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*A survey of 16 UK law students in September 2014.

INTELLECTUAL PROPERTY LAW

5th edition

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Contents

Acknowledgements	vii
Introduction	viii
Guided tour	x
Table of cases and statutes	xii
Chapter 1: Copyright subsistence	1
Chapter 2: Authorship, ownership and moral rights	17
Chapter 3: Copyright infringement, remedies and defences	35
Chapter 4: Confidentiality	57
Chapter 5: Patentability, entitlement and ownership	71
Chapter 6: Patent infringement, defences and remedies	87
Chapter 7: Design law	105
Chapter 8: Trade mark registrability	123
Chapter 9: Trade mark infringement	141
Chapter 10: Passing off	157
Chapter 11: Intellectual property, computer software and the internet	171
And finally, before the exam . . .	189
Glossary of terms	207
Index	213



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Introduction

Intellectual property law is a demanding but rewarding and enjoyable subject. It covers a range of diverse rights, some of which have little in common with others. Students should keep in mind that, although some rights may be quite different from others, a number of rights may exist in respect of the same subject-matter. For example, a new design of plastic bottle for tomato ketchup may be protected by design law (registered and unregistered), trade mark law and the law of passing off. The label attached to the bottle may be protected by artistic and literary copyright. Students are likely to get extra marks if they can demonstrate that they understand the overlap between the different intellectual property rights.

This book is a revision guide. It is intended to help focus students on the key areas in which they are likely to be examined. It also acts as an aide-mémoire, picking out key cases and statutes. It is no substitute for textbooks and other materials with which students should be familiar. Students should also be aware that this revision guide cannot cover all the ground which may be covered in a module on intellectual property. For example, it has not been possible to cover areas such as rights in performances.

Students should frequently check the syllabus of the module they are taking and refer to lecture notes, handouts and virtual learning materials provided by their lecturer and module leader. As intellectual property is such a big subject, most lecturers are likely to concentrate on some parts of the subject and deal with others in less detail. By reviewing the content of the course as taught or given as directed learning, students will have a much better idea of the areas they are likely to be examined on. Past examination papers also provide a rich form of guidance but students must be aware that, in a fast-moving subject like intellectual property, older examination questions may have been overtaken by recent developments. Questions in past examination papers should be attempted, provided they have current relevance. Ideally, students should attempt past examination questions after getting to grips with the subject area. Allow the time permitted in the examination and go through your answers critically, seeing how they could be improved (**'You be the marker'** section on the companion website gives guidance on this).

Inevitably, during the teaching of a module, there will be legislative changes to and/or important cases on intellectual property law. Examiners are impressed with students who show that they have taken the trouble to look up and understand the latest developments. Students should also be reminded that it is well worth reading the judgments in important Supreme Court (formerly House of Lords), Court of Appeal and Patents Court cases and rulings of the

Court of Justice of the European Union. Read and discuss other materials you are directed to by your lecturer, such as articles from specialised intellectual property journals.

Bear in mind the justifications for intellectual property rights (IPR). By granting limited rights, whether or not monopoly rights, innovation and investment into creating new works and inventions is stimulated. This results in increased employment, wealth, and research and development into the creation of new technologies and improvements thereto. IPR are particularly important in the development of new pharmaceuticals and biotechnological inventions. Another justification is that the subject-matter of IPR results from the exercise of human intellect, and a person should not be deprived of it without fair compensation by granting him or her rights over it limited in time and scope.

REVISION NOTE

Things to bear in mind when revising intellectual property law:

- Problem questions can be quite complex and it might be worthwhile drawing a 'mind map' or making a list of relevant dates before attempting the question. Spend a little time ensuring that you understand the question.
- Essay questions often require students to consider policy issues or unsatisfactory areas such as patents for computer-implemented inventions.
- Exam questions are not an excuse to write down everything you know about a particular area – answer what the question asks, not what you wished it had asked.
- Make full use of the recommended textbooks and other materials your lecturer suggests. Do not rely on this revision guide to learn the subject.
- Make sure you understand the main legislative provisions dealing with matters such as subsistence, requirements for registration and exceptions, authors, designers, inventors, ownership and entitlement, duration, infringement and defences.
- Seek advice from your lecturer about what you should revise. Most lecturers are very happy to give advice, guidance and feedback.
- Do not 'cherry-pick', only revising part of the syllabus. Questions on intellectual property often cover a wide range and may include a number of different and disparate intellectual property rights. Only omit revising a particular part of the syllabus if your lecturer has expressly confirmed that it will not be examined.
- Attempt past exam questions and review how your answer could be improved. Some lecturers are happy to look at your attempts and give you feedback. But make sure you do not waste time attempting past examination questions that are no longer relevant because of changes in the law.

Before you begin, you can use the [study plan](#) available on the companion website to assess how well you know the material in this book and identify the areas where you may want to focus your revision.

Guided tour



Topic maps – Visual guides highlight key subject areas and facilitate easy navigation through the chapter. Download them from the companion website to pin on your wall or add to your revision notes.



Revision checklists – How well do you know each topic? Use these to identify essential points you should know for your exams. But don't panic if you don't know them all – the chapters will help you revise each point to ensure you are fully prepared. Print the checklists off the companion website and track your revision progress!



Sample questions with answer guidelines – Practice makes perfect! Read the question at the start of each chapter and consider how you would answer it. Guidance on structuring strong answers is provided at the end of the chapter. Try out additional sample questions online.



Assessment advice – Not sure how best to tackle a problem or essay question? Wondering what you may be asked? Use the assessment advice to identify the ways in which a subject may be examined and how to apply your knowledge effectively.



Key definitions – Make sure you understand essential legal terms. Use the flashcards online to test your recall!



Key cases and key statutes – Identify and review the important elements of the essential cases and statutes you will need to know for your exams.



Make your answer stand out – This feature illustrates sources of further thinking and debate where you can maximise your marks. Use them to really impress your examiners!



Exam tips – Feeling the pressure? These boxes indicate how you can improve your exam performance when it really counts.



Revision notes – Get guidance for effective revision. These boxes highlight related points and areas of overlap in the subject, or areas where your course might adopt a particular approach that you should check with your course tutor.



Don't be tempted to . . . – This feature underlines areas where students most often trip up in exams. Use them to spot common pitfalls and avoid losing marks.



Read to impress – Focus on these carefully selected sources to extend your knowledge, deepen your understanding, and earn better marks in coursework as well as in exams.



Glossary – Forgotten the meaning of a word? This quick reference covers key definitions and other useful terms.

Table of cases and statutes

Cases

- 3M Innovative Properties Co's Designs* (No ICD000000040) 14 June 2004 (OHIM) **112, 196**
- Advocaat see Warnink, Erven, Besloten Vennootschap v J Townend & Sons Ltd*
- Aerotel/Macrossan Patent Application* [2007] RPC 7 (CA) **182, 201**
- Alice Corp. v CLS Bank* (US Supreme Court, June 2014) **180**
- Arsenal Football Club plc v Reed* (Case C-206/01) [2002] ECR I-10273 (ECJ) **144, 145, 146, 198, 199**
- Arsenal Football Club plc v Reed* [2001] RPC 46 (ChD) **163**
- Art & Allposters International BV v Stitching Pictoright* (C-419/13) 22 January 2015 **44**
- Asprey and Garrard Ltd v WRA (Guns) Ltd* [2002] FSR 31 (CA) **150, 198**
- Auchincloss v Agricultural & Veterinary Supplies Ltd* [1997] RPC 649 (CA) **98, 196**
- Baby Dry see Procter & Gamble Co v OHIM*
- Best Buy Inc. v Worldwide Sales Corp. Espana SL* [2011] EWCA Civ 618 **155**
- Blair v Osborne & Tomkins* [1971] 1 All ER 468 (CA) **25, 192**
- Bostick Ltd v Sellotape GB Ltd* [1994] RPC 556 (ChD) **167, 200**
- Bravado Merchandising Services Ltd v Mainstream Publishing (Edinburgh) Ltd* [1996] FSR 205 (CSOH) **151, 199**
- Bristol Conservatories Ltd v Conservatories Custom Built Ltd* [1989] RPC 455 (CA) **166, 200**
- British Horseracing Board Ltd v William Hill Organisation Ltd* [2004] ECR I-10415 **174, 179, 180, 201, 203**
- British Leyland Motor Corp. v Armstrong Patents Co. Ltd* [1986] 2 WLR 400 (HL) **118**
- Campbell v Mirror Group Newspapers* [2004] 2 All ER 995 (HL) **66, 68, 194**
- Catnic Components Ltd v Hill & Smith Ltd* [1982] RPC 183 (HL) **94, 95, 96, 97, 195**
- CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] 1 AC 1013 (HL) **39, 193**
- Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 (ChD) **61, 63, 65, 67, 194**
- Confetti Records v Warner Music UK Ltd* [2003] EMLR 35 (CA) **28, 32, 192**
- Conor Medsystems Inc. v Angiotech Pharmaceuticals Inc.* [2008] RPC 28 (HL) **80, 195**
- Davidoff & Cie SA v Gofkid Ltd* (Case C-292/00) [2003] ECR I-389 (ECJ) **136–7**
- Deckmyn (Johan) and Vrijheidsfonds VZW v Helena Vandersteen and Others* (Case C 201/13), 3 September 2014 **51**
- Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2001] FSR 11 (HL) **38, 42, 193**
- Douglas (Michael) v Hello! Ltd (No 6)* [2006] QB 125 (CA) **32, 64, 194**
- Dyson Ltd v Qualtex (UK) Ltd* [2006] RPC 31 (CA) **120, 197**
- Dyson Ltd v Vax Ltd* [2010] FRS 39 (ChD); affirmed [2012] FSR 4 (CA) **116, 197**
- EMI Records Ltd & Ors v British Sky Broadcasting Ltd & Ors* [2013] EWHC 379 (Ch) (28 February 2013) **50**
- Exxon Corporation v Exxon Insurance Consultants* [1981] 3 All ER 241 **5**

- Faccenda Chicken Ltd v Fowler* [1986] 1 All ER 617 (CA) **62, 194**
- Fenty v Arcadia Group* [2013] EWHC 2310 (Ch) **165**
- Fisher v Brooker* [2009] FSR 25 (HL) **21, 32, 50, 192**
- Football Association Premier League Ltd & others v QC Leisure & others* [2012] EWHC 108 **9, 15**
- Football Dataco Ltd v Stan James (Abingdon) Ltd* [2011] RPC 9 (ChD) **178, 200**
- Fujitsu Ltd's Application* [1997] RPC **181**
- General Motors v Yplon* (Case C-375/97) [1999] ECR I-5421 (ECJ) **137, 198, 203**
- Gillette Company v LA-Laboratories Ltd Oy* (Case C-228/03) [2005] ECR I-2337 (ECJ) 1 **151–2, 199**
- Green Lane Products Ltd v PMS International Group Ltd* [2008] FSR 1 (CA) **109, 196**
- Green v Broadcasting Corp. of New Zealand* ('Opportunity Knocks') [1989] RFC 700 **15**
- Grupo Promer Mon Graphic, SA v Office for Harmonisation in the Internal Market (Trade Marks and Designs) (OHIM)* (Case T-9/07) **122**
- Hensher (George) Ltd v Restawhile Upholstery Ltd* [1974] AC 64 (HL) **11–2, 192**
- Hitachi/Auction method* [2004] EPOR 548 (EPO) **182–3, 201, 203**
- Hotel Cipriani Srl v Cipriani (Grosvenor Street) Ltd* [2010] EWCA Civ 110 **169**
- Human Genome Sciences Inc. v Eli Lilly & Co.* [2011] UKSC 51 (SC) **80, 195**
- Hyde Park Residence Ltd v Yelland* [2000] RPC 604 (CA) **51–2, 193**
- Hyperion Records Ltd v Sawkins* [2005] RPC 32 (CA) **10, 27, 192**
- IDA Ltd v University of Southampton* [2006] RPC 21 (ChD) **83, 195**
- Improver Corp. v Raymond Industries Ltd* [1991] FSR 223 (CA, Hong Kong) **95, 96, 97, 196**
- Infopaq International A/S v Danske Dagblades Forening* (Case C-5/08) [2009] All ER (D) 212 (Aug) **5**
- Interflora Inc. v Marks & Spencer plc* (Case C-329/09) 22 September 2011 (CJEU) **184, 201, 203**
- Interlego AG v Tyco Industries Inc.* [1989] 1 AC 217 (HL) **5, 191**
- IPC Media Ltd v Highbury Leisure Publishing (No 2)* [2005] FSR 20 **15**
- Irvine v Talksport Ltd* [2003] FSR 35 (ChD) **165, 200**
- ITV v TV CatchUp* (Case C 607/11) [2011] **40**
- Jif Lemon see Reckitt & Colman Products Ltd v Borden Inc*
- Kelly v GE Healthcare* [2009] RPC 12 **84**
- Kenrick v Lawrence* (1890) 25 QBD 99 **54**
- Kirin-Amgen Inc. v Hoechst Marion Roussel Ltd* [2005] RPC 9 (HL) **95, 96, 97, 196**
- Koninklijke Philips Electronics v Remington Consumer Products Ltd* (Case C-299/99) [2002] ECR I-5475 (ECJ) **132, 138, 197**
- LA Gear Inc. v Hi-Tec Sports plc* [1992] FSR 121 (CA) **47, 193**
- Leidseplein Beheer and de Vries v Red Bull GmbH and Red Bull Nederland BV*, (Case C-65/12), 6 February 2014 **137**
- Levi Strauss & Co v Kimbyr Investments Ltd* [1994] FSR 335 **166**
- L'Oréal (UK) Ltd v Johnson & Johnson* [2000] FSR 686 (ChD) **153, 199**
- L'Oréal SA v eBay International AG* (Case C-324/09) 12 July 2011 (CJEU) **185, 186, 201**
- L'Oréal v Bellure NV* (Case C-87/07) [2009] ECR I-5185 (ECJ) **144, 148, 149, 154, 198**
- L'J Diffusion SA v Sadas Vertbaudet SA* (Case C-291/00) [2003] ECR I-2799 (ECJ) **147, 198**
- Lucasfilm Ltd v Ainsworth ('Star Wars')* [2011] UKSC 39 (SC) **11, 203**
- Lux Traffic Controls Ltd v Pike Signals Ltd* [1993] RPC 107 (ChD) **75, 77, 194**
- Malaysia Dairy Industries Pte. Ltd v Ankenævnet for Patenter og Varemærker* (Case C-320/12) [2013] ETMR 36; [2013] Bus LR 1106 ('Yakult Case') **133**
- Marks & Spencer plc v One in a Million Ltd* [1998] FSR 265 (CA) **167, 200**
- Millen (Karen) Fashions Ltd v Dunnes Stores* (Case C-345/13) [2015] CEC 572, CJEU **115, 196**
- Newzbin, Dramatico Entertainment v BskyB* [2012] EWHC 1152 (Ch) **50**
- Nintendo v PC Box* (Case C-355/12) [2012] 23 January 2014 **44**

TABLE OF CASES AND STATUTES

Norowzian v Arks Ltd [2000] FSR 363 (CA) **8, 13, 15, 191, 203**

Nova Productions Limited v Mazooma Games Limited & Others and Bell Fruit Games Limited [2007].
EWCA Civ 219 **15**

Opportunity Knocks see Green v Broadcasting Corp. of New Zealand

Oracle v UsedSoft (Case C-127/11) [2012] 3 July 2012
44, 175

Paramount Home Entertainment v BskyB [2014] EWHC 937 **50**

PepsiCo, Inc. v Grupo Promer Mon Graphic SA
(Case C-281/10) [2011] ECR I-10153 **110, 115, 116, 196**

Philips v Remington see Koninklijke Philips Electronics v Remington Consumer Products Ltd

Pozzoli SpA v BDMO SA [2007] FSR 37 (CA) **78, 79**
Procter & Gamble Co v OHIM ('Baby Dry') [2001] ECR I-6251 **131**

Procter & Gamble Co v Reckitt Benckiser (UK) Ltd [2008] FSR 8 (CA) **114, 196**

Protocol/Improver see Improver Corp. v Raymond Industries Ltd

Ray (Robin) v Classic FM plc [1998] FSR 622 (ChD) **22, 32, 192**

Reckitt & Colman Products Ltd v Borden Inc ('Jif Lemon') [1990] 1 All ER 873 (HL) **161, 199**

Redrow Homes v Betts Brothers plc [1998] FSR 345 (HL) **49**

R v Johnstone [2003] FSR 42 **146, 154**

Sabel BV v Puma AG, Rudolf Dassler Sport (Case C-251/95) [1998] RPC 199 **135–6, 197**

Samsung Electronics (UK) Ltd v Apple Inc [2012] EWCA Civ 1430 **113–4, 196**

SAS Institute Inc. v World Programming Ltd
(Case C-406/10) (forthcoming) (CJEU) **174, 176, 200**

Scandecor Development AB v Scandecor Marketing AB [1998] FSR 26 **162, 199**

Schültz (UK) Ltd v Werit (UK) Ltd [2013] UKSC 16
99, 196

Shield Mark BV v Joost Kist (Case C-283/01) [2004] ECR I-14313 (ECJ) **128, 197**

Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA (Case C-306/05) [2006] ECR I-11519 (CJEU) **45**

Société des Produits Nestlé SA v Cadbury UK Ltd [2013] EWCA Civ 1174 **128, 131**

Specsavers v Asda [2015] FSR 8 **144**

Star Wars see Lucasfilm Ltd v Ainsworth

Stephenson Jordan & Harrison Ltd v MacDonald and Evans [1952] RPC 10 (CA) **23, 192**

Svensson v Retriever Sverige (Case C-466/12) 13 February 2014 **45**

Symbian Ltd v Comptroller-General of Patents [2009] RPC 1 (CA) **182**

Synthon v SmithKline Beecham plc (No 2) [2006] RPC 10 (HL) **76, 77, 195**

Taittinger SA v Allbev Ltd [1993] FSR 641 (CA) **164, 200**

Temple Island Collections Ltd v New English Teas Ltd [2012] EWPC 1 **55**

The Newspaper Licensing Agency and others v Meltwater Holding BV and others [2011] EWCA Civ 890 **40**

Twentieth Century Fox Film Corp. v Newzbin Ltd [2010] EWHC 608 (Ch) **40**

UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and anor (C-314/12) [2014] All ER (D) 302 (Mar) **50**

Vicom [1987] EPOR 74 **181**

Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd (formerly Contour Aerospace Ltd) [2013] UKSC 46 **104**

Walter v Lane [1900] AC 539 (HL) **7, 21, 191**

Warnink (Erven) Besloten Vennootschap v J Townend & Sons Ltd ('Advocaat') [1979] AC 731 (HL) **161, 162, 199**

Windsurfing Chiemsee Productions v Huber and Attenburger (Joined cases C-108/97 and C-109/97) [1999] ECR I-2779 (ECJ) **130, 131, 197**

Windsurfing International Inc. v Tabur Marine (CB) Ltd [1985] RPC 59 (CA) **78, 79, 195**

Yakult Case see Malaysia Dairy Industries Pte. Ltd v Ankenævnet for Patenter og Varemærker

Statutes

Copyright, Designs and Patents Act 1988 **3, 31, 175**

- s. 1 **4**
- s. 3(1) **8, 9**
- s. 3(2) **6**
- s. 3(3) **6**
- s. 4(1) **10, 11**
- s. 4(2) **10**
- s. 5A **12**
- s. 5A(1)(a) **12**
- s. 5B **13**
- s. 6 **13**
- s. 6(1A) **13**
- s. 9(1) **20**
- s. 10(1) **21**
- s. 11(1) **23**
- s. 11(2) **23**
- s. 16(1) **38**
- s. 16(2) **38**
- s. 16(3) **40**
- s. 17 **41**
- s. 18 **43**
- s. 18A **44**
- s. 19(2) **44**
- s. 19(3) **44**
- s. 20 **45**
- s. 21(3) **46**
- ss. 22–26 **47**
- s. 28A **52**
- s. 29 **36, 52, 53**
- s. 30 **36, 52, 53**
- s. 30A **52**
- s. 51 **107**
- ss. 77–79 **26**
- s. 79 **27**
- ss. 80–83 **28**
- s. 84 **29–30**
- s. 85 **30**
- s. 97A **49, 50**
- s. 104(2) **24**
- s. 107 **47**
- s. 154 **14**
- s. 155 **14**
- s. 178 **53**
- s. 213(1) **118**

- s. 213(2) **118**
- s. 213(3) **119**
- s. 213(3)(a) **119**
- s. 213(3)(b)(i), (ii) **119**
- s. 213(3)(c) **119**
- s. 213(4) **118**

Deregulation Act 2015 **50**

Digital Economy Act 2010

- s. 17 **50**
- s. 18 **50**

Enterprise and Regulatory Reform Act 2013 **31, 53**

Human Rights Act 1998 **51, 59, 67**

Intellectual Property Act 2014 **116, 118**

Patents Act 1977 **95**

- s. 1 **74, 203**
- s. 1(1) **93**
- s. 1(2) **180, 181, 203**
- s. 1(3) **93**
- s. 1(4) **93**
- s. 2 **74, 93**
- s. 2(3) **76, 77**
- s. 3 **77, 93, 203**
- s. 4 **80, 93**
- s. 5 **93**
- s. 5(3) **203**
- s. 6 **93**
- s. 7(1) **83**
- s. 39 **83**
- s. 60 **93**
- s. 60(1) **91, 92**
- s. 60(1)(a) **99**
- s. 60(2) **91, 92**
- s. 60(5) **98**
- s. 60(5)(a) **97**
- s. 60(5)(b) **97, 98**
- s. 60(5)(c)–(i) **97**
- s. 61 **101**
- s. 61(2) **101**
- s. 64 **100**
- s. 64(1) **100**
- s. 64(1)(a), (b) **100**
- s. 70 **102**

- s. 125 **93**
- s. 125(1) **92**
- s. 130(7) **93**

Registered Designs Act 1949 **117**
 s. 35ZA **117**

Trade Marks Act 1994 **125, 143, 148, 152**
 s. 1 **127, 138**
 s. 3 **128, 138, 150**
 s. 3(1) **129**
 s. 3(1)(a)–(d) **128**
 s. 3(2) **131**
 s. 3(3) **133**
 s. 3(6) **133**
 s. 5 **147**
 s. 5(1) **134**
 s. 5(2) **134**
 s. 5(3) **136**
 s. 10 **147**
 s. 10(1) **144, 146, 154**
 s. 11(2)(b) **145**
 s. 21 **153**
 s. 40 **84**

■ Statutory instruments

Artist's Resale Right Regulations 2006, SI 2006/346, **31**

Copyright and Duration of Rights in Performances Regulations 2013, SI 2013/1782, **14**

Copyright and Rights in Performances (Personal Copies for Private Use) Regulations 2014, SI 2014/2361, **50–51**

Copyright and Rights in Performances (Quotation and Parody) Regulations 2014, SI 2014/2356, **51, 53**

Intellectual Property (Enforcement etc.) Regulations 2006, SI 2006/1028, **101**
 reg. 3, **48**

Trade Marks (Proof of Use, etc.) Regulations 2004, SI 2004/946, **137**

■ European Union legislation

Listed in ascending date order

Council Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, Regulations and administrative provisions of the Member States concerning misleading advertising (Misleading Advertising Directive)

Art. 3a, **149**

Art. 3a(1), **148**

Council Directive 87/54/EEC of 16 December 1986 on the legal protection of topographies of semiconductor products, **207**

Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs, OJ 2002 L341 (Community Design Regulation), **121**

Art. 3, **108**

Art. 4(1), **109**

Art. 10, **113**

Art. 110, **112**

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive)

Art. 3(1), **178**

Art. 7(1), **178**

Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions

Art. 6(2), **82**

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2008 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (E-commerce Directive), **186**

Art. 14, **186**

Art. 14(1), **145**

Directive 2001/29/EC of the European Parliament and of the Council on the protection of intellectual property rights in the information society (InfoSoc Directive), **175**

Art. 2, **39**

Art. 3, **39**

Art. 4, **39**

Art. 5, **51**

Art. 5(1), **40**

- Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, **48, 49, 101**
 Art. 12, **117**
- Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, **148**
- Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the Member States relating to trade marks (codified version, replacing the original Directive 89/104/EC) (Trade Marks Directive), **125**
 Art. 2, **127, 128, 130, 138**
 Art. 3, **138, 150, 203**
 Art. 3(1)(a)–(d), **128, 129**
 Art. 3(1)(e), **131**
 Art. 3(1)(f), (g), **133**
 Art. 3(2)(d), **133**
 Art. 3(3), **129**
 Art. 4, **147**
 Art. 4(1)(a), **134**
 Art. 4(1)(b), **134**
 Art. 4(3), **136, 203**
 Art. 4(4)(a), **136**
 Art. 5, **147**
 Art. 5(1)(a), **144, 146, 148, 154**
 Art. 5(2), **186**
 Art. 6(1), **145, 149**
 Art. 6(1)(a)–(c), **149**
 Art. 7, **184**
- Preamble
 Recital 11, **144**
- Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (codified version, replacing the original Directive 91/250/EC)
 Art. 1, **174**
 Art. 1(1)–(3), **174**
 Art. 5, **175**
 Art. 5(1)–(2), **175**
 Art. 5(3), **175**
 Art. 6, **176**
 Art. 9, **176**
- Directive 2011/77/EU on the term of protection of copyright and certain related rights (Copyright Term in Sound Recordings Directive), **14**
- Proposed Directive on Trade Secrets, **59**
 Art. 2, **61, 69**
 Art. 3, **69**
 Art. 3(2)(a), **63**
 Art. 3(3), **65**
 Art. 3(4), **65**
 Art. 3(5), **65**
 Art. 4, **64, 69**
 Art. 4(2), **67**
 Art. 11, **63**
 Art. 13, **63**
- ## ■ Conventions and Treaties
- Agreement Establishing the World Trade Organization 1994, **143**
- Agreement on Trade-related Aspects of Intellectual Property Rights 1994 (TRIPS Agreement), **14**
- Berne Convention for the Protection of Literary and Artistic Works 1886, **14**
- European Convention for the Protection of Human Rights and Fundamental Freedoms 1950
 Art. 8, **59, 65, 68**
 Art. 10, **59, 65, 68**
- European Patent Convention (EPC)
 Art. 52, **180**
 Art. 52(1), **181**
 Art. 52(2), **181, 183**
 Art. 52(3), **181**
 Art. 69, **93, 97**
 Protocol, **89, 93**
 Art. 69(1), **92**
- Paris Convention for the Protection of Industrial Property 1883, **143**
- Treaty on the Functioning of the European Union 2010
 Art. 267, **179**
- Universal Copyright Convention 1952, **14**

Copyright subsistence



Revision checklist

Essential points you should know:

- What amounts to originality
- What constitutes fixation
- What amounts to a copyright work
- What are secondary or derivative works
- The qualification requirements
- The duration of the copyright term

■ Topic map



■ Introduction

Copyright does not protect the idea but the independent expression of the idea.

Copyright does not create monopolies, but a limited right over creative expression. It is intended to prevent others, for a defined period of time, from taking unfair advantage of a person's creative efforts. Protected subject matter is governed by the Copyright, Designs and Patents Act 1988 (CDPA), refined by case law in the UK and from the Court of Justice of the European Union (CJEU). Although original literary works, films and sound recordings are all included, not all creative efforts are protected under the Act. This does mean that some highly original creations do not meet the criteria for protection. The owner of the copyright has the exclusive right to do, or license others to do, certain acts in relation to the work. Apart from where certain exceptions exist, the owner or licensee may sue for infringement and obtain remedies such as an injunction and damages. In April 2015, Mr Justice Arnold of the High Court of England and Wales commented that the CDPA was 'rooted in the analogue world', and that a stream of additions and modifications to the Act since its entry into force in 1988 meant that it has become unwieldy and inaccessible. Mr Justice Arnold stated that 'it is time for a new Copyright Act and that a departmental committee should be appointed to make recommendations for the framing of the new Act'. At the time of writing, however, there do not appear to be any immediate plans to do so.

ASSESSMENT ADVICE

Essay questions

A possible essay question may ask you to discuss the difficulty in establishing a work as one of artistic craftsmanship. Keep in mind any other forms of intellectual property protection such as design right that could be available as an alternative to copyright protection. Another essay question could relate to the gap in protection for creative ideas seen in the *Norowzian* case and the split between the idea and the expression of a work.

Problem questions

A problem question could include a scenario where a work is put into tangible form by another, where there is a trivial or *de minimis* work or a work with no artistic merit. There may also be an issue raised relating to sound recordings, including qualification and duration issues on both derivative and original works, or where a work builds upon a previously existing work, such as a remix or song 'mash-up'.

Sample question

Could you answer this question? Below is a typical essay question that could arise on this topic. Guidelines on answering the question are included at the end of this chapter, whilst a sample problem question and guidance on tackling it can be found on the companion website.

ESSAY QUESTION

The formats of television game shows and reality programmes, such as *Pop Idol* and *Big Brother*, are inadequately protected by copyright in the UK. The time is right to introduce format rights as a new type of copyright work.

Discuss with reference to decided cases.

Originality

Not all creative effort is protected. For protection, the output must fall into the category of 'works' and must be **original**.

KEY STATUTE

Section 1 Copyright, Designs and Patents Act 1988

Copyright is a property right which subsists in original literary, dramatic, musical and artistic works as well as sound recordings, films, broadcasts and typographical arrangements of published editions.

KEY DEFINITION: Original

A work is original for copyright purposes if it has originated from the author and has not been copied from another work. For computer programs and copyright databases, a work is original if it is the author's own intellectual creation. Databases will be discussed further in Chapter 11.

Originality for copyright purposes does not demand the novelty or innovation required in order to obtain a patent. For copyright, original means that the work originates from or is the intellectual creation of the **author**, its creator and it has not been copied from another's work. This is a low but minimum standard. A simplistic one-line drawing would be regarded as too trivial to merit copyright protection.

In an interesting US-based example, a macaque took a camera from a photographer and took a 'selfie'; the UK's Intellectual Property Office commented that an animal could not be an 'author' for the purposes of copyright law, and that the photographer could only claim copyright protection if they had made a 'creative contribution' to the work, such as setting up the shot.

KEY CASE

***Interlego AG v Tyco Industries Inc.* [1989] 1 AC 217, HL**

Concerning: whether small modifications made to existing drawings of 'Lego' bricks gave rise to a fresh copyright

Facts

The original Lego bricks had been patented and were registered as designs, but these had expired. Some changes had been made to the design and these later bricks were copied by Tyco. Lego claimed copyright infringement.

Legal principle

For copyright to exist, there must be an original work. Even though modifications are technically significant, if they are not visually significant and are in effect copies of existing works, they would not give rise to a new copyright.

To hold otherwise would result in the possibility that copyright, in what was essentially the same work, could be extended indefinitely by merely making minor changes. Facts are not protected and a name such as Exxon cannot be subject to copyright even if a lot of work has gone into its creation. However, it has been held that headlines on an internet website arguably could be a literary work, such as in the CJEU case *Infopaq International A/S v Danske Dagblades Forening* heard in 2009.

EXAM TIP

Show an awareness of the practical consequences of copyright protection by pointing out that the failure to grant copyright for a single word is not just due to the *de minimis* principle. The intention in *Exxon* was to obtain greater protection over a range of goods or services via copyright than mere registration as a trade mark would have provided. There is also a public interest in preventing the control of words or phrases that should be available for all to use without fear of copyright infringement.



Make your answer stand out

The *Infopaq* decision held that by taking 11 words, if those words were the result of the intellectual creation of the author, copyright infringement could occur. This view was reinforced in the *Meltwater* case on appeal. It has been argued that these decisions have changed the requirements for originality under the CDPA from ‘sweat of the brow’ to the ‘intellectual creation of the author’. Make your answer stand out by explaining that it has been suggested that these cases have been misinterpreted and that although copying 11 words may infringe copyright, 11 words in themselves may not necessarily amount to a separate work of copyright (see Deming Liu (2013) and Rahmatian (2013)).

Tangibility

Copyright does not protect ideas, only a particular expression of an idea. Artistic works will usually be in tangible form, otherwise they could not be seen, but they do need some sort of surface to exist upon. In order to protect an idea in a literary, dramatic or musical work, the expression must be recorded in a permanent form. This can be in writing or in any other way. All new methods of recording or fixation are covered in the Act.

KEY STATUTE

Section 3(2) and (3) Copyright, Designs and Patents Act 1988

Copyright does not subsist in a literary, dramatic or musical work unless and until it is recorded in writing or otherwise, that is, any other way. It is immaterial whether the work is recorded by or with the permission of the author.

There will be no copyright in an impromptu speech or a tune devised while playing the guitar unless they are recorded. The recording can be made by anyone, even without the permission of the author. On recording, fixation will take place and copyright will spring into existence.

REVISION NOTE

Who is the first owner of the copyright will be determined by who is the author of the work and their status. (Please refer to Chapter 2 on authorship and ownership.)

KEY CASE

***Walter v Lane* [1900] AC 539, HL**

Concerning: the existence of copyright in an impromptu speech

Facts

The Earl of Rosebery made a speech. A reporter for *The Times* recorded it verbatim in shorthand, adding nothing apart from his reporting skills. The speech was published in *The Times* and copied by another. The issue was whether *The Times* had a right to sue for infringement.

Legal principle

The speaker was the author of the written work for copyright purposes. The reporter, having used skill and judgement in recording the speech using his own choice, sequence and combination of words, adding structure and punctuation, was the author of that report of the speech, an original work in its own right.

If the reporter had taped the speech on a tape machine, he would have had copyright in the sound recording.

! Don't be tempted to . . .

Don't fail to understand that fixation can be made even without the knowledge or licence of the author of the 'work'. Make sure, however, that you do not confuse the situation of a secretary taking dictation, where they will not obtain copyright in the written work, and the reporter in *Walter v Lane*. Owing to the reporter expending extra skills in the reporting of the speech, copyright vested both in the author, the Earl and the reporter. If the reporter had taken down only some ideas expressed in the speech, there would have been no fixation of the expression of Lord Rosebery. If you were to record a talk given by a lecturer with a Dictaphone (always ask permission first!), you would not have copyright over the content of the lecture, but would have copyright over the sound recording.

■ A 'work'

The Act is very specific about what can be protected.

Literary works

KEY STATUTE

Section 3(1) Copyright, Designs and Patents Act 1988 (part)

A literary work is any work, other than a dramatic or musical work, which is written, spoken or sung, and includes a table or compilation (other than a database), a computer program, preparatory design material for a computer program and a database.

'Literary work' covers a work which is expressed in print or writing, irrespective of its quality. No merit is required. Selections, arrangements, raw research material and compilations of literary works are protected, but only if they are recorded. There is no protection for compilations of drawings, as a literary work.

Dramatic works

KEY STATUTE

Section 3(1) Copyright, Designs and Patents Act 1988 (part)

'A "dramatic" work includes a work of dance or mime.'

The dialogue of a dramatic work on its own is protected by literary copyright. A work of mime without words can be protected as a dramatic work. But there can be problems with outputs that do not fit the criteria of 'work'.

KEY CASE

***Norowzian v Arks Ltd* [2000] FSR 363, CA**

Concerning: what constitutes a dramatic work

Facts

Mr Norowzian made the film *Joy*. It showed a man dancing and used 'flash framing' and 'jump cutting' (removing bits of film). Due to these editing techniques, the dancing looked surreal. The man was doing things that in real time he could not have performed before an audience, hence this was not a dramatic work and was incapable of copyright protection.

Legal principle

The content of the film can be a dramatic work if it is 'a work of action with or without words or music which is capable of being performed before an audience'. A film itself can be a work of action and be performed before an audience.

A film is a dramatic work distinct from the script. Rhythm, pace and movement are ideas, and cannot be protected as only the specific expression of the idea is covered. A similar problem of 'slipping through the net' is found in television game-show formats. Often these comprise stock phrases or events which are interjected at appropriate times. For copyright to arise there must be fixation, a script recorded in permanent form. This is not appropriate to game shows, which are expected to be spontaneous.

Also bear in mind that sporting events such as football games, no matter how 'dramatic', will not be protected as copyrighted works. According to the CJEU, in the 2012 case *Football Association Premier League v QC*, a football game could not be protected as sporting events cannot be regarded as intellectual creations classifiable as works. Furthermore, the rules of the game were considered to leave no room for creative freedom for the purposes of copyright.

! Don't be tempted to . . .

Don't assume that all creative effort is protected by copyright. If the purpose of copyright is to protect creative effort, it is not doing so. By being so prescriptive in what is a 'work', UK copyright law may fail to provide protection for all creativity. This is of particular note in the fashion industry, which will rely upon design rights protection as discussed in Chapter 7.

Musical works

For copyright purposes, music and lyrics are separate. Lyrics are protected as literary works, so what is left is the music. The copyright can be owned by different people and expire at different times.

KEY STATUTE

Section 3(1) Copyright, Designs and Patents Act 1988 (part)

'A musical work is one consisting of music, exclusive of any words or action intended to be sung, spoken or performed with the music.'

There is, as with most of the other 'original' works, no quality requirement, and even a few notes may attract copyright. They must, however, be original. They may still be regarded as original musical works even if they are based on an existing piece of music. Such adaptations or transcriptions will attract their own copyright if the minimum amount of skill and labour has gone into their creation. It may be found, however, that the adaptation or transcription infringes the copyright in the earlier musical work if made without the permission of the owner.