INTELLECTUAL PROPERTY LAW
in the
EUROPEAN UNION

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Preface

This book is based on a course of lectures delivered annually at the Franklin Pierce Law Center, which is among the leading law schools in the United States, and indeed in the world, for the teaching of intellectual property law. The course has been for advanced post-graduate students, many from Europe and other parts of the world; and their contributions to discussions of the problems covered by the course have been exceptionally helpful in shaping the content and approach of the book. Their perceptive observations are reflected in two of the dissertations prepared at the end of the 1999 course and published on the Internet as part of the Conference on Competition and Intellectual Property Rights, organised by the Law Center in March and April of that year; as well as in one of the dissertations prepared at the end of the 2000 course and published on the Internet by the Patent, Trademark and Copyright Research Foundation.

Before describing the strictly legal aspects of intellectual property rights in the European Union, it may be helpful to speak briefly about the European Union's origins and aims; an explanation may go some way to clarify both the general background to the development of this field of law and, more specifically, the terminology used when referring to the European Union and the European Communities. After World War II, continental statesmen sought to create a mechanism by which the means of producing the main materials of war could be brought under joint control, thereby reducing greatly the likelihood that an individual state could challenge its neighbours by force of arms. If coal, iron and steel production could be subject to a mechanism of this kind, a substantial step would have been taken to this end. Accordingly, six European states concluded a Treaty in 1951, establishing the European Coal and Steel Community, and created what the Treaty called a "common market" in these products.

This was the first step in the progress of economic integration in Western Europe. The second and third steps were more ambitious and were to a large extent dictated by two powerful considerations, affecting the interests of Germany and France in particular. Germany sought to regain political respectability and economic influence by having barriers to its growing industrial trade removed, while France was keen to extend the opportunities for exporting its agricultural products to the countries closest to it. Certainly other factors played their part: the other four states (Italy, Belgium, the Netherlands and Belgium) also saw merits in the removal of trade barriers; and the Cold War added a degree of urgency to the need for cooperation in the West. Accordingly, Treaties concluded in 1957 extended the concept of the "common market" to a far wider range of products. The European Atomic Energy Community covered nuclear products; and the European Economic Community covered virtually all other industrial sectors, including agriculture.

Between 1958 and 1985 the three Communities developed only at a sluggish pace. Many of the Member States' leaders paid only lip-service to the Communities' objectives and drew the line at any serious attempts to limit national protectionism. However, in the mid-1980s, largely through the efforts of Jacques Delors, as President of the Commission

of the European Communities, a new impetus was given to the removal of barriers to trade and a time-table set for the completion of the "internal market" by the end of 1992. (The difference between the "internal market" and the "common market" is explained in Chapter 1.) In addition, the first major amendment to the founding Treaties was effected by means of an important new Treaty known as the Single European Act, which came into force in 1987 and, by extending the range of political decisions on which majority votes replaced the need for unanimity among the Member States, speeded the process of legislation.

By the 1990s, European politicians were looking for a new role and for wider powers for the three Communities; and their plan lay in the creation of a European Union, founded on the Communities and covering a number of new sectors, including defence, foreign policy and justice. The plan was embodied in the Treaty on European Union, which came into force in November, 1993. The Union did not supersede the Communities: it embraced them. This has resulted in an untidy structure, which it is nevertheless essential to understand at the outset of a study of any branch of European Union law. The untidiness was reflected in the clumsy way in which the provisions of the Treaty on European Union were grafted onto the provisions of earlier Treaties; but this was to some extent remedied in an amending Treaty, which came into force in May, 1999.

At the time of writing, yet another Treaty has been signed; but, since it has not yet been ratified, it does not yet have the force of law and is therefore outside the scope of this book. It does, however, deserve a mention here, if only to refer to its principal aim. Over the years, the number of Member States has increased from the original six to the present fifteen; and there are some respects in which the growth has called for changes in the whole legal framework of the European Union. The Nice Treaty of 2001 is designed to provide for wider structural changes to accommodate the expected additions over the next few years to the number of Member States constituting the European Union. It remains to be seen whether it will be ratified in due course. If it is, the effects on intellectual property law are likely to be mainly in respect of legal instruments and procedures. As such, they will be covered, like existing constitutional law, in the book based on another course given at the Franklin Pierce Law Center over the past few years and entitled *The Constitutional Law of the European Union*: it has been published in its entirety on the Law Center's website and may be read and downloaded free of charge.

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EDITORIAL NOTE

European Union law is changing rapidly each year. In 1999, the coming into force of the Treaty amending the Treaty on European Union changed many substantive provisions of all the Treaties, including the numbering of their provisions. The present book is revised annually. The law in this edition is stated as at 1st June, 2002.

Since European Union law is still relatively young, there are some respects in which it presents puzzling ambiguities and inconsistencies. Secondary legislation is eccentrically numbered; and even the names of the Institutions themselves are often recorded incorrectly in official documents. This book therefore imposes its own rules. The names of the Institutions are taken from the Treaties (see Chapter 10). Legislation is normally referred to with the year appearing last. Case-law is referred to simply by the official number and year of the case, which is quite enough to find the case on web-sites and in the other main sources of Community law. Articles of Treaties are referred to by their current numbers; but readers are warned that the old numbers may be mentioned in the text, for example, in quotations from court judgments antedating the renumbering. The standard abbreviations of the Treaties are used: for example, the Treaty establishing the European Community – the most frequently cited in the book – is "the EC Treaty".

Examples:

Legislation. Council Directive EEC/250/91 on the legal protection of computer programs. The Council is the body in this case responsible for adopting the legislation; in other cases, it may be "the European Parliament and the Council" or "the Commission". The Directive is the type of legislative instrument; in other cases, it may be "Regulation" or "Decision". EEC refers to the European Economic Community; since November, 1993, this is "EC"; and other measures may begin with "ECSC" or "EAEC". 250 is the number, 91 the year. This sequence is often varied in the official documents.

Case-law. Case 402/85, *Basset v SACEM*; Case T-107/94, *Kik v Council*; C - 267/95, *Merck & Co v Primecrown Ltd.* These citations will find the cases, whether on the web-site, in text-books, in the official reports or in other law reports. Where the case number is not preceded by a letter, this means that the case antedates the separation of the Court into a Court of First Instance and a final appellate Court. Since the separation, in 1988, the citations have begun either with a "T" for Tribunal, signifying the Court of First Instance, or a "C" for Court, signifying the Court of Justice itself.

Articles of Treaties. Article 308, EC Treaty. This is a shorter version of the following, which would indicate both the old numbering and the old abbreviation: Article 308, EC Treaty (formerly Article 235, EEC Treaty).

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1 Judgments of the Court of Justice of the European Communities and of the Court of First Instance

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C-223/98 *Adidas AG v Arlanda Customs Office*
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[Note. Many cases are now coming to the Court of First Instance by way of appeal from the Community Trade Mark Office ("OHIM"). Most of these are concerned with the question whether individual trade marks should or should not be registered. Some, however, raise points of principle about grounds for refusal. See the end of Chapter 5 for illustrations of the type of case concerned.]