

PREFACE TO THE SECOND EDITION

The international intellectual property system is continuously evolving. This book evolves with it.

Intellectual property (IP) remains at center stage in developments responding to globalization. Innovation and marketing skills define the competitiveness of companies and nations. The quest for a proper balance between the grant of exclusive rights and protection of the public domain remains at the heart of legal developments. The authors continue to take particular interest in the social welfare dimensions of intellectual property. IP laws ultimately are mechanisms to achieve desirable social welfare objectives for people around the world. We continuously draw attention to the “whole effect” of the international IP system.

Since the first edition was published in 2007, four major trends or developments may be highlighted.

First, the IP policies of large emerging economy countries—including Brazil, China, and India—have been the subject of considerable political and legal attention. As industry based in these countries invests more heavily in developing innovative products and brands, government institutions in these countries are gradually leaning toward strengthening domestic IP protection, while hesitating to do so at the international level. So far, this trend only implicitly alters the international IP landscape, but this may change in coming years.

Second, as emerging economy industries start to seriously challenge those of Europe, the United States and Japan, political leadership in the latter demand stronger global IP enforcement to maintain technological advantage. Intensifying attention to global enforcement of IP was manifest in the first WTO dispute settlement case interpreting the rules of the TRIPS Agreement enforcement chapter. The *China-Enforcement* case, decided in 2009, involved US claims that China’s criminal IP enforcement laws provided insufficient deterrence. The United States did not succeed with its claims, but the report of the WTO panel began to flesh out TRIPS Agreement enforcement standards. Key excerpts are introduced in Chapters 4 and 6. In a related development, the government of India was sued by a Swiss pharmaceutical company in Indian court for allegedly introducing patentability standards inconsistent with its TRIPS Agreement obligations. The late 2007 decision of the Indian High Court in the *Novartis* case, rejecting the allegation, is introduced in Chapters 1 and 2. Consistent with policies in the U.S. and the European Union, the *Novartis* decision is another example of denying direct effect to the TRIPS Agreement.

Third, the slow pace of IP norm-making at the multilateral level—already evident in 2007—has led some governments to voice serious concern about the

role of existing multilateral IP institutions, with an implicit threat to move international IP subject matter elsewhere. That “elsewhere” already is manifest in efforts to negotiate in *ad hoc* forums, as well as in bilateral trade agreement settings. This third major trend—a continuation—is evidenced by a proposed plurilateral Anti-Counterfeiting Trade Agreement or ACTA designed to provide more extensive rights to private IP holders and customs authorities to act at the border. The proposed agreement goes well beyond traditional notions of “counterfeiting” and has met with considerable political pushback from NGOs and developing country governments. We discuss the ACTA in various chapters. There is hardly a free trade agreement lacking provisions relating to the protection of IPRs. As to bilateral agreements, it is increasingly difficult to keep track of the many diverging IPRs provisions, most of which deploy MFN obligations to contribute to global increases in IP protection. Whether plurilateral or bilateral efforts led by the 20th century economic powers will succeed in pressuring the emerging 21st-century powers to give more serious attention to heightened IP standards and enforcement is not clear. It seems unlikely that Brazil, China, India and other major emerging economy countries will succumb to such pressure. Yet it is certainly possible that the perspective of emerging economy industrialists will ultimately converge with those of European, U.S., and Japanese industrialists, all seeking to protect investments in innovation. Perhaps the global need for climate change mitigation and adaptation will lead to more balanced approaches for protecting IPRs and promoting transfer of technology.

A fourth major development was the December 2009 entry into force of the Lisbon Treaty for the European Union (EU). Through this treaty, the EU has firmly secured comprehensive jurisdiction to address intellectual property rights (IPRs), both internally and in external relations. Importantly, the Lisbon Treaty altered the allocation of internal EU competences to conclude international agreements in the field of IP, strengthening the role of the European Parliament. Significant new powers relating to IP also were given to the EU in the field of investment protection. These developments are explained in chapter 1. Further progress was also made towards a single EU patent. It has been on the drawing board since the early 1970s, and it seemed almost certain that it would finally come into being in time for publication of this Second Edition. But, once again, language issues and questions regarding allocation of judicial competences continue to frustrate this objective.

Although there has been a great deal of IP-related activity taking place at WIPO, refining international registration systems and seeking to make progress on substantive issues, there has been limited progress in the area of multilateral IP norm-making. The WIPO Development Agenda has not yet shaped legal developments. As an exception to the general lack of progress at the multilateral level, the Nagoya Protocol on Access and Benefit Sharing to the Convention on Biological Diversity (CBD) was concluded in November 2010. The Nagoya Protocol seeks to clarify CBD IP-related obligations. It is introduced in Chapters 1 and 5.

This Second Edition introduces new cases addressing IP subject matter from various jurisdictions, with increasing attention to jurisprudence emanating from outside Europe and the United States. Chapter 2 provides an update on patent-related legislative developments in China. Chapter 5 introduces

new material addressing protection of traditional knowledge, as well as the intersection between IP and competition law, and principles of unfair competition more generally.

Despite all the changes, the fundamentals of intellectual property have remained stable and witness gradual challenges from new technologies, in particular in the field of copyright protection. We are mindful of the evolution of Internet-based content, most notably social network content, that once again challenges copyright and unfair competition law to adapt to changing forms of expression. So far, this has not led to any paradigm shift in norms or the way they are applied, but we monitor these developments.

We once again welcome your comments and suggestions for the next edition.

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Author's Statement: The views expressed in this book are personal and, in respect of Francis Gurry, do not necessarily reflect the views of the World Intellectual Property Organization (WIPO).