

AN EU CONFLICT-OF-LAWS APPROACH TO PROPRIETARY ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

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I INTRODUCTION

When a court of an EU Member State (MS) has to deal with a cross-border dispute involving an intellectual property (IP) right, questions may arise concerning the validity of the IP right, or who is the owner of this right¹. These questions are examples of issues related to proprietary aspects of IP rights. At regional level, there exist uniform rules on proprietary aspects of unitary EU rights, such as EU Trademarks,

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¹ Intellectual Property (IP) is often divided into two main categories: copyright and related rights, and industrial property such as patents, trademarks, industrial designs, geographical indications. See World Intellectual Property Organization (WIPO), «What is Intellectual Property?», 2020, p. 3, available at <https://www.wipo.int/publications/en/details.jsp?id=4528>

Benelux Trademarks and Designs². International treaties related to IP rights merely provide minimum protection that Contracting States, including MS, must follow. Hence, with respect to national IP rights, such as trademarks, the answers to the aforementioned questions generally have to be found in national IP laws³.

In cross-border transfers of national IP rights, the Rome I Regulation refers to the applicable law regarding contractual issues but not the proprietary aspects of transfers⁴. With respect to non-contractual obligations arising from an infringement of a national IP right, Article 8(1) Rome II Regulation refers to the law of the country for which protection is claimed, *lex loci protectionis*⁵. However, it has generally been argued that Rome II does not concern proprietary aspects of IP rights⁶. Because of the lack of a uniform conflict-of-laws rule on proprietary issues of national IP rights at EU and international level, MS courts have to determine the applicable law on the basis of their national conflict-of-laws rules⁷.

² Regulation (EU) No. 2017/1001 on the European Union trade mark OJ L 154, 16.6.2017; Council Regulation (EC) No. 6/2002 on Community designs OJ L 3, 5.1.2002; Council Regulation (EC) No. 2100/94 on Community plant variety rights, OJ L 227, 1.9.1994; Regulation (EU) No. 1257/2012 implementing enhanced cooperation in the area of the creation of unitary patent protection, OJ L 361, 31.12.2012; Agreement on a Unified Patent Court OJ C 175, 20.6.2013. The property aspects of unitary IP rights are governed by «a dual track system» that means national law is applicable when indicated in the Regulation involved. See D. VAN ENGELLEN, «The Netherlands», in KONO, T. (ed.), *Intellectual Property and Private International Law: Comparative Perspectives*, Hart Publishing, Oxford, 2012, p. 873. Benelux Convention on Intellectual Property (Trademarks and Designs) of 25 February 2005, last amended 1 June 2018. Nonetheless, Article 4.8bis stipulates a conflict-of-laws rule.

³ As EU law on copyrights have not resulted in full harmonisation, national copyright laws remain relevant.

⁴ Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I), OJ L 177, 4.7.2008. See M. GIULIANO, P. LAGARDE, *Report on the Convention on the law applicable to contractual obligations*, OJ C 282, 31.10.1980, No C 282/10.

⁵ Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.07.2007. See also recital 26 in the Preamble to Rome II.

⁶ See, for instance, P.L.C. TORREMANS, *Intellectual Property and Private International Law*, 3th ed., Oxford, Oxford University Press, 2024, pp. 817-818.

⁷ Nonetheless, some scholars and MS courts have argued that IP treaties contain conflict-of-laws rules. With respect to the Berne Convention for the Protection of Literary and Artistic Works of 1886, 828 UNTS 221, see e.g., S. J. SCHAAFSMA, *Intellectual Property in the Conflict-of-law Rule in the Principle of National Treatment*, Cheltenham, Edward Elgar Publishing, 2022. See e.g. the Dutch Court of Appeal of The Hague 22 September 2015, ECLI:NL:GHDHA:2015:2592, para. 20. However, the CJEU held that Article 5(1) Berne Convention does not contain a conflict-of-laws rule. CJEU 30 June 2005, *Tod's Spa*, C-28/04, ECLI:EU:C:2005:418, para. 32. On the scholarly debate regarding conflict-of-laws rules in copyright and related rights treaties, see M.M.M. VAN EECHOUD, *Choice of Law in Copyright and Related Rights: Alternatives to the Lex Protectionis*, Alphen aan den Rijn, Kluwer Law International, 2003, pp. 95-127. With respect to the Paris Convention for the Protection of Industrial Property of 1883, 828 UNTS 305, see M. PERTEGÁS SENDER, *Cross-border Enforcement of Patent Rights*, Oxford, Oxford University Press, 2001, pp. 221-224.

In view of codifications and case law of MS, this Chapter will show that there is often a lack of clarity regarding the interpretation and scope of conflict-of-laws rules on proprietary aspects of national IP rights. At European and international level, several academic groups have proposed conflict-of-laws rules regarding IP rights, including proprietary aspects⁸. Although the Conflict of Laws in Intellectual Property (CLIP) Principles are most based on European principles and case law, none of these proposals are specifically designed for the EU⁹.

This Chapter will propose an EU conflict-of-laws approach to proprietary aspects of national IP rights that is in accordance with the current EU private international law (PIL) framework, and in particular serves EU PIL principles such as predictability and the sound administration of justice¹⁰. Predictability is also an important objective in the context of the *erga omnes* effect of proprietary rights. From a perspective of instrumentalization of PIL¹¹, it is also important to provide legal certainty to foster creativity, innovation and commercial exploitation of IP which is a high priority of EU policy. Furthermore, international decisional harmony facilitates mutual trust which is vital for the free movement of judgments in the EU.

This Chapter will start to discuss two main conflict-of-laws approaches of MS adopted in legislation or case law regarding proprietary aspects of IP rights. In view of the EU PIL framework and principles, this Chapter will argue to adopt the *lex loci protectionis* rule as general EU conflict-of-laws rule regarding all proprietary aspects of national IP rights. Furthermore, arguments will be provided against the *lex originis*. In addition, this Chapter will propose a special conflict-of-laws rule

⁸ For an overview and comparison of proposals enacted by academic groups, see R., MATULIONYTĖ, «IP and Applicable Law in Recent International Proposals: Report for the International Law Association», *JIPITEC*, 3, 2012, pp. 263-305. See also the «Kyoto Guidelines» on IP and PIL adopted by the International Law Association Committee in 2020, see <https://www.jipitec.eu/archive/issues/jipitec-12-1-2021/5252>.

⁹ P. JURCYS, «International Jurisdiction in Intellectual Property Disputes: CLIP, ALI Principles and other Legislative Proposals in Comparative Perspective», *Journal of Intellectual Property, Information Technology and E-Commerce Law*, 2012, 3, p. 177. See the final text CLIP Principles of 1 December 2011 adopted by the European Max Planck Group on Conflict of Laws in Intellectual Property, <https://www.ip.mpg.de/en/research/research-news/principles-on-conflict-of-laws-in-intellectual-property-clip.html>

¹⁰ While the proposal «Intellectual Property Rights and the Conflict of Laws» by E. Ulmer, published under the auspices of the Commission of the European Communities in 1978, also mainly referred to the *lex loci protectionis*, it does not involve the current EU PIL framework. E. ULMER, *Intellectual Property Rights and the Conflict of Laws*, Luxembourg, Kluwer, 1978.

¹¹ On the instrumentalisation of PIL in the context of EU policy aims, see inter alia J. MEEUSEN, «Instrumentalisation of Private International Law in the European Union: Towards a European Conflicts Revolution?», *European Journal of Migration and Law*, 2007, 9, p. 288; V. VAN DEN EECKHOUT, «The Instrumentalisation of Private International Law: Quo Vadis? Rethinking the “Neutrality” of Private International Law in an Era of Globalisation and Europeanisation of Private International Law», 2012. Available at <https://papers.ssrn.com/sol3/papers.cfm?>

with respect to initial ownership of IP rights regarding inventions and works created in the context of employment. Finally, in the context of the common conflict-of-laws EU derogation mechanisms, special attention will be paid to national provisions that protect moral rights related to copyrights.

II. DE LEGE LATA

1. *Lex loci protectionis*

Comparing codifications¹² and case law of MS,¹³ the majority of these states appear to refer to the law of the country for which protection is sought or claimed, the *lex loci protectionis*, with respect to most of the proprietary aspects of IP rights. This rule is based on the territoriality principle related to IP rights that means the protection of an IP right is territorially limited to the state that granted the particular right¹⁴. However, some codifications appear to define *lex loci protectionis* as, for instance, the law of the country in which an act of use is committed¹⁵,

¹² Article 93 first sentence Belgian Code of PIL of 2004; Article 71 Bulgarian PIL Code of 2005 last amended in 2007; Article 24(1) Croatian Law of PIL of 2017; Section 80 PIL Act of Czech Republic of 2012; § 23 Estonian PIL Act of 2002; Article 1.53(1) Civil Code of the Republic of Lithuania of 2000; Section 48 Hungarian Act of 2017 on PIL; Article 46(3) Polish PIL Act of 2011. Although Article 10(4) Spanish Civil Code of 1889 states that IP rights shall be protected within Spanish territory pursuant to Spanish Law, it has been argued that this provision refers to the *lex protectionis*. See DE MIGUEL ASENSIO, P.A., “Spain”, in KONO, T. (ed.), *Intellectual Property and Private International Law: Comparative Perspectives*, Hart Publishing, Oxford, 2012, p. 1014.

¹³ For case law of the German Federal Court of Justice, see A. METZGER, «Germany», in KONO, T. (ed.), *Intellectual Property and Private International Law: Comparative Perspectives*, pp. 596-598. With respect to Swedish courts, see U. MAUNSBACH, «Sweden», in KONO, T. (ed.), *Intellectual Property and Private International Law: Comparative Perspectives*, Hart Publishing 2012, pp. 1044-1046. Courts in Cyprus, Ireland, and Malta generally have recourse to English common law. See C. A. EMILIANIDES, «Cyprus»; T. P. KENNEDY, «Ireland»; T. SCIBERRAS CAMILLERI, K. A. BORG, «Malta», in ESPLUGUES MOTA, C. et al. (eds.), *Application of Foreign Law*, Munich, European Law Publishers, 2011, pp. 161, 231, 266. According to English common law, the *lex protectionis* governs proprietary issues concerning IP rights. See A. BRIGGS, *The Conflict of Laws*, 4th ed., Oxford, Oxford University Press, 2019, p. 291. For Finland, see U. LIUKKUNEN, «Finland», in BASEDOW, J. et al. (eds.), *Encyclopedia of Private International Law*, Cheltenham, Edward Elgar Publishing, 2017, p. 2077. With respect to Luxembourg, see P. KINSCH, «Luxembourg», in BASEDOW, et al. (eds.), *Encyclopedia of Private International Law*, Cheltenham, Edward Elgar Publishing, 2017, p. 2303. Dutch courts generally apply the *lex protectionis* to the proprietary aspects of national IP rights. See *Gerechthof Den Haag* 30 July 2019, ECLI:NL:GHDHA:2019:1962, para. 4.13. However, the Dutch case law shows some inconsistency, see Part II.2. on the *lex originis*. Due to the lack of codified rules and accessible case law or related literature, it is unclear which conflict-of-laws approach regarding proprietary aspects of IP rights has generally been applied by the courts in Denmark, Latvia, Slovenia and Slovakia.

¹⁴ T. KONO, P. JURCYS, «General Report», in KONO, T. (ed.), *Intellectual Property and Private International Law: Comparative Perspectives*, Oxford, Hart Publishing, 2012, p. 17.

¹⁵ Paragraph 34(1) Austrian PIL Act of 1978. According to the literature and case law, this provision refers to the *lex loci protectionis*. See T. PETZ, «Austria», in KONO, T. (ed.),

or the law of the state in which the IP rights are used¹⁶. With respect to industrial property rights, some codifications refer to the law of the state in which the right «has been issued or the registration has been effected» or an application for registration has been filed¹⁷. Furthermore, codifications of MS often not clearly indicate the scope of the *lex loci protectionis* rule, or only as regards to particular proprietary aspects of IP rights¹⁸. To provide legal certainty, Part III will advocate to adopt the *lex loci protectionis* rule as a general EU conflict-of-laws rule by providing an autonomous concept of proprietary aspects of IP rights.

2. *Lex originis*

Some MS refer to «the law of the country where the work originates», the *lex originis*¹⁹, with respect to proprietary aspects of copyrights²⁰. While most MS do not apply the *lex originis* to all proprietary issues, the other issues are governed by the *lex loci protectionis*²¹.

Intellectual Property and Private International Law: Comparative Perspectives, Oxford, Hart Publishing, 2012, p. 239.

¹⁶ Article 54 of the Italian PIL Statute of 1995. According to the majority of the scholars, this provision refers to the *lex loci protectionis*, see N. BOSCHIERO, B. UBERTAZZI, «Italy», in KONO, T. (ed.), *Intellectual Property and Private International Law: Comparative Perspectives*, Oxford, Hart Publishing, 2012, p. 729. Article 46(1) and (2) Polish PIL Act of 2011 also refers to the law of the state in which these rights are exercised. See English translation by M. ZACHARIASIEWICZ, in BASEDOW, J. et al. (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, 2017, pp. 3628, 3629.

¹⁷ Article 71(2) Bulgarian PIL Code. See the English translation, in J. BASEDOW, et al. (eds.), *Encyclopedia of Private International Law*, Cheltenham, Edward Elgar Publishing, 2017, p. 3033. See also Section 49 Hungarian Act of 2017 on PIL; Article 2.625 Romania New Civil Code of 2009.

¹⁸ See e.g. Hungarian Act XXVIII on PIL of 2017 refers to the establishment, content, termination of copyrights (Section 48) and industrial property rights (Section 49). Despite the fact that Paragraph 34(1) Austrian PIL Act stipulates only certain proprietary aspects of IP rights, scholars and courts have indicated that the *lex loci protectionis* rule is applicable to other proprietary aspects of IP rights. See T. PETZ, *op. cit.*, p. 239.

¹⁹ L. GUIBAULT, P. B. HUGENHOLTZ, *Study on the Conditions Applicable to Contracts Relating to Intellectual Property in the European Union*, Amsterdam, Institute for Information Law, 2002, p. 134.

²⁰ Article 67 Greek Law 2121/1993 on Copyright, Related Rights and Cultural Matters of 1993 with respect to the subject, object, content, duration and limitations of copyrights and related right; Article 48 Portuguese Republic Civil Code of 1966 regarding the proprietary aspects of both copyrights and industrial property. Art. 2.624 Romania New Civil Code of 2009 regarding the creation, content and extinction of copyrights.

²¹ See, for instance, Article 67(3) Greek Law on Copyright, Related Rights and Cultural Matters of 1993 stipulates that the protection of copyrights and related rights shall be subject to the legislation of the State in which the protection is sought. Furthermore, «registered IP rights are invariably governed by the law of the protecting country», see A. GRAMMATICAKI-ALEXIOU, T. SYNODINOU, «Greece», in KONO, T. (ed.), *Intellectual Property and Private International Law: Comparative Perspectives*, Oxford, Hart Publishing, 2012, p. 630.

However, the case law of some MS shows inconsistencies²². In the codifications of MS, the *lex originis* is generally defined as the law of the state of first publication, or if the work has not been published the law of the creator's nationality²³. Scholars have argued that the *lex originis* approach provides legal certainty to authors and third parties²⁴.

However, the place of first publication is difficult to localise in case a work is disseminated via the internet²⁵. With respect to the criterion of the creator's nationality, or habitual residence at the time the work was created, as advocated by some scholars,²⁶ it can be argued that this requires to first assess who is the creator in order to determine the original proprietor which yields a «circular reasoning»²⁷. Considering copyright holders as socially or economically weaker parties could justify the place of residence as connecting factor regarding proprietary aspects of IP rights²⁸. However, although IP rights aim to protect right holders, they are not regarded as socially or economically weaker parties; IP law generally purports to balance the interests of right holders and the public such as users of information²⁹. In EU PIL, holders

²² With respect to initial ownership of copyrights, French courts generally refer to the *lex originis*. E. GOTTSCHALK, «The Law Applicable to Intellectual Property Rights: Is the Lex Loci Protectionis a Pertinent Choice-of-Law Approach?», in GOTTSCHALK, E., *et. al.* (eds.), *Conflict of Laws in a Globalized World*, Cambridge University Press, 2009, p. 191 refers to Cass. 1e civ. Dec. 22 1959, 49 (*Le Chant du Monde*). However, «the French Cour de Cassation has treated authorship and ownership as a matter of national treatment [by invoking the Berne Convention] by the law of the country where protection is sought (*lex loci protectionis*)». See S. RICKETSON, J. C. GINSBURG, *International Copyright and Neighbouring Rights: the Berne Convention and Beyond*, Oxford University Press, Oxford, 2022, p. 1342 refers to Cass, 1e ch. Civ., *RIDA* 2013, no 238, 409 (*Moussus v ABC New Intercontinental Inc*). On the inconsistency, see also I. KUNDA, «Law applicable to intellectual property rights in the European Union», *Korea Private International Law Journal*, 2016, 2, p. 459. Although the *lex loci protectionis* has generally been applied by Dutch courts, some courts have used *lex originis* regarding initial ownership. See M. VAN EECHOU, «BC, *lex protectionis* en auteursrechtbepende. Casenote over: Rb Den Haag, 12/12/18, ECLI:NL:RBDHA:2018:14824», *Tijdschrift voor Auteurs-, Media-, & Informatierecht*, 2019, 43(2), p. 74.

²³ To determine the original owner of industrial property rights, Article 93 of the Belgian Code of PIL refers to the state with which the intellectual activity has the closest connections as connecting factor.

²⁴ See e.g. TH. M. DE BOER, «Aanknoping in het internationaal auteursrecht», *Weekblad voor Privaatrecht, Notariaat en Registratie*, 1977, 5412, p. 690.

²⁵ See P.L.C. TORREMANS, *op. cit.*, 2024, p. 710; M. M. M. VAN EECHOU, *op. cit.*, 2003, p. 227.

²⁶ See N. KLASS, «Das Urheberkollisionsrecht der ersten Inhaberschaft: Plädoyer für einen universalen Ansatz», *Gewerblicher Rechtsschutz und Urheberrecht*, 2007, 56, p. 378; M. M. M. VAN EECHOU, *op. cit.*, p. 227.

²⁷ D. VAN ENGELN, *op. cit.*, p. 872.

²⁸ M. M. M. VAN EECHOU, *op. cit.*, 2003, pp. 175-176.

²⁹ See B. VAN HOUTERT, *Jurisdiction in Cross-border Copyright Infringement Cases: Rethinking the Approach of the Court of Justice of the European Union*, (Maastricht, ProefschriftMaken, 2020), para. 2.2.2.1.2. Available at <https://cris.maastrichtuniversity.nl/en/publications/jurisdiction-in-cross-border-copyright-infringement-cases-rethink>.

of IP rights have also not been regarded as persons that need special protection³⁰.

While the *lex originis* rule has been advocated on the basis of the universal protection of copyrights³¹, this rule is not in accordance with the «bundle» of rights theory of IP embraced by the EU with reference to, *inter alia*, the Berne Convention³². According to this theory, «the exclusivity that a copyright confers upon its owner is, in principle, limited to the territorial boundaries of the Member State where the right has been granted»³³. While the recognition of the established copyright based on the *lex originis* is reminiscent of the old vested rights theory³⁴, it is not in accordance with the prevailing ‘Von Savigny’s *Sitz*’-approach in the EU as will be explained in Part III.1.1.

III. DE LEGE FERENDA

1. *Lex loci protectionis*

From a perspective EU PIL, this section will provide arguments to refer to the law of the state for which protection is sought, *lex loci protectionis*, as general EU conflict-of-laws rule with respect to all proprietary aspects of IP rights. In line with the general trend in EU PIL, this rule refers to the law in force in that state other than its rules of PIL³⁵. While the term «claimed» in Article 8(1) Rome II is appropriate with respect to IP infringements, «sought» is preferable in case of proprietary aspects of IP rights³⁶. For instance, in a cross-border ownership dispute, both the assignor and the assignee may sought the protection of different national IP laws; in this case the court has to determine the applicable law or laws on the basis of the *lex loci protectionis*.

³⁰ *Ibid.*, para. 2.1.2.1.3.

³¹ See J. DREXL, «Article 3:201: Initial ownership», in BASEDOW, J., DREXL, J. (eds.), *Conflict of Laws in Intellectual Property. The CLIP Principles and Commentary*. European Max Planck Group on Conflict of Laws in Intellectual Property, Oxford University Press, Oxford, 2013, pp. 247-248.

³² P. B. HUGENHOLTZ, *Copyright Territoriality in the European Union*, research requested by the European Parliament’s Committee on Legal Affairs, 2010, p. 6. Available at [https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_NT\(2010\)419621](https://www.europarl.europa.eu/thinktank/en/document/IPOL-JURI_NT(2010)419621)

³³ *Ibid.*, p. 3. See also CJEU 14 July 2005, *Lagardère*, C-192/04, ECLI:EU:C:2005:475, para. 46.

³⁴ Cf. M. M. M. VAN EECCHOUD, *op. cit.*, 2003, pp. 99-100.

³⁵ See P. FRANZINA, «Article 20: Exclusion of Renvoi», in MAGNUS, U. *et al.* (eds.), *Rome I Regulation-Commentary*, Otto Schmidt, Köln, 2016, p. 815.

³⁶ According to J.J. Fawcett and P.L.C. Torremans, the terms «claimed» and «sought» are interchangeable. See J. J. FAWCETT, P. L. C. TORREMANS, *Intellectual Property and Private International Law*, 2th ed, Oxford, Oxford University Press 2011, p. 807.

The *lex loci protectionis* is not always equal to the *lex fori*³⁷. As indicated by the *Wintersteiger* ruling, the territorial protection of registered IP rights does not withhold the courts in another state than the state of registration to obtain jurisdiction³⁸; the former courts, such as the *forum rei* and the court of the *Handlungsort*, are allowed to determine the case on the basis of the law of the state of registration. However, at substantive level, an IP right is only protected by the law of the state that grants the right. With respect to registered IP rights, the latter state is the state of registration³⁹. As IP laws do not have extraterritorial effect; the right holder should invoke the law of the country in which he desires to maintain or exercise his right⁴⁰.

1.1. Characterisation of proprietary aspects of IP rights

For reasons of consistency and legal certainty, the autonomous interpretation of the non-exhaustive list in recital 26 in the Preamble to Rome II should be followed regarding the characterisation of IP for the proposed *lex loci protectionis* rule. While EU PIL «should be primarily construed according to substantive EU law»⁴¹, proprietary aspects of national IP rights are not uniformly regulated at EU level. The definition of the CLIP Principles «matters concerning the right as such» could be used as autonomous concept regarding proprietary aspects of IP rights⁴². Based on case law and codifications of MS that indicate proprietary aspects of IP rights⁴³, proprietary issues generally concern the creation, validity, existence, duration, scope of protection, content, initial ownership, right of priority, transferability, and third party-effects⁴⁴. To provide legal certainty, these issues should be enumerated as a non-exhaustive list with respect to scope of the proposed EU *lex loci protectionis* rule.

³⁷ See TH. M. DE BOER, «Aanknoping in het internationaal auteursrecht», *Weekblad voor Privaatrecht, Notariaat en Registratie*, 1977, 5412, p. 675.

³⁸ CJEU 19 April 2012, *Wintersteiger*, C-523/10, ECLI:EU:C:2012:220, para. 30.

³⁹ See P. L. C. TORREMANS, *op. cit.*, 2024, p. 814.

⁴⁰ See also TH. M. DE BOER, *op. cit.*, p. 676. In the context of the Dutch Copyright law, Th.M. De Boer refers to the Dutch Supreme Court 25 June 1965, *Nederlands Juristenblad*, 1966, 116 (*Televisier*).

⁴¹ S. BARIATTI, «Classification (Characterization)», in BASEDOW, J. *et al.*, (eds.), *Encyclopedia of Private International Law*, Cheltenham, Edward Elgar Publishing, 2017, p. 359.

⁴² See J. BASEDOW, «Article 3:102: *Lex protectionis*», in BASEDOW, J., DREXL, J. (eds.), *Conflict of Laws in Intellectual Property. The CLIP Principles and Commentary. European Max Planck Group on Conflict of Laws in Intellectual Property*, Oxford, Oxford University Press, 2013, p. 231, C:3.102.C07.

⁴³ With respect to the method of comparative law, see CJEU 30 November 1976, *Bier*, C-21/76, ECLI:EU:C:1976:166, para. 22.

⁴⁴ See also T. KONO, P. JURCYS, «General Report», in KONO, T. (ed.), *Intellectual Property and Private International Law: Comparative Perspectives*, Hart Publishing, Oxford, 2012, p. 139.

With respect to the transfer of IP rights, a distinction is generally made between the assignment of IP rights that transfers the ownership of IP rights, and the grant of a licence that provides mere contractual rights to use IP rights related to a work or invention⁴⁵. Cross-border contractual issues regarding the licence of IP rights are generally governed by Rome I or Rome Convention of 1980 depending on when the contract is concluded⁴⁶. However, in the context of assignment of IP rights, the difficulty lies in the characterisation of contractual and proprietary aspects⁴⁷. Cross-border issues involving the contractual obligations between the assignor and assignee are governed by the *lex contractus* that MS courts have to determine on the basis of Rome Convention of 1980 or Rome I depending on when the contract is concluded⁴⁸. The assignment of IP as such «has —like the contractual aspects of assignment— aspects of forum and of substance»⁴⁹. Aspects of substance concern mainly the assignability of IP rights⁵⁰. For instance, several codifications of MS regard moral rights as non-assignable⁵¹, Austria and Germany even prohibit the assignment of copyright in general⁵². For a valid assignment of the proprietary rights, national IP laws may also require certain formalities such as a written document or deed⁵³, or registration⁵⁴.

To avoid difficulties regarding the characterisation between contractual and proprietary aspects of assignments, it has been argued to apply the law governing the contract to the assignability of the IP right involved, or in the case of formal requirements related to the assignment to apply the law governing the formal validity of the contract⁵⁵. However, in the context of characterisation of property rights, the CJEU has frequently pointed out the distinction between «a right *in*

⁴⁵ See L. GUIBAULT, P. B. HUGENHOLTZ, *op. cit.* pp. 29-30.

⁴⁶ P. L.C., TORREMANS, *op. cit.*, 2024, pp. 743-781. Rome Convention on the law applicable to contractual obligations of 1980, OJ C 27, 26.1.1998 (Rome Convention of 1980).

⁴⁷ P. L.C., TORREMANS, *op. cit.*, 2024, pp. 748-749.

⁴⁸ P. L.C., TORREMANS, *op. cit.*, 2024, pp. 743-781.

⁴⁹ M.M.M. VAN EECHOU, *op. cit.*, 2003, p. 202.

⁵⁰ *Ibid.*

⁵¹ See e.g. Article L. 121-1 French Intellectual Property Code. The scope of the national rules that moral rights are inalienable, i.e. not transferable or waivable, nonetheless varies between MS. For instance, in Greece moral rights can be waived as regards particular works. See G. DAVIES, K. GARNETT, *Moral Rights*, Thomas Reuters, London, 2010, p. 1040. On the various moral rights and the distinction between economic and moral rights, see B. VAN HOUTERT, *op. cit.*, para. 6.2.2.1.

⁵² Article 29 German Copyright Act; Article 23(3) and 24(1) of Austrian Federal Law on Copyright.

⁵³ See e.g. Article 2(3) Dutch Copyright Act. A comparative research of copyright legislations of MS shows that a written contract «sometimes serves as a condition of validity of the transfer of rights», see L. GUIBAULT, P. B. HUGENHOLTZ, P.B., *op. cit.*, p. 32.

⁵⁴ E. ULMER, *op. cit.*, p. 88.

⁵⁵ M.M.M. VAN EECHOU, *op. cit.*, 2003, p. 203. M.M.M. Van Eechoud refers to the conflict-of-laws proposals of various scholars in the context of the assignment of copyright.

personam», like a contractual right, that has only effect *inter partes* and «a right *in rem*», «existing in an item of property» that has effect *erga omnes*⁵⁶. Furthermore, in view of the *Giuliano/Lagarde* report, the Rome Convention of 1980 on the law applicable to contractual obligations and Rome I are only concerned with the law applicable to contractual obligations, property rights and intellectual property are not covered by these instruments.⁵⁷ Considering this demarcation between contractual and proprietary rights in EU PIL and the fact that the assignment of IP rights concerns the transfer of ownership that has *erga omnes* effect, the *lex loci protectionis* should govern the requirements laid down in national IP laws that are necessary to transfer the ownership which include the assignability of IP rights and formalities concerning the validity of the assignment⁵⁸.

1.2. «Sitz» of the legal relationship and the territorial protection of IP rights

Based on the prevailing Von Savigny's Sitz-approach in the EU, conflicts-of-laws rules should refer to the law of the state most closely connected to the legal relationship⁵⁹.

This connection traditionally relates to geographical factors where the designation of the main connecting factor is determined by the nature of the legal relationship that is the subject of the conflict-of-laws rule⁶⁰. To justify the *lex originis* the place of origin of the creation, or the place of domicile of the creator should be the seat of the legal relationship.

However, although several MS adhere to the view that moral rights are inalienable from the author⁶¹, an IP right should generally be regarded as an object of property which exists separately from the creator and is «be capable of being transferred, of being charged as security in favour of a third party and of being the subject matter of licences»⁶². Furthermore, IP rights not only concern the relationship of the right holder to the creation but also the relationship others have to the work

⁵⁶ See CJEU 3 April 2014, *Weber*, C-438/12, ECLI:EU:C:2014:212, para. 43. See also CJEU 16 November 2016, *Wolfgang*, C-417/15, ECLI:EU:C:2016:881, para. 31.

⁵⁷ M. GIULIANO, P. LAGARDE, *op. cit.*, No C 282/10.

⁵⁸ «For intellectual property the generally accepted idea is that ... the *lex protectionis* governs proprietary aspects of the assignment». M.M.M. VAN EECHELD, *op. cit.*, 2003, p. 203.

⁵⁹ M. SONNENTAG, «Savigny, Friedrich Carl Von», in BASEDOW, J., et al. (eds.), *Encyclopedia of Private International Law*, Edward Elgar Publishing, Cheltenham, 2017, pp. 1613-1614.

⁶⁰ L. STRIKWERDA, S. J. SCHAAFSMA, *Inleiding tot het Nederlandse Internationaal Privaatrecht*, 12th ed., Deventer, Wolters Kluwer, 2019, pp. 168-169.

⁶¹ See e.g. Article L. 121-1 French Intellectual Property Code; Article 29(1) German Copyright Act.

⁶² See also recital 26 in the Preamble to the EU trade mark Regulation.

or invention namely exploiters, users and the public such as the interests of access to information and innovation⁶³. In view of national economic, social, cultural and political interests, each state makes its own balance of these interests reflected in national IP laws⁶⁴. As indicated in the Preamble to the CLIP Principles, rules on PIL should also respect «the need to consider and balance all interests involved, including the interests of owners of intellectual property rights, their contracting partners, and other users of intellectual property, and the broader public interest, in particular in access to, and use of, information as well as other public interests»⁶⁵.

Based on the prevailing view that IP rights are territorially protected⁶⁶, the seat of the legal relationship is in case of proprietary aspects of IP rights generally the closest connected to the state for which protection is sought. The *lex loci protectionis* should therefore be given more connecting value than the *lex originis* or any other connecting factor that points to a single law⁶⁷. Furthermore, the incorporation of the territoriality principle related to IP rights at the conflict-of-laws level could be regarded as a token of respect for «the individual Member States' interests» to apply «their IP laws on their territories» which «fosters mutual trust and facilitates the free movement of judgments»⁶⁸.

1.3. *Lex loci protectionis* under Rome I and Rome II

Applying the *lex loci protectionis* to the proprietary aspects of the assignment of IP rights can yield harmony from a perspective of the applicable law to the contractual issues related to this assignment. If the parties did not make a choice of law, the «characteristic performance» rule in Article 4(2) Rome I is generally only applicable in case of the simplest assignment contract⁶⁹. In other cases, MS courts often apply the law of the country for which protection is sought on the basis

⁶³ «Intellectual property is primarily a regulation of the circulation and exploitation of an intangible object that eludes in many regards the possibility of an absolute control and of a robust right to exclude.» See S. DUSOLLIER, «Intellectual property and the bundle-of-rights metaphor», in DRAHOS, P., GHIDINI, G., ULLRICH, H., *Kritika: Essays on Intellectual Property*, Edward Elgar Publishing, Cheltenham, 2020, pp. 178-179, see <https://sciencespo.hal.science/hal-03935820>.

⁶⁴ See in this context L. LUNDSTEDT, *op. cit.*, 2016, p. 3. L. Lundstedt refers, *inter alia*, to the Preamble to the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994.

⁶⁵ See the Preamble to the CLIP Principles of 1 December 2011 (see the link to website in the Introduction).

⁶⁶ See L. LUNDSTEDT, *op. cit.*, 2016, p. 1.

⁶⁷ E. Ulmer pointed out that «the theory of the link with one particular legal system» is against the territorial protection of IP rights, see E. ULMER, *op. cit.*, p. 8.

⁶⁸ L. LUNDSTEDT, *op. cit.*, 2016, p. 306.

⁶⁹ P. L.C. TORREMANS, *op. cit.*, 2024, p. 764-765; M.M.M. VAN EECCHOUD, *op. cit.*, 2003, p. 199.

of Article 4 paragraphs 3 and 4 of Rome I to contractual aspects related to transfers of IP rights⁷⁰.

In view of the *lex loci protectionis* rule in Article 8(1) Rome II regarding infringements of IP rights, the application of the same rule to proprietary aspects facilitates the sound administration of justice⁷¹. A single law approach is also in accordance with Article 13 Rome II that ensures the application of the *lex loci protectionis* to all non-contractual obligations arising from IP infringements. Based on the accessibility approach to jurisdiction, copyright holders will often sue the infringer in their home state⁷². Because of the territorial limited jurisdiction of the court of the *Erfolgsort*⁷³, the *lex loci protectionis* approach will lead to the *lex fori* which facilitates the sound administration of justice.

The adoption of a technology-neutral *lex loci protectionis* approach is in line with the technology-neutral approach by the CJEU⁷⁴. This approach is preferable in view of legal certainty and the fact that ‘offline’ IP infringements and obligatory transactions related to IP rights can easily be moved to the online setting. In view of unpredictability, it has nonetheless been argued in the context of Article 8(1) Rome II that the *lex loci protectionis* rule can entail many applicable national laws as a result of the internet, particularly in case of online copyright infringements⁷⁵. Academic proposals as referred to in the introduction of this Chapter have therefore proposed «a single-law approach» for ubiquitous IP infringements that generally consists of the «close connection» criterion⁷⁶. However, this criterion does not provide *ex ante* predictability which is an important objective in the context of *erga omnes* effect of proprietary aspects of IP rights.

2. Special conflict-of-laws approach regarding initial ownership in case of employment

With respect to initial ownership, it has been argued that the *lex loci protectionis* may cause limping legal relationships in case of employees

⁷⁰ P. L. C. TORREMANS, «Intellectuele eigendomsovereenkomsten en de Rome I-Verordening», *Revue de Droit Commercial Belge*, 6, 2009, p. 522.

⁷¹ M. PERTEGAS, «Intellectual Property and Choice of Law Rules», in MALATESTA, A. (red.), *The Unification of Choice of Law Rules on Torts and Other Non-Contractual Obligations in Europe, The “Rome II” Proposal*, Milano, CEDAM, 2006, p. 238; P. L. C. TORREMANS, *op. cit.*, 2024, p. 813.

⁷² See CJEU 3 October 2013, *Pinckney*, C-170/12, ECLI:EU:C:2013:635, para. 44. See B. VAN HOUTERT, *op. cit.*, para. 5.2.4.2.

⁷³ See e.g. CJEU 3 October 2013, *Pinckney*, C-170/12, ECLI:EU:C:2013:635, para. 45.

⁷⁴ J.-J. KUIPERS «Het internet en de Brussels I Verordening: een kwestie van Luxemburgse wispelturigheid?», *Nederlands Internationaal Privaatrecht*, 2012, 3, pp. 390-395; B. VAN HOUTERT, *op. cit.*, para. 6.1.4.

⁷⁵ See R. MATULIONYTÉ, *op. cit.*, p. 273.

⁷⁶ See R. MATULIONYTÉ, *op. cit.*, p. 286.

who invent or create work⁷⁷. Indeed, the undesirable situation may arise that the employer is regarded as the initial owner of a copyright in accordance with U.S. law that adheres to the ‘work for hire’ doctrine⁷⁸, but on the basis of German law the employee who created the work is considered to be the initial owner of this copyright. Scholars have therefore argued that this issue of initial ownership should be governed by the same law as the employment relationship⁷⁹. From an EU PIL perspective, employees are regarded as weaker parties who «should be protected by conflict-of-law rules that are more favourable to their interests than the general rules»⁸⁰. Besides the aforementioned general *lex loci protectionis* rule, this Part will therefore propose a specific EU conflict-of-laws rule regarding initial ownership of IP rights in case a work or invention has been made in the course of employment.

2.1. A plea for objective connecting factors

With respect to IP rights arising from activities by employees, several MS stipulate that the law applicable to the employment relationship governs the relationship between the employer and the employee, the *lex contractus*⁸¹. These national provisions seem to have merely *inter partes* effect. However, as argued in Part III.1.1, it has regularly been pointed out in the context of EU PIL that it is important to distinguish between contractual claims concerning obligations that have only effect between parties, *inter partes*, and proprietary rights that have *erga omnes* effect with respect to all persons. The *erga omnes* effect of proprietary rights, such as ownership of IP rights, requires legal certainty in particular for third parties. To achieve a valid transfer of IP rights, a third party should be able to rely on the ownership of the employer or employee⁸².

⁷⁷ See M. M. M. VAN EECHOUDE, *op. cit.*, 2003, p. 171.

⁷⁸ According to Titel 17 of the United States Code § 201(b), in case of a work made for hire, the employer or other person for whom the work was prepared is considered to be the initial owner (i.e. author) of all rights comprised in the copyright unless the parties have expressly agreed otherwise in a written instrument. See also e.g. Article 7 Dutch Copyright Act; Section 11(2) U.K. Copyright, Designs and Patents Act.

⁷⁹ See e.g. TH. M., DE BOER, «Aanknoping in het internationaal auteursrecht», *Weekblad voor Privaatrecht, Notariaat en Registratie*, 1977, 5413, p. 692. See also P. L. C. TORREMAN, *op. cit.* 2024, p. 726.

⁸⁰ Recital 23 in the Preamble to Rome I. See also Article 8 Rome I; Article 20-23 Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters (Brussels Ibis), OJ L 351, 20.12.2012.

⁸¹ Section 34(2) Austrian PIL Act of 1978; Article 72 Bulgarian PIL Code of 2005; Art 24 (2) Croatian PIL of 2017; Article 1.52 (2) Civil Code of the Republic of Lithuania of 2000; Article 47 Polish PIL Act of 2011. With respect to the determination of the original owner of the industrial property rights, Art 93 second sentence Belgian Code of PIL of 2004 refers the law applicable to the contractual relationship if the intellectual activity took place within this relationship.

⁸² Third parties who buy IP rights in good faith are nonetheless often protected by national laws.

However, in case the employment contract contains a choice of law, the required comparison between the *lex contractus* and mandatory provisions according to paragraphs 2, 3 and 4 of Article 8 Rome I, does not yield *ex ante* predictability. While it has been argued that provisions that attribute to employees the ownership of IP rights cannot be regarded as overriding mandatory provisions⁸³, these provisions could be regarded as mandatory provisions in the sense of Article 8(1) Rome I. Furthermore, while it is debatable whether national provisions that protect moral rights could be classified as overriding mandatory rules⁸⁴, they can be regarded as mandatory provisions that cannot be derogated from in the context of Article 8(1) Rome I⁸⁵.

Furthermore, in international property law, the applicable law has traditionally not been at the discretion of the parties⁸⁶. Moreover, in case of IP infringements, Article 8(3) Rome II even explicitly prohibits a choice of law for reasons of the territorial protection of IP rights and the related «national economic policies»⁸⁷. On the basis of the mandatory nature of the *lex loci protectionis* rule laid down in national laws of MS, scholars have also argued that parties are not allowed to choose the law with respect to proprietary aspects of IP rights⁸⁸.

2.2. Loci laboris as main connecting factor

As EU conflict-of-laws approach to initial ownership of IP rights related to inventions and works created in the course of employment the objective connecting factors of Article 60 Paragraph 1 of the European Patent Convention (EPC) should be adopted by analogy⁸⁹. To determine the applicable law to the right to a European patent, this provision refers to the law of the state in which the employee is mainly employed; if this state cannot be determined, the law of the state in which the employer has the place of business to which the employee is attached. As these connecting factors are similar to the factors in Article 8 paragraphs 2 and 3 Rome I, the CJEU's interpretation regarding these factors and the requirement of an «individual employment contract» should be followed. In view of the autonomous interpretation of this

⁸³ P. L.C. TORREMANS, *op. cit.*, 2024, p. 727.

⁸⁴ See Part III.3.

⁸⁵ P.L.C. Torremans argues that «the grant of minimum moral rights is mandatory», see P. L.C. TORREMANS, *op. cit.*, 2024, p. 793. See also Part III.3.

⁸⁶ D. KLERMAN, «Jurisdiction, choice of law, and property», in CHANG, Y. (ed.), *Law and Economics of Possession*, Cambridge University Press, Cambridge, 2015, pp. 267-266.

⁸⁷ See P.L.C. TORREMANS, *op. cit.*, 2024, pp. 825-826.

⁸⁸ With respect to Article 10(4) Spanish Civil Code of 1889, see DE MIGUEL ASENSIO, *op. cit.*, p. 1014.

⁸⁹ Convention on the Grant of European Patents, referred to as European Patent Convention, of 1973.

requirement⁹⁰, employment relationships in the context of «work for hire» doctrine fall under this concept.

In view of the *erga omnes* effect of proprietary rights, the objective connecting factors of Article 60 EPC provide legal certainty to third parties about the ownership which is important for the exploitation and transfer of IP rights. This approach also provides legal certainty to employers and employees; a single predetermined law regarding the issue of ownership will not only fosters the worldwide exploitation and transfers of IP rights but also yields creativity and innovation.

Furthermore, the *lex loci laboris* approach refers to the law of the state most closely connected to the legal relationship in which the right of ownership of the IP right arises as it can generally be assumed that the employee invents or creates the work at the place where he is mainly employed. In line with the *lex loci laboris* approach under Article 8 Rome I this approach may refer to the mandatory application of national laws related to remuneration for employees in case the initial ownership of IP rights is attributed to the employer⁹¹. Finally, in view of the special jurisdiction rules in Brussels Ibis Regulation related to employment contracts⁹², these connecting factors enable coincidence between forum and law, *Gleichlauf*, which facilitates the sound administration of justice.

3. Derogation mechanisms

In line with EU PIL, the proposed EU conflict-of-laws approach should allow the application of overriding mandatory rules and the public policy exception⁹³. According to the law of MS moral rights are often inalienable from the author⁹⁴ which entails friction in case the applicable law allows the assignment of moral rights, or adheres to the ‘work for hire’ doctrine. From a viewpoint of «moral rights as fundamental rights that protect the author against the abuse of his work»⁹⁵, it has been argued that the protection of moral rights is part of the public policy of the forum state and should be applied in case the law of the country for which protection is sought is lower⁹⁶.

⁹⁰ L. MERRET, *Employment Contracts in Private International Law*, Oxford University Press, Oxford, 2022, pp. 59-65.

⁹¹ See e.g. Article 12(6) Dutch Patent Law.

⁹² Article 21(1)(b) and (2) Brussels Ibis. In case the Member State in which the employee is domiciled coincides with the state in which the employee is mainly employed, see Article 22(1) Brussels Ibis.

⁹³ See e.g. Articles 9 and 21 Rome I; Articles 16 and 26 Rome II.

⁹⁴ See Part III.1.1.

⁹⁵ P.L.C. TORREMANS, *op. cit.*, 2024, p. 702.

⁹⁶ P.L.C. TORREMANS, «Private international law issues of moral rights», in GENDREAU, Y., *Research Handbook on Intellectual Property and Moral Rights*, Edward Elgar Publishing Limited, 2023, pp. 105-125.

Although the concept of public policy has not been defined in EU PIL, the CJEU «draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories»⁹⁷. The United Nations Universal Declaration of Human Rights of 1948 that considers moral rights as human rights has been the main guidance for the draft of the European Convention for Protection of Human Rights and Fundamental Freedoms of 1950 to which all MS are now bound⁹⁸. Moral rights are also «deeply entrenched» in the «civil law countries» of the EU⁹⁹. Furthermore, the Charter of Fundamental Rights of the European Union of 2012 explicitly stipulates that «intellectual property shall be protected»¹⁰⁰. It has also been argued that moral rights could be regarded as «personality rights that are linked to the person of the author of the work»¹⁰¹. In the *Wintersteiger* ruling, the CJEU held that «personality rights are protected in all Member States»¹⁰².

However, the French Supreme Court ruled that French provisions protecting the author's moral rights have to be regarded as overriding mandatory provisions¹⁰³. Applying Article 9 Rome I by analogy with respect to the assignment of copyrights, it is nonetheless questionable whether moral rights-provisions could be regarded as overriding mandatory provisions in view of the 'public interest'-requirement¹⁰⁴, because these provisions initially aim to protect the individual interests of authors.

ted, Cheltenham, 2023, p. 367. See also J. C. GINSBURG, P. SIRINELLI, «Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy», *Columbia VLA Journal of Law & The Arts*, 1991, 15, pp. 139-141.

⁹⁷ CJEU 28 March 2000, *Krombach*, C-7/98, ECLI:EU:C:2000:164, para. 22-25.

⁹⁸ Article 27(2) of the United Nations Universal Declaration of Human Rights of 1948. I. ZAMFIR, «At a Glance-The Universal Declaration of Human Rights and the European Union», *European Parliamentary Research*, 08-12-2023, [https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA\(2023\)757559](https://www.europarl.europa.eu/thinktank/en/document/EPRS_ATA(2023)757559)

⁹⁹ See P. GOLDSTEIN, P. B. HUGENHOLTZ, *International Copyright. Principles, Law, and Practice*, 4th ed., Oxford, Oxford University Press, 2019, p. 339.

¹⁰⁰ See Article 6bis Berne Convention; Article 17(2) Charter of Fundamental Rights of the European Union OJ C 326, 26.10.2012.

¹⁰¹ P. L. C. TORREMANS, *op. cit.*, 2024, p. 702.

¹⁰² CJEU 19 April 2012, *Wintersteiger*, C-523/10, ECLI:EU:C:2012:220, para. 24.

¹⁰³ See Cour de Cassation, 28 May 1991, D 1993, jur. 197 (*Huston*). The French Court of Cassation refers to «rules of imperative application», also known as overriding mandatory provisions. See M. E. ANCEL, «France», in KONO, T. (ed.), *Intellectual Property and Private International Law: Comparative Perspectives*, Oxford, Hart Publishing, 2012, p. 572.

¹⁰⁴ See also the «interest criterion», I. KUNDA, «Defining Internationally Mandatory Rules in European Private International Law of Contracts», *Zeitschrift für Gemeinschaftsprivatrecht*, 2007, 5, p. 217.

IV. CONCLUSION

While the *lex loci protectionis* is generally adopted by MS as conflict-of-laws rule regarding proprietary aspects of IP rights, there exists a lack of consensus on the definition and scope of this rule. In view of the digital era, it would be preferable to adopt ‘a single law’- approach, such as *lex originis* adopted by a few MS regarding initial ownership of copyrights, or the «close connection» criterion proposed by scholars for ubiquitous IP infringements¹⁰⁵. However, these connecting factors contravene the territorial protection of IP rights and do not provide predictability which is the main objective of PIL and property law. Therefore, this Chapter argues to adopt a general EU conflict-of-laws rule that refers to the law of the state for which protection is sought, the *lex loci protectionis*, regarding all aspects concerning the IP right as such. To provide legal certainty, proprietary aspects as indicated in Part III.1. should be enumerated as a non-exhaustive list. This technology-neutral approach is in accordance with the EU PIL framework in particular the *Sitz* approach, Article 8(1) Rome II, and often coincides with Article 4(3) and (4) Rome I, and may facilitate *Gleichlauf* under Brussels Ibis.

In accordance with the special protection of employees in EU PIL, this Chapter also proposes as special EU conflict-of-laws approach regarding initial ownership of IP rights ensuing in the context of employment to refer to the *lex loci laboris* and subsidiary the law of the state in which the employer has the place of business to which the employee is attached. The law that governs the employment relationship, as adopted by several MS and argued by various scholars, does not provide *ex ante* predictability necessary for the *erga omnes* effect of ownership.

In line with EU PIL, the proposed EU conflict-of-laws approach should exclude «renvoi» but allow the application of overriding mandatory rules and the public policy exception. Because of the generally accepted fundamental right character of IP rights in the EU, the public policy exception could be invoked in case the applicable law provides lesser or no protection regarding moral rights than the forum state.

From a perspective of instrumentalisation of PIL, the proposed EU conflict-of-laws approach provides predictability which enhances creativity and innovation, and facilitates the cross-border exploitation and transfers of IP rights.

¹⁰⁵ See paragraph 1.3 of this Chapter.

