not apply[82].

In short, the Hague judgments convention of 2019 doesn't apply directly to IP matters including copyright. However, it may apply **indirectly** to such rights when the main focus of the dispute and the judgment is on the contract involving an IP right. Nevertheless, there are some gray areas where the judgment touches on both contract and IP law. These cases are evaluated individually to see if the Convention applies based on the main focus of the judgment.[83]

B - Recognition and Enforcement of Judgments Under the HCCH 2005 Choice of Court Convention

The HCCH Convention of 30 June 2005 on Choice of Court Agreements primarily deals with agreements that pre-select a competent court rather than providing a comprehensive approach to all jurisdictional issues in cross-border copyright disputes. The convention applies only to copyright and related rights while excluding other intellectual property rights from its scope.

One of the key benefits of the HCCH Judgments Convention is its dedication to facilitating the recognition and enforcement of judgments issued by courts in contracting States designated in exclusive choice of court agreements. This is addressed in chapter III of the convention.[84] However, for a judgment[85] to be recognized and enforced in another contracting State, it must first be final and enforceable in the State where it was originally issued.[86] Importantly, the convention prohibits any review of the merits of the original judgment.[87] This means the enforcing court cannot re-evaluate the evidence or legal reasoning behind the decision.

Article 9 outlines several limited exceptions where a contracting State may refuse to enforce a judgment. For instance, the exclusive choice of court agreement was invalid under the law of the chosen court (unless the court itself deemed it valid), or if the judgement is contrary to the public policy of the requested State, or it was obtained by fraud or other grounds listed in the said article.

Moreover, A contracting State can refuse to recognize or enforce a foreign judgment if the awarded damages don't compensate the injured party for their actual loss or harm. This means exemplary or punitive damages, which are intended to punish the losing party rather than simply compensating the prevailing party are generally not recognized under this Convention.[88]

Finally, it's important to note that, scope of the convention is very limited to the agreements of choice of courts in cross-border copyright disputes, it does not encompass important matters such as global infringements, or copyright licenses or transfer which does not include a clause of choice of court to resolve any potential disputes.

---

[81] HCCH (ed.), «Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters»,2020, p. 64.
[82] Ibid.
[83] Ibid.
[84] Article 8 (1).
[85] Or a Judicial settlement, (article 12).
[86] Article 8 (3), (4).
[87] Article 8 (2).
[88] Article 11.

II - Soft Law Solutions for Copyright Enforcement of Court Decisions

Neither the HCCH 2005 Choice of Court Convention nor the 2019 Judgments Convention fully address the recognition and enforcement of copyright judgments. While the 2019 Convention may indirectly cover judgments if the dispute revolves around a contract involving IP rights, its scope is limited. Similarly, the 2005 Convention offers limited applicability to cross-border copyright disputes, as it may apply only for the agreements of choice of courts.

This lack of a uniform legal framework is particularly problematic in the digital age. Copyright infringements often transcend borders, and copyright contracts increasingly involve global parties. In this context, the ability to recognize and enforce foreign copyright judgments becomes crucial.

While a formal international treaty might be ideal, soft law instruments can serve as a valuable steppingstone towards a more harmonized and robust legal framework. In this regard, the Kyoto Guidelines on Intellectual Property and Private International Law (2020) offer a promising reference point. These guidelines, discussed in the previous chapter, provide a model for addressing recognition and enforcement of cross-border copyright judgments.[89]

Guideline 32(1) of the Kyoto Guidelines provides for **the general rule** is the recognition and enforcement of foreign judgments involving IP matters. However, this general rule has two exceptions. The first gives the requested court some flexibility regarding judgments **not yet final** in their country of origin, meaning they could still be appealed. In such a case the requested court may delay the enforcement process until the appeal is decided or the appeal period ends. Or it may allow enforcement but require the requesting party to provide a guarantee (security) in case the judgment is overturned later.[90] It can in any case also follow the general rule and recognize and enforce the judgment.[91]

The second exception is mandatory, under which the requested court must not recognize or enforce provisional and protective measures if the rendering court issued the measures without first granting the respondent a hearing or providing them with prior notice.[92]

Guideline 33 poses the ordinary conditions that the judgement must be recognized and enforceable in the rendered State to be so in the requested State.

Guideline 34(1) provides an exhaustive list of mandatory grounds on which a requested court must refuse to recognize and/or enforce a foreign judgment. These grounds include:

- Contrariety to the public policy of the requested State
- The original trial wasn't conducted fairly according to the requested State's standards.
- If the judgment is rendered by default
- If the judgment contradicts a previous one in the requested state.[93]
- If the original court didn't have the right to hear the case under these Guidelines.

---

[89] Due to the comprehensive nature of the Kyoto Guidelines on Intellectual Property and Private International Law, a full exploration of every provision falls outside the scope of this paper. However, to ensure a focused and impactful analysis, this work will delve into the key guidelines and principles that hold the most significance for understanding the recognition and enforcement of cross-border copyright judgments.
[90] Guideline 32 (2).
[91] Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property. Op. cit., p. 75.
[92] Ibid.
[93] Or another State under certain conditions.

However, the Guidelines prioritize maximum recognition and enforcement. If a portion of the judgment can't be enforced due to grounds such as the public policy exception, the remaining enforceable parts should be separated and enforced independently.[94]

Additionally, exemplary or punitive damages that are not available under the law of the requested State which are intended to punish the losing party rather than simply compensate the prevailing party are generally not recognized under the guidelines.[95]

Finally, if a judgment includes injunctions or other measures that are unknown to the legal system of the requested State this should not automatically lead to a denial of recognition and enforcement of an entire judgment.[96] Rather, the enforcing court can substitute the unavailable measure with a suitable alternative from their own legal system.[97]

Section 2: Recognition and Enforcement of Arbitral Awards

In cross-border copyright disputes, parties often opt for arbitration as an alternative to court litigation due to various reasons. The primary consideration is that copyright, being inherently territorial, may require protection in multiple countries. Rather than pursuing the dispute through numerous national courts, it can be more efficient for the author or right-holder to seek enforcement of their rights in a single neutral forum (I). the recognition and enforcement of arbitral awards, are – unlike court decisions – covered by an international legal framework which is the New York Convention, adopted in 1958 (II).

I - Arbitration and Enforcement of Cross-Border Copyright Arbitral Awards

Due to the territorial nature of copyrights, the issue of arbitrability of these rights varies depending on national laws. For instance, moral rights have a higher status in civil-law countries like France which under its national laws are in *Principe inalienable*. As a result, disputes related to such rights are not arbitrable. On the other hand, common-law countries like the United States give moral rights a lower status, recognizing them only within a limited scope of works. This allows certain transactions concerning moral rights, such as granting consent for the modification of a literary or artistic work. Consequently, the question of arbitrability of moral rights in common-law countries is not as problematic as it is in civil-law countries.[98]

In contrast, patrimonial rights are typically considered arbitrable. However, in legal systems like the French one where the resale royalty right known as “Droit de suite” is a non-waivable patrimonial right, it is not subject to arbitration. This holds true for other civil law systems that share the same stance on these rights.[99]

The arbitrability of intellectual property rights is a complex issue due to significant differences between national legal systems. This uncertainty can pose challenges for parties involved in arbitration especially when it comes to the determination of the law that decides the arbitrability of those rights.

On one hand, it is considered that the primary law that governs the question of arbitrability of the rights (e.g., Moral or patrimonial rights) is typically the law of the arbitration agreement

[94] Guideline 35(1).
[95] Guideline 35(2).
[96] Kyoto Guidelines « International Law Association’s Guidelines on Intellectual Property. Op. cit., p. 84.
[97] Guideline 35(3).
[98] Kyoto Guidelines « International Law Association’s Guidelines on Intellectual Property Op. cit., p. 72.
[99] Ibid.

itself, which is the law chosen by the parties to govern their agreement to resolve disputes through arbitration. However, if the agreement remains silent on this matter, the arbitral tribunal typically defaults to the law that applies to the main contract between the parties involved.[100]

On the other hand, "soft law" instruments like the Kyoto Guidelines offer valuable insights. These guidelines, while not legally binding, aim to provide direction for judges and arbitrators handling IP disputes in arbitration.

The Kyoto Guidelines strike a balance between flexibility and enforceability. They allow arbitrators some leeway in decision-making while emphasizing the importance of ensuring that arbitral awards are enforceable.[101]

To achieve this, the guidelines[102] recommend that arbitrators consider two key legal frameworks: firstly, adopting the *lex arbitri*, which refers to the law of the arbitration venue (where the arbitration takes place). Courts in this jurisdiction might refuse to enforce an award if the dispute wasn't arbitrable under their laws. Secondly, the lex protectionis, which refers to the law of the country where the disputed IP right is sought to be protected. Compliance with this law might be necessary for the award to be enforceable in that country.

By considering both the *lex arbitri* and lex protectionis, arbitrators can navigate the complexities of IP disputes and increase the likelihood of their awards being recognized and enforced internationally.[103]

The aforementioned distinction (regarding what is arbitrable or not) presents the primary challenge posed by territoriality in enforcing cross-border copyright arbitral awards, which is also found with regard to the enforcement of cross-border judicial decisions in the same realm.

However, apart from this challenge, territoriality may weigh in favor of enforcement of arbitral awards rather than courts' decisions. The lack of harmonization of private international law (PIL) (especially in jurisdictional matters) related to intellectual property (IP), along with multiple national laws prompt authors and stakeholders to prefer resolving their disputes in one single forum, eliminating the need for litigation in multiple national courts.

This streamlines the process and reduces costs for all parties involved but also addresses the issues discussed in the previous section concerning the recognition and enforcement of court decisions, which have not yet been internationally harmonized.

Despite the advantages arbitration offers for resolving intellectual property (IP) disputes, there are certain considerations that limit its effectiveness as a comprehensive enforcement tool for cross-border copyright disputes. Arbitration can only be utilized when the parties have entered into an arbitration agreement, typically as part of their contractual framework. However, most cross-border copyright disputes do not arise from an existing contractual relationship.

A prime example is online copyright infringements where there is no pre-existing contractual relationship between the parties. In such cases, the possibility of subjecting the disputes to arbitration is limited unless the parties, after the infringement occurs, voluntarily agree to submit their dispute to arbitration. However, this scenario is exceptional and less likely to occur.

---

[100] Celli (A.L) & Benz (N), «Arbitration and Intellectual Property», European Business Organization Law Review 3:593-610, EBOR 3, 2002, p. 599.
[101] Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property. Op. cit., p. 71.
[102] Guideline (31).
[103] Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property. Op. cit., p. 71

II - The New York Convention: A Lifeline for Copyright Arbitral Awards Enforcement

The New York Convention 1958,[104] is often hailed as the "single most important pillar of international arbitration".[105] It could be the key to enforcing cross-border copyright disputes. The convention focuses on the recognition and enforcement of "**foreign** arbitral awards". Article I of the Convention offers two definitions of "**foreign**" arbitral award:

Firstly, foreign arbitral awards are those[106] *"made in the territory of a State **other than** the State where the recognition and enforcement of such awards are sought"* However, individual countries can limit this broad scope through the reciprocity reservation mentioned in Article I (3 This reservation is of a nature that permits a country to limit the application of the Convention solely to awards issued within the territory of other contracting States..[107]

Secondly, the convention pertains on the other hand to "***non-domestic***" arbitral awards. The term "non-domestic" encompasses awards that, even if rendered in the State where enforcement is sought, are considered "foreign" under its law due to the presence of a foreign element in the proceedings, e.g., another State's procedural laws are applied.[108]

The main obligation set out in the convention by the article II is that each contracting State shall recognize any arbitration agreement made by parties in respect of a defined legal relationship This relationship could be "contractual or not" the word "*not*" here refers to tort law.

This scope of legal relationship may be relevant for addressing cross-border copyright infringements as it extends the application of the convention to cover non-contractual relationships. However, the requirement of having an arbitration agreement (which is typically formed after the dispute arises in this case) reduces the likelihood of such an agreement being reached after the dispute has already occurred.

In any case, there are two conditions here that should be respected, **the first** is that the agreement shall concern *"a subject matter capable of settlement by arbitration".* This condition means that the subject matter must be arbitrable. The matter of arbitrability is moreover expressed as a ground for refusal of authorization of the arbitral grant in Article V(2)(a), which gives that the court may deny requirement on its possess movement (without earlier ask) if it finds that *"the subject matter of the difference is not capable of settlement by arbitration under the law of that country"*.[109]

In the setting of cross-border copyright debate, this condition may result in a refinement between civil law and common law nations with respect to moral rights. As illustrated above, moral rights in civil law nations are regularly not arbitrable. In contrast, those rights in common law nations frequently hold a less status. They may permit certain transactions with respect to these rights, such as agreeing to adjust a work or even altering it. Thus, the question of arbitrability of moral rights in common law nations is less problematic compared to civil law countries.

The second condition is that the agreement must be *"in writing"*.[110] This can take the frame of either a standalone arbitration contract or a clause within a broader contract. In the case of

---

[104] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by a United Nations diplomatic conference in June 1958 at New York, and entered into force a year later, June 1959.
[105] Lord Mustill of Pateley Bridge.
[106] Article I (1).
[107] Gaillard (M) & Di Pietro (D) (Eds), «Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice», 2008, p. 40.
[108] United Nations (ed.), «Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York, 1958) », 2015, p. 1.
[109] GAILLARD (M) & DI PIETRO (D) (Eds), Op. cit., p. 53.
[110] Article II (1)

copyright transfer or licensing agreements, the specific writing requirement may vary depending on the national laws. However, the majority of them mandate that such contracts be made in writing.

The commitment for contracting States to recognize arbitration agreements is coupled with another commitment forced on a court within a Contracting State when it is presented with a case concerning the subject matter covered by the arbitration agreement. In such a situation, the court is required to refer the parties to arbitration. However, the court has the discretion to decline the referral if it determines that the agreement is invalid, unenforceable, or impracticable.[111]

Moreover, countries signing the New York Convention and therefore becoming contracting States can make limitations on their obligations through "reservations." These reservations essentially allow them to opt-out of certain aspects of the convention.

The two most common reservations are:

- Reciprocity Reservation: allows a country to only apply the Convention to awards made in the territory of other contracting states. Roughly two-thirds of contracting states use it.[112]

- Commercial Reservation: This restricts the convention's scope to disputes arising from legal relationships considered "commercial" under the national law of the country making the reservation. Currently, around one-third of the contracting states have made use of the commercial reservation.[113]

In the context of a commercial reservation, this situation would not pose a problem, as copyrights are frequently commercially exploited through licensing agreements, publishing contracts, and other commercial arrangements, particularly in international contexts. In these instances, a dispute arising from a contract concerning such exploitation could be deemed "commercial" within the scope of the New York Convention.

The core principle of the New York Convention, outlined in Article III, is to ensure that contracting states recognize and enforce arbitral awards related to copyright across borders. This means that an award issued in one country can be enforced in another, following the local enforcement procedures.[114]

This provision offers significant advantages for authors and rightsholders:

- **Security and Predictability:** Knowing that copyright disputes can be resolved through arbitration and that resulting awards will be recognized and enforced internationally even if such dispute involved numerous countries. This reduces the negative effects of the territorial nature of copyright and provides a sense of security and predictability for rightsholders.

- **Avoiding PIL Complexity:** The New York Convention helps creators avoid the complexities of private international law (PIL) in the context of intellectual property (IP). Unlike PIL, which varies by country, the New York Convention offers a more standardized approach.

---

[111] Article II (3).
[112] GAILLARD (M) & DI PIETRO (D) (Eds), «Enforcement of Arbitration Agreements and International Arbitral Awards . Op. cit. p. 40.
[113] Ibid, p. 44.
[114] Ibid, p. 54.

The only way to acquire such benefits in cross-border copyright disputes in national courts is under the HCCH Judgments Convention 2005. This not only resolves the matter of jurisdictional conflicts, but also guarantees that the decisions issued by the chosen court would be recognized and enforceable in all contracting states.

However, The New York Convention also outlines grounds where enforcement can be refused. There are two key articles that address this:

Firstly, article V (1), which lists specific grounds for refusal that the party opposing enforcement must raise. For instance, a reason for refusal could be if the arbitral award was made in a procedure where a party was not given a fair opportunity to be heard.

Secondly, article V (2) deals with situations where the enforcing court can refuse enforcement on its own motion. This typically involves a violation of public policy under the law of the forum (the country where enforcement is sought).

Finally, it's worth mentioning that the convention lacks provisions concerning conservatory, provisional, or interim measures issued by courts in aid of arbitration. Therefore, the availability of such measures and their procedural aspects are governed by the *lex fori* (law of the court) where the application for the measure is made.[115]

[115] Ibid, p53.

CONCLUSION

The existing international legal framework for copyright enforcement, in agreements like the TRIPS Agreement, the WIPO Copyright Treaty (WCT), and the Berne Convention, lays the foundation for addressing cross-border copyright disputes. This foundation rests on three principles enshrined within these agreements: 1) National treatment guarantees that foreign authors or other rightsholders receive treatment equal to that of national rightsholders in another unionist country. 2) Automatic protection without requiring pre-formalities to have copyright protection. 3) Independence of protection ensures that copyright protection exists regardless of any protection in the country of origin.

However, despite emphasizing strong enforcement (on national bases), these agreements do not directly address cross-border enforcement issues. At the same time, infringements can easily occur outside national borders because of the digital environment.

Despite the above-mentioned important (but not solely sufficient) principles, these agreements focus primarily on domestic enforcement within each country. They largely do not take into consideration the transnational disputes and don't provide clear mechanisms for handling cross-border enforcement of copyright. On the other hand, these agreements don't have specific rules governing private international law (PIL) within cross-border copyright disputes.

This is due, in large part, to the concept of territoriality in intellectual property law. This traditional principle dictates that intellectual property rights, including copyright, are granted and enforced on a country-by-country basis. Consequently, major copyright agreements reflect this principle by establishing minimum standards of rights and enforcement provisions that member countries must adhere to. However, these agreements don't prevent countries from enacting stricter national protection if they wish to. For the same reason, it is very challenging under the international frameworks of PIL, to deal with cross-border copyright disputes:

Firstly, in terms of jurisdictional conflicts related to cross-border copyright disputes, there is currently no comprehensive international legal framework in place, except for the limited applicability of the HCCH Choice of Court Convention 2005. As a result, rightsholders often find themselves navigating multiple legal systems to protect their copyrights. This requires engaging with the jurisdictions of multiple countries to ensure the enforcement of their rights. Consequently, this situation creates a sense of unpredictability and complexity for rightsholders seeking to enforce their copyrights internationally.

Secondly, concerning the choice of law, although there are provisions in the Berne Convention, they do not offer a robust solution for determining the applicable law. There is an ongoing debate surrounding Article 5(2) and whether it establishes a non-discrimination rule or a choice of law rule. Even if we interpret it as a choice of law rule, the wording of the text *"where protection is claimed"* is ambiguous, giving rise to another debate about whether it refers to (*lex loci protectionis*) or (*lex fori*). This ambiguity can lead to unpredictable outcomes for rightsholders, as the applicable law and level of protection will depend on the interpretation of the specific jurisdiction handling the case. Furthermore, the Berne Convention does not explicitly address a clear-cut solution for cross-border infringements occurring across multiple countries in the digital age. This situation underscores the potential necessity for reform or further clarification within the Berne Convention to establish a more consistent and predictable framework choice of law rules.

The aforementioned challenges of Private International Law (PIL) in cross-border copyright disputes, especially jurisdictional conflicts, often push parties towards arbitration as an alternative to court litigation. It can be more efficient for the author or right-holder to seek

enforcement of their rights in a single neutral forum rather than in multiple countries. Additionally in arbitration, the principle of "party autonomy" typically governs the choice of law, offering greater flexibility compared to PIL complexities.

Finally, regarding the recognition and enforcement of foreign judgments in copyright disputes, the current international legal framework falls short in effectively addressing this important matter. While the Hague Convention on Choice of Court Agreements (2005) and the HCCH 2019 Judgments Convention offer some promise, their reach is limited.

The HCCH 2019 Convention might (indirectly) cover judgments if the dispute involves a contract related to intellectual property rights, but its scope is narrow, as the main focus of the dispute should be the contract itself (general contract law principles) rather than the IPR. Similarly, the Hague 2005 Convention's applicability in copyright disputes is restricted, and potentially guarantees recognition and enforcement only to judgments related to situations where parties have a pre-existing agreement that specify a preferred court.

This lack of a comprehensive framework of recognition and enforcement of cross-border court decisions creates significant challenges for rightsholders seeking to enforce their copyrights across borders through civil court proceedings in today's interconnected digital world.

In contrast, the recognition and enforcement of arbitral awards benefit from a robust international legal framework: the New York Convention 1958. Nevertheless, it requires the parties to have entered into an arbitration agreement. while most of these disputes, (such as online copyright infringements), do not stem from pre-existing contractual relationships between the parties.

The absence of an international framework to govern private international law (PIL) related to IP disputes poses significant challenges, particularly in light of the above-mentioned notion of territoriality. However, while States have agreed to minimum standards for the enforcement of these rights, they could also come to an agreement on an international framework to govern PIL related to copyright disputes, focusing initially on less controversial issues. Such a framework regarding international copyright would provide authors or rightsholders seeking to exploit their copyrights abroad with certainty and predictability. In this regard, it’s worth noting that there are several instruments of soft law that could perfectly serve as valuable resources, paving the way for a more robust international legal framework for resolving PIL issues in cross-border copyright disputes.

In this respect, several soft law initiatives have proposed normative frameworks that address the intersection of private international law (PIL) and intellectual property. These initiatives though not legally binding, aim to provide guidelines and standards for resolving PIL issues related to IP. While there are numerous soft law instruments available, the Kyoto Guidelines stand out as a promising model for a harmonized international framework.

The Kyoto Guidelines, being the most recent initiative (2020), build upon the established principles of the American Law Institute (ALI) and the European Max Planck Group Commentaries on Conflict of Laws in Intellectual Property Principles (CLIP Principles) instruments. As such, they offer the most up-to-date and comprehensive framework for addressing cross-border copyright disputes. By encompassing jurisdiction, applicable law, and the recognition and enforcement of judgments, the Kyoto Guidelines provide a holistic approach that directly addresses copyright issues. This makes them a promising foundation for developing a robust international legal framework in this area.

In conclusion, given the evolving landscape of copyright and the increasing interconnectedness of the global economy, it has become imperative to reform the existing private international law (PIL) framework to provide greater certainty and predictability for

authors and rights holders. This is particularly crucial for copyright, which, unlike industrial property rights, is less bound by formalities and sovereignty considerations **and for authors and rights holders from developing countries with limited resources to enforce their rights abroad.**

By building upon the Kyoto Guidelines and other relevant soft law instruments, countries can establish a more harmonized and efficient international legal framework for resolving cross-border copyright disputes. This would not only benefit rights holders but also foster innovation and creativity **in developing countries** and on a global scale.

This can find its legal basis upon the article 20 of the Berne Convention which allows its member countries "to enter into special agreements among themselves" giving them the flexibility to take the necessary steps to modernize their PIL regimes and ensure a more equitable and effective system for the protection and enforcement of copyright rights.

Ultimately, the reform of PIL for copyright is essential for the continued growth and development of the creative industries, **particularly in the developing world.**

BIBLIOGRAPHY

Books

BOUCHE (N), le principe de territorialité de la propriété intellectuelle, Ph. D. Thesis. Strasbourg university, 2000.

CHRISTOPHER (H) & SANDERS (A.K), (Eds.), 25 Years of the TRIPS Agreement: past, present, future, Walters Kluers, 2022.

CHRISTOPHER (H) & SANDERS (A.K) (Eds.), Intellectual Property and Free Trade Agreements, Oxford and Portland, pregon,2007.

DE BOER (Th.M) & HUGENHOLTZ (P.B), Choice of law in copyright and related rights Alternatives to the Lex Protectionis, Mireille van Eechoud ,2003.

GINSBURG (J.C) & TREPPOZ (E), International copyright law: U.S. and E.U. perspectives : text and cases, Edward Elgar Publishing, 2015.

GROSSE RUSE-KHAN (H), The protection of intellectual property in international law, Oxford: Oxford University Press, 2016.

GOLDSTEIN (P) & HUGENHOLTZ (P.B), International copyright: principles, law, and practice, Oxford University Press, 2019.

M. HILTY(H) & STRAUS (J) &DREXL(J) (Eds.), TRIPS plus 20 From Trade Rules to Market Principles, Springer-Verlag Berlin Heidelberg 2016.

SEUBA (X), The global regime for the enforcement of intellectual property rights, Cambridge: Cambridge University Press, 2017.

TORREMANS (p), Research handbook on cross-border enforcement of intellectual property, Edward Elgar publishing, 2014.

WIPO Intellectual Property Handbook, WIPO publication, 2nd edition ,2004.

WIPO GUIDE to the BERNE CONVENTION for the Protection of Literary and Artistic Works (Paris Act, 1971), WIPO publication 1978.

Articles and Journal Articles

AUSTIN (G.W), et al. (Eds.), Across Intellectual Property, Essays in Honour of Sam Ricketson, CAMBRIDGE university press, 2020.

CELLI (A.L) & BENZ (N), «Arbitration and Intellectual Property», European Business Organization Law Review 3:593-610, EBOR 3, 2002.

DESSEMONTET (F), « A European Point of View on the ALI Principles Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes», Brooklyn Journal of International Law, 2005.

HCCH (ed.), «Explanatory Report on the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters»,2020.

KONO «Jurisdiction and Applicable Law in Matters of Intellectual Property», Article found in «General Reports of the XVIIIth Congress of the International Academy of Comparative Law», Springer Science and Business Media B.V., 2012.

Kyoto Guidelines « International Law Association's Guidelines on Intellectual Property and Private International Law », Toshiyuki Kono, Axel Metzger and Pedro de Miguel Asensio, Editorial, JIPITEC, Volume 12, 2021.

LUCAS (A), «law applicable to copyright infringement in the digital environment», study made upon the request of the secretariat of UNISCO, Intergovernmental Copyright Committee, IGC (1971)/XIII/5 Paris, 5 April 2005.

O'Halpin (O), «Modern challenges to *Lex Loci Protectionis*: A need for change? Jura Falconis Jg. 58, nummer2, 2022.

Peter (K.Yu) , « Why Are The Trips Enforcement Provisions Ineffective? », Journal of Intellectual Property Law, 18 (2), 479–531, 2011.

SEBESFI (V) «The Future of the Recognition and Enforcement of Foreign Intellectual Property Judgments in Australia» UNSW Law Jl 53,2022.

European Union (ed.), « The Anti-Counterfeiting Trade Agreement (ACTA): an assessment» ,2011.

European Union(ed.), «cross border enforcement of intellectual property rights in EU, study requested by the JURI committee, 2021.

United Nations (ed.), «Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York, 1958) », 2015.

RECENT SOUTH CENTRE RESEARCH PAPERS

No.	Date	Title	Authors
142	4 January 2022	Competition Law and Access to Medicines: Lessons from Brazilian Regulation and Practice	Matheus Z. Falcão, Mariana Gondo and Ana Carolina Navarrete
143	11 January 2022	Direito Brasileiro da Concorrência e Acesso à Saúde no Brasil: Preços Exploratórios no Setor de Medicamentos	Bruno Braz de Castro
144	27 January 2022	A TRIPS-COVID Waiver and Overlapping Commitments to Protect Intellectual Property Rights Under International IP and Investment Agreements	Henning Grosse Ruse-Khan and Federica Paddeu
145	9 February 2022	The Right to Health in Pharmaceutical Patent Disputes	Emmanuel Kolawole Oke
146	16 February 2022	A Review of WTO Disputes on TRIPS: Implications for Use of Flexibilities for Public Health	Nirmalya Syam
147	28 February 2022	Can Negotiations at the World Health Organization Lead to a Just Framework for the Prevention, Preparedness and Response to Pandemics as Global Public Goods?	Viviana Muñoz Tellez
148	7 March 2022	Marine Genetic Resources Beyond National Jurisdictions: Negotiating Options on Intellectual Property	Siva Thambisetty
149	8 March 2022	The International Discourse on the Right to Development and the Need to Reinvigorate its Implementation	Yuefen Li, Daniel Uribe and Danish
150	21 March 2022	The Liability of Internet Service Providers for Copyright Infringement in Sri Lanka: A Comparative Analysis	By Ruwan Fernando
147	28 February 2022	Les négociations au sein de l'Organisation mondiale de la santé peuvent-elles aboutir à un cadre juste pour la prévention, la préparation et la riposte aux pandémies en tant que bien public mondial?	Viviana Muñoz Tellez
147	28 February 2022	¿Podrán las negociaciones en la organización mundial de la salud resultar en un marco justo para la prevención, la preparación y la respuesta ante pandemias como bienes públicos globales?	Viviana Muñoz Tellez

151	19 April 2022	Escaping the Fragility/Conflict Poverty Trap: How the interaction between service delivery, capacity development and institutional transformation drives the process of transition out of fragility	Mamadou Dia
152	21 April 2022	An Examination of Selected Public Health Exceptions in Asian Patent Laws	Kiyoshi Adachi
153	26 April 2022	Patent Analysis for Medicines and Biotherapeutics in Trials to Treat COVID-19	Srividya Ravi
154	9 May 2022	COVID-19 Vaccines as Global Public Goods: between life and profit	Katiuska King Mantilla and César Carranza Barona
155	27 May 2022	Manufacturing for Export: A TRIPS-Consistent Pro-Competitive Exception	by Carlos M. Correa and Juan I. Correa
156	1 June 2022	A Tough Call? Comparing Tax Revenues to Be Raised by Developing Countries from the Amount A and the UN Model Treaty Article 12B Regimes	Vladimir Starkov and Alexis Jin
157	3 June 2022	WTO Moratorium on Customs Duties on Electronic Transmissions: How much tariff revenue have developing countries lost?	Rashmi Banga
158	15 June 2022	Twenty Years After Doha: An Analysis of the Use of the TRIPS Agreement's Public Health Flexibilities in India	Muhammad Zaheer Abbas, PhD
156	1 June 2022	Un choix cornélien ? Comparaison des recettes fiscales à engranger par les pays en développement au titre des régimes du Montant A et de l'Article 12B du Modèle de convention des Nations Unies	Vladimir Starkov et Alexis Jin
159	15 July 2022	Reaping the Fruits of Research on Microorganisms: Prospects and Challenges for R&D and Industry in Sri Lanka	Ruwan Fernando
160	21 July 2022	Movement Forward on ABS for the Convention on Biological Diversity: Bounded Openness Over Natural Information	Joseph Henry Vogel, Manuel Ruiz Muller, Klaus Angerer, and Christopher May
161	26 July 2022	Two Pillar Solution for Taxing the Digitalized Economy: Policy Implications and Guidance for the Global South	Irene Ovonji-Odida, Veronica Grondona, Abdul Muheet Chowdhary

162	11 August 2022	The Proposed Standing Multilateral Mechanism and Its Potential Relationship with the Existing Universe of Investor – State Dispute Settlement	Danish and Daniel Uribe
163	19 August 2022	The Human Right to Science: From Fragmentation to Comprehensive Implementation?	Peter Bille Larsen and Marjorie Pamintuan
156	1 June 2022	¿Una elección difícil? Comparación de los ingresos fiscales que recaudarán los países en vías de desarrollo a partir de los regímenes del Monto A y del Artículo 12B de la Convención Modelo de las Naciones Unidas	Vladimir Starkov y Alexis Jin
143	11 January 2022	Brazilian Competition Law and Access to Health in Brazil: Exploitative Pricing in the Pharmaceutical Sector	Bruno Braz de Castro
164	23 September 2022	Impact of a Minimum Tax Rate under the Pillar Two Solution on Small Island Developing States	Kuldeep Sharma
165	4 October 2022	Evaluating the Impact of Pillars One and Two	Suranjali Tandon and Chetan Rao
166	6 October 2022	Lessons From India's Implementation of Doha Declaration on TRIPS and Public Health	Nanditta Batra
167	27 October 2022	Analysing Intersections between Climate Change and Human Rights	Daniel Uribe Teran and Luis Fernando Rosales
168	28 October 2022	TRIPS Flexibilities and Access to Medicines: An Evaluation of Barriers to Employing Compulsory Licenses for Patented Pharmaceuticals at the WTO	Anna S.Y. Wong, Clarke B. Cole, Jillian C. Kohler
169	8 November 2022	The WTO TRIPS Decision on COVID-19 Vaccines: What is Needed to Implement it?	Carlos M. Correa and Nirmalya Syam
170	17 November 2022	Left on Our Own: COVID-19, TRIPS-Plus Free Trade Agreements, and the Doha Declaration on TRIPS and Public Health	Melissa Omino and Joanna Kahumbu
171	29 November 2022	Pautas para el Examen de Solicitudes de Patentes Relacionadas con Productos Farmacéuticos	Carlos M Correa

162	11 August 2022	El mecanismo multilateral permanente propuesto y su posible relación con el universo existente de solución de controversias entre inversionistas y estados	Danish y Daniel Uribe
162	11 August 2022	Le mécanisme multilatéral permanent proposé et sa relation potentielle avec l'univers existant du règlement des différends entre investisseurs et États	Danish y Daniel Uribe
172	1 December 2022	Illicit Financial Flows and Stolen Asset Recovery: The Global North Must Act	Abdul Muheet Chowdhary and Sebastien Babou Diasso
171	31 January 2022	Directives pour l'examen des demandes de brevet relatives aux produits pharmaceutiques	Carlos M Correa
173	7 February 2023	Analysis of COVID-Related Patents for Antibodies and Vaccines	Kausalya Santhanam
174	13 February 2023	Leading and Coordinating Global Health: Strengthening the World Health Organization	Nirmalya Syam
138	October 2021	Más allá de la responsabilidad social de las empresas: reforzar la diligencia debida en materia de derechos humanos mediante el Instrumento jurídicamente vinculante sobre empresas y derechos humanos	Daniel Uribe Terán
138	October 2021	Au-delà de la responsabilité sociale de l'entreprise : Renforcer le devoir de diligence en matière de droits de l'homme au moyen de l'instrument juridiquement contraignant relatif aux entreprises et aux droits de l'homme	Daniel Uribe Terán
167	27 October 2022	Analyse des Intersections entre le Changement Climatique et les Droits de l'Homme	Daniel Uribe Teran y Luis Fernando Rosales
167	27 October 2022	Análisis de las intersecciones entre cambio climático y derechos humanos	Daniel Uribe Teran y Luis Fernando Rosales
175	22 March 2023	Experiencias internacionales sobre la concesión de licencias obligatorias por razones de salud pública	Catalina de la Puente, Gastón Palopoli, Constanza Silvestrini, Juan Correa
176	29 March 2023	De dónde viene y a dónde va el financiamiento para la salud mundial	Germán Velásquez

177	18 May 2023	Policy Dilemmas for ASEAN Developing Countries Arising from the Tariff Moratorium on Electronically Transmitted Goods	Manuel F. Montes and Peter Lunenborg
178	22 May 2023	A Response to COVID-19 and Beyond: Expanding African Capacity in Vaccine Production	Carlos M. Correa
179	14 July 2023	Reinvigorating the Non-Aligned Movement for the Post-COVID-19 Era	Yuefen Li, Daniel Uribe and Danish
180	9 August 2023	Neglected Dimension of the Inventive Step as Applied to Pharmaceutical and Biotechnological Products: The case of Sri Lanka's patent law	Ruwan Fernando
181	14 August 2023	Trends, Reasons and Prospects of De-dollarization	Yuefen Li
182	7 September 2023	Multistakeholderism: Is it good for developing countries?	Harris Gleckman
183	15 September 2023	Least Developed Countries and Their Progress on the Sustainable Development Goals	Peter Lunenborg
184	15 September 2023	Promoting Jordan's Use of Compulsory Licensing During the Pandemic	Laila Barqawi
185	13 October 2023	Foreign Investment Flows in a Shifting Geoeconomic Landscape	Danish
182	7 September 2023	Multistakeholderismo: ¿Es bueno para los países en desarrollo?	Harris Gleckman
182	7 September 2023	Multipartisme: est-ce bon pour les pays en développement?	Harris Gleckman
186	14 November 2023	Patentamiento de anticuerpos monoclonales. El caso de Argentina	Juan Correa, Catalina de la Puente, Ramiro Picasso y Constanza Silvestrini
187	4 December 2023	The Global Digital Compact: opportunities and challenges for developing countries in a fragmented digital space	Carlos Correa, Danish, Vitor Ido, Jacquelene Mwangi and Daniel Uribe
188	7 December 2023	The Intersection Between Intellectual Property, Public Health and Access to Climate-Related Technologies	Lívia Regina Batista
189	21 December 2023	Status of Permanent Establishments under GloBE Rules	Kuldeep Sharma

190	24 January 2024	Implementing the Doha Declaration in OAPI Legislation: Do Transition Periods Matter?	Patrick Juvet Lowé Gnintedem
191	25 January 2024	TRIPS Waiver Decision for Equitable Access to Medical Countermeasures in the Pandemic: COVID-19 Diagnostics and Therapeutics	Nirmalya Syam and Muhammad Zaheer Abbas, PhD
192	30 January 2024	Pautas para el examen de patentes sobre anticuerpos monoclonales	Juan Correa, Catalina de la Puente, Ramiro Picasso y Constanza Silvestrini
193	2 February 2024	Desafíos actuales y posibles escenarios futuros de la salud mundial	Germán Velásquez
194	15 February 2024	Implementation of TRIPS Flexibilities and Injunctions: A Case Study of India	Shirin Syed
195	6 March 2024	Régimen de licencias obligatorias y uso público no comercial en Argentina	Juan Ignacio Correa
196	19 April 2024	Licencias obligatorias para exportación: operacionalización en el orden jurídico argentino	Valentina Delich
197	28 May 2024	Compulsory Licensing as a Remedy Against Excessive Pricing of Life-Saving Medicines	Behrang Kianzad
198	31 May 2024	What Can Cambodia Learn from Thailand and India as It Prepares to Graduate from Least Developed Country Status?	Brigitte Tenni, Deborah Gleeson, Joel Lexchin, Phin Sovath, and Chalermsak Kittitrakul
199	10 June 2024	A Toss Up? Comparing Tax Revenues from the Amount A and Digital Service Tax Regimes for Developing Countries	Vladimir Starkov and Alexis Jin
200	26 June 2024	Transforming the Non-Military Structures of Global Governance Assessing Priorities for Chapter 5 of the Pact for the Future	Harris Gleckman
201	27 June 2024	Antimicrobial Resistance: Optimizing Antimicrobial Use in Food-Producing Animals	Viviana Munoz Tellez
202	28 June 2024	Constraints to and Prospects for Sustainable Livestock Sector Practices in Argentina with Emphasis on Antimicrobial Usage	David Oseguera Montiel
203	11 July 2024	The Vaccine Industry After the COVID-19 Pandemic: An International Perspective	Felix Lobo

204	24 July 2024	Negotiating Health and Autonomy: Data Exclusivity, Healthcare Policies and Access to Pharmaceutical Innovations	Henrique Zeferino De Menezes, Julia Paranhos, Ricardo Lobato Torres, Luciana Correia Borges, Daniela De Santana Falcão and Gustavo Soares Felix Lima
205	30 July 2024	Foreign Direct Investment Screening for 'National Security' or Sustainable Development: a blessing in disguise?	Daniel Uribe Teran
206	28 August 2024	Equity and Pandemic Preparedness: Navigating the 2024 Amendments to the International Health Regulations	Nirmalya Syam
207	29 August 2024	Discussions on Draft Provisions on Damages in the Investor-State Dispute Settlement System in UNCITRAL Working Group III	José Manuel Alvarez Zárate
208	10 September 2024	Catalyzing Policy Action to Address Antimicrobial Resistance: Next Steps for Global Governance	Anthony D. So
209	25 September 2024	AMR in Aquaculture: Enhancing Indian Shrimp Exports through Sustainable Practices and Reduced Antimicrobial Usage	Robin Paul
210	30 September 2024	Decision 15/9 and the Nagoya Protocol: Who should get what in the Multilateral Benefit-Sharing Mechanism?	Joseph Henry Vogel, Natasha C. Jiménez-Revelles, Xavier A. Maldonado-Ramírez de Arellano
211	14 October 2024	The Implications of Treaty Restrictions of Taxing Rights on Services, Especially for Developing Countries	Faith Amaro, Veronica Grondona, Sol Picciotto
212	15 November 2024	Régulation internationale des dessins et modèles industriels : l'Accord sur les ADPIC à l'aune du droit de l'Union européenne	Adèle Sicot
213	13 December 2024	Navigating the WTO's Working Group on Trade and Transfer of Technology: A Critical Analysis from the Perspective of Developing Countries	Nirmalya Syam
212	9 January 2025	International Regulation of Industrial Designs: The TRIPS Agreement in the Light of European Union Law	Adèle Sicot
214	15 January 2025	Application of the Bolar Exception: Different Approaches in the EU	Dmytro Doubinsky

215	23 January 2025	Assessing Five Years of the African Continental Free Trade Area (AfCFTA): Proposals on Potential Amendments	Kiiza Africa
216	27 February 2025	Will the Pact for the Future Advance a Common Global Agenda on the Challenges Facing Humanity?	Viviana Munoz Tellez, Danish, Abdul Muheet Chowdhary, Nirmalya Syam, Daniel Uribe
214	20 March 2025	Application de l'Exception Bolar: Différentes approches dans le droit de l'UE	Dmytro Doubinsky

SOUTH CENTRE

International Environment House 2
Chemin de Balexert 7-9
1219 Geneva
Switzerland

Telephone: (41) 022 791 8050
E-mail: south@southcentre.int

Website:
http://www.southcentre.int

ISSN 1819-6926