Concise

International and European IP Law

TRIPS, Paris Convention, European Enforcement and Transfer of Technology

Second Edition

EDITORS
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PREFACE

'Concise IP' is the short name given to a series of five volumes of commentary on European intellectual property legislation. The five volumes cover: Patents and related matters, Trademarks and designs, Copyrights and neighbouring rights, IT and a general volume including jurisdictional issues. The series is based on a successful formula used for a Dutch publication, a series called *Tekst & Commentaar* (Text & Commentary) and on the equivalent German publication, *Kurz Kommentar* (Short Commentary). Since their first publication, these have won a prominent place among Dutch and German legal publications with each volume becoming an authority in the field.

Concise IP aims to offer the reader a rapid understanding of all the provisions of intellectual property law in force in Europe enacted by European and other international institutions. The volumes take the form of an article-by-article commentary on the relevant regulations and other legal instruments. It is intended to provide the reader with a short and straightforward explanation of the principles of law to be drawn from each article, rule or other provision. Where appropriate, this is done by reference to the construction of that provision by senior courts. Usually only judgments of the European Court of Justice, higher national courts or other senior tribunals such as the Board of Appeal of the European Patent Office are cited, though there are exceptions where an important point has only so far be considered by a lower tribunal. The citations do not include an analysis of the facts of the case, only the relevant point of law.

In order to keep the commentaries clear, they are in a form that is as brief as the subject matter allows. For in-depth analysis and discussion the reader will need to move on to specialist text books. Concise IP also differs from other publications in the form of commentaries, such as those in looseleaf format, by reason of its shorter, more direct style. The idea is that the reader will find it easy to gain a rapid appreciation of the meaning and effect of the provision of interest and thereafter be in a position to look in the right direction should further information be needed. The editors and authors are all prominent specialists (academics and/or practitioners) in their fields.

It is the intention of the editors and publisher to publish new editions every two to three years and we are most grateful to the authors for their contributions and to Rachel Liechti-McKee and Ruth Sonja Peterseil from the Department of Economic Law, University of Bern, for their efficient support in realizing this second edition.

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Karlsruhe,	Amsterdam,	London,
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DISCLAIMER

The views expressed in this commentary are strictly those of the authors and should not be regarded as stating the official position or policy of institutions to which authors may be affiliated, in particular law firms, the World Intellectual Property Organisation and the World Trade Organisation.

ABOUT THE EDITORS

Thomas Cottier

Thomas Cottier is Managing Director of the World Trade Institute and Professor of European and International Economic Law at the University of Bern and former Dean of the Faculty of Law. He directs a national research programme on trade law and policy (NCCR International Trade Regulation: From Fragmentation to Coherence). He was a visiting professor at the Graduate Institute, Geneva, and currently teaches also at the Europa Institut Saarbrücken, Germany, and at Wuhan University, China. Thomas Cottier was educated at the Universities of Bern, Switzerland, and Michigan, Ann Arbor, US. Upon his doctorate, he was a Research Fellow at the Universities of Bern and Cambridge, a lecturer at the University of St. Gallen and adjunct professor of law at the University of Neuchâtel prior to being appointed full professor at the University of Bern in 1994. His research activities mainly relate to the law of WTO, external economic relations of the EU, international intellectual property and constitutional theory. He was a member of the Swiss National Research Council from 1997-2004 and served on the board of the International Plant Genetic Resources Institute (IPGRI) Rome during the same period.

Thomas Cottier has a long-standing involvement in GATT/WTO activities. He served on the Swiss negotiating team of the Uruguay Round from 1986 to 1993, first as chief negotiator on dispute settlement and subsidies for Switzerland, conceptual work in the fields of services and intellectual property and legal counseling, and subsequently as chief negotiator on TRIPS. He held several positions in the Swiss External Economic Affairs Department and was the Deputy-Director General of the Swiss Intellectual Property Office.

He has also served on several GATT and WTO panels, including the chair of the panels dealing with the US and Canadian complaints on the measures taken by the EC with regard to meat and meat products (hormone cases). Thomas Cottier served the Baker & McKenzie law firm as Of Counsel from 1998 to 2005, advising the law firm on WTO issues.

Pierre Véron

Admitted in 1969, Pierre Véron is a member of the Paris Bar. His 13-lawyer firm, with offices in Paris and Lyon, deals only with patent litigation, with a special emphasis on international cases. He is the Honorary President of EPLAW, the European Patent Lawyers Association, and of the French Association of Patent Litigators (*Association des Avocats de Propriété*

Industrielle). He has taught European patent litigation at the CEIPI (International Centre of Industrial Property Studies) in Strasbourg.

He is a former member of the board of the AIPPI French Group. He has served on the boards of the Centre Paul Roubier (an industrial property research and education centre) and the Comparative Law Institute of Lyon University. He is an associate member of the American Bar Association (Section of Intellectual Property Law). Having an interest in arbitration, he is an associate of the Chartered Institute of Arbitrators. His firm is a member of the Intellectual Property Owners Association (IPO) and of the American Intellectual Property Law Association (AIPLA)

Pierre Véron is the editor of *Saisie-contrefaçon*, a book published by the leading French publisher Dalloz, and the author of more than 50 articles on industrial property litigation: *Arbitration and Intellectual Property, Cross-Border Injunctions in the French Courts, Secrecy in Industrial Property Litigation, Buyers' Remedies against Sellers of Products Infringing Third-Party Rights* and *Thirty Years of Experience with the Brussels Convention in Patent Infringement Litigation*.

He has presented several reports on behalf of the French Group at the AIPPI Congress: 'Obtaining of evidence of the infringement of industrial property rights' (1986 London), 'Experimental Use as a Defence to a Claim of Patent Infringement' (1992 Tokyo). He has also acted as officer of various international committees: 'Methods and Principles of Novelty Evaluation in Patent Law' (1995 Montreal), 'Confidentiality, Disclosure and Publication of Data in Information Networks' (1997 Vienna), 'Enforcement of Intellectual Property Rights' (1998 Rio de Janeiro), 'The Hague Convention on Jurisdiction in Civil Matters' (2001 Melbourne) and 'Jurisdiction and Applicable Law in the Case of Cross Border Infringement of Intellectual Property Rights' (2003 Lucerne).

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INTRODUCTION

Ever since modern protection of intellectual property emerged during the industrialization in the 19th century, the process was accompanied by international agreements. Bilateral in the beginning, seeking to secure comparable levels in neighbouring countries in the effort to combat counterfeiting and wide-spread copying, intellectual property agreements amount to the first multilateral instruments in international economic law, long before the GATT was founded after World War II. The Paris and the Berne Conventions of 1883 and 1886, respectively, multilateralized a great number of incoherent bilateral agreements and attempted to bring about common rules and harmonization in key areas relevant to international commerce. While these Conventions were eventually amended, and a great number of additional treaties added to the arsenal of intellectual property protection under the auspices of the World Intellectual Property Organization of the United Nations, decolonization slowed the process of harmonization. Developing countries, for many years, were anxious to preserve adequate policy space. They generally refused to accept advanced standards of protection commensurate with domestic law of industrialized countries. This changed, following the geopolitical changes of 1989, during the multilateral negotiations of the Uruguay Round of the GATT (1986-1993). Within an overall package deal seeking to liberalize textiles and agriculture, developing countries agreed to global minimal standards in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), which entered into force in 1995. Parallel to global developments, intellectual property protection also emerged within regional integration in Europe. While property rights remain the realm of Member States, the principles of EU law, in particular competition law and the free movement of goods, induced important case law and, eventually, gradual harmonization of selected aspects of intellectual property. This culminated in the common and EU-wide systems of protection in trade marks and designs.

These evolutions do not remain without substantial impact on legal practice. Courts and attorneys are bound to take into account international and European rules on intellectual property in their daily life. In many ways, they influence the application of domestic law, sometimes even overriding it. This short commentary seeks to offer assistance in facilitating access to, and use of, what sometimes are complex rules. The book, completing other volumes of the series, sets out the rules of the TRIPS Agreement, which today, by incorporating the Paris and Berne Conventions, and referring to other instruments, amounts to the backbone of the international law of intellectual property protection. It is followed by a commentary of the Paris Convention. It eventually turns to selected and key instruments in European Community law.

1. The TRIPS Agreement of the World Trade Organization is of paramount importance both in terms of substantive and procedural law. Based

upon the fundamental principles of non-discrimination, in particular most-favoured nation treatment and national treatment, it expounds basic rules in all fields of intellectual property protection, ranging from copyright and related rights, trademarks and geographical indications, industrial designs, layout designs of integrated circuits and the novel protection of undisclosed information. The agreement offers detailed rules on procedural rights and obligations both for civil and administrative procedures and sets forth minimal standards for protection by penal law. Also, it addresses standards on registration of rights. In doing so, the Agreement seeks to strike a proper balance between appropriation and competition, and to take into account the needs to protect public goods and welfare. Whether such a balance was found has been a matter of controversy ever since 1995. The jurisprudence of panels and the Appellate Body of the WTO made important contributions in interpreting and refining the law, and no commentary could do without discussing what amounts to the first and foremost body of international case law in intellectual property. It is worth noting that most of the case law relates to disputes between industrialized countries, while developing countries, except for an initial phase, have not been strongly exposed to litigation so far. This may change in coming years with the coming of age of emerging and newly competitive economies around the globe.

2. International law. (a) The Paris Convention for the Protection of Industrial Property of 20 March 1883. During the second half of the 19th century, there was a concern that the divergence between national industrial property laws could hamper the growth of international trade. A solution was found by way of the Paris Convention of 20 March 1883 which constituted a major step towards the international harmonization of industrial property. The Convention was the very first multilateral industrial property treaty and still enjoys strong support, with 173 contracting States currently forming the Union for the protection of industrial property envisaged by the Convention. Its scope is very wide: pursuant to art. 1 'the protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition' and 'Industrial property shall be understood in the broadest sense and shall apply not only to industry and commerce proper, but likewise to agricultural and extractive industries and to all manufactured or natural products'. The Paris Convention is based on two fundamental principles. The first is the principle of national treatment (art. 2) according to which each country in the Union is obliged to grant to nationals of other Union countries the same protection as it grants to its own nationals. The second is the setting of minimum standards of protection concerning certain issues (e.g. right of priority, independence of rights) to which a national of a Union country is entitled even if the law of the contracting country where protection is sought grants less protection to its own nationals. Art. 3 extends the benefits of the Convention to nationals of a country outside

the Union who are domiciled or have a real and effective industrial or commercial establishment in one of the countries of the Union.

3. European law. (a) Council Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The economic integration sought by the European Community (and now by the European Union), and the creation and sound operation of the internal market where free movement of persons, goods and services is ensured, makes a certain degree of judicial harmonization a necessity. It is in the interest of litigants whose dealings have a European dimension to know precisely which court has jurisdiction in respect of their litigation. Once a decision is given by a court, it is important to the prevailing party to have the decision recognized and enforced rapidly and simply throughout the European Member States. Council Regulation 44/2001, which replaces the Brussels Convention of 27 September 1968 with some modifications and improvements, meets those expectations and contributes to the creation of a 'European judicial area' through uniform rules governing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. These rules are of great practical importance in all intellectual property litigation. **(b) Council Regulation 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights.** Counterfeiting and piracy represent a significant challenge to the European Union because of their negative economic and social impact, endangering trade, innovation, fair competition, the health and security of consumers, investment, employment, fiscal revenue and public security (since organized crime is very often involved). For almost 20 years, action by customs authorities, as provided for in successive Council regulations – the most recent being Council Regulation 1383/2003 – has been one of the most effective tools in European law against counterfeiting and piracy. Acting ex officio or pursuant to a special application lodged by an intellectual property right-holder, the customs authorities may, for a certain period, suspend the release of goods or detain goods which are infringing or suspected of infringing intellectual property rights when such goods originate from third countries, or are European goods being exported to third countries. The customs action gives the right-holder time to retain and to examine the suspect goods and, if appropriate, to initiate proceedings against the infringer. **(c) Commission Regulation 772/2004 on the application of art. 81(3) of the Treaty to categories of technology transfer agreements.** To protect competition within the internal market with a view to promoting consumer welfare and an efficient allocation of resources, art. 81 of the Treaty (now art. 101 TFEU) provides a general prohibition against agreements between undertakings, decisions by associations of undertakings, and concerted practices which may affect trade between the EU Member States, and which have as their object or effect the prevention, restriction or distortion of competition within the common market. Any agreement or decision thus prohibited is automatically

void. Art. 101(3) of the Treaty provides an exception to that prohibition for agreements, decisions or concerted practices meeting four conditions. In addition, the Commission has been empowered by the EU Council through Regulation No. 19/65 to adopt so-called block exemption regulations which create exemptions (applicable by operation of law) for certain types of agreements that are regularly entered into, and where the decisional practice of the European Commission has enabled the development of a standard framework for an art. 101(3) analysis. Commission Regulation 772/2004 is one such regulation specially dedicated to technology transfer agreements covering intellectual property rights or know-how. **(d) Enforcement of Intellectual Property Rights Directive.** Supporting the fight against counterfeiting, piracy and against organized crime, Directive 2004/48 reduces the disparities between the systems of the Member States by establishing harmonized means for enforcing intellectual property rights. These means consist of measures, procedures and remedies aiding the gathering and preservation of evidence of the infringement of intellectual property rights, the institution of prompt proceedings to put an end to the infringement of intellectual property rights, and the entitlement of right-holders to obtain full compensation for any prejudice suffered. The general objective of the Directive is to approximate legislative systems so as to ensure a high, equivalent and homogenous level of protection in the European Union regarding all intellectual property rights. **(e) Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).** Like Regulation 44/2001, which tends to favour the proper functioning of the internal market and the creation of a 'European judicial area' through uniform rules governing jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Regulation 864/2007 tends to pursue the same objectives through uniform conflict-of-law rules relating to non-contractual obligations. As provided in recital 6, 'The proper functioning of the internal market creates a need, in order to improve the predictability of the outcome of litigation, certainty as to the law applicable and the free movement of judgments, for the conflict-of-law rules in the Member States to designate the same national law irrespective of the country of the court in which an action is brought'. These uniform conflict-of-law rules are of interest for intellectual property cases since the non-contractual obligations include the infringement of intellectual property rights and Article 8 of the regulation enacts a specific rule for such infringements.

AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY RIGHTS

The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

ANNEX 1C

[Preamble]

Members,

Desiring **to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade;**

Recognizing, **to this end, the need for new rules and disciplines concerning:**

- **(a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreements or conventions;**
- **(b) the provision of adequate standards and principles concerning the availability, scope and use of trade-related intellectual property rights;**
- **(c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;**
- **(d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and**
- **(e) transitional arrangements aiming at the fullest participation in the results of the negotiations;**

Recognizing **the need for a multilateral framework of principles, rules and disciplines dealing with international trade in counterfeit goods;**

Recognizing **that intellectual property rights are private rights;**

Recognizing **the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;**

Recognizing **also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;**

Emphasizing **the importance of reducing tensions by reaching strengthened commitments to resolve disputes on trade-related intellectual property issues through multilateral procedures;**

Desiring **to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as 'WIPO') as well as other relevant international organizations;**

Hereby agree **as follows:**

1. Reducing distortions to international trade and the promotion of adequate protection of intellectual property (first recital). (a) Role and function of the Preamble. In accordance with the general rule of interpretation of art. 31 para. 1 of the Vienna Convention on the Law of Treaties, a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The second paragraph of this provision specifies that the context for the purpose of the interpretation of a treaty shall comprise its Preamble. In construing the purpose of the operative provisions of the TRIPS Agreement, Members, panels, the Appellate Body and domestic courts are bound to take the Preamble into account. **(b) Reducing distortions and impediments to international trade.** The TRIPS Agreement of the WTO dates back to efforts introduced at the end of the Tokyo Round (1979) with a view to combating counterfeit goods and distortions of international trade. This concept was eventually expanded based upon the insight that inadequate substantive and procedural standards of protection comparably cause distorting effects. In the course of the Uruguay Round, a group of industrialized countries led by the United States and the European Communities achieved to substantially broaden and deepen the scope of the contemplated Agreement to the protection of trade-related intellectual property rights more generally by raising expectations among developing countries for better market access and improved technology transfer. The TRIPS Agreement as it stands today presents a high degree of normative density since it includes a great number of very detailed substantive and procedural rules covering the major fields of intellectual property rights. The introductory part of the Preamble captures this evolution. At the same time, it reflects the importance to establish and appropriately balance by means of adequate protection of intellectual property rights. **(c) Effective and adequate protection of intellectual property rights.** The Preamble recognizes that trade distortions may be caused by insufficient, as well as excessive, standards. While the Agreement generally defines minimal standards and allows Members of the WTO to adopt enhanced levels of protection, it is important to note the overall intention of avoiding barriers to legitimate trade by means of intellectual property protection. The TRIPS Agreement forms part of WTO law, which, in general

terms, is based upon the philosophy of 'raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand' (Preamble to the Marrakesh Agreement Establishing the World Trade Organization) by means of trade liberalization and enhancing market access. These goals need to be taken into account in applying and interpreting the TRIPS agreement.

2. Scope of new rules and disciplines (second recital). The Preamble sets out the scope of regulation addressed by the Agreement. It refers to the basic principles of non-discrimination, both MFN (newly applicable to the field in art. 4) and national treatment (art. 3), as well as transparency (art. 63). It stipulates the need for adequate substantive standards of protection (Part II) and refers, in addition, to intellectual property agreements incorporated into the TRIPS Agreement (art. 2.9). In respect to procedural standards (Part III), differences in domestic legal systems are emphasized and indicate a higher degree of divergence. It refers to effective and expeditious dispute settlement (Part V) and thus emphasizes the incorporation of the TRIPS Agreement into the WTO system, equally expressed by the eighth recital. It recalls the need for transitional arrangements (Part VI) stressing the goal of fullest participation in the results, which suggests that special and differential treatment should be limited. The Preamble does not address the rules pertaining to the acquisition and maintenance of rights (Part IV).

3. Multilateral framework against trade in counterfeit goods (third recital). This recital reflects the main concern that initially drove the former GATT parties to elaborate a multilateral trade arrangement addressing the protection of intellectual property rights (see above). It mainly relates to provisions of Part III.

4. Private rights (fourth recital). While WTO law generally addresses rights and obligations of Members and mainly focuses on trade regulation in public law, the TRIPS Agreement explicitly recognizes that intellectual property rights are private rights, pertaining to natural and juridical persons. It implies that the Agreement essentially protects holders of intellectual property rights, as opposed to Members. The qualification essentially depicts the nature of intellectual property. It grants holders the right to exclude third private parties from commercially exploiting the subject matter protected by such rights commensurate with the definition of scope of rights ascribed to the different forms of rights. The qualification of private rights is, however, without impact on dispute settlement before the WTO. It remains purely intergovernmental. Also, it should be noted that the Preamble does not refer to intellectual property rights as human rights in accordance with art. 27 of the Universal Declaration of Human Rights which refers to a natural property right concept when it states that everyone 'has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author'. Art. 15 section 1(c) of the International Covenant on Economic, Social and Cultural Rights expresses the