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### Choice of law in copyright and related rights : alternatives to the lex protectionis

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# Chapter 1

## Introduction

### 1.1 Conflict of Laws Concerns in Intellectual Property

As Ricketson put it in his 1987 standard work on the 1886 Berne Convention for the protection of literary and artistic works: 'words, sounds and pictures, like birds, fly over frontiers with the greatest ease'.<sup>1</sup> This observation was made when mobile telecommunication networks were accessible for just a happy few, when (commercial) satellite broadcasting was still in its infancy except in the US and when the Internet was primarily an affair of science communities.

These global communications networks have accelerated the growth of the production and cross-border distribution of information goods and services. Information and communication technology has also enabled the copying of 'content' –whether protected by intellectual property rights or not– on a previously unknown scale.

Although the volume and certainly the value of the current production and use of intellectual creations dwarfs the output in pre-electronic days, the exploitation of foreign works was, then as it is now, substantial and often quick.

The practices of Belgian publishers are a telling example of the liveliness of the European book trade in the 19th century. Despite (or more likely because of) the fact that they were widely criticised for pirating French works, Belgian printers are said to have wagered French publishers that they would have a pirate edition on sale before the French original was even printed.<sup>2</sup>

In the early 19th century, Dutch printers and publishers produced more translations of foreign titles than original local works.<sup>3</sup> Under Dutch law, authors of works that were first published abroad had no exclusive right to authorise translation of their work. Rather, a publisher could acquire the exclusive translation right on condition that he publicly announced his intention to market a translation and had a copy of the foreign work certified by the municipal

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1 Ricketson 1987, p. 590.

2 Kruseman 1886, pp. 534–536.

3 Kruseman 1889, pp. 375–391.

authorities. Competition was fierce and (would-be) publishers routinely resorted to artful schemes to be the first to obtain translation rights.

The successful French author Eugène Sue regularly sold the translation rights to his novels for various languages. Following the 1848 publication of *The Seven Capital Sins* (*Les sept péchés capitaux*), five Dutch parties laid claim to the translation rights for a Dutch edition. One publisher had a copy of the German translation (which had been published in Germany one day before the French original) certified. Another asserted the translation right was his since he had published a reprint of the French original in Holland. A third party claimed to have acquired the rights from the French publisher, while a fourth maintained he had paid the author himself for the translation rights. The claim of contestant number five appears to have been wholly frivolous. Amsterdam District Court eventually ruled that the publisher who had registered the German translation had acquired the exclusive right to translate the book into Dutch.<sup>4</sup>

The cross-border use of copyrighted works was one of the reasons why, from the middle of the 19th century onwards, states increasingly concluded treaties on the mutual protection of authors. Bilateral treaties have since given way to widely accepted multilateral agreements on the protection of authors (i.e., copyright) as well as performers, broadcasting organisations and record producers (i.e., related or neighbouring rights).

What is exceptional is that the treaty that is still the core instrument in international copyright today – the Berne Convention for the protection of literary and artistic works of 1886 – was conceived at a time when modern copyright was not the well-defined, integral part of private law that it is today. Despite considerable differences of opinion on the nature, objectives and legal construction of copyright – not just within but also between legal communities – international agreement was reached. Since then copyright and related rights have evolved. The Berne Convention has been revised various times and has been supplemented by various treaties.

The focus of the international copyright community on substantive intellectual property law and the conventional wisdom that intellectual property law is territorial, have for a long time caused a somewhat disinterested attitude towards the conflicts of laws. As Wadlow observes: ‘what is remarkable about intellectual property law is that to all intents and purposes it has simply been assumed to have been outside the scope of private international law altogether...’<sup>5</sup>

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4 Kruseman 1886, pp. 335 et seq.

5 Wadlow 1998, p. 10. Where the US is concerned, Dinwoodie supposed that the (previous) lack of interest of conflicts law scholars in intellectual property law and vice versa is due in part to the fact that the focus of conflict of laws in the US is on interstate relations, whereas copyright law is federal (Dinwoodie 2001a, p. 433).

Despite continuous efforts which boil down to the harmonisation of domestic copyright and related rights law, differences in substantive law remain. Given these differences, the rules of private international law still have to be called upon to resolve questions involving ownership and the transfer of rights, the duration of copyright, the applicability of exemptions, etc.<sup>6</sup>

Private international law or the conflict of laws addresses three issues.<sup>7</sup> The first concerns *jurisdiction*: which national courts are qualified to adjudicate a case with foreign elements? To return to the example of the *Seven Capital Sins* case (above): should the disputes over who is the rightful owner of the translation right be adjudicated by a Dutch, French or maybe even German court? A pet example of jurisdiction problems in intellectual property cases is the posting of allegedly infringing materials on a website. Does the fact that a website may be accessed from anywhere in the world mean that any court anywhere has jurisdiction over the infringement claim?

The second issue and primary subject of this study, is *choice of law*. It addresses the question of which country's (substantive) law applies to the dispute or matter at hand. For example, if a German scientist, who has published an article in a London (UK) based journal that is distributed world-wide, feels his moral rights have been infringed by the editors, should the question of whether there is such an infringement be judged under German, English or some other law? Or, in the above case of the *Seven Capital Sins*, if Mr Sue claims he has sole authority to license translation rights, should this claim be tested against Dutch, French, German or some other law?

The third element of private international law concerns *the recognition and enforcement of foreign decisions*. Once a ruling has been handed down, say one in which the German scientist has been awarded damages for infringement of his moral rights, under which circumstances can this decision be enforced outside the forum state?

In the ambit of the Hague Conference for private international law, work on a convention that addresses both jurisdiction and enforcement in civil and

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6 There are those who doubt that agreement on conflict rules is attainable, and who see unification of substantive copyright law as the only way forward, e.g., Sterling 2002, pp. 281-282.

7 In Germany jurisdiction and recognition/enforcement of foreign judgments are called *Internationales Zivilprozeßrecht* or *Internationales Verfahrensrecht*. The term *internationales Privatrecht* is used to indicate choice of law only (also named *Kollisionsrecht*). In French law, *droit international privé* is a very broad term which comprises not only choice of law (*conflit des lois*), jurisdiction (*conflits des juridictions*) and the recognition and enforcement of foreign judgments (*jugements étrangers*), but also the law of nationality and the law of aliens (*condition des étrangers*). In the Netherlands, *internationaal privaatrecht* is the general term that comprises jurisdiction (*rechtsmacht*), choice of law (*toepasselijk recht* or *conflictenrecht*) and recognition and enforcement of foreign judgments (*erkenning en tenuitvoerlegging* or *executie*).

commercial matters is in progress. Intellectual property has turned out to be one of the most difficult matters to reach an agreement on.<sup>8</sup> Since this study deals with choice of law in copyright and related rights, issues of jurisdiction and enforcement of foreign decisions will only be touched upon.<sup>9</sup>

## 1.2 Subject-matter and Scope of this Study

This study concerns choice of law for copyright and related rights, or put differently: the question of which domestic copyright or related rights law governs a case with international elements.

### 1.2.1 CENTRAL RESEARCH QUESTION

For a long time, the international copyright and related rights system, with its provisions that guarantee foreigners a minimum level of protection and the obligation for contracting states not to discriminate against foreign owners of intellectual property (national treatment principle), seemed to provide a straightforward answer to the question of which state's law applies in an international case.

Infringements of copyright were only actionable as 'delicts', to which the courts applied their local law. The perceived territorial nature of intellectual property, combined with the national treatment principle, seemed to justify that questions such as whether exclusive rights existed in an intellectual creation, for how long, for whose benefit and with what scope, were governed by the law of the country where protection was wished for (the *Schutzland*). Thus the law of the *Schutzland* or *lex protectionis*, soon came to dominate the issue of applicable law in international copyright and related rights.

Like copyright and related rights, private international law is subject to continuous change. Its methods have been revised and more and more special conflict rules have developed for different areas of private law. For most of the 20th century, these developments in choice of law seem to have been more or less

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<sup>8</sup> Lack of consensus on intellectual property issues was an important reason why the Diplomatic Conference of 2001 ended in failure. See: Hague Conference 2001 and 2002.

<sup>9</sup> According to Austin 2000, pp. 594-595, private international law concerns in the area of intellectual property have focused on enforcement (both as regards jurisdiction and the execution of foreign judgments) rather than the applicable law. On enforcement see among others Fentiman 1999; Geller 1996; Ginsburg 1999 and 1997; Kur 2002; Wadlow 1998.

disregarded in intellectual property doctrine –the private international law of contracts and its implications for the cross-border exploitation of intellectual property excepted. Some modern statutes on private international law do contain conflict rules for intellectual property, but in other statutes the subject is left untouched.<sup>10</sup>

The advent of the 'Information Society' has awoken a fresh interest in choice of law for copyright and related rights, due to the fact that the production and use of information and information technologies have become of primary economic significance and the fact that modern communication technology offers new possibilities for massive and instantaneous distribution of information across geographic boundaries. By common admission, the arrival of the networked environment lays bare the shortcomings of the traditional territorial approach to copyright and related rights.<sup>11</sup>

The question can be raised whether conflict rules based on a territorial view of intellectual property are (or possibly ever were) adequate. Do they help to achieve the objectives of choice of law, namely the smooth operation of international commerce, without however disregarding demands of substantive justice? If choice-of-law rules based on territoriality are inadequate, which changes could be recommended? Is there a need for separate conflict rules for separate issues, i.e., does the question of who owns exclusive rights have to be subject to the same law as the question of what the scope of these rights is? These are the types of questions that will be addressed in this study.

In short, the objective of this study is to determine which conflict rules are suitable for contemporary copyright and related rights. This central question will be answered from the perspective of the objectives of choice-of-law and of the policies that underlie substantive copyright and related rights law. Which choice-of-law rule is suitable for which issue –i.e., the existence of an intellectual property right, ownership, transfer, infringement– will be examined on the basis of the four principles that –in Europe at least– can be said to underlie contemporary

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10 Conflict rules specifically for intellectual property are contained in e.g., Art. 54 Italian Private International Law Act of 1995 (*Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato* or *LDIP*), Art. 34 Austrian Private International Law Act 1978 (*Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht* or *IPRG*), Art. 110 Swiss Private International Law Act 1987 (*Loi Fédérale du 18 décembre 1987 sur le droit international privé* or *LDIP*). The subject does not however, appear in the Dutch pre-draft of a Private International Law Act (1992), nor in the Act on the Law Applicable to Torts (*Wet Conflictenrecht Onrechtmatige Daad* or *WCOD* 2001). In Germany, despite various plans, conflict rules for intellectual property were not incorporated into the Private International Law Act (*Einführungsgesetz zum Bürgerlichen Gesetzbuche* or *EGBGB*).

11 To name but a few: Bing 1998; Cruquenaire 2000; Dreier 1997; Fentiman 1995; Geller 1998; Ginsburg 1999; Goldstein 1994; Hugenholtz 1998; Novier 1995; Olsson 1998; Peinze 2002; Quaadvlieg 1998.

choice-of-law rules. What these principles are will be elaborated in Chapter 2 on the choice-of-law process.

Considering the predominant role that international conventions on intellectual property play, any inquiry made into suitable conflict rules should take account of the implications that these treaties have for choice-of-law issues. The most important preliminary question to be answered is therefore what the choice-of-law calibre of existing multilateral copyright and related rights conventions is.

### 1.2.2 EUROPEAN PERSPECTIVE

In principle, both intellectual property and private international law are national law. Each country legislates its own conflict rules and its own intellectual property law. However, as both intellectual property law and choice of law are areas with a strong international dimension, considering conflict rules for copyright and related rights from a purely national –i.e., Dutch– perspective does not seem a fruitful approach.

Intellectual property has in the past decades joined the many areas of law that for the largest part are regulated at the European level. ‘Brussels’ has initiated and prescribed the extension of copyright and related rights to new subject-matter such as software and databases, as well as new exploitation rights, such as lending and rental rights.<sup>12</sup>

It was not until much later, with the entry into force of Article 65 of the EC Treaty on 1 March 1999, that the EU legislature gained significant competence to harmonise or unify the private international law of Member States. An ambitious programme has been launched, which contains two instruments that are especially relevant to our subject.

One is the conception of choice-of-law rules in the area of non-contractual obligations (torts, unjust enrichment). Since infringement of intellectual property can be characterised as a tort, this proposed Regulation could become an instrument of major importance for cross-border infringement of copyright and related rights. The other relevant initiative concerns the European Convention on the Law Applicable to Contractual Obligations (Rome Convention 1980), which will be modified and transposed into a Regulation. Considering that the

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12 Harmonisation of intellectual property law at the European level can be called for to remove barriers to the establishment of the Internal Market, or once these are removed, to guarantee its proper functioning (Art. 14 EC Treaty, Arts. 94 (ex 100) and 95 (ex 100a) of the EC Treaty, which authorise the Council to issue Directives that harmonise legislation, are the usual legal basis for intellectual property rights Directives, sometimes supplemented by Arts. 55 (ex 66) and 47 (ex 57).

exploitation of intellectual property typically involves contractual arrangements. The Rome Convention and its proposed successor are of relevance to our enquiries as well.

From the above it is clear that although in principle Dutch law is the point of departure for this study (including European law, as incorporated into Dutch law), the enquiries into suitable conflict rules will be conducted with a keen eye on EU developments. Where case-law is concerned, the focus will be on the judgments of Dutch courts. Interesting judgments of foreign courts on the choice-of-law calibre of copyright and related rights treaties will however not be ignored.

### 1.2.3 DELINEATION OF ISSUES STUDIED

Choice of law deals with all areas of private law: from employment contracts to hereditary succession; from the international sale of goods and information services to matrimonial property. From the perspective of copyright and related rights, choice of law addresses questions as diverse as: Which law determines whether the employer owns the copyright in software created by its foreign employees? Which law governs the question of whether all or any of the (illegitimate) children of a Spanish painter who died in testate in Berlin can exercise the exploitation and moral rights in the artwork? Which law is applicable to the cross-border sale of a book or to the international subscription to an on-line database? Is the question whether the performer's rights of an Irish singer who lives with her American spouse in London part of the communal property subject to Irish, American, UK or some other law?

Although all of the above questions somehow involve copyright, they do not, from a choice-of-law perspective, belong to the same category of legal relationships for which choice of law gives different conflict rules. Given that there is no such thing as 'the' conflict rule for all 'copyright issues', it is important to properly determine what the relevant legal questions and the corresponding conflict rules are.<sup>13</sup>

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13 The need to characterise the issues raises the point which law should guide this process: e.g., if a newspaper has acquired a licence to use a photograph in its print edition and it also uses the photograph in its web-version of the newspaper, is this a matter of copyright infringement (tort) or breach of contract? Dutch private law may answer this question differently than, say, German law. It is widely accepted that characterisation takes place under the law of the forum (*lex fori*), but with an open mind towards legal definitions and institutes of foreign law: Strikwerda 2000a, p. 43. See also Fentiman 1995, p. 33 et seq. Lots more can be said about characterisation, i.e., the process by which the proper legal category for a legal relationship is determined. However, given the general nature of the problem and the limited space available, the problem of characterisation will not be dwelt upon in this study.

An enlightening example of how various (international) conflict rules can come together in a copyright infringement case, is found in one of the few published Dutch rulings in which explicit reference is made to applicable law issues. The facts of the *Carmina Burana* case are as follows:<sup>14</sup>

In 1992 the widow of German composer Carl Orff –he had died ten years earlier– assigned the moral rights in Orff's work to Schott, the German music publisher with whom Orff had done business while still alive. In the same year, two Dutch companies released records with a 'disco' and a 'house' version of *O fortuna*, a part of Orff's well-known composition, *Carmina Burana*.<sup>15</sup> Orff was named as the composer. The adaptations were distinctly un-classical and incidentally did very well in the pop charts.

The German publisher brought a claim for infringement of the author's moral rights. One of the defendant record companies disputed Schott's authority to exercise the moral rights of the composer. Since Orff had not transferred his moral rights to his widow in the manner that Article 25(2)<sup>16</sup> of the Dutch Copyright Act (*Anteinswet 1912*) prescribes,<sup>17</sup> the widow had not acquired these rights under Dutch law. Even if she had, German copyright law does not allow the assignment of copyright (only the granting of rights of use, i.e., a purely contractual construction whereby the intellectual property rights remain with the author) so the publisher could not have acquired them from the widow.

The President of the Amsterdam District Court ruled that under German law, Orff's moral rights had devolved upon his widow. The plaintiffs had also shown that under German law, the widow could transfer the moral rights to the publisher, so that the latter had capacity to sue in the Netherlands.

As to the formal validity of the transfer of moral rights, the court reiterated that according to Dutch private international law, the *locus regit actum* rule is the normal conflict rule, i.e., the question of formal validity is subject to the law of the place where the transfer was concluded.<sup>18</sup> Consequently, whether the transfer was

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14 Pres. Rb. Amsterdam 24 February 1992 [1992] IER 38.

15 Orff's composition was an adaptation, or rather, an interpretation of medieval lyrics which were set to Gregorian musical notation.

16 In the published case, the Article referred to is 25(4), which I assume is an error because it deals with the right of the author (or the person he has appointed to exercise his moral rights after his death) to make changes to the work even after having assigned the copyright. This was not an issue in the instant case.

17 Article 25(2) Aw has been revised by Art. VIII *Invoeringswet Boek 4 en Titel 3 van Boek 7 van het nieuwe Burgerlijk Wetboek, vierde gedeelte*. (Stb. 2002, 429). The 'codicil' as a legal instrument required to designate the successor in title is no longer mentioned. As the possibility to use a codicil is now provided for in Book 4 Civil Code on succession, no substantive change has taken place.

18 See also Seignette 1996, pp. 312–313.

valid as to form was judged solely under German law, not under the law of all the countries for which the rights were assigned. It would lead to an unjustified limitation on the protection that the Berne Convention –and following that, the Dutch Copyright Act– purports to give foreign authors and works if a copyright owner who wants to assign (part of) moral rights in a work must take into consideration the formal requirements of scores of legal systems and possibly draw up as many acts.<sup>19</sup>

The outcome of the case was that the German publisher could invoke moral rights in Orff's composition and that the house-version produced by the record companies did constitute an infringement of these moral rights under Dutch law.

Various questions, which do not necessarily fall under the same conflict rule, arise in this case:

- a) Is the *Carmina Burana* (still) a protected work?
- b) Was Orff the author of the work and/or initial owner of the copyright?
- c) Did Orff's widow inherit the copyright?
- d) Was the assignment of the (moral) rights to the publisher by the widow materially valid (e.g., can economic and/or moral rights be assigned)?
- e) Was the assignment valid as to form?
- f) Had the title to the copyright passed from Orff's widow to the publisher?<sup>20</sup>
- g) Was there an infringement of copyright?

Question c) is not specific to copyright and belongs to the realm of succession.<sup>21</sup> Since the Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons of 1989 has not yet entered into force, this question is decided under domestic choice of law for successions.<sup>22</sup> Had Orff made a will, its

19 Verkade, in: Gielen & Verkade 1998, at Art. 25, aant. 4.6, finds it a valid point of view that Art. 25(2) *Auteurswet* should not apply to foreign authors, but that 'the exercise of moral rights would then depend on the particular legal system of their country' [my translation, mve].

20 Compare the sale of movable goods: the obligations of buyer and seller are governed by the law of the contract. However, the question of what legal act is necessary to effect the transfer of the property (is a contract of sale enough, or is a separate act of giving possession necessary?) is governed by the law of the place where the goods were at the moment when the legal act that envisaged the transfer of title took place. HR 3 September 1999 [2000] NIPR 22.

21 The economic rights usually devolve according to a country's general rules on succession; the question of who can exercise the moral rights (which in principle continue to exist after the author or performer has died) is sometimes regulated separately, such as in Art. L121-2 of the French Copyright Act (*Loi no 92-597 du 1er juillet 1992 relative au code de la propriété intellectuelle: CDPJ*).

22 Convention on the Law Applicable to Succession to the Estates of Deceased Persons of 1 August 1989. From hereon: Hague Convention on Succession. The conflict rules of The Hague Convention do apply in the Netherlands, by way of the *Wet conflictenrecht erfopvolging* (Act on the Law Applicable to Succession), *Stb.* 1996, 457. In *Raedecker v. Nederlands Congrescentrum* (alleged infringement of moral rights of Dutch painter who died in France) the court recognised

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formal validity would have been judged under the Hague Convention on the Conflicts of Laws relating to the Form of Testamentary Dispositions.<sup>23</sup>

In theory, the widow could have invoked copyright not only because she was Orff's hereditary successor, but because the intellectual property may have been part of the marital community.<sup>24</sup> Whether that was the case depends on the law governing matrimonial property, which as far as international instruments are concerned, can be found in the Hague Convention of 1905 and its 1978 successor.<sup>25</sup> Neither issues of succession nor those relating to matrimonial property will be discussed in this study.

The remaining questions can be divided into three groups: those relating to contractual obligations (d. e); to non-contractual obligations (g); and to copyright as such, i.e., its 'proprietary' aspects (a. b. f) such as existence, scope, duration as well as assignment. The latter includes the question of which rights are assignable and how an assignment is to be effectuated. This transfer of the intellectual property itself can be distinguished from its exploitation through contracts, that is, by way of granting licences of use.

Questions relating to contractual obligations –whether exploitation licences or agreements on the assignment of intellectual property are concerned– are governed by the Rome Convention on the law applicable to contractual obligations of 1980,<sup>26</sup> a treaty that will be referred to throughout this study. For the transfer of intellectual property, by assignment, but particularly by the granting of exploitation licences, the Rome Convention 1980 will prove to be an important instrument.

As for infringement, since this can be characterised as a tort, the rules in the area of non-contractual obligations will be considered in this study. The

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the plaintiffs' standing to sue because under French law they were the author's sole heirs. Since the author had died in France in 1987, the old (unwritten) conflict rule for succession, i.e., the law of the country of which the deceased was a national at the time of death (the Netherlands) should in principle have been applied –domicile was sometimes used as the connecting factor in cases where the deceased had no real ties with the country of which he or she was a national (Rb. Den Haag 5 September 2001 [2001] AMI 6, nr. 18).

- 23 Convention of 5 October 1961: entry into force on 5 January 1964 (40 Contracting States according to the status report on <[www.hcch.net/e/index.html](http://www.hcch.net/e/index.html)> [last visited 1 November 2002]). From hereon: Hague Convention on Testamentary Dispositions.
- 24 In Dutch law, it is assumed that copyright is part of communal property: Gielen & Verkade 1998, Auteurswet, Art. 2, aant. 1.
- 25 Convention relating to conflicts of laws with regard to the effects of marriage on the rights and duties of the spouses in their personal relationship and with regard to their estates of 17 July 1905 (renounced by most signatories), Convention on the Law Applicable to Matrimonial Property Regimes of 14 March 1978 (5 signatories, see <[www.hcch.net/e/index.html](http://www.hcch.net/e/index.html)> [last visited 1 November 2002]).
- 26 The Rome Convention also applies to end-user licences, whether concluded with professional parties or consumers. Consumer contracts and other end-user contracts will not be considered in this study.

relationship between conflict rules for tort and conflict rules for copyright and related rights proper is complicated and will be examined in detail in the last part of the last chapter.

In sum, where the categories of legal relationships to be distinguished are concerned, this study will depart from three principal types of legal relationships as they are recognised in choice of law: contracts, torts and property. From the perspective of copyright and related rights, the principal questions are: which exclusive right exists in an intellectual creation and for how long (existence, scope and duration); who is considered to own such rights (initial ownership); how can these rights be transferred (transfer); and what constitutes infringement of copyright and related rights (infringement).

These four categories of issues will be distinguished throughout the study. Existence, scope and duration are, in choice-of-law terms, primarily matters of property. So is the question of who initially owns intellectual property, but here contracts may play a role, especially in work-for-hire situations. The transfer of rights has both proprietary and contractual aspects. Infringement of intellectual property essentially belongs in the tort category, but here proprietary aspects also play a role, since the question of whether there is infringement can of course not be viewed separately from the question of whether a copyright or related right exists to begin with, and particularly, what its scope is.

### 1.3 Some Words on Terminology

The fact that English has become the lingua franca in legal studies brings along some linguistic difficulties. Inspired as Dutch private law is by French and German law, the use of some English terms can prove particularly problematic. The transfer of property rights is one of them. The reader will understand that as a rule, the legal terms used refer to concepts of civil law (more particularly Dutch law), not common law.

Where the *transfer* of rights is used, it denotes a general term, covering both the assignment of the intellectual property rights and the granting of (exploitation) licences.

An *assignment* of right (*cession*, *overdracht*, *Übertragung*) is understood as the complete transfer of rights in the intellectual creation (work, performance, broadcast, phonogram, etc.) from one party to another. It confers on the assignee a real or absolute right and consequently, the assignor (e.g., initial copyright owner) loses all claims on these rights.<sup>27</sup>

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27 Guibault & Hugenholtz 2002, p. 29.

A *licence* (*concession, licentie, Einräumung von Nutzungsrechte*) is defined as a contractual permission to perform certain acts with respect to the protected intellectual creation. These acts would constitute infringement of intellectual property rights if they were performed without the authorisation of the right owner. The counterpart of the licensee's right of use is the licensor/right owner's contractual obligation not to enforce the intellectual property with respect to the acts permitted under the agreement.

On another note, this study concerns copyright and related rights. The latter are also called neighbouring rights. Both are sub-areas of intellectual property, a term which will mostly be used as a synonym for copyright and related rights. Where intellectual property is used to indicate the entire field (i.e., including patents, trademarks, etc.) it should be clear from the context. Another term used to denote copyright and related rights is simply 'exclusive rights.'

The term 'copyright' pertains to the rights of authors in their works of literature or art. 'Related rights' encompasses: the rights of performing artists in their performances, the rights of record producers in phonograms they produced, the rights of broadcasting organisations with respect to broadcasts and the rights of database producers with respect to databases they produced. In the latter case the *sui generis* database right should be distinguished from any copyright in the database, which may also be vested in the database producer. With the exception of the *sui generis* database right – this is a recognised statutory right throughout the EU – the exclusive rights mentioned feature in multilateral treaties on intellectual property.

To indicate the potential subject-matter of the different rights, the general terms 'information' and 'content' are used. General terms used to indicate the subject-matter of copyright and related rights are: '(protected) subject-matter' and 'intellectual creations'.

## 1.4 Plan

The structure of this study is as follows. The second Chapter is dedicated to providing a proper picture of the objectives and method of the contemporary choice-of-law process, including the structure of conflict rules and the principles on which they are based. Since the allocation method is the predominant choice-of-law method for identifying the applicable law in Europe and elsewhere, the focus will be on how copyright and related rights fit into that scheme.

Central to the third chapter is an enquiry into how the treatment of foreign authors and foreign intellectual creations has developed since the first bilateral treaties on intellectual property and how it has been given shape in the multilateral conventions of the present.

The analysis of Chapter 3 will enable the examination of the choice-of-law calibre of existing treaties in the area of copyright and related rights, which is the

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subject of Chapter 4. The principal question to be answered in Chapter 4 is whether these treaties actually lay down conflict rules, or whether it is merely that the principles on which they are based have a natural affinity with certain connecting factors. It will be argued that –with one exception– intellectual property treaties do not prescribe clear conflict rules.

The next step in the quest for suitable conflict rules is to ascertain what the policies are that underlie copyright and related rights and whether they point towards the use of certain conflict rules. In addition, there are certain developments in the information industries that merit attention when considering the suitability of choice-of-law rules: the commodification of information; the possibilities that communication technologies offer for massive and instant cross-border distribution and use of works; the concentration of exclusive rights in multinational conglomerates; the apparent weakening of the position of the creators and users *vis-à-vis* publishers, producers and other intermediaries, etc. The policies of copyright and related rights as analysed in Chapter 5, combined with technological and economic developments, will serve as input for the analysis of Chapter 6.

In Chapter 6, it will be examined which of the four principles that are at the heart of modern choice-of-law rules are best suited for copyright and related rights. A major issue to be addressed is whether the fact that copyright and related rights law are increasingly based on utilitarian grounds rather than on justice-considerations should have any consequences for the applicable law.

Another important question is if and how the protective streak that most copyright and performer's rights law have towards the creator or performer – especially with regard to the ill-considered transfer of rights– should be accommodated in a conflict rule.

In Chapter 6 it will also be elaborated how the generally accepted choice-of-law rule for most copyright issues, namely the *lex protectionis*, can be given a basis in modern conflicts law without reverting to old-fashioned notions of territoriality. Finally, it will be considered how issues of infringement in the digital environment could be addressed.

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