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# The Public Policy Exception and International Intellectual Property Law

Marketa Trimble

Samuel S. Lionel Professor of Intellectual Property Law  
William S. Boyd School of Law, University of Nevada, Las Vegas  
[marketa.trimble@unlv.edu](mailto:marketa.trimble@unlv.edu)

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# THE PUBLIC POLICY EXCEPTION

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- The exception that courts either may or must use to exclude the **application of foreign law** or to deny **the recognition and enforcement of a foreign judgment** that is contrary to some (significant) public policy of the forum.
- The use of the exception should be exceptional
- A sole difference between foreign law and forum law should not suffice for the exception to apply

# PUBLIC V. PRIVATE INTERNATIONAL LAW

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- A variety of mutual influences
- Public international law sets guiderails for national substantive laws

# PUBLIC V. PRIVATE INTERNATIONAL LAW

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- Is there a direct link between public international law of IP and private international law norms?
- Do the guiderails that international IP treaties have established guide (or restrict) national IP laws sufficiently to make the laws public policy-compliant for the purposes of private international law?
- Could courts resort to the public policy exception less frequently because of the high degree of harmonization achieved through international IP treaties?



Sarl Louis Feraud Intern. v. Viewfinder, Inc., 489 F.3d 474 (2d Cir. 2007)



SAS Institute Inc v World Programming Ltd [2013] EWHC 69 (Ch) (25 January 2013)  
SAS Institute Inc. v. World Programming Limited, 874 F.3d 370, 379 (4th Cir. 2017), cert. denied  
SAS Institute Inc v World Programming Ltd [2018] EWHC 3452 (Comm) (13 December 2018)

# LIMITATIONS ON THE PUBLIC POLICY EXCEPTION

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- The application may be subject to court discretion
  - E.g., Rome I and Rome II Regulations, the 2005 Uniform Foreign-Country Judgments Recognition Act
- The object may be specified that should conflict with public policy
  - E.g., the foreign judgment, the specific proceedings, the cause of action
- The degree of public policy incompatibility may be set high
  - E.g., “manifestly incompatible,” “in exceptional circumstances”
- The type of public policy may be narrowed
  - E.g., “strong public policy,” “fundamental principles of procedural fairness and ... infringement of security and sovereignty of [the forum] State”
  - E.g., constitutional principles (a free speech–fair use link in the U.S.)
  - E.g., international human rights treaties

# GENERAL PUBLIC POLICIES IN INTERNATIONAL IP TREATIES

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- Berne Convention and Paris Convention
  - Few public policies in the original conventions
- TRIPS Agreement
  - Preamble
  - Article 7 on objectives
  - Article 8 on principles
  - Articles 40 and 41(1) on the protection against abuses of IP rights
  - Article 27(2) on exceptions to patentability
- WIPO treaties
  - Preambles of the WCT, WPPT, Beijing Treaty
- Free trade agreements

# SPECIFIC PUBLIC POLICIES IN INTERNATIONAL IP TREATIES

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- Much more difficult to discern from international IP treaties
- A **wide range of public policies** may underpin treaty-compliant national IP laws.
- Per WTO dispute settlement bodies, TRIPS cannot be used to impose on countries any particular public policies that TRIPS does not specify.
  - E.g., United States—Section 110(5) of the US Copyright Act, WTO, Report of the Panel, WT/DS160/R, 15 June 2000
    - No requirement in TRIPS Article 13 that an exception or limitation pursue an “an exceptional or distinctive objective”

# THE EFFECT OF INTERNATIONAL IP TREATIES

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- Should the fact that foreign law complies with international IP treaties affect the application of the public policy exception?
  - The approach could to some extent simplify the application of the public policy exception.
  - The approach could make the public policy exception analysis more predictable.
  - The approach could improve countries' compliance with the treaties.

# THE EFFECT OF INTERNATIONAL IP TREATIES

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- A possible approach:

- (1) Foreign law complies with the treaties.

- (2) Foreign law does not comply with the treaties.

- (3) The treaties are silent on the point in foreign law.

# THE EFFECT OF INTERNATIONAL IP TREATIES

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} Standard public policy  
exception analysis.

# THE EFFECT OF INTERNATIONAL IP TREATIES

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- A possible approach:

(1) Foreign law complies with the treaties.

(2) Foreign law does not comply with the treaties.

(3) The treaties are silent on the point in foreign law.

Some conclusions could be drawn.

Standard public policy exception analysis.

# THE EFFECT OF INTERNATIONAL IP TREATIES

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- A possible approach:
- Foreign law is **compliant** with the treaties
  - The difference is acceptable to the forum because the forum country agreed to the “guiderails” of this extent.
  - But only if the foreign law applies territorially
- Foreign law is **incompliant** with the treaties
  - A presumption of incompliance with the public policy of the forum
- Possible nuances and caveats

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