PART ONE: INTRODUCTION

Chapter 1: The Structure and Objectives of the European Union

The Legal Context

1-1 Intellectual property is not referred to as such either in the Treaty establishing the European Community or in the Treaty on European Union. However, there is a reference in the EC Treaty to "commercial and industrial property"[1]; and this has been interpreted by the Court of Justice[2] to be equivalent to the term, "intellectual property", which has been generally used in industrialised countries since at least 1967.[3] But the very nature of the reference to commercial and industrial property, in one of the Treaty provisions on the free movement of goods, emphasises that in this context intellectual property law is subordinated to the laws designed to implement the specific objectives of the European Community and, in particular, the objective of creating an internal market.

1-2 It is therefore essential, before discussing the manner in which intellectual property rights may be exercised, and the manner in which the rules on the infringement of intellectual property rights may be applied, in the European Union, to look briefly at the broader legal framework within which those rights and rules exist. It is necessary to look both at the general objectives of the European Union and at the mechanisms - the institutions and the legislative, administrative and judicial procedures - by which those objectives are expected to be attained.

The Treaties

1-3 Most of the principal objectives and mechanisms of the European Union are set out in the Treaties. These are:
- the founding Treaties,
- the amending Treaties and
- the Treaties of Accession.

1-4 Four Treaties count as founding Treaties:
- the Treaty establishing the Coal and Steel Community (the ECSC Treaty),
- the Treaty establishing the European [Economic[4]] Community (the EC Treaty),
- the Treaty establishing the European Atomic Energy Treaty (the Euratom Treaty)
- the Treaty on European Union (the EU Treaty).

The European Union is "founded on the European Communities".[5]

1-5 All the amending Treaties, dealing with budgetary control, the unification of the Communities' institutions and the like, and including the Single European Act, were incorporated in the amendments contained in the Treaty on European Union; and all the amendments contained in the latest Treaty, which came into force on 1st May, 1999, have

been incorporated in the consolidated versions of the basic Treaties. It is not therefore necessary to refer to them separately hereafter.

1-6 Since Treaties of Accession, under which new Member States are admitted to the European Communities and, since 1993, to the European Union, have a legal status equal to the founding Treaties, there are many points in them containing substantive amendments to the objectives and mechanisms of the Union. So far as intellectual property and competition are concerned, the main points of importance in the Treaties of Accession are the differing dates on which important provisions of the founding Treaties come into force. Treaties of Accession were signed in respect of the following accessions:

- Denmark, Ireland and the United Kingdom (1972),
- Greece (1982),
- Spain and Portugal (1985) and
- Austria, Finland and Sweden (1995).

1-7 Since all the legislation at European Union level, governing intellectual property matters, and all the relevant case law, stem from provisions of the EC Treaty, this book is concerned almost exclusively with the EC Treaty and only marginally with the other basic Treaties.

1-8 Member States of the European Union are those which have ratified the founding Treaties, as amended. There are at present fifteen Member States, as follows:

- Austria
- Belgium
- Denmark
- Finland
- France
- Germany
- Greece
- Ireland
- Italy
- Luxembourg
- The Netherlands
- Portugal
- Spain
- Sweden
- The United Kingdom

The Institutions

1-9 All the Treaties are international agreements in international law; but, unlike most international agreements, they establish legislative, executive and judicial institutions, as well as procedures to implement the objectives of the Treaty. There are five institutions[6]:

- the Council,
- the European Parliament,

- the Commission,
- the Court of Justice and
- the Court of Auditors.

Of these, the Council has legislative and policy-making, or quasi-executive, powers. The European Parliament has limited legislative powers and limited powers over policy-making. The Commission has executive, legislative and quasi-judicial powers. The Court of Justice has, with the Court of First Instance, judicial powers. The Court of Auditors has executive and quasi-judicial powers.

1-10 The Council consists of a representative of each Member State at ministerial level, authorised to commit the government of that Member State.[7] As there are fifteen Member States, there are fifteen members of the Council. They are not necessarily the same ministers: if the main item on the agenda of a Council meeting is, say, agriculture, the members for that meeting are likely to be the Ministers of Agriculture. Ministers are not, however, restricted to decisions in their own field; Ministers of Agriculture may, for example, be required to decide on a matter of industrial policy, if the decision is urgently needed. The Council is the principal institution adopting (or enacting) legislation.

1-11 Membership of the European Parliament is based on direct universal suffrage.[8] There are 626 members ("MEPs"), the numbers from the various Member States being fixed: Germany has ninety-nine members; France, Italy and the United Kingdom have eighty-seven each; Spain has sixty-four; the Netherlands, thirty-one; Belgium, Portugal and Greece have twenty-five each; Sweden has twenty-two; Austria, twenty-one; Denmark and Finland have sixteen; Ireland, fifteen; and Luxembourg, six. The powers of the European Parliament are mainly advisory and supervisory, and do not include the initiation of legislation. The European Parliament may, however, in some cases adopt legislation jointly with the Council.

1-12 Members of the Commission are appointed by the Member States' governments, but are expected to be "completely independent in the performance of their duties".[9] The Commission comprises twenty members, one national from each Member State and a second from five Member States, namely, France, Germany, Italy, Spain and the United Kingdom. In a sense, the Commission is the power-house of the European Union, with a variety of powers, ranging from the enforcement of the Treaties and the measures taken under them, powers of formulation and decision and miscellaneous powers conferred by the Treaties or by delegation under the Treaties. Above all, the Commission has the power to propose measures; and, in the institutional order, it can be said, with some exceptions, that "the Commission proposes and the Council disposes".

1-13 In the Court of Justice of the European Communities, there are fifteen judges, normally chosen from each of the Member States.[10] Their duty is to ensure that in the interpretation and application of the Treaties the law is observed. The Court is assisted by nine advocates-general. Attached to the Court is a Court of First Instance, with jurisdiction to hear and determine certain classes of case, subject to a right of appeal to the Court of Justice on points of law only.

1-14 To carry out the audit of the accounts of all revenue and expenditure of the Community, there is a Court of Auditors, comprising fifteen members appointed by the Member States.[11]

1-15 Under the Treaties, the Council and Commission must in some cases, and may in others, consult the Economic and Social Committee[12] and the Committee of the Regions.[13] These are advisory Committees and are not institutions, properly so called. They each comprise 222 members appointed by the Council acting unanimously on proposals from the respective Member States.

Primary and Secondary Legislation

1-16 In a sense, the Treaties themselves are legislative instruments; and the provisions of the Treaties which have a legislative character are conveniently referred to as "primary legislation". For many purposes, the Treaties confer legislative powers on the Council and Commission; and the laws made by the Council and Commission are conveniently referred to as "secondary legislation". The provisions of the Treaties are paramount: no secondary legislation can override any primary legislation. If there is an anomaly in one of the provisions of a Treaty, it cannot be corrected by any secondary legislative measure: it can be corrected only by a revision or amendment made under another Treaty. Similarly, if the Court of Justice of the European Communities interprets one of the Treaties in a way which creates legal anomalies or political or other inconveniences, the Court's ruling can changed only by the provisions of another Treaty and not by a legislative measure at the secondary level.[14]

1-17 As to the forms of legally binding secondary legislation, there are three as follows:

- regulations, which have general application, are binding in their entirety and are directly applicable in all Member States,
- directives, which are binding as to the result to be achieved, upon each Member State to which they are addressed, but leave to national authorities the choice of form and methods, and
- decisions, which are binding in their entirety on those to whom they are addressed.[15]

1-18 Regulations, directives and decisions are adopted:

- jointly by the European Parliament and the Council or
- by the Council alone or
- by the Commission.[16]

Joint adoption is the result of what is known as the co-decision procedure.[17] Adoption by the Council alone is the result of what are known as the cooperation and consultation procedures.[18] Adoption by the Commission is the result of powers directly conferred on the Commission by a Treaty[19] or of powers delegated to the Commission under a Council measure.[20] Whether a specific measure is adopted by one or other of these procedures or under one or other of these powers depends on the terms of the relevant Article in the Treaty governing the subject of the measure.

Objectives

1-19 In general terms, the objectives of the European Union, including the European Community, are set out in the preambles to the Treaties. The recitals in the preambles are not as precise as the provisions of most Articles of the Treaties; but they throw some light on what the Treaties are intended to achieve. Only the recitals having a bearing on the subjects covered in this book are referred to here.

1-20 In the preamble to the Treaty on European Union, there is a reference to the "new stage in the process of European integration undertaken [sc which began] with the establishment of the European Communities". The signatory states confirm their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law. They are resolved to achieve the strengthening and the convergence of their economies and are determined to promote economic and social progress for their peoples within the context of the accomplishment of the internal market. They reaffirm their objective to facilitate the free movement of persons and resolve to continue the process of creating an ever closer union, in which decisions are taken as closely as possible to the citizen in accordance with the principle of subsidiarity.

1-21 In the preamble to the Treaty establishing the European Community, the signatories express their determination to lay the foundations of an ever closer union among the peoples of Europe. They are resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe. They recognise that the removal of existing obstacles called for concerted action to guarantee steady expansion, balanced trade and fair competition; and they expressed the wish to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade.

1-22 In the Treaty on European Union, five objectives are specified[21]; but only the opening words of the first of these objectives have a direct bearing on the content of this book. The words indicate the Union's objective to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers. Unlike the Treaty on European Union, the Treaty establishing the European Community does not refer objectives as such, but defines the "task" of the Community and the "activities" of the Community for the purpose of carrying out its task.

1-23 Accordingly, the Treaty provides that the Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in the Treaty, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of

social protection, the raising of the standard of living and quality of life and economic and social cohesion and solidarity among Member States.[22]

1-24 For these purposes, the activities of the Community include, as provided in the Treaty and in accordance with the timetable set out in it, -

> (a) the elimination, as between Member States, of ... quantitative restrictions on the import and export of goods and of all other measures having equivalent effect;
> (b) a common commercial policy;
> (c) an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital; ...
> (g) a system ensuring that competition in the common market is not distorted;
> (h) the approximation [sc. harmonisation] of the laws of Member States to the extent required for the functioning of the common market; ...[23]

There are further references in the text to the promotion of competitiveness.[24]

1-25 It follows from the foregoing that, among the principal objectives of the European Union and the European Community, the following are especially important:

- the establishment and functioning of the common market,
- the completion of the internal market,
- the removal of barriers between Member States,
- the promotion of the four freedoms (of goods, services, persons and capital),
- the encouragement of competition and
- the development of a common commercial policy.

Each of these objectives has a bearing on intellectual property; and it is only in the context of these objectives that intellectual property law has evolved within the European Union and only in that context that their evolution can be understood.

Common Market

1-26 Although there is no definition of the common market in the Treaties (not even in the European Coal and Steel Community Treaty, in which the expression was first used), the sense in which it is used suggests that it indicates the economic, as well as the geographic, framework created by the three original Treaties. The economic framework is evident from a number of provisions, still fully in force, in which compatibility with the common market is a criterion for the application of specific rules.[25] The geographic framework is implicit in the use of the phrase in certain provisions of the Treaty, "within a substantial part of the common market".[26] Three points about the common market are worth mentioning. First, neither the expression nor the concept has been superseded: both are very much alive. Second, the concept has survived the abolition of the time-table for the establishment of a common market. Third, the expression is not synonymous with either European Community or European Union.

Internal Market

1-27 By contrast, the internal market is a geographic area with legal characteristics and has been more or less explicitly defined in the Treaty establishing the European

Community, as amended by the Treaty on European Union.[27] It comprises an area without internal frontiers, in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties. The original intention was that it should be progressively established over a period expiring on 31 December 1992[28]; but not all the measures designed to ensure the four freedoms had been adopted or come into force by that date. Therefore, strictly speaking, the internal market has not yet been completed or fully established. By definition, the internal market does not include the external elements, or other internal elements, of the common market; and the co-existence of the two expressions is to be found in a provision under which derogations from the establishment of the internal market must cause the least possible disturbance to the functioning of the common market.[29] It should just be added that a third term, the single market, is not a legal term of art.

Barriers between Member States

1-28 Although the primary legislation does not define or categorise the different kinds of barriers between Member States, they have been usefully described as:

- legal barriers (differences of national law, which effectively bar nationals from other Member States),
- physical barriers (mainly the customs barrier and the immigration barrier) and
- fiscal barriers (differences of national tax systems, under which the need for full compliance may also effectively bar nationals from other Member States).[30]

There is some overlapping between these categories. Fiscal barriers are the result of laws and are part of a wider category of legal barriers; but they are a distinctive category themselves and one of the most intractable. Physical barriers are merely the physical and concrete means by which certain types of legal barrier are enforced, particularly tax and immigration rules.

Four freedoms

1-29 Barriers between Member States are the opposite side of the coin to the four freedoms. Where there are barriers, one or more of the freedoms is still restricted. Where barriers are dismantled, one or more of the four freedoms is released. Where the four freedoms are fully realised, there are no longer any barriers between Member States. Many provisions of the Treaties seek to guarantee the respective freedoms:

- free movement of goods (free circulation and the prohibition of measures having equivalent effect to quantitative restrictions on imports, exports and goods in transit, between Member States)[31],
- free movement of persons (citizens' right to move and reside freely within the Union and workers' right to be employed within the Union)[32],
- free movement of services (right of establishment and freedom to provide services)[33] and
- free movement of capital.[34]

Two of the four freedoms have a powerful bearing on intellectual property. The free movement of goods affects industrial property in particular; the free movement of services affects copyright and neighbouring rights. Reconciling the free movement of

goods and services with the provisions of national laws on the protection of intellectual property has been the biggest single problem in both litigation and legislation hitherto; and many difficulties in this field continue to arise.

External Trade

1-30 An odd difference of wording between two sets of provisions in the Treaty establishing the European Community illustrates two different approaches to the implementation of the common commercial policy. One speaks of the progressive abolition of restrictions on world trade[35]; the other provides legal powers to take measures to protect trade.[36] To some extent these two approaches reflect an ambiguity in the trade policy of the European Union, veering between free trade and protectionism; and this in turn may be a reflection of different attitudes to world trade in the various Member States, with the United Kingdom traditionally in favour of freer trade and France traditionally in favour of a more effective protectionism. Whatever the explanation, it is as well when looking at intellectual property and competition in the context of the European Union's external trade relations to bear in mind the ambiguity of the common commercial policy.

Conclusion

1-31 Legislation and case law on intellectual property in the European Union are not the same as in individual states. They are governed by special considerations dependent on the prior requirements of the Treaties. Above all, laws at the European Union level are not primarily concerned with the substance of intellectual property law, but rather with the contribution which those branches of the law may make to the political, economic and social objectives of the European Union.[37] Regulations and directives on intellectual property law have to be justified by reference to the requirements of the Treaties and in particular to the principles of free movement of goods and services.

1-32 At the same time, there are some signs that the emphasis on the basic objectives of the Treaties may be subject to change. There are three reasons for this. The first is that, in practice, it is relatively easy to justify the harmonisation of laws at the European Union level. Almost all differences between the laws of Member States in the commercial area, and especially in the area of intellectual property, create barriers to trade of one sort or another; and there is an increasing tendency for the recitals to harmonisation measures to speak merely of the possibility that these differences "may impede the free movement of goods and freedom to provide services and may distort competition within the common market".[38] The Commission does not feel obliged to say that the differences do in fact affect trade between Member States, nor to offer evidence of the assertion. Consequently, the onus on the Commission to justify its proposals, at any rate in relation to the principle of harmonisation, is relatively light.

1-33 In the second place, the increasing legal power of the European institutions suggests that in practice they will virtually legislate on the substantive issues and not just on the issues raised by the need to comply with the specific objectives of the Treaties. In

the interests of the four freedoms, it may well be desirable to create a new framework for commercial activity; and, in the creation of a new framework, substantive questions of law have to be addressed. It is true that the principle of subsidiarity requires the Community to take action only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.[39] But the very wording of the subsidiarity rule provides the basis on which, in a matter such as intellectual property, the Community can almost always claim to be in a better position to act. Intellectual property is increasingly international; the larger the framework, the more effective the law is likely to be.

1-34 In the third place, the increasing recognition during the last twenty years of the economic importance of intellectual property rights means that an economic community has a greater interest in the effects of those rights on the economy. Twenty years ago, it was by no means self-evident that intellectual property had great economic significance; now it is incontestable. It follows that the onus of showing that a given aspect of intellectual property is within the scope of the European Community's legitimate interests and activities has decreased accordingly.

1-35 Increasing recognition of the economic importance of intellectual property rights has resulted in the growing responsibility for intellectual property questions in the World Trade Organisation, a far more commercially oriented body than the World Intellectual Property Organisation. The European Union has played a large part in the development of the TRIPS (Trade related aspects of Intellectual Property Rights) Agreement and in the moves to give the World Trade Organisation a role in the global enforcement of competition rules.[40] As befits a global economy, responsibility for both intellectual property and competition laws may already be in the process of gradually passing from national and regional authorities to world wide agencies.

[1] Article 30, EC Treaty.
[2] The Court has expressly recognized, as forms of "industrial and commercial property", patents (for example, in Case 15/74, *Centrapharm v Sterling Drug*), trade marks (for example, in Case 119/75, *Terrapin v Terranova*), copyright (for example in Case 62/79, *Coditel v Cine Vog*), rights akin to copyright (in Case 56/64, *Consten v Grundig*) and designs (for example, in Case 144/81, *Keurkoop v Nancy Kean Gfts*).
[3] According to Dr Klaus Pfanner, at the time when he was Deputy Director-General of the World Intellectual Property Organisation, the term had been used for some years by the Swiss Patent Office, before it gained formal international recognition in the 1967 Stockholm Convention establishing the World Intellectual Property Organisation.
[4] The word "Economic" was deleted by Article 8.1 of the EU Treaty. What is now known for short as the EC Treaty was, until 1993, known for short as the EEC Treaty.
[5] Article 1, third paragraph, EU Treaty.
[6] Article 7(1), EC Treaty.
[7] The provisions governing the powers and functions of the Council are contained in Articles 202 to 210, EC Treaty; cf, Articles 3, first paragraph, and 5, EU Treaty.
[8] The provisions governing the powers and functions of the European Parliament are contained in Articles 189 to 201, EC Treaty.
[9] The provisions governing the powers and functions of the Commission are contained in Articles 211 to 219, EC Treaty.
[10] The provisions governing the powers and functions of the Court of Justice are contained in Articles 220 to 245, EC Treaty.
[11] Articles 246 to 248, EC Treaty.
[12] Articles 257 to 262, EC Treaty.
[13] Articles 263 to 265, EC Treaty.
[14] A case in point is reflected in the Protocol to the EU Treaty expressly designed to overcome the inconveniences created by the Court of Justice in Case 262/88, *Barber v Guardian Royal Exchange Insurance Group*.
[15] Article 249, EC Treaty.
[16] Ibid, first paragraph.
[17] Under Article 251, EC Treaty.
[18] Article 252, EC Treaty, governs the cooperation procedure. The consultation procedure is specified in miscellaneous Articles of the EC Treaty on a case-by-case basis.
[19] For example, under Article 86(3), EC Treaty.
[20] For example, Council Regulation EEC/2821/71.
[21] In Article 2, EU Treaty. See also the European Union's "task", specified in Article 1, third paragraph, EU Treaty.
[22] Article 2, EC Treaty.
[23] Article 3, EC Treaty.
[24] For example, in Article 157(1), EC Treaty. (But the words are used there in a somewhat political or rhetorical sense.) Articles 65 and 66 of the ECSC Treaty govern competitiveness in the iron, coal and steel industries.
[25] For example, Article 89, EC Treaty; also Council Regulation EEC/4064/89 (the "Mergers Regulation")..
[26] For example, in Article 82, EC Treaty.
[27] Article 14, second paragraph, EC Treaty.
[28] Article 14, first paragraph, EC Treaty.
[29] Article 15, second paragraph, EC Treaty.
[30] The Commission's White Paper, Completing the Internal Market (COM (85) 310), June 1985.
[31] Articles 23 to 31, EC Treaty.
[32] Articles 18 and 39 to 42, EC Treaty.
[33] Articles 43 to 48 and 49 to 55, EC Treaty.
[34] Articles 56 to 60, EC Treaty.

[35] Article 131, first paragraph, EC Treaty. (The second paragraph refers to competitiveness in a special sense.)
[36] Article 133(1), EC Treaty.
[37] See, for example, the first and third recitals in the preamble to the first Council Directive EEC/104/89 to harmonise the laws of the Member States relating to trade marks.
[38] This wording, which is taken from the first recital in the preamble to Council Directive EEC/104/89, has set the pattern for several subsequent measures and proposed measures.
[39] Article 5, second paragraph, EC Treaty.
[40] For the legal relationship between the European Community and the WTO, see the Court's Opinion, 1/94, *Re World Trade Organisation*.