

TRADE MARK USE

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FOREWORD

This is a fascinating book. It is not often possible to say that about books on esoteric subjects such as intellectual property law, nor, within intellectual property law, about trade marks. Certainly you would not expect to find a fascinating book on trade mark *use*. But what the editors have done here is to look at the concept of use, the utility of use, the necessity of use, the requirement to use, and all other possible aspects of use of trade marks and how the law deals with these uses. Since, over the years, I have found that intellectual property, and especially trade mark, problems throw up quite an extraordinary number of philosophical issues, I found this approach by the authors quite captivating, and I was not at all surprised to find a philosopher among the contributors! And all this from the point of view of TRIPs, of the German courts, the English courts, from the point of view of OHIM, as well as the European Court of Justice, including the Court of First Instance.

This is a book not just for the academic, or the practitioner, nor just for the judge or the legislator, but for all of those, and indeed for any others who might find trade marks of some interest—especially in the context in which we now find the developing law at Community level so critically positioned.

I was particularly impressed by the way in which the topics on use are divided. It makes a great deal of sense, in examining the role of use of a trade mark, to look at use in discrete segregated sections, notwithstanding the often overlapping roles which that use may enjoy. So, for example, the chapter on use and non-use is a marvellous general chapter which lays the groundwork for the remaining chapters. Use in context of registration, more particularly to establish distinctive character, or use by third parties, or in infringement cases, all merit different arguments, even if sometimes related, so that the particular role of use in the various individual contexts in which it is found, or required, is clear.

I look forward to seeing, in future editions of the work—which I am sure will certainly come—a continuation of the debate on the interesting topic of ‘The Need to Leave Free for Others’ and the way in which this may develop

at national level, as well as in the ECJ. And I am sure we shall see, as greater numbers of cases, especially those on exotic marks, come to the ECJ, further developments in the debate on the boundaries between the requirement for a sign to have the necessary capacity to distinguish before it can constitute a trade mark and the requirement that a trade mark, in turn, be distinctive for the purposes of registration, especially in light of the excellent exposé of the manner in which English law on this issue has evolved during the past 100 years.

Among the other very interesting topics I found was the chapter entitled 'Infringement', and especially the section on 'Permitted Infringement', which I think could lead to quite a heated exchange between those who consider that there can be no such thing as a 'permitted infringement', and those who take the opposite view. It is not surprising that the author of this particular section takes the view that Article 6 of the Directive (Article 12 of the Regulation) 'yields several surprises'. It is wonderful to find such a debate about a part of the European trade mark legislative scheme which addresses the real difficulties which can arise in commerce, and I think that this, and others among the several excellent contributions, will be of enormous assistance to those charged with interpreting Community legislation, whether at national or at Community level.

It would be unforgivable to conclude this foreword without a special recognition of the enormously valuable contribution which the two editors have made to this book. It is true of course that the individual contributions are very interesting, arresting at times, and controversial even. But the ability of the editors, Jeremy Phillips and Ilanah Simon, to assemble such an interesting group of contributors is quite admirable, and the choice of contributors inspired. And with such inspired choices are found views from quite different perspectives from those we might normally be exposed to; that is no bad thing, for it helps avoid the trap, so readily fallen into, of believing that what we are used to or familiar with must be right!

If there is an area in which I would like to see some further research, it is one in which there appears to date to be very little written material. It is the status of the jurisprudence of the ECJ developed in the period when trade mark rights, including use of a trade mark, were embedded exclusively in the free movement of goods between Member States context; in particular, those rights existing under the then Article 36, vis-à-vis the position since the adoption of the Community Trade Mark Regulation and (less so) the Directive. If it is accepted that the Regulation legislates for the actual *grant of rights*,

as opposed to controlling or permitting the exercise of trade mark rights granted at national level, as was the case, does this make a difference? I leave this question for the editors to consider, and wait to see whether, in a future edition of this excellent book, it might be tackled!

For the moment, the task which they undertook has been superbly accomplished.

Fidelma Macken
The High Court
Dublin
February 2005

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Katarina Wihlborg, Chris Rycroft, Geraldine Mangle and the team at OUP, whose sleek professionalism in turning this book from dream to reality, from nightmare to object of desire, in so short a time cannot be bettered.

Finally, Matthew Reed, whose drive and initiative ensured that we and our contributors had something to write about.

Jeremy Phillips and Ilanah Simon
London, August 2004

BIOGRAPHIES

THE EDITORS

Professor Jeremy Phillips

Intellectual Property Consultant to London-based solicitors Slaughter and May, Jeremy previously held a variety of academic posts. He is currently Visiting Professorial Fellow, Queen Mary Intellectual Property Research Institute, as well as a visiting professor at University College London, Bournemouth University and the University of Alicante.

Jeremy edits the *European Trade Mark Reports* and has been consultant editor of the *Butterworths Intellectual Property Law Handbook* since its inception. His most recent book, *Trade Mark Law: a Practical Anatomy*, was published in 2003 by Oxford University Press. He is a joint director of the IPKat intellectual property weblog.

Ilanah Simon

A Doctoral Associate of the Queen Mary Intellectual Property Research Institute, Ilanah holds two degrees from University College London. Her doctoral thesis is a comparative study of trade mark dilution in the USA and the European Union. She has published numerous articles in recent years, particularly within the field of trade mark law.

A regular contributor of cases for the MARQUES case law database, Ilanah is Deputy Editor of the *European Trade Mark Reports* and the contributory editor for trade mark law in the *European Union Law Reporter*. She is also joint director of the IPKat, the first intellectual property based weblog to be based in Europe.

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Carina, a philosophy graduate from the University of Cambridge, is an assistant solicitor in the Intellectual Property group of the London-based firm of Slaughter and May.

Carina's experience includes a spell in Sweden, where she worked with a leading intellectual property practice. She has also worked in-house in the trade mark department of a company that owns many leading internationally renowned brands of alcoholic beverage.

Dr Jeffrey Belson

The author of *Certification Marks* (Sweet & Maxwell London 2002) and various articles in the field of trade mark law, Jeffrey is Regulatory and Intellectual Property Manager for the Indigo Division of Hewlett-Packard. He has served on various committees and on the Board of Directors of the International Trademark Association.

Before joining HP-Indigo, Jeffrey was advanced technologies manager in the Israel microelectronics sector. He is a recipient of the Israel Government's Kaplan Prize for distinguished service to industry. Jeffrey holds a B.Sc. (Hons) and Ph.D. in physics from the University of Reading, England.

Anna Carboni

Anna Carboni is a barrister at Wilberforce Chambers in London. The first seventeen years of her legal career were spent as a solicitor at Linklaters, latterly as a partner in the Intellectual Property Department. However, having qualified as a Solicitor-Advocate in 2000, she made her move to the Bar three years later in order to concentrate on court and advisory work.

Trade mark law is Anna's favourite field. She has done the full range of trade mark filing and prosecution, advising on brand clearance and protection and standing up in court for her trade mark clients. She has conducted litigation for numerous well-known brand owners, including adidas, Gucci, Microsoft and 3M—to name a few. Anna is on the panel of experts for Nominet's domain name dispute resolution service. She is an active member of numerous industry and professional associations and she also regularly speaks and writes on trade mark and other intellectual property topics.

Dr Jennifer Davis

Jennifer Davis is a Newton Trust Lecturer in Intellectual Property Law in the Law Faculty, University of Cambridge. She is also a Fellow of Wolfson College, Cambridge, where she is Director of Studies in Law. She lectures in various areas of intellectual property and has a particular interest in trade marks and the theoretical underpinnings of intellectual property law.

Before joining the Faculty, Jennifer practised as a lawyer in the area of intellectual property litigation. She is the author of *Intellectual Property*

(Butterworths London 2001; 2nd edn 2003) and her recent articles on trade marks include 'To Protect or Serve? European Trade Mark Law and the Decline of the Public Interest' [2003] *European Intellectual Property Review* 180–187 and 'European Trade Mark Law and the Enclosure of the Commons' [2002] *Intellectual Property Quarterly* 342–367.

Professor Graeme B Dinwoodie

Professor Dinwoodie is a Professor of Law and Director of the Program in Intellectual Property Law at Chicago-Kent College of Law, having previously taught at the University of Cincinnati College of Law and the University of Pennsylvania School of Law. He teaches and writes on intellectual property law, with an emphasis on the international and comparative aspects of the discipline. A prolific writer in the field, he is the co-author of the casebooks *Trademarks and Unfair Competition: Law and Policy*, *International Intellectual Property Law* and *International and Comparative Patent Law*.

Graeme has served as a consultant to the World Intellectual Property Organization on matters of private international law, as the Independent Academic Expert on the ICANN Names Council's Task Force reviewing the Uniform Domain Name Dispute Resolution Policy and as an Adviser to the American Law Institute Project on Principles on Jurisdiction and Recognition of Judgments in Intellectual Property Matters. Before entering academe, Graeme was an associate with Sullivan and Cromwell, New York.

Dr G E Evans

Gail Elizabeth Evans is Reader in Intellectual Property Law at Queen Mary, University of London, and Head of the Intellectual Property Unit. She has held academic positions in Australia and the USA, teaching various commercial law subjects including international intellectual property and cyber-law. She is the author of *Lawmaking under the Trade Constitution: A Study in Legislating by the World Trade Organization* (Kluwer Law International The Hague 2000), which traces the making of the TRIPs Agreement and its impact on the domestic trade mark legislation of nation states.

Gail has published numerous articles in the fields of international trade, intellectual property law and electronic commerce. Recent publications include: 'Comment on the Second WIPO Internet Domain Name Process' [2001] *EIPR* 1 and 'Online Contracts' in *The Handbook of Informational Security*, edited by H. Bidgoli (Wiley New York 2005).

Arnaud Folliard-Monguiral

Arnaud Folliard-Monguiral was admitted to the Paris Bar and is qualified as a trade mark and design professional representative. Having joined the Office for Harmonisation in the Internal Market (OHIM) in 2000, Arnaud is a member of the Industrial Property Litigation Unit (IPLU). As such, he is appointed agent of the Office in proceedings before the Court of First Instance and the European Court of Justice.

Arnaud writes a monthly review of Community trade mark-related case law for the French intellectual property review *Propriété Industrielle* (published by JurisClasseur). In addition to his commentaries, Arnaud is the author of articles, the latest of which are dedicated to three-dimensional trade marks (*Prop. Ind.* March 2003, *EIPR* April 2003), procedural issues before the CFI (*Prop. Ind.* May 2003, *Prop. Ind.* January 2004), and the impact of EU enlargement on Community trade marks and designs (*Prop. Ind.* September 2003, *EIPR* February 2004).

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Thomas Hays is Senior Lecturer in Intellectual Property Law at the University of Aberdeen and a Research Fellow, Centrum voor Intellectueel Eigendomsrecht (CIER), the Molengraaff Institute for Private Law Research, Utrecht, The Netherlands.

An attorney qualified to practise in the District of Columbia, Thomas has recently published *Parallel Importation under European Union Law* (Sweet & Maxwell London 2003) and *Intellectual Property Law and Practice* (W Green & Co Edinburgh 2004). He has a Ph.D. from the University of Cambridge.

Dr Belinda Isaac

Belinda Isaac is a partner and Head of Intellectual Property at the Oxford office of Morgan Cole, solicitors. She has a Doctorate in intellectual property law from London University. Belinda has many years of experience advising on a broad range of intellectual property issues, especially trade mark protection and enforcement. She has acted for numerous international businesses in connection with the protection of their well-known brands. More recently her practice has spread to include biotechnology and research governance advising both private and public sector organizations.

Belinda writes extensively on intellectual property subjects in leading academic journals and in the newspapers. She is author of *Brand Protection Matters* (Sweet & Maxwell London 2001) and a contributory author of *Pharmaceutical Medicine Biotechnology and European Law* (CUP Cambridge

2000). Belinda sits on the Editorial Advisory Board of the *European Trade Mark Reports* and is the UK correspondent for the *Entertainment Law Review*. A member of several trade mark organizations including the International Trade Mark Association and the Pharmaceutical Trade Mark Group, Belinda has also taught intellectual property in Oxford and is a regular speaker at international intellectual property conferences.

Allan James

Allan James is Head of Practice for trade marks and designs at the UK Patent Office. He entered the field of intellectual property in 1988 when he joined the Patent Office and became one of the Office's Hearing Officers in 1991. He still regularly hears opposition and invalidation cases in the Patent Office.

In addition, Allan has been the author of the Patent Office's examination guidelines since 1994 and, for the past six years, he has served as a member of the team responsible for the drafting of the UK's submissions to the European Court of Justice on those trade mark cases which have come before that Court.

Professor Mark D Janis

Professor Mark Janis is Professor of Law and H Blair & Joan V White Intellectual Property Law Scholar at the University of Iowa College of Law in Iowa City. Mark teaches and writes in the fields of patents, trade marks/unfair competition and intellectual property/antitrust. He has published numerous law review articles on intellectual property law and is co-author of both *IP and Antitrust* (Aspen Publishers New York 2001) and *Trademarks & Unfair Competition: Law and Policy* (Aspen Publishers New York 2004).

Mark has been named a University of Iowa Faculty Scholar for 2002–2005 to conduct research on intellectual property rights in plant biotechnology. A registered patent attorney, prior to joining the Iowa law faculty in 1995 Mark practised patent law with Barnes & Thornburg in Indianapolis, Indiana.

Sheldon H Klein

Sheldon Klein, of Washington, DC, law firm Arent Fox, handles trade mark, copyright, unfair competition, advertising and internet law matters, including client counselling, litigation, registration and licensing. Well known in the intellectual property bar, he has been quoted on significant cases by the *Wall Street Journal*, the *Los Angeles Times*, the *Philadelphia Inquirer*, *Corporate Legal Times* and many other publications.

Sheldon, a frequent lecturer at major intellectual property conferences,

is the author of numerous scholarly articles for intellectual property law publications such as the *Trademark Reporter*, *Trademark World*, *Managing Intellectual Property* and the *AIPLA Quarterly Journal*, and for general legal publications such as the *National Law Journal* and *Legal Times*. He is currently on the Editorial Board of *Trademark World* and is a past member of the Editorial Board of the *Trademark Reporter*.

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Spyros Maniatis is a Senior Lecturer in Intellectual Property Law and a Senior Research Fellow at the Queen Mary Intellectual Property Research Institute, University of London. His research interests include trade mark and unfair competition law, the history of intellectual property rights and innovation, and innovation theory.

An active author and lecturer in the field of trade marks and related areas of law, Spyros has written extensively for UK and US journals on the subject of domain names and other trade mark issues. He has been co-author of *Trade Marks, Trade Names and Unfair Competition: World Law and Practice* (Sweet & Maxwell London) since 1996 and is also co-author of *Domain Names: Global Policy and Procedure* (West and Sweet & Maxwell London 2000).

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N Christopher Norton is an Associate in the Intellectual Property Practice of Washington, DC, law firm Arent Fox. His practice includes preparing and prosecuting domestic and international trade mark applications, representing clients before the US Patent and Trademark Office in trade mark cancellation and opposition proceedings, litigating disputes involving claims of trade mark infringement and unfair competition, advising clients on issues pertaining to copyright law and licensing and drafting intellectual property agreements and licences.

Prior to attending law school, Christopher worked with the Columbia Institute for Political Research in Washington, DC, and the University of California, San Francisco's Center for AIDS Prevention Studies in Albuquerque, New Mexico.

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Born in Ljubljana, Slovenia, Bojan Pretnar is a graduate of Ljubljana University where he holds a degree in mechanical engineering as well as M.Sc. and Ph.D. degrees from the Faculty of Economics. He has taught

courses on innovation and intellectual property at Ljubljana University since 1990. He is a founding Member of the World Intellectual Property Organization Policy Advisory Commission and a member of the Editorial Board of the *European Trade Mark Reports*. He is also the author of two books and numerous articles in the field of intellectual property.

The first Director of the newly established Slovenian Intellectual Property Office, Bojan is the main architect of advanced and original intellectual property legislation of Slovenia. He has been a senior staff member of the World Intellectual Property Organization in Geneva since March 2000.

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Andreas Rahmatian's first degrees are in law and in musicology and history (University of Vienna). He completed an LL M in comparative and intellectual property law at the University of London (1995) and a Ph.D. in private law at the University of Vienna (1996).

Andreas has worked as an Associate Attorney at Law in a law firm in Vienna, where he specialized in intellectual property law, before training as a solicitor with a City firm in London. During that time, and after qualification as a solicitor (2001), he taught property and trust law part-time at the University of London, then took the post of Lecturer in Law at the University of Stirling in February 2002. He currently teaches commercial law subjects and intellectual property law.

Andreas' main research interests are (apart from intellectual property law) property law, contract law, private and commercial law, comparative law, civil law systems and their relationship with Scots law and legal history.

Dr Ashley Roughton

Ashley Roughton, a barrister, practises at Hogarth Chambers. He is a co-author of *The Modern Law of Trade Marks* (second edition under preparation) and is also a co-author and joint editor of the forthcoming book *The Modern Law of United Kingdom and European Patents* (both published by LexisNexis, London).

Before becoming a barrister in 1992 Ashley was an engineer with Mercedes Benz. He took his Ph.D. at Cambridge and B.Sc. at King's College, London. He also has an M.Sc. in economics from City University and is a member of the Department of Economics at City University. Ashley practises in all aspects of intellectual property law.

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Massimo Sterpi is a partner in the law firm Studio Legale Jacobacci e Associati of Turin (Italy), having studied at the University of Turin and King's College, London. He is a member of the Editorial Board of the *European Copyright and Design Reports*, he also serves as a Council Member of MARQUES, the organization of European trade mark proprietors. Massimo chairs MARQUES' IP Outer Borders Team, which deals with the limits of intellectual property protection and social reaction to latest intellectual property trends.

A frequent speaker in conferences on intellectual property topics, Massimo practises mainly in the areas of technology, famous brands and art-related issues. He is co-author of *The Community Trademark Handbook* (Turin 1995). He has authored several articles, in various languages, on copyright, patent and trade mark law as well as intellectual property litigation issues.

Robert Sumroy

Since 2003 Robert Sumroy has been a partner in the Intellectual Property Group of London-based solicitors Slaughter and May, which he joined in 1994. The areas in which he practises are intellectual property, information technology, data protection and electronic commerce.

Robert is the author of the intellectual property aspects of the 'International joint ventures' chapter of the *PLC* practice manual.

Dr Neil J Wilkof

Neil Wilkof is a partner and head of the IP and Information Technology department at the law firm of Herzog, Fox & Neeman (Tel Aviv, Israel). An active member of the International Trademark Association, he is also a member of the Editorial Board of the *European Trade Mark Reports* and the *European Copyright and Design Reports*.

Neil is the author of numerous articles in the field of trade mark, copyright and computer law. He is the author of *Trade Mark Licensing* (Sweet & Maxwell London 1995), the second edition of which will be published in 2005 and is also co-editor (with Mel Simensky and Lanning Bryer) of *Intellectual Property in the Global Marketplace* (Wiley New York 1999). He has taught intellectual property and computer law since 1991, first at Bar-Ilan University and more recently at the University of Haifa.

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