

Paper proposal for ATRIP 2018
Fairness, Morality and Ordre Public in Intellectual Property

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ARE NON-DISCRIMINATION PRINCIPLES FAIR?

The notion of fairness and fair treatment in international IP law is commonly associated with the concept of non-discrimination and the principles of national treatment (NT) and most-favoured-nation treatment (MFN). Indeed, the call for papers refers to 'strong non-discrimination rules, such as national treatment obligations, that aim to prevent unfair treatment of non-nationals'. The essential idea underlying NT and MFN is that foreign right holders should receive the same or 'no less favourable' treatment as compared to nationals or foreigners that receive advantages with regard to the protection of intellectual property. While MFN has come to international IP law only through its marriage with trade, NT has a long tradition dating back to the origins of multilateral IP treaties.

In my paper, I analyse IP non-discrimination principles in comparison with equivalent concepts in international trade and investment law. Such a comparative perspective across the main pillars of international economic law offers interesting insights and allows to question the 'fairness' of broad and unqualified NT and MFN principles in the IP context. For example, there is no comparability test under the IP non-discrimination principles which would require right holders to be in 'like circumstances' – something which often lies at the heart of the equivalent tests in trade and investment law. Furthermore, TRIPS NT and MFN now extend to treatment that is de facto discriminatory, i.e. has a differentially disadvantageous effect in practice. Under *EC-GIs*, his approach has been imported from trade law – but without recognising that trade (and investment) law balance it with General Exception clauses that allow to justify policies with disadvantageous 'side effects'. IP treaties don't offer equivalent exceptions – but could perhaps be construed to justify public interest measures, even if they disadvantage foreign right holders. My paper hence questions whether IP non-discrimination principles can be applied in 'fair' manner.