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Introduction to the Symposium

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INTRODUCTION

INTELLECTUAL PROPERTY ONLINE: THE CHALLENGE OF MULTI- TERRITORIAL DISPUTES

*Samuel K. Murumba**

OVERVIEW

On October 8, 2004, a day-long symposium jointly sponsored by Brooklyn Law School's Center for the Study of International Business Law and the *Journal* brought together some of the best expertise to grapple with the formidable challenges of multi-jurisdictional intellectual property disputes. Although the phrase "intellectual property online" in the title to the symposium might, at first blush, give that impression, such disputes are by no means restricted to digital transmission of creative products; they can, and often do, arise in the world outside the digital domain.¹ The phrase does, however, highlight the fact that the digital networked environment has compounded the challenges and made them at once both more pressing and, perhaps, even intractable.

That we were able to bring together in one place such a distinguished caliber of knowledge and expertise—spanning three continents², drawing on both the Civil Law and Common Law traditions, and representing "state of the art" thinking on this subject—was largely attributable to two happy coincidences. The first is that the subject of the symposium had now become

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1. On this point, see Annette Kur, *Applicable Law: An Alternative Proposal for International Regulation*, 30 BROOK. J. INT'L L. 951 (2005).

2. The speakers brought insights and knowledge from Australia, Germany, Japan, New Zealand, Switzerland, the United Kingdom and, of course, the United States.

an important project of the American Law Institute,³ having begun life as initiatives by Professors Rochelle Dreyfuss of New York University Law School and Jane Ginsburg of Columbia University Law School,⁴ as well as collaborative work between the latter and Professor François Dessemontet of the University Lausanne.⁵ These three—two of whom were principal speakers at the symposium⁶—are now the Reporters for the ALI Project. The rest of the speakers were my fellow Advisers on that Project. Another of our speakers, Dr. Annette Kur, Head of Max-Planck Institute for Intellectual Property, Competition and Tax Law, Munich, has been working on a parallel project, which she discusses in this issue.⁷ The assembly of these eminent scholars was thus already in place before the symposium, thanks to the initiative of the Reporters as well as of the American Law Institute, and especially its Director, Professor Lance Liebman, William S. Beinecke Professor of Law at Columbia University.

That such a gathering should happen at Brooklyn Law School was due to another happy coincidence. As Professor Dreyfuss points out in her excellent account of the ALI Project in this issue, the whole “enterprise owes its origins to the 1999 Draft of the Convention on Jurisdiction in Civil and Commercial Matters, negotiated at the Hague Conference on Private International Law.”⁸ Now it so happens that in 1997, Brooklyn Law School had also held an international symposium on the proposed Hague Convention, which was published in the 1998 issue of the *Journal*.⁹ The sponsorship of the symposium by the

3. AMERICAN LAW INSTITUTE, INTELLECTUAL PROPERTY: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (now in its third draft).

4. See the introduction to Rochelle Dreyfuss, *The ALI Project on Transnational Intellectual Property Disputes: Why Invite Conflicts?*, 30 BROOK. J. INT'L L. 819 (2005).

5. See François Dessemontet, *A European Point of View on the ALI Principles*, 30 BROOK. J. INT'L L. 849 (2005).

6. Professor Ginsburg was unable to join them as she was away teaching at University of Cambridge.

7. See Kur, *supra* note 1.

8. Dreyfuss, *supra* note 4, at Part I.

9. See Symposium, *Enforcing Judgments Abroad: The Global Challenge*, 24 BROOK. J. INT'L L. 1 (1998). Like the present one, this, too, was co-

Center for the Study of International Business Law itself is also uniquely suited to that theme. Almost two decades ago, Brooklyn Law School keenly felt the incipient shift, then barely noticeable, from a world defined by national borders to one in which the practice of law was beginning to transcend these boundaries, and we came to the conclusion that the increasing globalization of the economy was, indeed, transforming the study and practice of law. The response to these changes was the establishment, in 1987, of the Center for the Study of International Business Law whose mission since has been to study and shape international business law and policy. In pursuit of this mission, the Center has sponsored numerous programs for a broad range of constituencies, including legal scholars and students, law firms and practitioners, corporations, investment firms, banks and other financial organizations, regulatory agencies, public interest organizations, policy makers, and the media. Through these endeavors, the Center both recognizes the strengths of the School's business law faculty and takes full advantage of its location in New York City, the epicenter not only of international finance, but also of transactions in art and other cultural property, a principal concern of intellectual property. Among the many other programs sponsored by the Center since the symposium on the proposed Hague Convention, was another international one also on the mutual interaction between the digital revolution and intellectual property,¹⁰ at which three of the speakers at the present symposium gave presentations. The present symposium can, in this respect, be seen as another stage in a kind of natural progression.

THE PROGRAM

As already mentioned, the principal focus of the present symposium is the challenge of multi-jurisdictional disputes which has been compounded by the advent of the digital networked environment. The instantaneous and simultaneous multi-territorial transmission of copyright works, trade symbols, and other intellectual property, made possible by digital networks,

sponsored by the Center for the Study of International Business Law and the *Journal*.

10. See Symposium, *Software as a Commodity: International Licensing of Intellectual Property*, 26 BROOK. J. INT'L L. 1 (2000).

has cast in sharp relief the urgent need for a comprehensive conflict of laws/private international law regime specifically devoted to intellectual property. Commercial exploitation and infringement of intellectual property have thus become truly multi-territorial. It is, nevertheless, desirable from the point of view of both potential plaintiffs and potential defendants that adjudication of claims be consolidated in a single forum. Consequently, the last few years have seen endeavors by the intellectual property community to work in earnest on international principles of jurisdiction, choice of law, and enforcement of judgments specifically tailored to intellectual property disputes. The American Law Institute's project on *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*, which is the principal focus of this symposium, is a major initiative in this process; we sought to enrich both that project and the symposium by consideration of alternative or parallel developments elsewhere, including specific initiatives such as that of the Max-Planck Institute which Professor Kur discusses.

The symposium papers in this issue follow the chronology of their presentation at Brooklyn Law School. That chronology was, in turn, dictated by what seemed to us like a natural logic of their content. We divided the subject of the symposium into two components with the understanding that these were to be treated not as rigid categories but as convenient indications of the flavor of each session.

The first component to which we devoted the morning session, called "Resolution Through Conflict of Laws," had its principal focus on the American Law Institute Project on *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*. This session opened with Professor Rochelle Dreyfuss's enlightening account of the origin, history, conceptual terrain, and latest iteration of the ALI Project. Professor Dreyfuss's paper laid the ground work for the rest of the symposium. It was followed by Professor François Dessemontet's excellent account of the European perspective on the ALI Project. This theme—of perspectives on the ALI Project from different vantage points—continued, in the second morning panel, with Professor Toshi Kono's instruc-

tive Japanese perspective,¹¹ and Professor Graeme Dinwoodie's lucid account of the common law perspective.¹²

The second component, to which we devoted the main afternoon session, could be labeled: "Resolution through Substantive Harmonization." Its distinctive emphasis was on applicable law, which is the principal orientation of the Max-Planck new Project, and opens with a paper by a principal architect of that Project, Professor Annette Kur. Dr. Kur's paper was followed by Professor Graeme Austin's and Professor Richard Garnett's papers, both of which also have a distinctly substantive law orientation: Professor Austin's paper is a scholarly analysis of copyright ownership;¹³ Professor Garnett's is an able defense of extra-territorial application of substantive national laws in cases of outright piracy.¹⁴ The closing session was a roundtable discussion by all the speakers which is not included here.

These are ongoing conversations. Both the ALI Project and parallel alternatives are works in progress. But as the papers in this issue indicate, the groundwork has been well and truly laid for progress towards resolving difficult challenges of multi-jurisdictional intellectual property disputes—challenges which are likely to increase exponentially in the years ahead.

11. See Toshiyuki Kono, *Intellectual Property Rights, Conflict of Laws and International Jurisdiction: Applicability of ALI Principles in Japan?*, 30 BROOK. J. INT'L L. 865 (2005).

12. Captured in the transcript from Dinwoodie's remarks, 30 BROOK. J. INT'L L. 885 (2005).

13. See Graeme W. Austin, *Intellectual Property Politics and the Private International Law of Copyright Ownership*, 30 BROOK. J. INT'L L. 899 (2005).

14. See Richard L. Garnett, *Trademarks and the Internet: Resolution of International IP Disputes by Unilateral Application of U.S. Laws*, 30 BROOK. J. INT'L L. 925 (2005).