

PREFACE TO THE FOURTH EDITION

The international intellectual property system is built upon a series of multilateral agreements negotiated, adopted and implemented over the span of more than a century. The system has proven to be resilient in the face of technological change and disturbance in the global political environment. In the past few years the conceptual foundations of multilateral organization and cooperation have, however, come under pressure from political leaders and groups stressing that national interests can best be pursued alone or outside of international organization and cooperation. The United States has left its leadership in the WTO behind for the time being. The planned departure of the United Kingdom from the European Union (i.e. Brexit), is another manifestation of this pressure and, among its many ramifications, Brexit will affect the way that intellectual property is regulated within the UK and in trade relations with the European Union.

Perhaps paradoxically, nationalist trends have not diminished attention to international agreements and rules governing intellectual property (IP). To the contrary, the national interest is being defined by IP in the information society age. Threats to national IP interests are said to arise from failure of foreign governments to enforce relevant international standards. Disputes between the United States and China and concerns voiced by Europe and Japan regarding IP and transfer of technology are threatening the foundations of the multilateral trading system, with potentially broader strategic ramifications. The issues involved are complex and implicate the unresolved relationship between IP protection and rules governing foreign investment, interfacing mixed economies and state capitalism in China.

Technological development in the information technology space continues to provide new and different mechanisms for analyzing and communicating data. This evolution is at the heart of contemporary concerns beyond geopolitical relations. Personal identities are increasingly tied up with social-media platforms that embody various forms of expression. Artificial intelligence (AI) is deployed as a means for sifting through large quantities of data and is practically applied in a range of scientific endeavors. “Open source” has secured a firm place in the commercial IT environment, with major firms specializing in open source software development valued in the billions of dollars. Data has been “weaponized” in the context of political campaigns and manipulation of public opinion in other contexts. The use of computer tools to extract valuable information from businesses without authorization (i.e. hacking and cyber-intrusion) has become a major focus of attention, with the IT industry offering new solutions for data security on a regular basis. Trade secret protection has become a greater focus of attention, including through the adoption of criminal statutes, in consequence of some of these developments.

The present shifts in addressing national interest in these and other areas manifests itself in emphasis on bilateral negotiation of terms of trade regulation and investment rules, and it is within the framework of bilateral and “plurilateral” trade and investment negotiations that IP matters are principally being addressed today. There are good reasons to be wary of this emphasis, particularly as IP tends to be treated in these agreements from a private mercantile angle. The “internal” balance that is customarily sought in IP rules between public and private interests may not be so well represented in these “externally oriented” agreements. Nonetheless, the shift in focus from multilateral to bilateral approach is not new. It began during the concluding phase of the GATT Uruguay Round (1986-93) and intensified following the entry into force of the WTO Agreement on January 1, 1995. Importantly, however, all these developments strongly rely upon the conceptual foundations of the multilateral system of the TRIPS Agreement, incorporating the Paris and Berne Conventions and much work prepared within WIPO. They add additional standards subject to MFN obligations and shape the common law of intellectual property beyond the parties to these preferential agreements. Moreover, these new agreements increasingly integrate trade, investment and IP and competition law and thus contribute to the integration of different regulatory areas.

In February 2016 twelve countries signed a Transpacific Partnership Agreement (TPP) incorporating heightened levels of IP protection, including a requirement of eight-years regulatory exclusivity for biological pharmaceutical products (“biologics”). The US withdrew its signature from the TPP, whereupon the remaining 11 countries eliminated much of the heightened IP protection (including that for biologics) and rebranded the TPP as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP). Also, the US put on hold negotiations with the European Union on the Transatlantic Trade and Investment Partnership Agreement (TTIP) which entailed interesting new prospects in the field of IP.

In October 2018, Canada, Mexico and the United States announced the conclusion of a new trilateral trade arrangement to take the place of the NAFTA. Despite US criticism of the TPP, this NAFTA 2.0 (or USMCA) essentially incorporates the IP rules that were negotiated for the TPP (adding another two years of biologics exclusivity). However, it largely eliminates investor to state dispute settlement (ISDS) which gave rise to substantial controversy when it was invoked regarding patents under the NAFTA.

As this edition is finalized, the European Union (EU) has yet to bring its Unitary Patent system into force. We expect the Unitary Patent system “any day now,” once a constitutional challenge in Germany is resolved. The entry into force of the EU Unitary Patent will be accompanied by the introduction of the Unified Patent Court system that will substantially modify the way that patent infringement cases and invalidity challenges are addressed within the EU. We have been anticipating the EU Unitary Patent for quite some time and predict its arrival with caution. The EU also made much progress in addressing copyright in the information society, contributing solutions to the unresolved issues of ownership of big data.

In June 2018 a WTO dispute settlement panel rejected challenges brought by Cuba, the Dominican Republic, Honduras, and Indonesia against Australia’s

Tobacco Plain Packaging legislation. The main issue from an IP standpoint was whether Australia's special requirements "unjustifiably" encumbered the rights of tobacco company trademark owners. The panel recognized the devastating public health impact of tobacco use and the state interest in controlling that use as reflected, *inter alia*, in the WHO Framework Convention on Tobacco Control. It rejected the argument of the tobacco-producing countries that the TRIPS Agreement established a right to use trademarks in favor of their owners, and that Australia somehow improperly restricted such right. Australia's adoption of Tobacco Plain Packaging legislation justifiably encumbered tobacco trademarks.

There are important incremental developments in terms of decisions by national and regional courts. For example, the US Supreme Court adopted a rule of international exhaustion of patent rights for the United States, confirming the flexibility built into the WTO TRIPS Agreement. It is worth recalling that in the late 1990s the European Union, United States and the originator pharmaceutical industry claimed that South Africa violated the TRIPS Agreement by implementing international exhaustion of patents.

The Court of Justice of the European Union (CJEU) has rendered significant decisions involving trademarks and geographical indications that further elaborate the relationship between the two forms of protection, as well as addressing consequences of linguistic and cultural differences among the member states.

The China Patent Office is processing a very large number of new invention and utility patents, and China-based inventors are filing large numbers of patent applications outside China. China has signaled its intention to take its place among the leading technological powers and is committing the resources important to accomplishing this objective. A good argument can be made that China faces a greater risk of over-protecting IP than under-protecting it as its "patent thicket" grows. Moreover, as China continues to commit resources to advancing its technological capacity, concerns regarding issuance of low-quality patents is likely to diminish.

After comprehensive internal dialogue, South Africa has adopted a new IP Policy framework and is in the process of transforming that policy into legislation that is expected to include movement to a patent examination system from the current *pro forma* registration system. This is among the many developments in the field of IP taking place in Africa. Patent Offices in Latin America have substantially enhanced their cooperative efforts as these offices, like others throughout the world, attempt to address the increased volume and complexity of patent applications.

There is hardly a country or region of the world where IP issues do not figure prominently in the national dialogue. We cannot realistically treat every country in the world in this course book, but we try to identify and address issues that affect countries and people in different economic, political and social circumstances.

While technologies and their forms of implementation continue to evolve, the "known forms" of IP are adapting to this evolution. We do not as yet see a previously unknown form of IP on the horizon. Not much progress was made in

protecting traditional knowledge (TK) and the potential of unfair competition rules remain to be tapped in treaty-making and case law.

This Fourth Edition essentially retains the structure of the previous editions of this course book, with cases, commentary, notes and questions updated to reflect the developments mentioned above, and many others, up to late 2018. As always, we welcome comments and suggestions from all those who use it.

Frederick Abbott
Thomas Cottier
Francis Gurry

November 2018