With increasing frequency intellectual property cases involve cross-border elements, such as foreign parties or foreign conduct, and the rise in these cross-border cases highlights the need to define the territorial reach of national IP laws. The reach of a national IP law depends on substantive IP law, but it also depends on conflict of laws rules; however, legislators have so far paid insufficient attention to the territorial delineation of IP law through IP statutes and conflict of laws rules. In fact, legislators only rarely draft IP statutes with any consideration of cross-border scenarios; other than in isolated exceptions, such as section 271(f) of the U.S. Patent Act, IP laws are conceived as single-country laws without providing for cross-border scenarios. Conflict of laws rules, by contrast, are designed expressly to address cross-border aspects of litigation, but until recently the rules had not been considered and drafted with IP issues in mind. In some countries, such as China, legislators have reviewed conflict of laws rules in light of IP laws and adopted new conflict of laws statutes with IP-specific provisions. In the United States, state conflict of laws rules do not provide IP-specific rules; nor does the Restatement (Second) of Conflict of Laws, which federal courts apply when deciding federal question cases. Congress’s power to legislate on conflict of laws issues has been debated, and only a few federal statutes address conflict of laws issues, none of which concern IP.

In this article I review, from both the IP law and the conflict of laws perspectives, the various tools that are available to define the territorial reach of national IP laws. I survey special IP-specific provisions that have been introduced in national conflict of laws rules, and discuss provisions of national IP laws that have an impact on the application of conflict of laws rules. Using country examples I demonstrate the interaction between IP laws and conflict of laws rules and discuss how the interaction does or does not serve national IP policies. Given the importance of the territorial delineation of IP laws I recommend that legislators give equal consideration to cross-border and one-country scenarios when drafting legislation, and that IP experts employ conflict of laws rules as tools for implementing national substantive IP policy.