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Ninth Edition

INTELLECTUAL PROPERTY

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Preface

There have been relatively few legislative changes since the previous edition, though notable are the controversial copyright provisions of the Digital Economy Act 2010 with its copyright infringement reports and initial obligations code. An initial challenge to these provisions was made by BT and TalkTalk Telecom, but this was unsuccessful. It remains to be seen whether this attempt to control online copyright infringement will be effective without being unduly heavy-handed or raising serious privacy concerns.

The Supreme Court replaced the Appellate Committee of the House of Lords in October 2009 as the highest court in the UK. Thus far it has handed down judgments in two important intellectual property cases. The first case is *Lucasfilm v Ainsworth* (a case involving the Stormtroopers' helmets in the Star Wars films). The case is important in ruling on the scope of 'sculpture' for copyright purposes and in relation to jurisdictional issues. The second case, *Human Genome Sciences v Eli Lilly* is arguably the most important UK case on the meaning of industrial application for the purposes of patent law.

Other important cases from the courts in the UK and the Court of Justice of the European Union include the use of trade marks as internet search engine AdWords, the doctrine of freedom to supply services (relevant to encrypted broadcasts of live football matches), database copyright and the concept of repair under patent law. There has been a further development in the principles applicable to employee compensation where an invention turns out to be of outstanding benefit to the employer. All the above cases are discussed in this new edition as well as a multitude of other recent cases. All parts of the book have been updated to incorporate these cases.

When describing and discussing remedies in terms of each branch of intellectual property law, it is inevitable that there is some overlap as some remedies, such as injunctions and damages are generally available. However, and following a suggestion from a reviewer of the previous edition, for which I am grateful, it was felt that it would be useful to have a separate chapter

on remedies. This permits a general discussion on the remedies available under each type of intellectual property law, leaving a more in depth discussion of specific remedies under each part of the book.

Since the cut-off date of the previous edition, the EC Treaty has been replaced by the Treaty on the Functioning of the European Union. The necessary changes have been made as appropriate and reference now is generally to the latter Treaty. However, some references to the old Treaty are made in an attempt to ensure clarity, especially when discussing earlier cases. A table of equivalents setting out the relevant provisions of both Treaties appears in the section on law reports, references, etc. just before the first chapter.

The previous edition noted some of the recommendations made in the *Gowers Review of Intellectual Property*. Since then, a relatively small number of recommendations have been adopted. More recently, the *Hargreaves Report* has reiterated some of these recommendations and made further recommendations. These include the establishment of a digital copyright exchange, provisions easing the use of 'orphan works', format shifting, and dealing with problems in patent law such as patent thickets. Improving IP education and delivering effective IP advice to SMEs are also seen as important matters that should be addressed. Reference is made to both Gowers and Hargreaves in this edition. It has to be said, however, that further legislative changes must be compatible with EU law and the various international IP Conventions and Agreements. Some of the recommendations are already permitted as options under EU copyright Directives, such as format shifting and parody, but which the UK has thus far failed to implement.

As ever, I have enjoyed writing the ninth edition of this book and learnt more about intellectual property whilst doing so. I thank Cheryl Cheasley and all the people at Pearson Education for their help, support and patience and my wife Lorraine for her help and encouragement. I have attempted to state the law as at 1 January 2012.

David Bainbridge

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- Marrakech Agreement Establishing the World Trade Organisation, 1994 [382](#), [736](#), [823](#)
- Paris Convention for the Protection of Industrial Property 1883 [5](#), [17](#), [18](#), [393](#), [554](#), [587](#), [588](#), [607](#), [622](#), [628](#), [629](#), [687](#), [748](#), [796–797](#), [823](#), [824](#), [855](#)
- Article 2 [976](#)
- Article 6^{bis} [736](#), [748](#), [753](#), [824](#), [844](#)
- Article 6^{bis}(1) [796](#)
- Article 6^{ter} [610](#), [729](#), [840](#)
- Article 19 [855](#)
- Patent Cooperation Treaty 1970 [8](#), [17](#), [400](#), [401](#), [402](#), [427](#), [428](#), [437](#), [512](#), [525](#)
- Rome Act 1928 [127](#)
- Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations 1961 [17](#), [242](#), [243](#), [321](#), [326](#), [339](#)
- Rome Convention on the law applicable to contractual obligations 1980 (consolidated version) OJ C 27, 26.01.1998, p 34 [979](#)
- Article 3 [979](#)
- Article 4 [979](#)
- TRIPs Agreement (Trade Related Aspects of Intellectual Property Rights) [17](#), [18](#), [26](#), [36](#), [43](#), [52](#), [166](#), [326](#), [382](#), [469](#), [481](#), [489](#), [491](#), [508](#), [516](#), [587](#), [748](#), [750](#), [782](#), [823](#), [834](#)
- Article 9 [43](#)
- Article 9(2) [43](#)
- Article 16 [736](#)
- Article 16(1) [782](#), [787](#)
- Article 16(2) [824](#)
- Article 16(3) [788](#)
- Article 25 [587](#)
- Article 26 [587](#)
- Article 27(2) [489](#)
- Article 30 [491](#), [568](#)
- Article 31 [516](#)
- Article 39 [382](#), [385](#)
- Universal Copyright Convention 1952 [6](#), [17](#), [36](#), [74](#), [75](#), [76](#), [123](#), [136](#), [750](#)
- Article II [74](#)
- Vienna Convention on the Law of Treaties of 1969
- Article 31 [482](#)
- Article 31(1) [482](#)
- Washington Treaty on Intellectual Property in Respect of Integrated Circuits 1989 [17](#)
- WIPO Copyright Treaty 1996 [36](#), [52](#), [174](#), [332](#)
- Article 1 [43](#)
- Article 2 [43](#), [267](#)
- Article 6(1) [174](#)
- WIPO Patent Law Treaty 2000 [400](#)
- WIPO Performers and Phonogram Treaty 1996 [36](#), [174](#), [332](#)
- Article 8(1) [174](#)
- WTO Agreement 1994 [736](#)

Glossary

Terms and phrases common in intellectual property law

Assignment: the transfer of the title in a chose in action. For example, ownership of copyright is transferred by means of an assignment in writing which is signed by or on behalf of the previous owner of the copyright, that is, the assignor. In intellectual property law, an assignment must be distinguished from an exclusive licence, which is similar in many practical respects, but which does not involve the transfer of the title to the right. Strictly speaking a patent is an item of personal property without being a 'thing in action' (section 30(1) of the Patents Act 1977), but transfer of title is still referred to as an assignment.

Character merchandising: this occurs when the owner of the rights in some popular character or personality grants licences to others allowing them to apply drawings, photographs or other representations of the character to goods and articles which those others make or sell. Typically, the character will be a famous fictitious character popularised by television or film. Examples are Mickey Mouse, Bob the Builder, Denis the Menace, Indiana Jones, Harry Potter, etc.

Collecting society: a society that collects revenue in respect of the exploitation of an intellectual property right and distributes that revenue amongst the right owners. In some cases, the owners of the right will assign part of their rights to the collecting society. An important example is the *Performing Right Society* (PRS) which takes an assignment of the performing rights in music, grants blanket licences and distributes the revenue thus earned between the songwriters, composers, and publishers of music. *Phonographic Performance Ltd* (PPL) collects and distributes money on behalf of record companies and performers in respect of public performances of recordings. The *Mechanical Copyright Protection Society* (MCPS) collects and pays royalties where music is copied onto any format, such as CDs and DVDs. Music played in shops, restaurants and other premises to which the public have access usually will need to pay for a PRS and PPL licence and, possibly depending on the circumstances, a MCPS licence. Work premises will also usually need such a licence. There have been moves to integrate the licence provisions of these organisations to simplify matters.

Another important collecting society, the *Copyright Licensing Agency* (CLA), licenses the copying of extracts

of books, journals and periodicals on behalf of authors and publishers. Typically Universities hold CLA licences allowing them, for example, to make copies of a journal article or a chapter of a book to distribute to a class of students. The royalties to authors are distributed through the *Authors' Licensing and Collecting Agency* (ALCS), members of which, including the author of this book, are represented by the CLA. Whereas some collecting societies, such as the PRS, take an assignment of the relevant rights others, such as the CLA, do not.

Comptroller of Patents, Designs and Trade Marks: the head of the Patent Office (its operating name is now the UK Intellectual Property Office) with responsibility for the administration and grant of patents, registered designs and trade marks. Under trade mark legislation and design legislation the Comptroller is referred to as the *Registrar*. The Comptroller has other duties. Examples are: the conduct of hearings and proceedings, the production of statistics and an annual report, increasing public awareness of the work of the Patent Office in addition to working with, advising and participating with the European Patent Office, the World Intellectual Property Organisation and the Council of Europe. The Comptroller has the power to make non-binding opinions as to validity (novelty or inventive step) or infringement of patents. In the year ending 31 March 2011, the Patent Office employed 899 persons (as at 31 March 2011) and had a turnover of over £66 million.

Exhaustion of rights: a doctrine emanating from EU law. Basically, the owner of an intellectual property right which relates to articles which have been put into circulation by him or with his consent anywhere within the European Economic Area ('EEA' – the EU Member States, Iceland, Liechtenstein and Norway) cannot exercise that right to prevent the subsequent import, export or sale of those particular articles. The right is said to be exhausted. This will only apply where trade between Member States is likely to be affected. The doctrine does not apply in relation to articles put on the market outside the EEA and imported into the EEA.

Freezing injunction (formerly Mareva injunction): an injunction freezing the assets of a defendant thus preventing him from removing them out of the jurisdiction of the court. Such an injunction is useful

where the defendant is not resident within the United Kingdom. Originally named after the case *Mareva Compania Naviera SA v International Bulk Carriers SA* [1980] 1 All ER 213.

Get-up: a style, mark, appearance, packaging or form of advertising or marketing used in connection with, or applied to, an undertaking's ('trader's') goods or services which may be or become distinctive in relation to that undertaking and which may give rise to, contribute to, or be associated with, the undertaking's goodwill which is protected by the law of passing off. A particular stylised logo, emblem or other form of insignia may, in appropriate circumstances, be registered as a trade mark.

Infringement: intellectual property law gives rights to the owner of that property permitting him to do certain acts in respect of the thing in which the right subsists. Any person who does one of these acts without the permission or authority of the right-owner is said to infringe the right unless the act concerned is permitted by law or a defence applies. Thus, it is usual to speak of an infringement of copyright or to say that a patent has been infringed.

Licence: a licence is a permission given by the owner of a right (the licensor) to another person (the licensee) allowing that other person to do certain specified things in respect of the subject matter of the right. For example, the owner of the copyright subsisting in a musical work may grant a licence to a publishing company allowing it to print and sell copies of the work in the form of sheet music. Another example is where the proprietor (owner) of a patent grants a licence to another person permitting the working of the invention by that other person. Intellectual property licences are normally contractual in nature and the licensor will usually receive royalties by way of consideration for the permission.

Licences may be exclusive or non-exclusive. An *exclusive licence* is one where the licensee has the exclusive right to do certain things to the exclusion of all others including the licensor. Several *non-exclusive licences* may be granted to different persons in respect of the same work and the same activities. For example, the owner of the copyright in a dramatic work may grant several non-exclusive licences to theatre companies permitting each of them to perform the dramatic work live on stage.

Compulsory licences may be granted under the provisions of an Act of Parliament. For example, the Patents Act 1977 gives the Comptroller of Patents, Designs and Trade Marks the power to grant a compulsory licence to an applicant if, for example, where the invention is a product, demand in the United Kingdom is not being met on reasonable terms. In some cases, licences are available as of right. This may be the ultimate result of a report from the Competition Commission (for example, if a patent or design is not being sufficiently

worked and this is contrary to the public interest), or because of a statutory provision, for example as regards designs subject to the design right during the last five years of the right, or because the owner has volunteered that such licences be available (in the case of a patent, the proprietor may do this and from then on he will only pay half the usual renewal fees).

If there is a defect in an assignment or a misunderstanding as to the ownership of a right, a court might be prepared to imply a licence. For example, if a person commissions the making of a work of copyright and there is no express agreement for the assignment of that copyright, the court might be able to imply a licence so that the commissioner can use the work for certain purposes consistent with the purpose of the commission. Alternatively, the concept of beneficial ownership may be used to similar effect.

Moral rights: the rights that the author of a work of copyright has independent of the economic rights of the copyright owner. The moral rights are: to be identified as the author of the work (or the director of a film) and to be able to object to a derogatory treatment of the work. These rights leave the author with some control over his work even if he does not own the copyright. Any person also has a right, under copyright law, not to have a work falsely attributed to him. Moral rights have also been extended to performers in respect of their live performances and recordings thereof.

Public domain: refers to all material which is available to the public at large (or a portion of it) and which may be freely used and exploited without infringing anyone's intellectual property rights. Material may be in the public domain because: (a) it is commonplace or lacks novelty, (b) it has been put there deliberately by the 'owner', and (c) the intellectual property rights concerning the material have expired or lapsed. It is possible that material has fallen into the public domain through a breach of confidence, in which case only those persons who have come across the material in good faith without notice of the breach of confidence will be free to make use of it. Such cases will be rare.

Reverse engineering: the process where information about the design or construction of an article is determined by an examination of the article itself, frequently after dismantling or measuring the dimensions of the article. Another manufacturer can copy articles by this process without having to inspect drawings and other design documents made for the article. For example, one company copied another's exhaust pipes by removing an exhaust system from a car, examining and taking measurements of it. The protection of spare parts is a controversial area, particularly with respect to spare parts for vehicles. The UK approach is to deny protection to

elements of such parts which have to be a particular shape to fit or match a composite article of which they form a part.

Royalty: a payment mechanism, normally calculated on a percentage of the income derived from sales of works or articles subject to an intellectual property right. This is a common method of paying for a licence to exploit an intellectual property right. For example, the author of a literary work may grant a licence to a publisher permitting him to print and sell copies to bookshops. The publisher may then pay the author 10 per cent of the price he receives from the booksellers. Sometimes, royalty figures will have to be agreed by the Comptroller of Patents, Designs and Trade Marks or by the Copyright Tribunal (for example, where a compulsory licence is obtained and the parties cannot agree a royalty). A percentage based on sales is not the only method of payment and a single lump sum or series of sums can be agreed between the parties instead. It is not unusual for writers to be given an advance on royalties.

Search order (formerly Anton Piller order): an order of the High Court permitting the aggrieved party to enter the premises of an alleged wrongdoer and take into safe custody or copy materials that are important evidentially. Originally named after the case of *Anton Piller KG v Manufacturing Processes Ltd* [1976] 1 Ch 55. The order must be executed by a solicitor. The applicant must show, *inter alia*, a strong case. Its purpose is the preservation of evidence, that is, to prevent the destruction or concealment of evidence by an alleged wrongdoer. The order is common in intellectual property cases, for example to allow a copyright owner to take possession of alleged pirate copies of his work to be used in evidence. The successful applicant for a search order usually has to give an undertaking in damages to compensate the other person should the applicant lose the case at trial.

Computer terms and phrases

Assembly language: *see* low-level programming language.

Computer memory: the storage facilities of a computer. Computers can store vast amounts of data. Some of the computer's storage is internal, such as that provided for by integrated circuits and an internal magnetic disk. Other forms of storage are external, for example, magnetic external hard drives, solid state memory, CDs and DVDs. Older forms of external storage include punched cards, paper tape, magnetic tape and disks. Internal computer memory can be classified as being ROM (read only memory) or RAM (random access memory). ROM contains programs such as the start up program and parts of the computer's operating system. ROM cannot be altered; it is permanent. RAM is transient memory;

the contents are alterable. It is used to store application programs in current use and associated data during the operation of a computer program or software suite. When the computer is switched off, the contents of RAM are lost.

Computer program: a series of instructions which control or condition the operation of a computer.

Decompilation and disassembly: disassembly is an operation whereby the object code of a computer program is converted into assembly language (a low-level programming language). This is relatively easy to do using an appropriate computer program. Much more difficult is decompilation. This is where object code is converted into its original form in a high-level language. For this to be feasible, the type and version of the high-level language in which the program was originally written must be known. Quite often the word decompilation is used to describe disassembly (in essence, the process is the same, retrieving a source code program from an object code version). Reverse analysis of computer programs is usually undertaken using a disassembler program.

Under certain circumstances, lawful users of computer program are permitted to decompile that program to achieve 'interoperability' with that or another computer program.

High-level programming language: a language that resembles natural language more closely than machine code (object code) or assembly language. High-level language is relatively remote from the machine language which can be directly 'understood' by the computer's central processing unit (processor). It is easier to write programs using a high-level language. However, for the program to operate, it must be converted permanently (compiled) or temporarily (interpreted) into machine code. Each statement in a high-level language corresponds to several statements in machine code. From reading a listing of a computer program written in a high-level language, it is possible to obtain a good insight into the ideas used and the program's algorithm. Examples of high-level languages are C++, Java, COBOL, BASIC, PASCAL and FORTRAN.

Ideas and principles: generally ideas and principles underlying computer programs and computer programming languages, as such, are not protected by copyright. Lawful users of computer programs are entitled to observe, study and test the operation of a computer program to determine those ideas and principles. This is in line with the general principle that copyright protects expressions of ideas rather than the ideas themselves.

Low-level programming language: (or assembly language) a language which is very close to the machine

code directly executable by the computer. Each statement is directly equivalent to a machine code operation. Assembly language is usually written using mnemonics and memory addresses. Programs written in low-level languages have the advantage of being faster than programs written in high-level languages.

Programming language: a set of words, letters and numbers which, according to the particular syntax of the language, describe a computer program, directly or indirectly, to a computer.

Object code: the machine code resulting from compiling a program written in a high-level language. Alternatively, it is produced by 'assembling' a program written in a low-level language. Object code is directly executable by a computer. Object code is not directly intelligible and must be converted by disassembly before it can be understood by humans. Most computer programs are marketed in object code form. It is processed faster and is far less easy to modify than a source code program.

Reverse analysis: this is the computer equivalent of reverse engineering. It is the process where a computer program is analysed by converting object code into assembly language or high-level language to determine features about the program. Reverse analysis can be used to discover interface details, that is information which will enable the writer of another program to make his program (or the files generated by his program) compatible with the other program. Reverse analysis can also be used to determine a program's algorithm and structure and to facilitate the writing of a program which will perform the same task. Hence, the scope and permissibility of reverse analysis are of utmost importance to the computer industry.

Source code: a program in a high-level language which must be converted into object code before it can be executed. *See also*, **object code**.

Internet terms and phrases

AdWord: keywords used by Google advertisers to increase the chances of links to their websites being listed following a search by users. Controversially, advertisers have used trade mark words belonging to other organisations as keywords. This has generated a significant amount of litigation. See Chapter 21 for examples.

Domain name: the unique name that is the address of a website or its URL (Uniform Resource Locator) that describes the location of the site. For example, the author of this book has a number of domain names, including <http://www.davidbainbridge.com>.

Electronic mail (e-mail): a system for sending mail electronically, via computer networks, anywhere in the world, almost instantaneously. Persons using electronic mail have their own e-mail address. This may be supplied by the person's employer or their Internet Service Provider (ISP).

HTML (Hypertext Markup Language): the language used to format content for display on a web Browser. It comprises a set of markers to indicate formatting of text and images, etc. and to link within a web page or to other web pages or other files.

For example, consider the phrase 'The cat sat on the mat'. To display the whole phrase centralised with the word 'cat' underlined and the word 'mat' emboldened, the HTML version would read as follows:

The CAT sat on the **mat**

Internet: a global system of linked telecommunications and computer networks which allows the sending of data or messages from one computer to another anywhere in the world.

Internet Service Provider (ISP): an organisation that provides its subscribers with access to the internet together with other services such as chat rooms, bulletin boards and hosting web pages. Injunctions may be available against ISPs requiring them to block access to material infringing copyright. They may also be required to collect data on and send reports on serial copyright infringers, thereby facilitating legal action against them.

Intranet: a computer network within a single organisation allowing for the transfer of data, e-mail messages and computer documents. For example, a company may have an intranet that serves the head office and all its branch offices, wherever physically located.

Search engine: a system for searching the World Wide Web for sites that best match the query entered by the user. For example, a user looking for websites relating to restaurants in Tewkesbury might enter 'Tewkesbury restaurants' which will return a list of links to eating places in and around Tewkesbury.

World Wide Web (WWW or the web): the collection of resources using the Hypertext Transfer Protocol (HTTP, a protocol of established rules for communication over the internet controlling the transfer of data and information).

Website: a specific location on the World Wide Web. It may contain numerous web pages that link together as well as links to other websites. A website may be controlled and managed by a company or other organisation or by a single individual. The author manages a village website at www.eckington.info.

List of bibliographic abbreviations

AC	Appeal Cases	F	Federal Reporter (US)
AIPC	Australian Intellectual Property Cases	FCA	Federal Court of Australia
All ER	All England Reports	FSR	Fleet Street Reports
ALR	Australian Law Reports	F Supp	Federal Supplement (US)
ATPR	Australian Trade Practices Cases	Godbolt	Godbolt's Reports
B & C	Barnewall and Cresswell's King's Bench Reports	Hare	Hare's Chancery Reports
BCLC	Butterworth's Company Law Cases	ICR	Industrial Cases Reports
Beav	Beavon's Reports	IIC	International Review of Industrial Property and Copyright Law
BGH	Bundesgerichtshof (Criminal)	IRLR	Industrial Relations Law Reports
BGHZ	Bundesgerichtshof (Civil)	JCPC	Judicial Committee of the Privy Council
Bro PC	Brown's Parliamentary Cases	Jur	The Jurists Report
Burr	Burrow's King's Bench Reports	KB	King's Bench
Ch	Chancery	LJ CH	Law Journal Reports (Chancery)
Ch App	Court of Appeal in Chancery	LT	Law Times Reports
Ch D	Chancery Division	Mac & G	Macnaghten and Gordon's Chancery Reports
CLSR	Computer Law and Security Report	MacG CC	MacGillivray's Copyright Cases
CMLR	Common Market Law Reports	MLR	Modern Law Review
Co Rep	Coke's Report	NSWLR	New South Wales Law Reports
CPC	Community Patent Convention	NZLR	New Zealand Law Reports
Cr App R	Criminal Appeal Reports	OJ	Official Journal of the European Communities
Crim LR	Criminal Law Review	OJ EPO	Official Journal of the European Patent Office
CTM	Community Trade Mark	P	Probate
De GJ & S	De Gex, Jones and Smith's Report	Pet	Peter's Supreme Court Reports (US)
ECC	European Commercial Cases	QB	Queen's Bench
ECDR	European Copyright and Design Reports	QBD	Queen's Bench Division
ECR	European Court Reports	RPC	Reports of Patent, Design and Trade Mark Cases
EHRR	European Human Rights Reports	Russ & M	Russell and Mylne's Chancery Reports
EIPR	European Intellectual Property Review	S Ct	Supreme Court
EMLR	Entertainment and Media Law Reports	SI	Statutory Instrument
ENPR	European National Patent Reports	Stra	Strange
EPO	European Patent Office	TLR	Times Law Reports
EPOR	European Patent Office Report	UKHL	House of Lords (United Kingdom)
Eq	Equity Cases	USC	United States Code
ETMR	European Trade Mark Reports	USPQ	United States Patents Quarterly
EWCA Civ	Court of Appeal, Civil Division (England and Wales)	WLR	Weekly Law Reports
EWHC	High Court (England and Wales) (with suffix as appropriate, eg (Ch) or (QB))	WPC	Webster's Patent Cases
EWPC	Patents County Court		

Law reports references, etc.

There have been some changes to the system of referencing for law reports and terminology, as described below. The Treaty on the Functioning of the European Union has replaced the EC Treaty and a table of equivalents is given at the end of this section.

References to law reports

Since the beginning of 2001, some (though by no means all) law reports references have changed their reference system to make them media neutral (particular examples are ETMR, FSR and RPC). The same applies to reports published by the Court Service. This means that a reference will be the same whether the report is published on paper or electronically and, importantly, reference can be made to a particular part in a judgment by paragraph number without using page numbers. Thus, cases in some series of law reports are numbered seriatim, rather than referring to the first page of the report, and a reference to a part of the judgment is made using the paragraph number.

For example, to refer to the case of *British Airways plc v Ryanair Ltd* at the point where Jacob J talks of the defendant's advertising as amounting to no more than 'vulgar abuse', the citation should be *British Airways plc v Ryanair Ltd* [2001] FSR 32 at para. 35. That case was the 32nd reported in the Fleet Street Reports for 2001 – in the report as published on paper, the reference would be [2001] FSR 541 at 554. In this edition of this book, the convention is to use media-neutral referencing, that is, by case number rather than the first page number of the case as printed in paper form. This practice accords with the referencing used by judges.

Availability of law reports and legislation

Apart from subscription services such as the Law Reports, the All ER, FSR, RPC and online subscription services such as LexisNexis and Westlaw, increasing numbers of the full text of judgments are available free of charge by online access. Appendix 2 indicates the website addresses where access to these may be made though at this stage it should be noted that BAILII (British and Irish Legal Information Institute) is particularly good and has a wealth of UK, Court of Justice and

General Court of the European Union and foreign cases available, usually uploaded soon after the judgment is available.

Judgments of the Court of Justice of the European Union and the General Court (formerly the Court of First Instance) are available from Europa Eur-Lex and Curia websites. Both give free access to the European Court Reports which may be accessed by means of the year and case number (for example, Year 2000 No 291 in the case of Eur-Lex) or case reference (for example, C-291/00 in the case of Curia). The latter is more up to date than the former but does not carry the ECR reference where available. Consequently, to assist readers in accessing these cases, the case number is given, as is the ECR reference. Many of the Court of Justice rulings and decisions of the General Court are also available in the conventional law reports. Although these have the advantage of a headnote and summary, as with national cases, students will be rewarded by studying the full text of the judgments.

Full text UK legislation is available freely at www.legislation.gov.uk. Care should be taken as not all the legislation is fully updated. European Union legislation is available from Europa Eur-Lex and the text of most of the international treaties and conventions is available at the WIPO website. The European Patent Office website gives access to the European Patent Convention and to cases before the Boards of Appeal. The Office for the Harmonisation of the Internal Market (Trade Marks and Designs) also carries decisions of the Divisions and Boards of Appeal.

Terminology

The changes in terminology resulting from the Civil Procedure Rules 1998 are used throughout this book. Verbatim quotations from older cases have not been modified. Thus a judge in an older case will refer to the plaintiff rather than the claimant. (Scotland and Northern Ireland are unaffected.)

The European Court of Justice is now known as the Court of Justice of the European Union (CJEU) and the Court of First Instance is now known as the General Court of the European Union.

Supreme Court, etc.

Note that there have been some changes to the names of the courts. The Supreme Court of England and Wales (Court of Appeal and High Court) is now known as the Senior Courts of England and Wales. Of course, the Court of Appeal (Civil and Criminal Divisions) and the High Court Divisions retain their previous names. The Appellate Committee of the House of Lords is now known as the United Kingdom Supreme Court. The establishment of the Supreme Court marks a constitutional significant change as the justices of that court are now independent of Government and Parliament.

The Treaty on the Functioning of the European Union

The Treaty on the Functioning of the European Union (TFEU) came into force on 1 December 2009 as a result of the Lisbon Treaty. The TFEU replaced the EC Treaty. References in this book are generally to the TFEU with cross-references to the EC Treaty as appropriate. In some cases a reference to the EC Treaty is retained, for example, where a decision of the Court of Justice of the European prior to the TFEU refers to the EC Treaty (again a cross-reference is given if needed for clarity).

The following table sets out the provisions of the TFEU referred to in this book with the equivalent numbering from the old EC Treaty.

<i>Provision</i>	<i>EC Treaty</i>	<i>TFEU</i>
No discrimination on the grounds of nationality	Art 12	Art 18
Quantitative restrictions on imports prohibited	Art 28	Art 34
Quantitative restrictions on exports prohibited	Art 29	Art 35
Exceptions justified on a number of grounds including the protection of industrial property	Art 30	Art 36
No restrictions on the freedom to provide services	Art 49	Art 56
Meaning of 'services'	Art 50	Art 57
Prohibition of anti-competitive agreements, etc.	Art 81	Art 101
Prohibition of abuses of dominant positions	Art 82	Art 102
Approximation of laws of Member States*	Arts 95–97	Arts 114–118
Preliminary rulings by the Court of Justice of the EU	Art 234	Art 267
Binding nature of Regulations, Directives, etc.	Art 249	Art 288
Treaties not to prejudice systems of property ownership	Art 295	Art 345

* The EC Treaty did not have an equivalent of Article 118 which concerned the establishment of EU-wide intellectual property rights (although, of course, the Community trade mark and Community design were previously in existence).

Part One

PRELIMINARY CONSIDERATIONS

1 Introduction to intellectual property rights 3

Introduction to intellectual property rights

1

This chapter looks at some of the basic principles underlying this area of law, examines the nature of intellectual property law and discusses some cross-cutting themes that transcend boundaries between individual forms of intellectual property rights. Some practical considerations are also dealt with briefly at this stage, such as the essential rationale for intellectual property and its importance in a commercial sense. Finally, the nature of the study of intellectual property is discussed. The purpose of this chapter is to give the reader a feel for intellectual property law and to introduce some of the important issues, laying the foundations for the more detailed study which follows.

What is intellectual property law?

Intellectual property law is that area of law which concerns legal rights associated with creative effort or commercial reputation and goodwill. The subject matter of intellectual property is very wide and includes literary and artistic works, films, computer programs, inventions, designs and marks used by traders for their goods or services. The law deters others from copying or taking unfair advantage of the work or reputation of another and provides remedies should this happen. There are several different forms of rights or areas of law giving rise to rights that together make up intellectual property. They are:

- copyright
- rights in performances
- the law of breach of confidence, especially with respect to technical and commercial information
- patents for inventions
- registered designs
- unregistered design rights
- trade marks
- passing off
- malicious falsehood (trade libel).

This list is not exhaustive and there are other rights, for example, the rights associated with plant and seed varieties protection, but these will not be dealt with in detail in this book.

Taxonomy of intellectual property rights

Obviously, there are many similarities and differences between the various rights that make up intellectual property law. For example, there is common ground between

patents and registered designs, as there is between copyright and rights in performances. Some rights give rise to monopolies, while others merely prevent the unfair use by others of an existing work or article. The various rights are not necessarily mutually exclusive and two or more of the rights can co-exist in relation to a certain 'thing'. Sometimes the rights will progressively give protection, one right taking over from another over a period of time during the development of an invention, design or work of copyright.

A practical distinction that can be used to subdivide the various rights is whether there is a requirement for registration; that is, whether the right is dependent upon the completion of formalities, or whether it automatically springs into life at a specified time. Another distinguishing feature is the nature of the right, whether it applies to something which is primarily creative or has to do with goodwill in a wide commercial sense. Creative things can be further subdivided into those that are creative in an artistic or aesthetic sense, such as an oil painting, music or literature, or those that are inventive in an industrial context, such as a new type of machine or engine, or a new way of making a particular product. Before looking further at each type of right, consider Table 1.1, which shows how, somewhat imperfectly, intellectual property rights conform to the above taxonomy. The word 'artistic' is used in an everyday and wide sense and should not be confused with the artistic category of copyright works where the word has a special significance.

Formalities

Some intellectual property rights, in respect of particular ideas, works or things, are secured by the successful completion of a formal application and registration procedure. The necessary formalities are not simply satisfied by depositing details with an appropriate authority because such rights are not granted lightly. They do, after all, put the owner of the right in a privileged position whereby he can restrain others from doing certain things while exploiting the right himself. The rights impinge upon the freedom of action of others. The owner has a form of property which he can use as he likes, subject to some constraints, and he can take legal action either to deter would-be trespassers or to obtain damages against those who have trespassed just as the owner of real property can do.¹

For those rights that require registration, the applicant will succeed in obtaining such registration only if certain rigorous standards are achieved.² The rationale for this is that rights subject to formalities are generally monopolistic in nature. Another distinction is between those rights that are provided for and governed by statute and those that derive

¹ This also extends to other persons having rights under intellectual property law such as an exclusive licensee of a copyright or patent, as it does to lessees and licensees of real property.

² However, the examination of trade mark and registered design applications has been relaxed. Patent applications remain subject to a rigorous search and examination process.

Table 1.1 Taxonomy of intellectual property

<i>Whether formalities required</i>	<i>Basic nature of right</i>	
	<i>Creative</i>	<i>Commercial reputation and goodwill</i>
	<i>Artistic</i>	<i>Industrial</i>
Formalities required	Patents Plant varieties	Registered trade marks
	Registered designs	
Formalities not required	Copyright Rights in performances Database right	Passing off Malicious falsehood
	Unregistered designs	
	Law of breach of confidence	

Table 1.2 Statutory and common law rights

<i>Statute</i>	<i>Common law (or equity)</i>
Copyright	Breach of confidence (equity)
Database right	Passing off
Rights in performances	Malicious falsehood
Patents	
Registered trade marks	
Registered designs	
Unregistered designs	
Plant varieties	

from the common law or equity (although the latter are given statutory recognition). There is no correlation between the need for formalities and whether the area of intellectual property law is rooted in statute, as a comparison of Table 1.1 and Table 1.2 shows.

Industrial property

Traditionally, a number of intellectual property rights were known collectively as industrial property. Such rights include patents, trade marks and designs. This description is used in the Paris Convention for the Protection of Industrial Property 1883. Included in this term by implication are the law of confidence³ and passing off. When other rights such as copyright and related rights (for example, rights in performances) are added to industrial property the phrase used to describe the entirety of rights is intellectual property and this has become the phrase normally used to describe these individual, and sometimes disparate, rights collectively. Significant moves have been made in terms of the international harmonisation of intellectual property law, but it should be remembered that the early development of copyright, patents and trade mark law in England set the mould that was largely adopted throughout the common law countries of the world. Even before the beginning of the twentieth century, international collaboration and cooperation was well under way, reflecting the worldwide importance of intellectual property.

Before discussing further the nature of intellectual property, it will be useful to describe briefly each right individually using non-technical language.

Copyright

Copyright is a property right which subsists (exists) in various ‘works’, for example literary works, artistic works, musical works, sound recordings, films and broadcasts. The author of a work is the person who creates it⁴ and he (or his employer) is normally the first owner of the copyright, which will last until 70 years after the author’s death or 50 years after it was created depending on the type of work.⁵ Copyright gives the owner the right to do certain things in relation to the work, which includes making a copy, broadcasting or giving a public performance. Anyone else who does any of these things (known as the acts restricted by copyright) without the permission of the owner, infringes copyright and may be subject to legal action taken by the owner for that infringement. Ownership of a copyright is alienable and it can be transferred to another or a licence may be granted by the owner to another, permitting him to do one or more specified acts with the work in question.

Copyright does not protect ideas, only the expression of an idea (that is, its tangible form), and others are free to create similar, or even identical,⁶ works as long as they do so independently and by their own efforts. In other words, copyright does not create a monopoly in a particular work.⁷ In addition, certain things may be done in relation to

³ Especially where the information is of a technical or commercial nature.

⁴ For some types of works, the author is the person by whom the arrangements necessary for the creation of the work are undertaken. Films are usually works of joint authorship, the authors being the principal director and the producer.

⁵ From the end of the calendar year during which the author died or the work was created, as appropriate. The 50-year period has been raised to 70 years for some forms of works.

⁶ For example, two photographers may independently take photographs of the same scene which when viewed alongside each other are virtually indistinguishable. Each will have their own copyright in their own photograph.

⁷ Except perhaps where the creator of the work is the only person with access to the contents or other material from which the work has been created.

a work of copyright without the permission of the copyright owner, such as making a copy of a work, for example for the purposes of non-commercial research, private study, criticism or review. Such acts are known as the ‘permitted acts’ and limit the scope of copyright protection. Copyright gives rise to three forms of rights:

- 1 the proprietary or economic rights in the work, for example the right to control copying;
- 2 moral rights which leave the author (or principal director of a film), who may no longer be the owner of the copyright, with some control over how the work is used or exploited in the future; and
- 3 an artist’s right to a royalty on the resale of his work.⁸

The author (or film director) has a right to be identified as such and has a right to object to a derogatory treatment of the work. The moral rights are independent of the economic rights and hence the importance of the distinction between the author of a work and the owner of the copyright subsisting in it. There are some forms of infringement which can be grouped together as being of a commercial nature, such as importing or dealing with infringing copies, that carry criminal penalties.

International protection of copyright works is effected mainly through two international conventions: the Berne Convention for the Protection of Literary and Artistic Works 1886 and the Universal Copyright Convention 1952, both of which lay down minimum standards of protection to be attained and for reciprocity of protection between those countries that are signatories to the conventions. The conventions have been partly responsible for the measure of harmony that now exists on the world stage, albeit far from complete. The effect is that a foreign national can take legal action in the UK for copyright infringement occurring there as if he was a British subject.⁹ The UK is a member of both conventions. Further and significant harmonisation has taken place throughout the European Union as a result of a number of harmonising Directives.

Rights in performances

Live performances give rise to two different sets of rights: the rights of performers and recording rights. Formerly, a performer only had one type of right not dissimilar to the author’s moral right in copyright, whilst persons with whom the performer had an exclusive recording contract acquired a right similar to the copyright owner’s economic right. However, as a result of the Copyright and Related Rights Regulations 1996,¹⁰ bolstered by the Copyright and Related Rights Regulations 2003,¹¹ the performer now also has a true property right relating to making copies, the issue of copies and the rental and lending of recordings of his performance. Being property rights, these rights may be assigned or licensed. Performers now also have express moral rights to be identified as the performer and to object to a derogatory treatment of their performances.¹²

The need for specific rights in live performances is that they give the performer, and the person having exclusive recording rights, a means of protecting live performances from persons making illicit (‘bootleg’) recordings of such performances.¹³ Of course, the work being performed may be protected by copyright, but the copyright owner may not wish to take action. These rights are directly enforceable by the performer and the recording company. In some cases, the work on which the performance is based may be an old work in which copyright no longer subsists, such as an operatic aria by Mozart. Rights in performances are not restricted to music and are available in respect of a dramatic performance, the reading or recital of a literary work and the performance of a variety act such as by a juggler.

Rights in performances last for 50 years from the end of the calendar year during which the performance took place.¹⁴ Where a sound recording of a performance is published commercially and is played in public or included in a broadcast or cable programme

⁸ This right was introduced in the UK in 2006 as a result of an EU Directive. It is described in Chapter 5 on authors’ rights.

⁹ *Hanfstaengl v Empire Palace* [1894] 2 Ch 1. All three judges in the Court of Appeal commented on this then novel state of affairs. For a list of countries afforded reciprocal protection see the Copyright and Performances (Application to Other Countries) Order 2008, SI 2008/677, amended to include Bermuda by the Copyright and Performances (Application to Other Countries) (Amendment) Order 2009, SI 2009/2745.

¹⁰ SI 1996/2967.

¹¹ SI 2003/2498.

¹² By virtue of the Performances (Moral Rights) Regulations 2006, SI 2006/18.

¹³ Bootleg recordings of performances by Phil Collins and Cliff Richard were the subject of a case before the European Court of Justice in which it was held that German copyright law was contrary to Article 12 of the EC Treaty (now Article 18 of the Treaty on the Functioning of the European Union) in that it discriminated against non-German nationals: *Joined Cases C-92/92 and C-326/92 Collins v Imtrat Handelsgesellschaft mbH* [1993] ECR I-5145, [1994] FSR 166.

¹⁴ Unless within that 50 years it was ‘released’, in which case the rights last for 50 years from the end of the calendar year when it was so released.