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THE PROTECTION OF
INTELLECTUAL PROPERTY
IN INTERNATIONAL LAW

HENNING GROSSE RUSE - KHAN

THE PROTECTION
OF INTELLECTUAL
PROPERTY IN
INTERNATIONAL
LAW

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Bismillah, ar-Rahman, ar-Rahim
For Jasmin, Alia, and Karima

PREFACE

The idea for this book grew out of a course that I introduced in the academic year 2010/2011 at the Munich Intellectual Property Law Centre (MIPLC); a master programme devoted to teaching IP and competition law, and jointly run by the Max Planck Institute on Innovation and Competition, the George Washington University School of Law, and the University of Augsburg. Under the initial title 'Intellectual Property Protection within the Global Legal Order', the course focuses on a range of interfaces between IP and other areas of international law, the different perspectives these areas take on IP, and ways to conceptualize these interfaces, as well as the international institutions whose work involves looking at IP from different angles. At that time, I had already become fascinated by the complexity and diversity in the treatment of IP in international law—something one discovers when looking beyond the often narrow confines of the traditional international IP system. The main objective of the course hence was (and still is) to raise awareness of the multitude of diverse and specialized regimes relevant for IP protection on a global plane and to encourage critical analysis of its role in the wider international law framework.

As I write this Preface, the preparations for the seventh year of teaching the course are in full swing. While the overall approach has remained, one thing however has changed that reflects an important development in my own thinking about these interfaces: for several years now, the course has been called 'Intellectual Property in Global Legal Orders'. Instead of conceiving the body of rules within which I assess IP-related interfaces as one single 'Global Legal Order', I prefer to think of a multitude of different 'Global Legal Orders'. The former suggests (and perhaps unduly predetermines) order and well-defined relations—it connotes unity and even hierarchy. Shifting from one to many legal orders rather implies pluralism and a basic element of equality amongst the different orders—with the term 'order' still suggesting some inherent structure and 'system' that governs. This shift is similarly reflected in my change of title for this project from 'The Protection of Intellectual Property in the International Legal System' to 'The Protection of Intellectual Property in International Law'. The reasons for this shift are subject to an in-depth discussion in the first Part of this book. My main point here is that my perspective on the topic has changed over the years—primarily by developing a more refined view of the wider international law context within which I look at IP-related interfaces. This change in perspective is indicative for the diversity of potential approaches to the topics discussed in this book. As further explained in the concluding chapter, I do

not claim to offer the ‘correct’ or ‘best’ view on how IP protection fits into the wider context of international law or how IP treaties relate to those on human rights, investment, trade, bio-diversity, or climate change. This book is rather an attempt to bring together years of my own research that have looked at various aspects of such interfaces and to place them into a more holistic framework. While this framework is certainly very far from a complete account of the IP-related interfaces, I hope it stimulates further research and thinking outside the often narrow boxes of specific legal disciplines and expertise.

I owe thanks to a long list of persons that have—in various ways—contributed or otherwise helped me to complete this book. First, there are my former colleagues at the Max Planck Institute in Munich where most of the research and work on the book has been conducted. Foremost, I want to thank Josef Drexel who has always supported my work on international IP law in general, has offered critical advice and support for various specific projects in this context, and has given me the space to write this book—although I initially joined the Institute with a common understanding of doing a more traditional Habilitation. I am also immensely grateful to Annette Kur and Reto Hilty. Annette has usually been my first and principal contact to discuss new ideas. I admire her sharp and critical mind which is nevertheless always interested in an original approach that is off the beaten track. Reto has always lent me an open ear, shared important advice and strategic thinking, and has fully integrated me into projects that allowed me to gain further insights and better understandings of the law and policy battles fought over IP protection on the international level—such as the one leading to the Munich Declaration on the Three-Step-Test and on the Flexibilities in the International Patent System. At Max Planck, I also want to thank in particular Mor Bakhoum, Thomas Jaeger, Hanns Ullrich, Silke von Lewinski, Seth Ericson, Andrea Wechsler, Mark Oliver Mackenroth, Beatriz Conde-Gallego, Mathias Lamping, Kaya Köklü, Soheir Nadde-Phlix, and Owais Sheikh for their ideas, advice, and support.

Ever since Cambridge has become the centre of gravity for my research, Lionel Bently has been the colleague and senior academic supporter whose help was instrumental in getting the unfinished work done. Next to offering useful advice on a range of specific questions, Lionel entrusted me with the international IP LLM and allowed me to tailor my teaching to my research interests pursued in the book. In addition, I owe thanks to Bill Cornish, Eva Nanopoulos, Surabhi Ranganathan, Jorge Vinuales, Catherine Seville, Kathy Liddell, Lorand Bartels, Michael Waibel, Markus Gehring, David Erdos, Brian Cheffins, John Bell, Eilis Ferran, as well as all other colleagues at the Centre for Intellectual Property and Information Law and the Lauterpacht Centre for International Law. Beyond the people who have supported me at my two academic homes in the course of this project, a range of colleagues and friends from all over the world have contributed, in ways too many to mention, to this book. From all those, I wish to give special thanks for their help

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With all these acknowledgements in mind, any errors in the book of course are solely my own responsibility. Relevant developments have been generally taken into account until the end of 2015. The websites referred to in footnotes were last visited on 1 December 2015.

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