

THE LAW
OF
PASSING-OFF

UNFAIR COMPETITION
BY MISREPRESENTATION

Christopher Wadlow

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THE
LAW OF
PASSING-OFF

UNFAIR COMPETITION BY
MISREPRESENTATION

BY

CHRISTOPHER WADLOW

SOLICITOR
SIMMONS & SIMMONS
LONDON

THIRD EDITION

LONDON
SWEET & MAXWELL
2004

First Edition published 1990
Second Edition published 1995

Published in 2004 by
Sweet & Maxwell Limited of
100 Avenue Road
London NW3 3PF
Typeset by YHT Ltd,
1 The Avenue
West Ealing
W13 8NT
Printed and bound in Great Britain
by William Clowes Ltd,
Beccles, Suffolk NR34 9QE

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make this product: only farmed timber
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ISBN 0 421 789204
A CIP catalogue record for this book is
available from the British Library

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PREFACE

In this third edition, the *Law of Passing-off* gains a new subtitle and two major extensions to its coverage. Though the term “passing-off” is familiar enough, it is something of a misnomer. It understates the full extent and importance of the tort, and baffles all but specialists. In the Civil law “unfair competition” has long been recognised as a subject of major importance in its own right, and even in England the phrase is increasingly accepted either as a synonym for passing-off, or as an all-embracing term for that and related causes of action, of which the natural counterpart to passing-off is injurious falsehood. This edition is therefore better described as the *Law of Unfair Competition by Misrepresentation*.

The present edition includes for the first time a chapter on the international law of unfair competition under the Paris Convention for the Protection of Industrial Property, with a detailed account of the drafting and negotiating history of Article 10bis of the latter. As related but logically separated developments, there are new sections on the possible impact of the European Convention on Human Rights, the WTO TRIPs Agreement, and on unfair competition in private international law. Although the Paris Convention does not directly affect day-to-day practice it does provide the only international consensus against which national laws of unfair competition may be compared, and any future efforts at harmonisation by the European Community can hardly fail to take it as their starting point. The Community has so far concentrated on consumer protection law rather than unfair competition, but it is not too early for common lawyers to give thought to whether domestic law complies with Paris Convention norms, and to see what can be done, absent legislation, to bring it into conformity where it might be thought to depart. The present edition is to some extent pre-emptive of what can be expected to come.

The three specific categories of misrepresentation which the Paris Convention addresses as unfair competition correspond respectively to classic passing-off, trade libel, and various misdescriptions which are civilly actionable, if at all, under one of the extended forms of passing-off. For this reason, as well as for its affinity with passing-off, I have included in the

present edition a treatment of the law of injurious falsehood, principally as it applies between competitors, but drawing on cases between non-competitors where matters of principle are concerned. Injurious falsehood has historically been of secondary importance, but the past decade or so has produced a significant number of decided cases, some dealing specifically with competitive situations such as comparative advertising, while others far removed from commercial competition have important implications for the law in its wider aspects. I have endeavoured to deal with injurious falsehood to the same standard as for passing-off, and with the ultimate aim of presenting an integrated treatment of the two if or when they converge sufficiently.

In addition to these major developments, there has been a steady stream of decided cases from the United Kingdom courts and the major common law jurisdictions—some dealing with issues which could hardly have been anticipated even as recently as the last edition, such as domain names; some restating old principles anew or applying them to new situations; and some requiring my former understanding of the law to be reconsidered, and corresponding sections rewritten. In the result, this edition is approximately 40% longer than the second, despite pruning material which has become obsolete or been superceded. A few decisions might even be thought unduly reactionary, and I have generally been more cautious than in previous editions in predicting how the law might develop in the future.

It is noticeable that many more passing-off cases are going to trial or summary judgment than a decade ago, so that complicated legal issues may now require and receive much more thorough consideration than was usual when most actions were decided on applications for interim injunctions, and *American Cyanamid* prevailed. There is certainly no sign of passing-off being eclipsed by the registered trade mark system, and the Court of Appeal was kind enough to pronounce on the interpretation of my favourite statutory provision just one day before the cut-off date for the present edition: the Trade Marks Act 1994, s.2(2) means precisely what it says: “nothing in this Act affects the law relating to passing off”.

Once again, I am immeasurably grateful to Simmons & Simmons, and especially to Kevin Mooney, for their continuing support.

I have endeavoured to state the law at July 31, 2003.

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PLAN OF THE BOOK

New in the present edition

The present edition includes for the first time a treatment of the tort of injurious falsehood in a competitive or near-competitive context. Where possible, this is integrated with the treatment of passing-off so that although there is one whole chapter (chapter 6) devoted to matters of principle which arise in injurious falsehood alone, examples of misrepresentations of both kinds are included in chapter 7 under the title “actionable misrepresentations”.

The other major innovation of the present edition is its treatment of unfair competition in international law. A new chapter (chapter 2) deals with the unfair competition provisions of the Paris Convention for the Protection of Industrial Property and the extent to which the subject matter of the present work might be affected by TRIPs. There are also new sections on human rights, in chapter 9, and on unfair competition in private international law in chapter 10.

The book and its coverage

The basic plan of the book is carried over from previous editions, but two chapters are entirely new and others are renumbered, extended, or reordered internally. So far as passing-off is concerned, the structure continues to be defined by the “Classical Trinity” of goodwill, damage and misrepresentation. Each of these three essential elements receives at least one chapter to itself. However, the decided cases do not deal in anything like equal proportion with the theoretical issues into which passing-off may be resolved. The length of the treatment given to each issue has to take into account the size of the relevant body of law and the numerous subsidiary rules, presumptions, exceptions, and even inconsistencies which have evolved. In the case of the element of misrepresentation, this means that three chapters are required for its treatment in passing-off, moving progressively from general principles, through the intermediate level of actionable misrepresentations,

to the one particular way in which the most common kind of misrepresentation is most typically made, which is by imitation of the claimant's distinctive sign.

Injurious falsehood also has a Trinity of its own, namely misrepresentation, malice, and damage; but the tort is less important than passing-off by at least an order of magnitude, and the body of decided cases is very much smaller. Malice and other matters which have no direct counterpart in passing-off are dealt with in a chapter (chapter 6) entirely devoted to injurious falsehood, but tracking so far as possible the structure of the corresponding chapter for passing-off, while examples of potentially actionable misrepresentations of every kind are included in a single chapter regardless of whether they are currently thought to constitute passing-off, injurious falsehood, both, or neither. Elsewhere, matters primarily or wholly relevant to injurious falsehood alone have been incorporated at appropriate places within the existing structure.

With peripheral and mostly obvious exceptions, the treatment of the substantive law of unfair competition by misrepresentation in the present work is entirely concerned with the common law torts of passing-off and injurious falsehood. In these two fields the common law is rightly assumed, with surprisingly few necessary provisos, to be essentially uniform no matter wherever it may find itself applied, and by whomsoever it may be expounded. Extensive reference is therefore made, generally without further explanation or qualification, to the decisions of courts in the major common law jurisdictions other than the United Kingdom. Conversely, other bodies of law which may be relevant in specific instances, such as the other common law economic torts, defamation, and the statutory or European regimes for registered trade marks, geographical indications trade descriptions and misleading advertising, receive only peripheral mention. Readers are referred to the appropriate specialist texts.

In the case of trade mark law it would be perverse or impossible to exclude from consideration the many decided cases in which passing-off and trade mark infringement have both played a role, but the present work attempts to describe the law of passing-off in its own terms and almost entirely in reliance on decisions in cases where passing-off was the major issue or one of them, rather than by analogy with the parallel but distinct body of case law on registered trade marks. Likewise, injurious falsehood is treated as far as possible either as a topic in its own right, or as a practical counterpart to passing-off, but never as a distant relative of defamation in the sense of libel and slander.

Passing-off, injurious falsehood, and “unfair competition”

Section A of chapter 1 begins the book with the question of whether “unfair competition” deserves to supercede “passing-off”, either as a synonym, or as a more widely embracing term. There follows an overview of passing-off in section B in terms of its “Classical Trinity” of goodwill, misrepresentation and damage, with judicial definitions or summaries of passing-off from some of the leading cases. A corresponding overview of injurious falsehood

in terms of misrepresentation, malice and damage follows in section C. Section D provides an extended history of the development of the law, and section E revisits passing-off in its context as a common law tort of unfair competition.

New chapter 2 describes the treatment of unfair competition in international law. Section A distinguishes between the role of international law as defining substantive obligations on states, considered in the present chapter but not yet directly affecting day-to-day practice, and its adjectival effects on defences and enforcement, which are considered at appropriate places in chapters 9 and 10. Sections B and C concentrate on the provisions of the Paris Convention for the Protection of Industrial Property relevant to unfair competition, with section B presenting a commentary on Art.10*bis* of the latter and Section C describing in some detail its drafting and negotiating history, spanning half-a-dozen formal revision conferences from the first years of the twentieth century onwards. The TRIPs Agreement has relatively little to say about mainstream unfair competition law, but its possible implications are considered in section D.

Goodwill and damage

After this introduction, the first substantial chapter on English law as such is chapter 3 which deals with goodwill in terms of its importance as the property right protected by the action for passing-off. Injurious falsehood protects a wider and indeed much vaguer class of pecuniary interests and requires only brief mention in this context. Section A explains the nature of goodwill and its importance as the basis of the action. Goodwill is also contrasted with reputation on the one hand, and statutory rights in registered marks on the other. Only traders may have goodwill, and section B sets out the rather elastic idea of what constitutes being a trader for the purposes of the law of passing-off. Sections C and D elaborate on this and respectively deal with two specific examples of claimants on the margin of trading activities, namely trade and professional associations and non-trading organisations such as charities. Goodwill is normally created by trading, but section E discusses whether goodwill can exist before actual business commences. Sections F and G discuss the inherently territorial nature of goodwill and the circumstances in which a foreign enterprise can be said to have goodwill to protect. Section F presents an orthodox account in terms of the English authorities, and section G gives an international overview for several common law jurisdictions which differ from the English point of view to a greater or lesser extent. The next three sections deal with goodwill as legal property. Section H introduces the question of ownership of goodwill in general terms by reference to a number of cases decided since the previous edition, and section I discusses ownership in a variety of commercially important circumstances in which more than one party might plausibly be said to have a claim to the goodwill, or a share in it. Section J covers dealings with goodwill, their validity, effects and incidental consequences. Section K deals with extinction of goodwill, and section L

mentions some peripheral sources of law which may be relevant for non-traders.

Chapter 4 deals with damage. Only misrepresentations *really likely* to cause damage are actionable as passing-off, whatever their nature. Damage was the gist of the common law tort of passing-off, and its theoretical importance has been reaffirmed in modern law now that the class of actionable misrepresentations may perhaps be so wide as to be embarrassing if no such restriction is imposed. Section A deals with the theoretical importance of damage in the history of the tort and today. Section B qualifies this, because as a practical matter proof of likelihood of damage was never insisted upon in its own right in the majority of cases. The apparent contradiction may be resolved by saying that the legal burden of proving damage is always on the plaintiff, but that the evidential burden may shift to the defendant. It is on him to disprove damage in certain situations which have occurred so often before that damage may safely be assumed in the absence of proof to the contrary. Damage thus remains the acid test for unusual misrepresentations or unprecedented circumstances, but without requiring wasted effort in the ordinary case. Section C categorises the heads of damage in passing-off which are established or have received judicial consideration, and section D deals with the treatment of damage in injurious falsehood.

The misrepresentation: basic principles

Chapters 5 to 8 all deal with the element of misrepresentation from various standpoints, with chapters 5 and 8 being specific to passing-off, chapter 6 specific to injurious falsehood, and chapter 7 relevant to both.

Chapter 5 is entirely concerned with passing-off and sets out certain common principles which apply whatever the nature of the misrepresentation and however it may be made. Section A deals with the essential importance of the misrepresentation to the cause of action and foreshadows certain situations in which there is no misrepresentation, or one which does not amount to passing-off. Passing-off is not confined to misrepresentations which are false in every conceivable sense, and section B deals with those which are misleading in fact though literally or colourably true. As well as being false, the misrepresentation in passing-off must be a material one, as described in Section C. Section D deals with the contexts in which the claimant's distinctive name, mark or get-up can be used without misrepresentation and therefore without liability for passing-off. The next two sections E and F deal with the defendant's state of mind: innocence is no defence and fraud is not essential, but the latter has evidential value. Section G deals with the status of the defendant as a trader, and Section H with the so-called "common field of activity", which, like fraud, remains of evidential value despite being repudiated as a component of the cause of action in its own right. Section I discusses the classes of person to whom the misrepresentation may be made. Customers and consumers are the obvious candidates but suppliers and others may also be relevant. Any definition of passing-off in terms of misrepresentation would be incomplete without

mentioning that there is strict liability for putting deceptive goods into circulation even before any customer or consumer is deceived. This doctrine of “instruments of deception” is introduced in section J as part of the wider topic of who may be liable for passing-off; and discussed in more detail in section K, which includes the treatment of exports and the rather unsatisfactory way in which the original concept has been extended to goods which are incomplete or otherwise not inherently deceptive, and even to intangibles such as company and domain names. The final section, L, discusses the relevant time for determining if the defendant’s conduct is actionable.

Chapter 6 is the counterpart chapter for injurious falsehood, and deals with issues of general importance which have no parallel in passing-off, or which receive significantly different treatments in the two bodies of law. With those qualifications, it follows a similar order to chapter 5. Section A deals with the essential importance of the misrepresentation to the cause of action and asks what makes a false representation actionable as injurious falsehood, and in particular whether the misrepresentation need be a disparaging one. As in passing-off, the misrepresentation in injurious falsehood must be a material one, and Section B deals with this and the two related issues of identification of the claimant and the treatment of representations categorised as “puffing”. Sections C and D deal with the mental element of malice, which, unlike fraud in passing-off, remains very much an essential element of injurious falsehood to this day. The (mis)representation in injurious falsehood is interpreted in a different manner to that in passing-off, and the application and legal basis of the so-called “single meaning rule” are considered in Section E.

Is the misrepresentation actionable?

Chapter 7 discusses in more detail the categories of misrepresentation which are potentially actionable as passing-off or injurious falsehood, or both, and the manner in which the misrepresentation may be effected. The most common manner, imitation of the claimant’s distinctive sign, has the whole of chapter 8 to itself. Since chapter 7 covers both passing-off and injurious falsehood, it begins with a short section A contrasting and attempting to distinguish the two torts. Thereafter, sections B to K deal primarily with misrepresentations capable of amounting to passing-off and sections L to O with those capable of amounting to injurious falsehood, although the boundary is not precise and a damaging misrepresentation may sometimes amount to both, or more often is neither. The most fundamental kind of misrepresentation actionable as passing-off is that the defendant is the claimant, or is so closely associated with the claimant as to make no difference, and this is addressed in section B. More specifically, the earliest kind of misrepresentation recognised as passing-off, and still the most common, is that the goods of the defendant are those of the claimant or an associated enterprise. This provides the subject matter of sections C and D, the latter dealing with passing-off where the defendant’s goods are substituted in purportedly fulfilling orders for those of the claimant. In certain circum-

stances there may be passing-off even though the goods sold by the defendant really do originate from the claimant. Liability in these circumstances is dealt with in section E.

Passing-off need not involve goods. There may be passing-off of businesses or services whether or not goods are also involved, and in broader circumstances than already discussed in Section B. Section F deals with licensing and franchising, and sections G and H discuss the problems of merchandising and endorsement in which real characters, or the creators of fictitious ones, have used or attempted to use the action for passing-off to restrain the unauthorised use of their names or likenesses. Producers of products such as *Champagne*, *Scotch Whisky* and *Advocaat* are recognised as having a cause of action against misuse of those terms for spurious products, so section I deals in general terms with misrepresentations or mis-descriptions of this kind, while some of the more important specific products are dealt with individually in section J. Section K deals with what is sometimes called “inverse passing-off”, because the misrepresentation is not that the goods or services of the defendant are those of the claimant, but that the claimant’s goods or achievements are those of the defendant, who thereby misappropriates the credit due to the claimant.

The next four sections are principally concerned with misrepresentations actionable as injurious falsehood. Section L covers misrepresentations that the claimant has ceased to trade at all, or is under some other material disadvantage. Section M deals with various kinds of outright disparagements which fall more naturally under the head of injurious falsehood rather than defamation, and section N with comparative advertising. Section O addresses various kinds of disparagements relating to intellectual property rights. Section P, the final section, revisits the question of whether or to what extent all or any of these categories can be embraced within a single general rule.

Passing-off as a law of signs

Chapter 8 (under the new heading of “Signs”) concentrates on the one particular way in which the misrepresentation in passing-off is most often supposed to have been made. This is by the adoption by the defendant, innocently or otherwise, of a name, mark, get-up or other sign sufficiently close to what is distinctive of the claimant to deceive. The first three sections are of general relevance regardless of the type of mark or sign in issue. Section A discusses the concept of distinctiveness and section B the factors which influence whether a sign is distinctive or not. Section C describes how one approaches the question of whether the defendant’s sign is similar enough to that of the claimant for the relevant public to be deceived. Thereafter the chapter is divided up in terms of certain types of sign of recurring importance. Section D covers the related but logically distinct concepts of word marks which may be distinctive though *prima facie* descriptive, and terms which are really the generic name of the goods or services they describe. Section E deals with certain categories of verbal marks which raise specific issues, such as personal and geographical names.

Cases on the titles of publications and the like raise few issues of principle but are sufficiently numerous to have a section to themselves, section F. Sections G and H deal with the distinctiveness of get-up, and the important distinction between the get-up of packaging and the intrinsic appearance of the goods themselves. Get-up is not confined to goods sold: one may have a distinctive get-up for premises or business assets. Section I discusses a broader spectrum of visual marks, which may contribute to get-up or be relevant in their own right. Problems arising from the internet are new to the present edition, and section J now addresses the response of the law to cybersquatting and similar abuses. Finally section K mentions some matters for which distinctiveness had been claimed, but which cannot easily be fitted into the previous categories.

Defences, remedies and procedure

Chapter 9 deals with defences. A brief introduction in section A explains the sources of law and their different degrees of relevance to passing-off and injurious falsehood. New section B deals with the possible impact of the European Convention on Human Rights by reference to unfair competition cases decided by the European Court of Human Rights and admissibility decisions of the European Human Rights Commission. The other potentially relevant body of European law in the form of the Community rules on free movement and competition is dealt with in Section C. The remaining sections deal with defences under national law. Section D deals with misleading or illegal conduct by the claimant, including deceptive marks and unjustified claims to patent or trade mark protection. Section E covers honest use of one's own name, which may perhaps still be a defence when the name is used as the name of a business, though it is no defence when the name is used on goods. Section F covers innocent passing-off in general, innocence being no defence to an injunction but possibly a defence, or a partial defence, to pecuniary remedies. Various situations can arise in which different parties assert mutually incompatible rights and these are the subject of section G. Finally, section H deals with defences which arise when the claimant fails to enforce his rights sufficiently promptly or vigorously.

Chapter 10 is on remedies and procedure. The detailed impact of the Civil Procedure Rules is as yet unclear, and on most issues the pre-CPR authorities are assumed to have been superceded, so the chapter has been simplified accordingly. An outline of the effects of the CPR reforms is given in section A. Section B deals with interim measures, which are still of considerable, if no longer overwhelming, importance. Two topics which are relatively unaffected by the CPR, and for which pre-CPR authorities are assumed still to be of relevance, are evidence and its admissibility in passing-off actions, including trade and survey evidence, and the various kinds of final relief, respectively considered at sections C and D. The private international law of unfair competition is the subject of new section E.

TABLE OF CASES

Table of UK Cases

A.G.S. Manufacturing Co v Aeroplane General Sundries (1918) 35 R.P.C. 127, CA	7-10, 7-145
AA Levey v Henderson-Kenton (Holdings) Ltd [1973] F.S.R. 425; [1974] R.P.C. 617, Ch D.	3-85
A/B Helsingfors Manus v RJ Fullwood & Bland Ltd [1949] Ch. 208; [1949] 1 All E.R. 205; (1949) 66 R.P.C. 71; [1949] L.J.R. 861, CA	3-71, 3-119, 3-126, 3-129, 3-179, 8-35, 10-48
AG Spalding & Bros v AW Gamage Ltd; sub nom. Spalding v Gamage [1914-15] All E.R. Rep. 147; (1915) 32 R.P.C. 273; (1915) 84 L.J. Ch. 449, HL	1-11, 1-26, 1-42, 1-43, 1-44, 1-46, 3-1, 3-5, 3-9, 3-10, 4-1, 4-2, 4-4, 4-9, 4-10, 4-12, 4-14, 4-27, 4-34, 5-1, 5-2, 5-5, 5-17, 5-43, 5-44, 7-21, 7-23, 7-39, 7-41, 7-44, 7-46, 7-47, 7-52, 7-128, 7-152, 8-1, 8-64, 9-75, 9-82, 10-12, 10-46
A.V. Rowe v Aircraft Disposal Co (1920) 37 R.P.C. 249	5-33, 8-60
Ad Lib Club Ltd v Granville [1971] 2 All E.R. 300; [1971] F.S.R. 1; [1972] R.P.C. 673; (1970) 115 S.J. 74; <i>The Times</i> , December 15, 1970, Ch D	3-22, 3-165, 3-181, 3-182, 8-35, 9-60
Adrema v Adrema Werke GmbH, BEM Business Efficiency Machines (No.2); sub nom. Adrema Werke Maschinenbau v Custodian of Enemy Property (No.2) [1958] R.P.C. 323	3-128, 3-140, 3-172, 3-173
Adrema Werke Maschinenbau GmbH v Custodian of Enemy Property and the Administrator of German Enemy Property (No.1) [1957] R.P.C. 49, CA.	3-5, 3-67, 3-128, 3-140, 3-155
Advance Magazine Publishing Inc v Redwood Publishing Ltd 266 [1993] F.S.R. 449, Ch D.	8-103
Aerators Ltd v Tollitt [1902] 2 Ch. 319, Ch D	5-65, 5-66, 8-58, 8-62, 8-69
Ainsworth v Walmsley (1865-66) L.R. 1 Eq. 518, Ct of Chancery.	7-23
Ajello v Worsley [1898] 1 Ch. 274, Ch D	7-37
Alain Bernardin et Cie v Pavilion Properties Ltd [1967] F.S.R. 341; [1967] R.P.C. 581, Ch D.	3-16, 3-79, 3-81, 3-103
Alcott v Millar's Karri & Jarah Forests Ltd (1904) 91 L.T. 722; 21 T.L.R. 30, CA	6-4, 6-17, 7-161
Alfred Dunhill Ltd v Sunoptic SA [1979] F.S.R. 337, CA.	3-122, 3-170, 3-177, 4-39, 5-55, 5-86, 7-69-7-71, 7-117, 8-85, 10-61, 10-62, 10-63
Allen v Flood; sub nom. Flood v Jackson [1898] A.C. 1, HL	1-44, 7-192
Allen v Original Samuel Allen & Sons Ltd (1915) 32 R.P.C. 33.	3-160, 5-34
Allied Domecq Spirits & Wine Ltd v Murray McDavid Ltd 1998 S.C. 354; 1999 S.L.T. 157; [1998] E.T.M.R. 61; [1997] F.S.R. 864; 1997 G.W.D. 35-1816; <i>The Times</i> , December 9, 1997, OH.	7-45

TABLE OF CASES

American Cyanamid Co v Ethicon Ltd [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All E.R. 504; [1975] F.S.R. 101; [1975] R.P.C. 513; 119 S.J. 136, HL.	6-38, 7-199, 8-142, 10-3, 10-6, 10-7, 10-8
Ames Crosta Ltd v Pionex International Ltd [1977] F.S.R. 46, Ch D	5-86
Amway Corp v Eurway International Ltd [1973] F.S.R. 213; [1974] R.P.C. 82, Ch D	3-64, 3-77, 7-77, 8-189
Anheuser-Busch Inc v Budejovicky Budvar NP (t/a Budweiser Budvar Brewery) [1984] F.S.R. 413; (1984) 81 L.S.G. 1369; (1984) 128 S.J. 398, CA	3-2, 3-6, 3-9, 3-17, 3-57, 3-66, 3-67, 3-79, 3-86, 3-87, 3-93, 3-94, 3-101, 3-103, 3-124, 3-186, 4-6, 4-7, 4-23, 5-7, 5-133, 7-159, 9-100, 9-101, 9-106
Annabel's (Berkeley Square) Ltd v G Schock (t/a Annabel's Escort Agency) [1972] F.S.R. 261; [1972] R.P.C. 838, CA 3-19, 3-22, 4-5, 4-30, 4-31, 4-40, 5-18, 5-83, 5-86	
Antec International Ltd v South Western Chicks (Warren) Ltd (Interlocutory Injunction) [1997] F.S.R. 278; [1998] F.S.R. 739, Ch D	8-67
Apollinaris v Duckworth (1906) 23 R.P.C. 540, CA	5-113, 5-116
Archbold v Sweet (1832) 1 M & Rob.162; 5 Car. & P. 219	3-19
Ardath Tobacco Co v Sandorides (1924) 42 R.P.C. 50	8-181
Argyllshire Weavers v A Macaulay (Tweeds) Ltd (No.3) 1965 S.L.T. 21; [1964] R.P.C. 477, OH	1-46, 7-131, 7-169, 7-196, 8-37, 10-65
Armstrong Oiler Co v Patent Axelbox and Foundry (1910) 27 R.P.C. 362.	5-33, 8-60
Arsenal Football Club Plc v Reed (No.2) [2003] EWCA Civ 696; [2003] 2 C.M.L.R. 25; (2003) 26(7) I.P.D. 26045; (2003) 147 S.J.L.B. 663; <i>The Times</i> , May 22, 2003, CA.	1-1, 1-55, 3-22, 5-39, 7-85, 7-107, 8-17
Arthur Fairest v Fairest (1949) 66 R.P.C. 275	7-149
Artistic Upholstery Ltd v Art Forma (Furniture) Ltd [1999] 4 All E.R. 277; [2000] F.S.R. 311; (1999) 22(12) I.P.D. 22118; <i>The Times</i> , September 21, 1999, Ch D	3-21, 3-28, 3-31, 3-40, 3-42, 3-46, 3-181, 8-111
Ash (Claudius) & Sons Ltd v Invicta Manufacturing Co Ltd (1911) 28 R.P.C. 465, HL.	5-48, 5-54, 8-39
Asprey & Garrard Ltd v WRA (Guns) Ltd (t/a William R Asprey Esquire) [2001] EWCA Civ 1499; [2002] E.T.M.R. 47; [2002] F.S.R. 31; (2002) 25(1) I.P.D. 25001, CA.	3-145, 3-164, 4-17, 5-34, 5-39, 5-44, 5-102, 8-20, 8-39, 8-50, 8-85, 9-6, 9-64, 9-66-9-70, 9-80
Aspro Travel Ltd v Owners Abroad Group Plc [1996] 1 W.L.R. 132; [1995] 4 All E.R. 728; [1995] E.M.L.R. 501; <i>The Times</i> , July 11, 1995; <i>Independent</i> , July 20, 1995, CA.	7-156
Associated Newspapers Group Plc v Insert Media Ltd [1991] 1 W.L.R. 571; [1991] 3 All E.R. 535; [1991] F.S.R. 380; <i>The Times</i> , March 11, 1991; <i>Independent</i> , March 25, 1991 (C.S.); <i>Guardian</i> , March 6, 1991; <i>Daily Telegraph</i> , March 14, 1991, CA	4-33, 5-40, 5-96, 7-55, 10-19
Associated Newspapers Ltd v Express Newspapers [2003] EWHC 1322; <i>The Times</i> , June 17, 2003, Ch D.	3-85, 4-12, 5-96, 8-19, 8-20, 8-29, 8-55, 8-98, 8-99
Associated Newspapers Ltd v Lew Barclay Exhibitions Ltd (1955) 72 R.P.C. 278.	8-83, 8-90, 8-111
Athlete's Foot Marketing Associates Inc v Cobra Sports Ltd [1980] R.P.C. 343, Ch D	3-64, 3-68, 3-69, 3-77, 3-79, 7-77
Attenborough v Jay (1898) 14 T.L.R. 365; (1898) 14 T.L.R. 439, CA	8-21
Att-Gen v Barret Proprietaries Ltd (1932) 50 R.P.C. 45	3-29, 8-94
Aubanel and Alabaster v Aubanel (No.1) (1949) 66 R.P.C. 343	3-12
Austen v Boys (1858) 44 E.R. 1123	3-12
BBC v Talbot Motor Co [1981] F.S.R. 228, Ch D	3-3, 3-21, 3-55, 3-60, 3-61, 4-23, 5-87, 5-94, 8-9
BBC v Talksport Ltd (No.1) [2001] F.S.R. 6; (2000) 23(10) I.P.D. 23084; (2000) 97(27) L.S.G. 39; <i>The Times</i> , June 29, 2000, Ch D	7-151
BBC Worldwide Ltd v Pally Screen Printing Ltd [1998] F.S.R. 665; (1998) 21(5) I.P.D. 21053, Ch D	3-21, 7-119
Bach & Jackson Ltd v Cowan & Wells [1969] F.S.R. 11; [1969] R.P.C. 156; (1968) 113 S.J. 38, Ch D.	8-80

Balden v Shorter [1933] Ch. 427, Ch D	3-147, 6-10, 6-36, 7-157
Banbury Buildings Ltd v Sectional Concrete Buildings Ltd [1969] F.S.R. 522; [1970] R.P.C.463, Ch D	8-80
Barclays Bank Plc v Homan [1992] B.C.C. 757; [1993] B.C.L.C. 680; <i>The Times</i> , October 13, 1992; <i>Independent</i> , November 5, 1992, CA	7-190
Barclays Bank Plc v RBS Advanta [1997] E.T.M.R. 199; [1996] R.P.C. 307; (1996) 15 Tr. L.R. 262; (1996) 19(3) I.P.D. 19025; <i>The Times</i> , February 8, 1996, Ch D	7-175
Barnsley Brewery Co Ltd v RBNB [1997] F.S.R. 462, Ch D	3-157, 3-165, 3-176, 3-178, 3-181, 3-185, 4-14, 5-50, 5-135, 7-127, 8-25, 9-90, 9-91
Barrett v Associated Newspapers (1907) 23 T.L.R. 666, CA	6-5
Baskin Robbins Ice Cream Co v Gutman [1976] F.S.R. 545, Ch D	8-164, 8-181
Batty v Hill (1873) 1 H. & M. 268	7-146
Baume & Co Ltd v AH Moore Ltd (No.1) [1958] Ch. 907; [1958] 2 W.L.R. 797; [1958] 2 All E.R. 113; [1958] R.P.C. 226; 102 S.J. 329, CA	1-42, 9-83, 10-48
Beazley v Soares (1883) L.R. 22 Ch. D. 660, Ch D	3-168
Bechstein v Barker & Barker (1910) 27 R.P.C. 484	5-27, 5-33, 8-60
Beecham v British Lion Production Assets and Decca Record Co (1951) 68 R.P.C. 111	3-19, 3-25, 7-50, 8-89
Bendle v United Kingdom Alliance (1915) 31 T.L.R. 403, CA	7-172
Berkeley Hotel Co Ltd v Berkeley International (Mayfair) Ltd [1971] F.S.R. 300; [1972] R.P.C. 237, Ch D	3-165, 3-181, 5-56, 8-76
Berlei (UK) Ltd v Bali Brassiere Co Inc (No.1); sub nom. BALI Trade Mark (No.1) [1969] 1 W.L.R. 1306; [1969] 2 All E.R. 812; [1969] F.S.R. 288; [1969] R.P.C. 472; 113 S.J. 720, HL	5-21
Bestobell Paints Ltd v Bigg [1975] F.S.R. 421; 119 S.J. 678, Ch D	4-52, 6-10, 6-13, 6-38, 6-42, 7-160, 7-164, 7-174, 7-182, 7-200, 10-9
Biba Group Ltd v Biba Boutique [1980] R.P.C. 413, Ch D	8-86, 9-65
Birmingham Small Arms Co Ltd v Webb & Co (1906) 24 R.P.C. 27	9-82
Birmingham Vinegar Brewery Co Ltd v Powell; sub nom. Powell v Birmingham Vinegar Brewery Co [1897] A.C. 710, HL	1-40, 3-104, 4-25, 5-3, 7-122, 7-133, 7-211, 8-16, 8-58, 8-83
Blacklock v Bradshaws Publishing Co (1926) 43 R.P.C. 97	5-62, 7-12, 8-108
Blanchard v Hill (1742) 26 E.R. 692	1-28
Blazer Plc v Yardley & Co Ltd [1992] F.S.R. 501, Ch D	5-90
Blofeld v Payne (1833) 110 E.R. 509	1-31, 1-33, 4-10, 4-25, 8-114, 8-132
Boake Roberts v Wayland (1909) 26 R.P.C. 249	8-92
Boardman v Phipps; sub nom. Phipps v Boardman [1967] 2 A.C. 46; [1966] 3 W.L.R. 1009; [1966] 3 All E.R. 721; 110 S.J. 853, HL	3-190
Body Shop v Rawle (1993) 27 I.P.R. 255	7-80
Bonnard v Perryman [1891] 2 Ch. 269; [1891-94] All E.R. Rep. 965, CA	4-52
Bonnier Media Ltd v Smith 2003 S.C. 36; 2002 S.C.L.R. 977; [2002] E.T.M.R. 86; 2002 G.W.D. 23-757; <i>The Times</i> , July 10, 2002, OH	8-179, 10-71
Boorne v Wicker [1927] 1 Ch. 667, Ch D	3-163
Boot Tree Ltd v Robinson [1984] F.S.R. 545, Ch D	3-159, 8-67
Boots Co Ltd v Approved Prescription Services Ltd [1988] F.S.R. 45, CA	8-162
Borthwick v Evening Post (1888) L.R. 37 Ch. D. 449, CA	4-5, 4-12, 8-99
Bostik v Sellotape GB [1994] R.P.C. 556; <i>The Times</i> , January 11, 1994, Ch D	8-112, 8-157
Bostitch Inc v McGarry & Cole; sub nom. "Bostitch" Trade Mark [1964] R.P.C. 173	3-119, 3-126, 3-129, 7-297-36
BOSTITCH Trade Mark [1963] R.P.C. 183	3-119, 3-126, 3-129
Bourne v Swan & Edgar Ltd; sub nom. Bourne's Trade Marks [1903] 1 Ch. 211, Ch D	1-31
Boussod Valadon v Marchant (1907) 24 R.P.C., CA	3-167
Bovril v Bodega (1916) 33 R.P.C. 153	7-30
Bowden Wire v Bowden Brake Co (1914) 31 R.P.C. 365	3-129, 8-30, 8-59
Bradbury v Beeton (1869) 39 L.J. Ch. 348	8-102
Bradford Corp v Pickles [1895] A.C. 587, HL	1-55
Braham v Beachim (1877-78) L.R. 7 Ch. D. 848, Ch D	7-134, 8-84
Brestian v Try [1958] R.P.C. 161, CA	3-84, 4-23, 4-36, 4-43, 7-11, 8-29, 8-86, 9-94