

Model Law on Intellectual Property

A Proposal for German Law Reform –
Abbreviated English Edition

Hans-Jürgen Ahrens
Mary-Rose McGuire

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Model Law on Intellectual Property

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Preface

Large-scale projects aiming at the codification of an entire area of law always require prior scientific analysis and preparation, which can serve as the basis of a further in-depth discussion by academics and practitioners. To initially provoke such a discussion for the German law is the main objective of this draft Code of Intellectual Property (CIP) presented herein. We believe that this purpose is best served by a detailed draft accompanied by explanatory comments. The texts do not only point out the need for reforms but at the same time summarize the present state of law even where, due to fragmented single disciplines and ministerial competences, the overall (scientific) coherence of the subjects threatens to be lost out of sight. The model law at the same time could provide food of thought for the future design of IP legislation of the European Union. However, not all issues related to intellectual property law are prone to be covered by EU legislation, as some of it naturally is – and must remain – closely linked to the set up of the competent national administrative bodies or reliant on the interaction with other national legislation, such as general private and civil procedure law. In view of these differences the English edition is abbreviated and restricted to those areas that may be relevant with regard to legislation on a European Union level. The English edition accordingly only consists of book 1 (general part) and book 10 B (employees' creations) of the German edition. In order to provide an impression of the overall project, however, the content of the other books is briefly set out in the introduction.

Whether the German legislator has the strength and disposition to develop a comprehensive legislation cannot be predicted. Yet, for individual issues of legislation such as the contractual exploitation of intellectual property rights the need for legislation is more than obvious. The draft of a code of intellectual property presented in

this work thus can serve two different purposes. First, in its entirety it provides a framework for IP legislation in Germany, which may serve as a model for major legislative projects. Second, it contains model provisions in case of amendment of specific areas of law, precisely because it makes the broader context of individual measures visible.

As mentioned above, book 1, which forms the general part, could also serve as a framework for Community law. This is even more so as it in parts already consists of rules of Community law, which are restated and applied far beyond their mandatory scope of application. And in other parts it closely adheres to the paradigms of Community law, which in particular are embodied in the Regulations on Community intellectual property rights. But it also covers areas where Community legislation is still lacking. This for instance holds true for the field of contractual exploitation. Insofar book 1 also covers areas that have – even in the context of the preparatory works for a genuine European private law – so far been omitted by Community law. Yet, it is not a utopia far from existing law that has been formulated in this book, but rather you will find solutions that have been originally developed through practice and have mainly been refined and consistently amended to a full-fledged system. This overarching concept promotes transparency and coherence; gaps in the existing rules are addressed.

By contrast, the general procedural rules of book 2 mirror the national administrative set-up and heavily rely on existing national procedural provisions. Accordingly they are only of national relevance and therefore have not been included into this abbreviated English-language edition. Quite similarly the books 3 to 9, which neither have been translated for this edition, depict how the existing German law could be restated following the systematic approach of the CIP without prejudice to the substance of the German IP protection scheme. They contain all the rules that have to be specifically regulated for the individual intellectual property rights. Accordingly they at their core maintain the content of the existing separate statutes unless the respective provisions have be-

come obsolete due to the formulation of general rules contained in books 1 and 2. Unsurprisingly the scope of the books 3 to 9 has been decreased in quantitative terms to a considerable extent as in particular all parallel provisions were replaced by the creation of common rules in the general part (book 1) and general procedural rules (book 2) that apply to all other books. The books 3 to 9 therefore contain first the substantive provisions which apply only to the respective intellectual property right, such as the scope of protection and specific limitations tailored to it, and second the procedural rules on the application procedure as far as they similarly reflect the nature and aim of protection. The books on particular intellectual property rights largely restate the existing law, although of course streamlined with regard to terminology and structure. The emphasis is on the simplified and self-explanatory structure which is made possible only because many rules could be deleted. The restatement of these unmodified parts thus primarily serves the aim of transparency and it clearly shows the benefit of the application of the new regulatory technique, i.e. extracting common rules both with regard to substance and procedure.

Book 10 is dedicated to the field of employees' inventions, an area which is the subject of an ongoing policy discussion, not only at a national but also at a European level. As reform appears to be desirable both from a national and a European perspective we have decided to include a translation of this part into this English-language edition. Book 10 first contains the German Act on Employees' Inventions as it stands and second an attempt to carefully expand it to an overarching law on employees' creations that may be of particular relevance with regard to copyrights but also to designs.

This work has originated as a private scientific project. It goes back to the initiative of *Hans-Jürgen Ahrens* and was conducted at his Osnabrück Chair of Private Law, German and European Commercial Law and International Civil Procedure with the support of a junior research group, of which *Mary-Rose McGuire* then was a member. The substantial financial support provided by the Ger-

man Association for the Protection of Intellectual Property Law (GRUR) has permitted the employment of several doctoral candidates at the University of Osnabrück, namely *Mareike Matthies*, *Bea Metelski*, *Sebastian König*, *Matthias Rabbe*, *Stephanie Rieke*, *Anna von Seth* and *Peter Wirtz*, who have worked on this team during more than three years and have contributed to the success of the project and who later were assisted by research staff at the University of Mannheim, namely *Martina Burger*, *Valerie Schweppe*, *Lea Tochtermann*, *Sofia Wagner* and *Florian Winzer*. The GRUR has also kindly covered the costs of translation, which in its better part was conducted by *Jasmin Jaenisch* (University of Mannheim).

But the support provided by GRUR was not only limited to financial aspects. Far more also the expertise of its members has contributed to it. A number of them have acted as experts and have in many ways been inspiring. Their criticism and suggestions have found their way into the present draft Code of Intellectual Property. We in particular would like to mention Prof. Dr. *Kurt Bartenbach* (lawyer), Dr. *Helmut Eichmann* (lawyer), Prof. Dr. *Willi Erdmann* (presiding judge at the Federal Court of Justice, retired), *Helmut Knoll* (presiding judge at the Federal Patent Court), Dr. *Hans-Peter Kunz-Hallstein* (lawyer), Prof. Dr. *Michael Loschelder* (lawyer), Prof. Dr. *Peter Meier-Beck* (presiding judge at the Federal Court of Justice), Prof. Dr. *Christian Osterrieth* (lawyer), *Joachim Rauch* (presiding judge at the Federal Patent Court) and Prof. Dr. *Winfried Tilmann* (lawyer) who acted as expert advisers and have both supported the process and assessed the results.

Our work – in particular with regard to the sophisticated issues related to the organisation of the administrative authorities and proceedings – was further supported by statements submitted by employees of the German Patent and Trade Mark Office and a meeting allowing an intense discussion hosted by *Cornelia Rudloff-Schäffer* (president of the GPTO) in her office. Dr. *Maximilian Häußler* (judge at the Federal Patent Court), currently head of the patent division, *Sven Holland* (assistant director), Dr. *Johannes*

Holzer (assistant director, head of the division for copyright and state supervision of collecting societies), Stephan Reich (assistant director), Christoph Schmid (head assistant director) and Michael Staats (assistant director) cooperated in this process. Their numerous scientific proposals and practical suggestions have provided cherished input and in many instances have led to a revision of the previous draft. But also as far as we did not adopt them they have provided important insight and have given rise to an intensive discussion, sometimes to a reinforcement of the arguments of our own positions.

Mannheim and Osnabrück, November 2012

*Professor Dr. Mary-Rose McGuire
Professor Dr. Hans-Jürgen Ahrens*

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