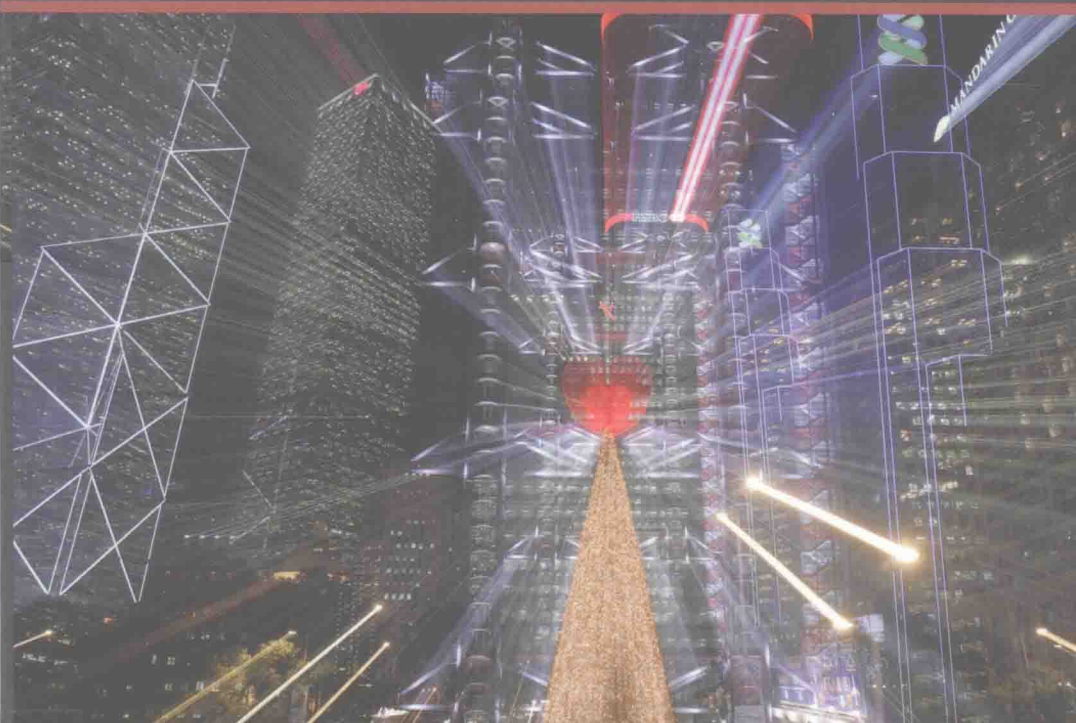


CORNISH, LLEWELYN & APLIN

INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS

EIGHTH EDITION

W. CORNISH, D. LLEWELYN AND T. APLIN



SWEET & MAXWELL

Classics Series

Intellectual Property

Patents, Copyright, Trade Marks and Allied Rights

Eighth Edition

WILLIAM CORNISH

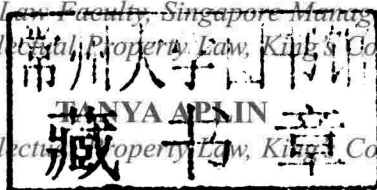
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Intellectual Property

Patents, Copyright, Trade Marks and Allied
Rights

Eighth Edition

Preface to the Eighth Edition

This textbook first appeared in 1981, when the teaching of intellectual property law in universities in Britain and other common law jurisdictions was for the most part simply ignored. The book was designed for postgraduate students and lawyers who wanted to get some grip on the subject and took as its premise the idea that the various branches of the subject shared enough ground to make discussion of them in a single volume a desirable aim. Its content has continued to be an account of the rules applicable in the jurisdictions of the United Kingdom, which are set in a framework discussing their evolution and policy objectives. Its focus is mainly on the substantive law rather than the niceties of practice, important though procedures are in protecting rights over non-material subject-matter. There is a lot of ground to cover and so our treatment involves a considerable measure of generalisation. While it provides detailed reference to the major provisions in the legislation and case-law it also indicates other sources where subjects are expanded at greater leisure.

This is the second edition on which the three current authors have worked together. Our collaboration has made it possible to bring out the present edition only three years after the previous one. There has been a constant stream of new material and it has required quite some ingenuity to adapt the text so that it reflects the changes. Our objective has been to cover each subject to the end of 2012. We have also been able to say something about major developments in the first months of 2013.

The subject used to be regarded by most judges, lawyers, industrialists, politicians, journalists, civil servants and individual inventors and creators as a recondite specialism that was best left to small bands of people who knew what it was about. Today it is too important and too controversial for such casualness to pass muster. The reach of the various types of protection—by patents, copyright, trademarks and so on—has expanded, and at the same time the relevant law has become far more complex than before. Legislation—primary and secondary—judders forth relentlessly. The decisions of courts spread their reach, not least because specialist series of law reports have germinated massively in number and their publishers and editors jostle for market share by including decisions that involve only the application of established law to particular situations.

Today UK intellectual property has to be surveyed at the levels of purely national law, European Union and other law and international law. Over the last four decades, the Europeanisation of IP law has been striking. Not least remarkable has been the active pursuit by the institutions of the European Union of rights that extend to the whole Internal Market, and at the same time the

harmonisation of national law that will give rights within the geographical scope of each Member State of the EU. Yet it has only been under the Lisbon Treaty of 2009 that this drive has had a clear constitutional foundation—that provided by art.118 of the Treaty on the Functioning of the European Union. Evolving operative legal rules from the legal and administrative experience of European states has involved many compromises, and some of them are ripe for reconsideration, according to significant interest groups. Yet what has emerged in Europe so far has provided a model for legislation in the field across the globe. Since most countries around the world are members of the World Trade Organisation, and are obliged therefore to comply with the high-level standards of its Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPs), the European models have had a timely importance.

The case for a Community right covering the territories of the Union that for decades seemed politically intractable concerned the patent system. However, as 2013 burst upon us, two Regulations from the European Union were enacted alongside the signing of an Agreement on jurisdiction between most EU Member States. Together these laid the foundations for a Unitary EU patent, granted through the existing law and procedure of the European Patent Convention and enforceable solely in a Unified Patent Court. Much about this scheme is still left for further negotiation and decision, notably the rules of procedure for the Unified PC and the fees and costs for litigating in this novel jurisdiction. Even in what has now become law through these moves there are serious questions to be adumbrated. As we note in Chapter 3, there is evidence of sleight-of-hand in a measure clearly designed to impose major limitations upon references to the EU Court of Justice concerning the interpretation of the substantive patent law, as distinct from general questions of EU law. Spain has instituted proceedings which are set to raise issues about the competence of the EU Council and Parliament to enact the two Regulations that provide some of the foundations of the proposed system. If the present scheme does survive that challenge, patents with territorial effect throughout the participating Member States will be granted and subsequently enforced by single procedures. How far this will attract applicants will depend on numerous factors, which call for comparison with the present national and European grant systems. No simple prediction can at this stage be made, not least because so much detail about how the new system will work is still to be settled. The development of the regulatory schema so far suggests that it is the largest change in policy to find its way into the present edition of this book. But who knows?

In the field of copyright and related rights, the influence of Europe has become even more pronounced, in part through the introduction of new directives dealing with orphan works and term extension, but more fundamentally through a rising tide of references to the CJEU. The reach of the Orphan Works Directive is limited to public libraries, museums and educational establishments, thus leaving Member States to decide how best to deal with the creation of digital libraries by private commercial entities. The Term Extension Directive, after a long and bitter struggle, was finally adopted (albeit with some compromises) and sees performers and sound recording producers receive an additional twenty years protection with questionable corresponding benefit to society. The Commission,

which has long had in its sights the regulation of collecting societies, has issued a Proposed Directive on collective management that seeks to ensure that Member States apply a consistent set of rules to the functioning and governance of collective societies. This directive, too, is likely to get bogged down in a protracted struggle and, if eventually adopted, may be diluted by compromise.

Meanwhile, the CJEU has issued a substantial number of rulings across a wide range of copyright and related rights areas, including: originality, authorship, ownership, exclusive rights, exceptions (in particular private use), software, databases and injunctive relief against ISPs whose services are used by infringers. There have been two noticeable tendencies in the court's rulings: a superficial reliance on human rights (inspired no doubt by the EU Charter of Fundamental Rights) and eagerness towards greater harmonisation. It thus seems increasingly likely that we will see moves towards codification of copyright and related rights in the future.

At a national level, English courts have done their best to integrate the expanding EU jurisprudence into the domestic copyright framework; however, their task has been made all the harder by the UK's past, minimalist approach to implementation of EU copyright directives. Reform of exceptions and limitations, on the agenda since the Gowers Report, has gained impetus since the Hargreaves Review and a fairly ambitious set of proposals is currently planned by the government. If adopted, existing exceptions will be amended to better suit the digital environment and new exceptions—for parody, limited private use, quotation and text and data mining—will be introduced.

Concerning designs, the CJEU has clarified the attributes of the notional informed user, as well as the relationship between validity requirements and infringement provisions. However, the copyright/design interface has been thrown into disarray by the CJEU ruling in *Flos v Semeraro*; the UK's response, which is to delete s.52 of the CDPA, is overly cautious and highly problematic. The UK government is also consulting on reform of UK designs law in order to align it better with EU law. The proposed reforms, however, are more by way of tinkering around the edges than a radical rethink (e.g. by doing away with the UK unregistered design right).

As to the ever-burgeoning law on trade marks and unfair competition, the flood of cases before national and EU courts has continued unabated since the last edition. The CJEU has tried valiantly to give guidance to national courts. Occasionally this has been a success, but more frequently the result has been even more confusion and complexity. What is clear is that trade marks have become much easier, and cheaper, to obtain (and maintain) and the scope of protection has expanded considerably. There are growing signs of disquiet at the profusion of trade marks and their capacity to derail what most neutral observers would regard as legitimate competition.

W.R.Cornish

D. Llewelyn

T. Aplin

April, 2013

Table of Abbreviations

1. General

Cornish Oxford History	W. Cornish in Cornish et al., <i>Oxford History of the Laws of England</i> , 1802-1914, Vol.XIII, Pt V
Derclaye and Leistner	E. Derclaye and M. Leistner, <i>Intellectual Property Overlaps</i> (2011)
EMLR	Entertainment & Media Law Reports
EIPR	European Intellectual Property Reports
FSR	Fleet Street (IP) Law Reports
Gowers Review	A. Gowers, <i>Review of Intellectual Property</i> (2006)
Hargreaves Review	I. Hargreaves, <i>Digital Opportunity: A Review of Intellectual Property and Growth</i> (2011)
IIC	International Review of Intellectual Property and Competition Law
IPQ	Intellectual Property Quarterly
JIPLP	Journal of Intellectual Property Law and Practice
Ng, Bently and D'Agostino	C. Ng, L. Bently and G. D'Agostino (eds), <i>The Common Law of Intellectual Property</i> (2010)

OHIM	Office for the Harmonisation of the Internal Market (Trade Marks and Designs)
PIP	Paris Convention for the Protection of Industrial Property
Sherman and Bently	B. Sherman and L. Bently, <i>The Marking of Modern Intellectual Property Law</i> (1998)
TEU	Treaty of European Union, Lisbon 2007
TFEU	Treaty on the Functioning of the European Union 2007
TRIPS	Agreement on Trade-Related Intellectual Property Rights including Trade in Counterfeit Goods 2004
UK IPO	Intellectual Property Office of the United Kingdom
UNCTAD	United Nations Conference on Trade and Development
Vaver and Bently	D. Vaver and L. Bently (eds), <i>Intellectual Property in the New Millenium</i> (2004)
Wilkof and Basheer	N. Wilkof and S. Basheer (eds), <i>Overlapping Intellectual Property Rights</i> (2012)
WIPO	World Intellectual Property Organisation
WTO	World Trade Organisation
2. Patents	
A. Benyamini	<i>Patent Infringement in the European Community</i> (1993)

CIPA Guide	P.G. Cole, <i>CIPA Guide to the Patents Acts</i> (7th edn, 2011)
CIPA	CIPA—Journal of the Chartered Institute of Patent Agents
CPC	Community Patent Convention 1975
Ency. PL	F. Clark, W. R. Cornish, G. Hamer, T. Moody-Stewart, C. May, <i>Encyclopedia of United Kingdom and European Patent Law</i>
ENPL	European National Patents Reports
EPC	European Patent Convention 1973
EPO	European Patent Office
EPO Guidelines	EPO Examination Guidelines (2012)
EPOR	European Patent Office Reports
OJ EPO	Official Journal of the EPO
PA 1977	Patents Act 1977
PCT	Patent Co-operation Treaty 1970
Sherman and Bently	Making not Marking
Singer	R. Singer, M. Singer and D Stauder, <i>The European Patent Convention</i> (2nd English edn, 2003; 5th German edn, 2013)
SPC	Supplementary Protection Certificate
Terrell	R Miller et al., <i>Terrell on the Law of Patents</i> (17th edn, 2011)

UPC Agreement	Unified Patent Court Agreement
UPOV Convention	Convention for the Protection of New Varieties of Plants
3. Confidence and Privacy	
Gurry	T. Aplin, L. Bently, P. Johnson and S. Malynicz, <i>Gurry on Breach of Confidence</i> (2nd edn, 2012)
4. Copyright and Designs	
BerneC	Berne Convention for the Protection of Literary and Artistic Works
CA 1956	Copyright Act 1956
CDPA 1988	Copyright, Designs and Patents Act 1988
Copinger	K. Garnett, G. Davies and G. Harbottle (eds), <i>Copinger and Skone James on Copyright</i> (16th edn, 2010)
ECDR	European Copyright and Designs Reports
EURD	EU Registered Design
Laddie et al	Sir H. Laddie, P. Prescott, M. Vitoria, A. Speck, L. Lane, <i>The Modern Law of Copyright and Designs</i> (4th edn, 2011)
Modernising Copyright Report	UK IPO, <i>Modernising Copyright: a modern, robust and flexible framework</i> (2012)
PLR Scheme	Public Lending Right Scheme
PLRA 1979	Public Lending Right Act 1979
PRT	Performing Right Tribunal

RDA	Registered Designs Act 1949
Ricketson and Ginsburg	S. Ricketson and J. Ginsburg, <i>International Copyright and Neighbouring Rights</i> (2nd edn, 2005)
Rome Convention	Rome Convention for the Protection of Performers, Phonograms and Broadcasting Organisations of 1961
Russell-Clarke	<i>Russell-Clarke and Howe on Industrial Designs</i> (8th edn, 2010)
Sherman and Wiseman	B. Sherman and L. Wiseman (eds), <i>Copyright and the Challenge of the New</i> (2012)
UCC	Universal Copyright Convention 1952
UDR	Unregistered Design Right (UK or EU)
UK Designs Reform	UK IPO, <i>Consultation on the Reform of the UK Designs Legal Framework</i> (2012)
5. Trade Marks and Names	
ETMR	European Trade Mark Reports
EUTM	EU Trade Mark
EUTM Reg.	EU Trade Mark Regulation 40/94/EC
Kerly	Sir D. Kitchen, D. Llewelyn et al., (eds), <i>Kerly's Law of Trade Marks and Trade Names</i> (15th edn, 2011)
Madrid Agreement/Protocol	Madrid Agreement Concerning the International Registration of Marks/Protocol thereto

TMA 1994

Trade Marks Act 1994

TM Dir

First Directive on the Approximation of Trade
Mark Laws (89/104/EEC)

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A v B Plc sub nom. B and C v A; A v B (A Firm) [2002] EWCA Civ 337; [2002] 2 All E.R. 545; [2003] Q.B. 195; [2002] E.M.L.R. 21; (2002) 152 N.L.J. 434; (2002) 146 S.J.L.B. 77	2-31, 8-44, 9-03, 9-06, 9-16, 9-20, 9-21, 9-23
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