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INTERNATIONAL INTELLECTUAL PROPERTY IN AN INTEGRATED WORLD ECONOMY

Third Edition

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Frederick M. Abbott
Edward Ball Eminent Scholar
Professor of International Law
Florida State University, Tallahassee

Thomas Cottier
Professor of European and International Economic Law
University of Bern and
Managing Director, World Trade Institute and
the Institute of European and International Economic Law, Bern

Francis Gurry
Director General
World Intellectual Property Organization, Geneva

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To our children

Annie

Céline

Devin

Emma

Maurice

Ryan

Samuel

and

Thomas

PREFACE TO THE THIRD EDITION

International intellectual property law has developed incrementally over the past several years. We previously observed the growing importance of emerging market countries in the scientific and technological fields and that this trend might gradually influence perspectives within these countries on the treatment of intellectual property. We previously noted the slow pace of negotiations regarding new IP rules at the multilateral level, and that IP negotiators have been focusing their attention on bilateral, regional and plurilateral forums. These trends have continued, albeit not on a linear path. The multiplicity of stakeholders with interests in IP rules pushing and pulling in different directions virtually assures that developments in this field will not follow a straight line.

The TRIPs Agreement of the WTO, incorporating the Paris and Berne Conventions, remains the cornerstone of the international system and the conceptual basis for additional instruments. There is no single "seminal moment" to report since the previous edition, but there have been quite a few notable developments, each of which is addressed in this Third Edition.

Treaties establishing copyright exceptions in favor of the visually impaired (the Marrekesh VIP Treaty) and establishing rights for performers of audiovisual works (the Beijing Treaty on Audiovisual Performances) were adopted at WIPO (though they are not yet in force).

The European Union has introduced a new European Union Patent System designed to make available a single EU Patent, including Unified Patent Court. At the end of 2014, the new EU Patent System is not yet operational owing to requirements for additional ratifications of the Agreement on a Unified Patent Court. However, we have introduced the new system on the assumption that it will become operational in the relatively near term (while remaining appropriately cautious regarding an event that is more than 40 years in the making). The introduction of the new EU Patent System may ultimately simplify the process of applying for and enforcing patents in Europe. However, given the plan to simultaneously maintain existing national systems as well as the European Patent Convention (EPC) system, "simplified" might not be the proper term for describing this new state of affairs.

The United States, with adoption of the America Invents Act of 2011 (AIA), has transitioned from its "first to invent" patent priority system to a "first to file" system, bringing it into line with the rest of the world. In addition, the AIA has created a new post-grant opposition procedure fairly similar to the one long used under the EPC, and this new institutional mechanism is up and running.

There have been a substantial number of judicial decisions throughout the world with important implications for international IP law. Perhaps the most notable is the US Supreme Court decision in the *AMP v. Myriad* (2013) case, holding that patents are not available on genes as found in nature. There are a number of other significant Supreme Court case law developments in the United States (adopting international exhaustion in the field of copyright, refining the definition of transmission to the public in the field of copyright, limiting the availability of software patents, restricting the replanting of patented seeds, and others), by the European Court of Justice (precluding the application of member state IP rights to goods based on mere transit, allowing for reverse-engineering of computer software under the Software Directive, and others), and by the Supreme Court of India (requiring a demonstration of enhanced therapeutic efficacy for patenting a new form of known compound), all of which are part of the body of rules to which international IP lawyers look.

It is worth pointing out that most of the important judicial decisions referenced above limit rather than extend the scope of IP protections. They are directed towards achieving a balance between the rights of IP holders and the rights of the public to access knowledge. This presents something of a contrast with efforts to negotiate new IP rules in bilateral/regional and plurilateral forums where IP-dependent industry groups and some supporting governments are pushing for more extensive protections. So, for example, in the TransPacific Partnership (TPP) negotiations the United States has tabled proposals to significantly strengthen protections for IP right holders with its 11 negotiating partners. The project entails a number of TRIPs plus proposals, also incorporating existing international agreements negotiated at WIPO. There is pushback from some, and it remains to be seen how far this plurilateral forum will go toward strengthening protections. It is notable that the Anti-Counterfeiting Trade Agreement (ACTA), discussed in the previous edition, was rejected by the European Parliament following strong protest from consumer groups in the EU. There may be lessons to be learned from this experience for IP negotiators in terms of the necessary inclusiveness and breadth of the negotiating process.

In 2014, there were some very important disputes regarding the scope of international IP protection. Probably the most important are the cases initiated directly or indirectly (through WTO member states) by the tobacco companies at the WTO and under investor to state dispute settlement (ISDS) provisions. The companies claim that tobacco plain packaging rules, such as that adopted by Australia, are inconsistent with international trademark law (including the TRIPS Agreement and Incorporated provisions of the Paris Convention). Authors Abbott and Cottier are of the firm view that Australia's plain packaging legislation is *not* inconsistent with international trademark law, and presume such claims will be rejected.* Nonetheless, there is a substantial amount of interest in industries other than tobacco, such as the food industries, regarding how decisions are ultimately framed.

* Francis Gurry, due to his position as Director General of WIPO, refrains from expressing an opinion about these cases as opinions from WIPO may be sought during proceedings. More generally, 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).

Another important pending case involves claims against the government of Canada by Eli Lilly, a US-based pharmaceutical company, under the NAFTA's ISDS mechanism. The company argues that the legal formula adopted by the Canadian Supreme Court to assess the patent criterion of utility constitutes an act of expropriation under customary international law. The claims by Eli Lilly are directed to the Canadian Supreme Court case which has been used — and continues to be used — in this course book to introduce the utility doctrine (*Apotex v. Wellcome*, 2002).

China has adopted some significant changes to its patent law, and these are discussed in Chapter 2.

As always, we welcome your comments and suggestions regarding a future Fourth Edition, and extend our appreciation to those who have provided feedback regarding the Second Edition.

Frederick M. Abbott
Thomas Cottier
Francis Gurry

November 2014

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 competiveness 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 adaption 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.

Frederick M. Abbott
Thomas Cottier
Francis Gurry

April 2011

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).

PREFACE TO THE FIRST EDITION

The title of this book reflects reality for lawyers involved in the field of intellectual property (IP). The world economy is highly integrated, and intellectual property law is playing an increasingly important role in this global environment. Intellectual property rights (IPRs) regulation in Brazil, China, India, and Russia affects not only those countries, but has important effects on the businesses and economies of the United States and European Union. IPRs regulation affects social welfare, such as by influencing the quantum of information available in the public domain and by influencing the development and pricing of medicines. Because markets for socially important goods and services are international, IPRs rules established for one country (or a group of countries) may well affect social welfare in other countries. Multilateral and regional IPRs rules provide the framework in which the multinational business community operates. The same rules have important implications for social welfare throughout the world.

This book is designed as a detailed introduction to the international system that regulates intellectual property rights. Chapter 1 introduces the forms of intellectual property from a cosmopolitan perspective, taking into account decisions from various jurisdictions. It identifies and explains the multilateral organizations in which rules are negotiated and applied, such as the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO), and other organizations with subject matter interest in IPRs, such as the Food and Agriculture Organization (FAO) and World Health Organization (WHO). Regional agreements and institutions, which play an important role in IPRs regulation, are introduced in the first chapter, and the role of regional institutions in IPRs regulation is covered throughout the book. Chapter 1 then turns to basic principles, such as national and most favored nation treatment, exhaustion, independence, territoriality, extraterritoriality, and human rights, which have systemic effects across the IPRs landscape. At the conclusion of the first chapter, the policies underlying the protection of IPRs at the multilateral level are considered.

The book approaches the detailed subject matter of international IPRs regulation by addressing the three main categories of IPRs, with their respective subcategories, in separate chapters on the international patent system (Chapter 2), the international trademark and identifier system (Chapter 3), and the international copyright system (Chapter 4). Each chapter starts with a more detailed consideration of the IP form. It then proceeds to identify the multilateral rules that apply to that IP form, how rights are secured on a wide geographic basis, and how rules have been applied in dispute settlement. Relevant regional institutions and rules, select national rules, and special policy considerations follow. Chapter 5 addresses protection of industrial design, plant varieties, trade secret, and regulatory data, using a

similar approach. One of the most significant developments regarding the international IPRs system over the past decade is heightened attention to matters of enforcement. Chapter 6 covers the subject in some detail, including how enforcement is being addressed at the WTO, in other international organizations, at the regional level, and in national law.

Throughout the book we pay strong attention to the public policy implications of international IPRs rules and enforcement, with special attention to the different interests and perspectives of developed and developing countries. For law students, as well as practitioners, judges, government officials, representatives of international organizations and nongovernmental organizations, it is essential to understand technical aspects of how the international IPRs system works and to understand — as well as our collective state of knowledge allows — how the system affects economic and social welfare. A full appreciation of the technical details and social welfare implications of the international IPRs system among those who shape and apply the rules is critical to continued improvement of the system. Properly designed and implemented, the system should benefit us all.

Frederick M. Abbott
Thomas Cottier
Francis Gurry

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