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Foreword

*James E. Malackowski**

The words may not yet have been spoken but the proclamation has been written that Intellectual Property as an asset class has finally arrived. Not surprisingly, the transfer of IP has become more central to business strategy as a result. Jacques de Werra has prepared a must-have guide to this new financial era in the *Research Handbook on Intellectual Property Licensing*.

The *Handbook* brings together a unique collection of world renowned experts providing detailed discussion in every chapter. The brilliance of this collective work is found in its broad two dimensional focus – beyond patents to all key IP assets on the one hand, and country specific discussion for key regions around the world on the other.

Taking copyrights as an example, the *Handbook* includes an obligatory discussion of U.S. copyright law but also focuses on current issues governing copyright licensing in Europe and cross border transactions generally. Recognizing this current global focus, de Werra brings readers a dedicated chapter on enforcement of open sources software licenses.

Key issues regarding international patent licensing are detailed alongside modern challenges governing the transfer of factual information and databases not otherwise patent protected. Whether part of these transactions or separate, trademark license issues are addressed in equal detail. Perhaps even more challenging to manage given the American Invents Act, the commercial transfer of trade secrets and know-how are also covered and hereto the *Handbook* does a terrific job presenting best practices.

I read the *Research Handbook on Intellectual Property Licensing* with both a merchant banking and association leadership point of view. I found refreshing and timely those chapters dedicated to technology licensing between academic institutions and private companies as well as the understanding provided regarding developing socially responsible non-exclusive intellectual property initiatives in the pharmaceutical sector. De Werra relies on leading members from the Licensing Executives Society for such insight.

* Chairman and Chief Executive Officer, Ocean Tomo, LLC.

Another unique aspect de Werra has put together is coverage of the complete life cycle of IP issues from the *Handbook's* forward-looking view of a concept proposal for a model intellectual property commercial law to discussion of licensing agreements in bankruptcy and arbitration. De Werra himself presents his design for a global alternative dispute resolution policy applicable to intellectual property licensing disputes.

Regional licensing issues are presented for Europe and Asia with the latter containing country specific discussion of China, India and Japan.

Whether read cover-to-cover as a compilation of current best practice or used as a true reference guide, the *Research Handbook on Intellectual Property Licensing* is a must have for anyone seeking to capture value from intangible assets.

Preface

Even if intellectual property licensing agreements have been standard instruments in the business world for some time and have even in the last years become part of our daily life as consumers (particularly in the online environment), the nature and features of licensing law remain quite unclear and are sometimes misunderstood specifically in cross-border intellectual property transactions.¹

One potential explanation for this is that licensing law, as an element of contract law, has remained governed by diverging national rules and principles and has (unfortunately) not been affected by the global movement of harmonization which has drastically changed the international intellectual property landscape in recent years. It is sufficient to note in this respect that intellectual property licensing agreements are merely evoked but are not regulated in the TRIPS agreement.² It can thus be regretted that licensing law has not been included in the major harmonization projects which have been conducted in the field of intellectual property, in view of the fact that licensing is quite certainly the most usual vehicle by which intellectual property rights are commercialized and put to use.

Starting from this observation, the goal of this *Research Handbook on Intellectual Property Licensing* was to explore certain aspects of intellectual property licensing law from a comparative perspective by offering a compilation of opinions from leading experts coming from various jurisdictions and legal systems. The choice was made to focus essentially on the contractual and private law aspects of intellectual property licensing and thus to leave aside certain topics, particularly compulsory licensing as well as the interaction between licensing and competition law which, as far as

¹ For a recent illustration, see *Sunstar, Inc. v. Alberto-Culver Co.*, 586 F.3d 487 (7th Cir. 2009) (addressing the question whether under an international trademark license agreement governed by the law of Illinois a Japanese licensee [Sunstar] is authorized to use *variants* of the licensed trademark under a “Senyoshiyoken license” as defined under Japanese law).

² See Art. 21 (for trademark licensing) and Art. 28 para. 2 (for patent licensing).

this last topic is concerned, would constitute a book subject by itself³ and obviously is a complex and debated issue.⁴

Given that the goal of the book and more generally of the series in which it is integrated is to offer some policy perspectives on the topic at issue, the decision was made to go beyond a parallel presentation of intellectual property licensing law on a country by country basis in order to be in a position to address other issues of relevance. The book thus not only analyzes the features of specific types of intellectual property licensing agreements (such as trademark or patent licensing agreements) but also covers issues which affect licensing law as such (such as the treatment of licensing in bankruptcy) in an interdisciplinary approach.

The book is divided into three parts. In the first part (Specific Intellectual Property Licensing Policies), individual chapters are devoted to a presentation of specific licensing policies tailored to certain types of licensed intellectual assets / intellectual property rights (i.e. copyrights, patents, trademarks, known how and trade secrets, software, etc.). The second part (Common Intellectual Property Licensing Policies) contains chapters addressing various aspects of intellectual property licensing law which do not depend on the type of intellectual assets at issue but which are rather supposed to cover all types of intellectual property licensing agreements (such as the treatment of licensing in bankruptcy or the determination of the law governing international licensing agreements). Given the diversity of local solutions, the third part of the book (Local Intellectual Property Licensing Policies) adopts a geographic approach and presents selected national and regional intellectual property licensing policies, by focusing on countries and regions which appear of key importance on the global intellectual property scene (i.e. China, Europe, India and Japan).

This *Handbook* ultimately aims at offering a scientific contribution to the identification of what could constitute global features of intellectual property licensing agreements. From a broader perspective, it is designed to contribute to the discussion about the adoption of a global regulatory framework on intellectual property contract law (or intellectual property commercial law), which shall regulate the relationship between intellectual property rights and contract.⁵ On this basis, the book is not conceived as an

³ As confirmed by the publication of the remarkable Research Handbook on Intellectual Property and Competition Law (Josef Drexl (ed.), Edward Elgar 2008).

⁴ As reflected in art. 40 of TRIPS.

⁵ See Michael Anthony C. Dizon, “The symbiotic relationship between global contracts and the international IP regime”, *Journal of Intellectual Property Law & Practice* 2009 4(8): 559–565, at 564 (“While the prospects of negotiating, adopting, and the coming into force of an international convention on IP and contracts in the near term are unlikely, a more expedient and plausible alternative to jump-start the

end in and by itself but is rather viewed a step in an on-going scientific process that will hopefully continue after its publication and stimulate the policy debates on this most challenging issue.⁶

Irrespective of its potential relevance for future scientific and policy projects, what remains is that this book is a collective work which means that it would not have been publishable if all the authors had not contributed to it. I thus would like to express my deepest gratitude to all the authors of the excellent chapters which compose this book, for there would be no book without them.

But this book is not only a collective work. It is also the result of a collective preparation process. I thus would like to express my gratitude to all the persons who have contributed to the publication of the book at the Department of Commercial Law of the Law School of the University of Geneva, and particularly to Anastasia Bondarenko, Pierre Heuzé, Francine Pinget, Esther Pralong-Wild and Vera Belarbi-Kloser.

Jacques de Werra
Geneva, September 2012

discussion is to engage in international soft lawmaking”), whereby this author kindly referred to an article that I wrote a few years ago (“Moving Beyond the Conflict Between Freedom of Contract and Copyright Policies: in Search of a New Global Policy for Information Licensing Transactions”, *Columbia Journal of Law & the Arts* 2003 25:239–378).

⁶ For the purpose of which an on-line platform has been activated, see www.ip-licensing.info (last accessed July 23, 2012).