1. Introduction

Intellectual property is increasingly a global commodity. Its intangible nature fits it perfectly for cross-border travel. Technologies of all kinds and in all fields have developed with almost incredible rapidity. As a result, many products of intellectual property may be readily enjoyed by users – both legitimate and illegitimate – all over the world. Counterfeit and pirate intellectual property is therefore a huge concern to right holders. But the process of defending intellectual property rights in such an environment can often be difficult and expensive. Intellectual property law has had to respond to these realities. Traditionally, intellectual property rights have been territorial in nature. In an economic world where trade is frequently international, and more and more commonly global, this fact gives rise to difficulties and conflicts between national systems. This engenders efforts towards cooperation and harmonisation at international levels, in an attempt to reduce obstacles to trade, and to increase the general international standard of protection for intellectual property. Such forces are not new; the Paris and Berne Conventions represent significant harmonisation efforts dating from the nineteenth century. However, the current economic significance of intellectual property rights results in ever-growing pressure for harmonisation. These may well be matters of great political importance and delicacy, not simply collections of rules which need tidying up. In some areas – such as patent litigation, for example – there have been identifiable, widely acknowledged problems.

Since the previous edition of this book, the unitary patent has been agreed, and should enter into force in the near future. The decades taken to reach this position are a testament to the great difficulties in reaching any kind of consensus in this area. Other initiatives, such as the now-abandoned Draft Criminal Enforcement Directive, raise problematic issues of principle regarding the relationship between the member states and the Community, and provoke discussion as to the appropriate legislative level for such interventions. Looking outwards from the Community, the picture regarding harmonisation initiatives is complex and somewhat mixed. The negotiations towards the plurilateral anti-counterfeiting trade agreement known as ACTA generated widespread political and public controversy. This incident, too, raises deep questions about the ways in which such agreements should be pursued and how they should be justified. Similar issues arise in different international contexts, again with differing outcomes. For example, within the TRIPS (Agreement on Trade-Related Aspects of Intellectual Property Rights) framework, the EU has contributed constructively to discussions regarding the patenting of biological resources, which is a matter of serious concern to countries that are the source of such resources. Yet the EU’s proposals concerning the harmonisation of geographical indications have been strongly opposed by other countries that regard them as protectionist and unreasonable. In such contexts, harmonisation is more than instrumental, in a narrow sense.

The exploitation and protection of intellectual property is a crucial aspect of the EU’s position in the global economy. The Commission has repeatedly emphasised the
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importance of these rights, which underpin innovation, employment, competition and thus economic growth. Its political efforts in this field are very considerable. Both the Digital Single Market and the Innovation Union are currently high-priority strategic objectives for the Commission. Community activity in this field is extensive, and the proposals are increasingly detailed and well publicised. There are significant developments in both high-level policy matters, and practical measures. A continuing explosion of case law affecting intellectual property is decided by a number of EU institutions, within its judicial framework. Their practical impact is considerable. These decisions offer detailed interpretation of the wide range of harmonising measures. Some of these are traditional instruments, harmonising the laws of member states to remove barriers to trade. Many of these concern specific intellectual property rights (or aspects of them), although a few address horizontal aspects of this broad area of law, such as the enforcement of rights. There are also a number of schemes which create unitary systems for the protection of particular intellectual property rights, offering Community-wide protection via a single application.

Always, though, the wider context has to be respected. Important though strong intellectual property rights are to the Community, they must nevertheless be compatible with the Community’s fundamental principles; including free movement and competition, but not ignoring others. Since the Treaty of Lisbon, the European Charter of Fundamental Rights has equal status with the EU treaties. This (among many other things) gives greater explicit recognition to the requirement to protect intellectual property. Yet unless the use of intellectual property rights is checked, their territorial nature will inevitably lead to obstacles to free trade and free competition. The balance is continually contested, both within the single market, and at its borders. The Court of Justice of the European Union (CJEU) has had a major impact in this field; for example, creating the doctrine of Community-wide exhaustion of rights. This provided a practical response to the problem: protection of intellectual property rights is ensured, but their use by a right holder to impede free movement or free competition is significantly curtailed. The doctrine has since been adopted in many Community legislative texts. The CJEU has had a direct role in determining a number of important issues in other areas, also. Some of these have raised significant questions affecting contemporary intellectual property law and practice – the legality of hyperlinking, for one. The speed with which digital technology changes, and the way in which markets react to it, have meant that it can be almost impossible for Community legislative responses to keep pace. The CJEU’s interventions can be decisive in such contexts, and may achieve a very high profile. Such involvement can offer welcome clarification and certainty. But, also, the outcome of cases can at times be perceived as unpredictable, and approaches to similar issues can seem inconsistent. Decisions regarding important legal matters can sometimes seem inadequately justified – perhaps not even adequately explained. To retain its authority, the Court must strive to reach a place where such criticisms are undeserved.

Although there are many stories of success to be found in the history of these initiatives, it is also necessary to report significant controversies, and numerous fruitless proposals. Harmonisation is not unquestionably ‘a good thing’, even within the EU, and certainly not for all those affected by intellectual property rights. Interest groups are likely to have strong views as to the appropriate boundaries for the intellectual property
rights which most concern them. Those hoping to hold rights will seek strong, wide rights. Those likely to have to pay more as a result of strengthened rights will oppose such expansion. Existing national schemes may work extremely well, in their context, and changes to those systems will be disruptive and expensive. National right holders may be perfectly content to work their rights on a national scale, and may not welcome the prospect of paying for or defending an EU-wide right. Those professionals accustomed to dealing with (say) registration or litigation at a national level will not relish centralisation which diminishes their business. Harmonisation initiatives have often been crafted and re-crafted to take account of these factors. It is understandably tempting to harmonise what can be agreed upon for now, leaving more obstinate problems for another day. Although this technique may be fruitful, there is also a risk that, with the central issues already aligned, there is even less incentive to address any intractable controversies which remain. This is evident in a number of areas of intellectual property law, where the substantive rules have been satisfactorily harmonised, leaving procedural matters for the member states. But member states’ procedural systems may be very different, leading, perhaps, to inconsistencies in the remedies normally available for breaches of intellectual property rights. Harmonisation of these remedies beyond a certain level of generalisation will almost inevitably generate tensions with member states’ general approaches to remedies. It is, unsurprisingly, difficult to reach agreement on modifications to these wider systems, especially if the justification for change arises only in the narrow context of intellectual property rights. In a more general political context, concerns have frequently been expressed; that the EU tends routinely to expand its field of action, that its law-making processes are insufficiently democratic and too frequently hidden from scrutiny. It is also important to be aware that the vision of European integration is not uniformly shared or welcomed as an overriding political objective – certainly not one that justifies absolutely any legislative or judicial intervention in the name of that cause.

Reviewing the Community law which affects the various specific intellectual property rights, there are areas of strength and areas of weakness. Trade mark law should be counted among the successes of Community harmonisation. It displays both main forms of harmonisation; a Directive harmonising national laws, and a Regulation creating a unitary Community trade mark. The substantive laws of member states have been aligned with each other, and are paralleled as closely as possible in the core provisions of Community trade mark legislation. The journey has not been easy, however, and followed long negotiations. Much guidance has been required from the CJEU as to the interpretation of the legislative provisions, both major and minor. Community trade mark law starts with a far more open stance towards trade mark registration than many national systems previously had been willing to adopt. Shapes, smells and even movements now fall within the basic definition of a registrable mark (although their passage to the register is far from guaranteed). National courts took a certain amount of time to adapt to this and other philosophical changes. Lack of clarity in the legislation also caused frustration, at least initially. The volume of case law is immense. However, as the system has matured, understanding has grown and the central provisions are increasingly well understood. The unitary Community trade mark has proved very popular, and coexists satisfactorily with national systems. It is nevertheless unlikely to displace them in the foreseeable future, given the difficulties
inherent in demonstrating Community-wide eligibility for protection. In addition, although much convergence has been achieved, attitudinal differences may still be detected.

Design law within the EU offers a considerable challenge for those with a harmonising brief. The breadth of the design field has led member states to use varieties of copyright, patent and *sui generis* design protection to cover design products, as well as unfair competition law. Both registered and unregistered rights are common. Even within a single member state it is unlikely that only one form of intellectual property will be engaged. The Commission was faced with a muddle of overlapping schemes of design protection in the member states, and therefore chose to harmonise national laws as best it could, while also offering a Community-wide scheme of design protection (both registered and unregistered). For national laws, the Directive harmonises the conditions for obtaining registration, the extent and term of protection, and conditions for refusing or invalidating the right. This still leaves many procedural aspects to the member states, who are, in addition, free to offer additional protection via their own national schemes. The single issue of design protection for spare parts was a stumbling block to agreement for many years, and was shelved in order to allow the rest of the Community initiative to proceed, since this in itself was relatively uncontroversial. The internal market for spare parts is seriously distorted as a result. However, the fundamental issue remains extremely contentious, with national systems divided (in terms of principle) between liberalisation and protection. This is an example of an area where deferring the problem has not resulted in a common perspective. It is, of course, also an area where vested interests (namely, the automotive industry) are extremely powerful. Nevertheless, the Community design regime has so far proved popular. Considerable efforts have been made to make the various systems accessible, comprehensible, practical and quick. If it continues to be cheap and convenient, it may perhaps be that it will supplant the confused web of national protection. The transitional period will certainly be a long one, nevertheless.

Arising informally, and covering a diverse range of subject matter, copyright law is also fundamentally difficult to harmonise. The common law and *droit d’auteur* systems approach its protection somewhat differently, and there is significant diversity on particular issues between member states. In the first edition of this book, the seemingly unthinkable challenge of achieving a unitary Community copyright was noted. Instead, the history in this area has unrolled in the form of a significant number of Directives, the majority of which address particular sectors (rental rights, databases, satellite broadcasting and so on). Copyright term has been the subject of a horizontal Directive, and the Information Society Directive has also attempted some harmonisation of basic rights and exceptions. Its aspirations in this respect were, however, comparatively limited. Modern digital technology presents the copyright industries with both huge opportunities and huge threats. Copying has never been easier, and there has been an increasingly wide consideration of the justifications for copyright, and its appropriate reach. Members of the public struggle to understand why they should not share, use and adapt the copyright works they can access so readily, and are unconvinced that much real damage is done if they do. Those in the creative industries see genuine threats to their ability to produce copyright work if it is ineffectually protected, as investment is difficult to find in such conditions, nor can creators make a living. There
has been a perception in some quarters that copyright can be used in an unreasonable and unjustifiably restrictive way; to prevent users from accessing purchased content when they are away from home, for example. There is also an increasing recognition that uses of copyright works may take different forms. This in turn leads to arguments that individuals should be able to get involved with copyright works as active users and follow-on creators, and not merely as passive, controlled consumers. In discussion of legislative and other policy initiatives there is a new emphasis on balancing the needs and rights of users with those of right holders. Furthermore, the Commission is keen to promote the idea of a shared European cultural heritage. Both of these strands of thinking are seen in the new Orphan Works Directive.

It remains to be seen how these ideas will develop in the EU environment, but the Commission has recently released an ambitious vision of its future agenda for the modernisation of the copyright framework. This remains strongly focused on fostering free movement, competition and promoting innovation in the exploitation of cross-border rights. However, the plans are very much set in a wider policy context. The latest copyright proposals have been presented as part of the Digital Single Market Strategy – a much wider package, which will include legislative measures to facilitate cross-border e-commerce, and which will affect very broad areas such as telecoms, online platforms, the data economy, use of personal data, cybersecurity, VAT rules, industry standards and interoperability. Also, interestingly, the Commission did not shy away from the vision of a single copyright code and a single copyright title. Though it acknowledges that the path to it would necessarily be challenging, it urges that the benefits could be such that the difficulties should be overcome.

In the field of patent law harmonisation until this point, the EU has had to acknowledge a history of repeated failure – though the launch of the Unitary Patent may mean that things will change radically. The success of the European Patent Convention makes it clear that it is not patent law itself which presents insuperable problems. But efforts towards a Community Patent were time after time mired in unproductive discussions regarding translations and jurisdictional arrangements. This was extremely frustrating for patentees, litigants and the Commission alike. The scale of the problem was alarming, given the economic importance of patents, and their significance for growth and innovation in the Community. Nevertheless, national interests and disagreement continued for decades to prevail over stakeholders’ needs for a functioning Community-wide system. There have been some limited sectoral interventions. Regulations have been enacted in the fields of medicinal products and plant protection products. These create a form of *sui generis* protection for innovative products which require extensive and time-consuming testing, to the point where the relatively short duration of general patent protection makes it difficult for a right owner to reap adequate commercial rewards. The Biotechnology Directive was eventually passed, after immense controversy. The proposed Directive on the Patentability of Computer-Implemented Inventions, also contentious, fared less well. One further general and ambitious initiative – the unitary patent – is now at the point of implementation. Will it be a success? This will depend to a significant extent on the perceived efficacy of its procedures. One factor in particular will be whether the newly created Unified Patent Court can respond quickly and effectively to help resolve
disputes between parties in a way which is both trusted and respected. The outcome seems likely to influence future policies and their achievement.

Intellectual property has offered a broad stage on which a variety of Community harmonisation initiatives have taken a turn. Both political and economic interests have shaped them. At first, the focus was on the single market, both internally and its boundary. EU border measures, the Enforcement Directive and other enforcement measures (now, it seems, just about to include harmonised protection for trade secrets within the EU) are intended as a very practical response to the evasion of intellectual property laws. These are driven both by the frustration of those trading across borders, and by the wider economic dynamics affecting the single market. Increasingly, the Community’s regional initiatives are being set in a global context. There are already many examples. The Information Society Directive was required in order that the EC could ratify the WIPO (World Intellectual Property Organization) internet treaties. The EC is a signatory to the Madrid Agreement, as a result of which Community trade mark protection may be extended internationally, and those applying for a trade mark via an international application may designate the EC as a chosen territory. The EC has now acceded to the Hague Agreement, which allows protection of a design not only throughout the EU, but also in other member countries of the Hague Agreement, via a single application at WIPO. EU patent law will likewise have to take its place within the global patent environment. There are risks here. In the field of intellectual property, the pressure to compete with the US and Japan is enormous. If rights are granted according to the wishes of the industries affected, which can mobilise powerful lobbying groups to promote their interests, the path will be towards ever-strengthening protection. Yet if intellectual property rights are to retain their credibility, it is crucial that legislation takes account of the wider public interest, and acknowledges the sometimes negative effects of intellectual property rights. Less developed countries, in particular, are tired of being told that only the industrialised countries’ vision of intellectual property is acceptable. Increasingly, the EU is being required to listen hard and take account of such criticisms, in spite of the clamour of economic interests. The field of intellectual property is thus both extremely important and exceedingly contentious in a wide range of areas. The challenge the EU continues to face is that of finding a way through these varied and often unstable economic, political, legal and cultural geographies, to reach balanced, effective and widely respected outcomes.¹