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Culture, Conflicts, and International Law

The proliferation of international regulation governing intellectual property has created the potential for significant conflict with international human rights norms. Although intellectual property is certainly compatible with human rights in most situations, the policies states implement to balance the two are at risk of being challenged as violations of their trade obligations. Because the trade regime can consider only trade norms in hearing such complaints, however, these decisions are likely to systematically undervalue human rights goals.

This article examines traditional conflict of laws principles – including interest analysis, exhaustion, comity, forum non conveniens, and due process – to develop guidance for managing such inter-regime conflicts. The article argues that instead of focusing on legal doctrines, which translate poorly into the international level, a conflicts methodology for inter-regime conflicts should focus instead on choosing the appropriate decision-maker. States, not international regimes, are best positioned to develop solutions that appropriately balance competing obligations. It is precisely in situations of inter-regime conflict that the values at the heart of local decision-making, including experimentation, expertise, and consensus building, are most important.

As a result, the trade regime should defer to domestic policies, whether legislative or judicial, that genuinely seek to balance claims of exclusivity and access in order to comply with the state's obligations under both the trade and human rights regimes. Such deference might be accomplished by a presumption that the policy satisfies the state's trade obligations, although that presumption might be rebutted by a showing that the decision was not necessary, reasonable, or proportional. Deference to national policies would not only ensure that decisions are tailored to local needs and values, but also create an incentive for states to engage in such balancing.