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# PATENTS, TRADE MARKS, COPYRIGHT AND INDUSTRIAL DESIGNS

T. A. BLANCO WHITE, ROBIN JACOB
and JEREMY D. DAVIES

**SECOND EDITION**

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&
MAXWELL

CONCISE COLLEGE TEXTS

# PATENTS, TRADE MARKS, COPYRIGHT AND INDUSTRIAL DESIGNS

SECOND EDITION

BY

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## PREFACE TO THE SECOND EDITION

A lot has happened, in the field covered by this book, since the last edition, and much has had to be re-written. The main change is in the law of patents, where the Patents Act 1977 has changed almost everything. Here, a warning is called for. Our publishers felt that this book would be more use if it was produced at once, as soon as the new Patents Act was passed, than if we waited to see how the thing developed. So we have had to do quite a lot of guessing. We guessed that the Act would actually come into force on January 1, 1978: it now looks like June (or August) and when we refer to "old" patents, we mean patents applied for before that date. We have had to guess what some of the Rules under the Act will say. Above all, we have had to guess what the new Act means: it is an almost unbelievably badly constructed Act, and time and again poses problems for the reader, as to what if anything those responsible were trying to say, that only years of judicial decisions can settle. In bigger books than this, it is possible to explain the difficulties and discuss the various possible meanings; we have had to guess what the courts were likely to say. Broadly speaking, though, this little book should not be far wrong.

We hope this book will be published before the new Patents Act comes into force. Nevertheless, we have written it as if the new law were already applied, with notes (mostly at the ends of chapters) as to differences in the law as it now stands. What is more, we had actually to write it before the last lot of amendments had been made; and not everything amended could be changed in proof. The following points call for comment here:

1. References throughout to "the end of 1977" or "the beginning of 1978" should now be read as referring to the date some time in mid-1978 when the new Act comes into force. This applies particularly to pages 17, 18, 30 and 52.

2. The old British law of infringement will apply to acts done before that date and may apply to all infringements of "old" patents before or after that date; not only in cases started before then, as stated on page 18.

3. There are no longer any grounds of invalidity which affect



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existing disputes only (see p. 29). In addition, certain grounds of invalidity, which were to have been abolished entirely, and were therefore not mentioned in this work, are now to be retained for "old" patents only. The most significant of these are:

(1) *Inutility*: that the invention does not do what the patentee says it will.

(2) *No fair basis*: that the claims are not supported by the description, and especially that they are too wide.

(3) *False suggestion*: that the application or the specification contained a false statement on some essential point.

(4) *Not best method*: that the patentee failed to disclose the best method known to him of working the invention.

There are other grounds which are of negligible practical importance.

4. Not all existing patents are extended to 20 years (p. 30). The transitional provisions separate existing patents into two categories: "New existing patents" are those which were granted less than 11 years before the appointed day (since about mid-1967); these are automatically extended to 20 years. "Old existing patents," granted before mid-1967, will expire after 16 years, but may be extended for up to four years on the ground that the patentee ought to have made more out of them than he has. If the application for extension is made before the new Act comes into force, an extension of up to 10 years is possible.

5. The new rule in relation to the costs of an action for a declaration of non-infringement (p. 51) may or may not apply to actions relating to old patents. The same applies to the rule that a threat against a manufacturer is not actionable.

T. A. B. W.<br>
R. J.<br>
J. D. D.

The Temple,<br>
*November*, 1977

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# PART I

# INTRODUCTION

## 1

## IMITATIONS AND REMEDIES

### IMITATIONS

THE subject of this book is the law of commercial and industrial imitation: imitation by one manufacturer of another's products, imitation by one trader of the names and badges by which another's goods or business are known.

**Overlap of the types of imitation**

In law, these two varieties of imitation are best treated as distinct; in practice, they overlap. For one thing, the imitation of a rival manufacturer's goods often depends for its profitability on being able to tell customers that this is an imitation of something they will have heard of; people are usually willing to pay more for products they have heard of. For another, where imitation of goods is close enough for the imitation to look like the original, the similarity of appearance is usually itself enough to suggest to customers knowing the one product that the other is really the same thing. Again, in these days of advertising, it is often more important that a product should be convincingly advertised than that it should work well; and it may be that the main reason for wanting a product to be different from its rivals is to make it easier to advertise that product as being different.

**The commercial use of legal rights**

One result of this sort of overlap is that the various legal rights with which this book is concerned are by no means always used for the purposes that the law supposes them to serve. In legal theory, a patent—and much of this book is concerned with patents—should normally be reckoned as valueless unless it enables its owner to secure an order from the courts forbidding a competitor to make or sell something that competitor would otherwise want to put on the market.

To some businesses, that is indeed the purpose of patents. To others, however, the mere possession of a patent, however rubbishy to the lawyer's mind, may be of real value for advertising purposes. Others again treat patents merely as cards in complicated games of business politics that no lawyer understands. Industrial designs, on the other hand, are given protection, in theory, to protect the work of the designer—to protect the artistic element in manufacture. In many cases, however, the main value of design protection is to supplement the manufacturer's trade marks by securing to him exclusive rights in the " get-up " of his goods—a function that, in legal theory, belongs rather to the law of passing-off. Again: copyright is mainly concerned with the way ideas are expressed and its primary function is to enable authors, composers and so on to make some sort of living from their work—to protect a special sort of product of a special sort of manufacturer. But industrial designs are very often closely related to copyright works—drawings or models—so that copyrights are likely to be the main obstacles to the copying of an industrial design. There is a special registration system for industrial designs, but it is not much used, and we shall not devote much space to it. (Parliament has unfortunately called the right given by registration of an industrial design " copyright " too, but to avoid confusion we shall use the word " copyright " for copyright proper only: *i.e.* for the rights given under the Copyright Act 1956.) In addition, such things as the instruction leaflet for a new gadget are usually copyright, and these copyrights are sometimes important.

**The scheme of this book**

For reasons of convenience in exposition, this book is divided into sections broadly along the lines drawn by the Acts of Parliament dealing with these branches of the law. The basic division is into three parts: the first part is concerned with the copying of the product and deals mainly with the law of patents and of industrial designs; the second part is concerned with the way things are sold and deals mainly with the law of passing-off, trade marks and other rules preventing unfair competition or unfair selling techniques; and the third part deals with the law of copyright (apart from its use to protect industrial designs) and the law of confidential information.

Enough has been said, however, to make it clear that the division is merely a matter of convenience; any commercial problem must be treated as a whole, and commercial

disputes often enough cut across these lines. It is indeed one of the functions of a book of this sort to show the interrelations between these different subjects, in a way that more specialised works cannot easily do.

## Remedies

### " Exclusive rights "

Most of the legal rights with which this book is concerned are rights to stop other people doing things. For some reason, Acts of Parliament do not put it like that: thus the proprietor of a registered industrial design is said by the Act to have " the exclusive right " to do certain things with the design, and the other rights here concerned are expressed in similar language. But what is meant is, not that the owner of the design, or patent, or copyright concerned has by that ownership the right to do anything he could not otherwise do, but that he has the right—subject to questions of validity—to decide whether other people shall be permitted to do certain things or not. This point is worth emphasising, because the position is too often not understood. In particular, many if not most of the people who take the trouble to secure patents for inventions believe that, somehow, possession of the patent secures to them the right to manufacture their inventions without interference. It does nothing of the sort: the thing such an inventor wants to manufacture may well incorporate other people's patented inventions, and the only way the inventor can be sure that he has the right to manufacture is by searching to find what patents other people have. His own patent gives him (if it is valid, and his specification is properly drawn up—points discussed later in this book) the right to stop other people using the particular device that is the subject of the patent—and gives him nothing else. In principle, the position is much the same with the other rights considered in this book, although ownership of a registered trade mark, exceptionally, gives a limited freedom from infringement of other people's trade marks.

### Other rights

This book also deals with certain rights which are rather different from the above described rights to stop infringement: in particular it deals with forms of passing-off and the like which are different in nature; and it deals also with certain other parts of the law—such as the prevention of the misuse of confidential information and the action to

prevent threats of patent litigation. By and large, what is said below about litigation applies in these cases too, although prosecutions to prevent and punish the use of false trade descriptions are different because such use is criminal in nature.

**Infringement**

Since most of the various rights here discussed are similar in nature, they are enforced in essentially the same way—by an action in the courts (in England, normally in the High Court) for "infringement" of the right. The real point of most such actions is, that in this law-abiding country, once the owner of the right has made it clear that he insists on his right, and once the court has declared that the right exists, few business men will want to argue the point any further. Although the owner of the right usually asks for, and usually gets (if he wins his action) an injunction against further infringement—a formal order, that is, from the court to the infringer, forbidding infringement for the future—it is the decision that really matters, not the formal order. Indeed, such an order is so rarely disobeyed in commercial cases (where the defendant is almost always a company) that no really effective method of dealing with real disobedience has ever been worked out. In practice the thing to do against individuals who are determined infringers is to sue not only any companies which are controlled by them which are infringing for the time being, but also the individuals themselves. This prevents these individuals from forming new companies for the purpose of infringing—disobedience of an injunction by an individual means, ultimately, imprisonment.

**When to sue**

Such an action for infringement can be brought either when infringement has already started, or at an earlier stage, when infringement is threatened; in general, the law allows one whose rights are infringed to choose when to sue. If infringement has already taken place, a successful plaintiff will be entitled to damages for what has already occurred as well as to an order for the future, and to an order that any goods or materials whose use would infringe his rights be delivered up to him or rendered innocuous. In many cases, he can instead of damages claim to have paid over to him the profits the infringer has made from his infringement. However, litigation in England is expensive, and although the losing party will be ordered to pay the winner's costs,



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