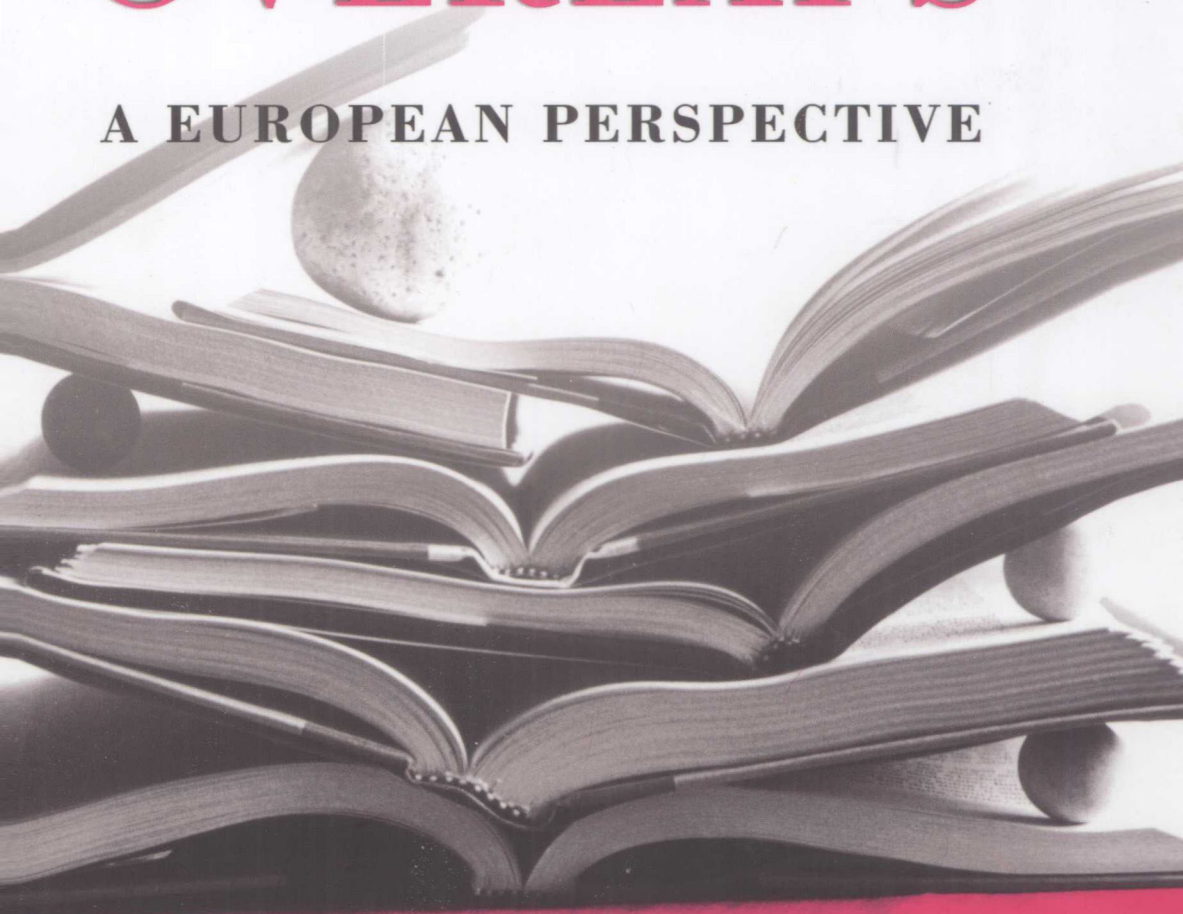


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A EUROPEAN PERSPECTIVE



Estelle Derclaye and Matthias Leistner

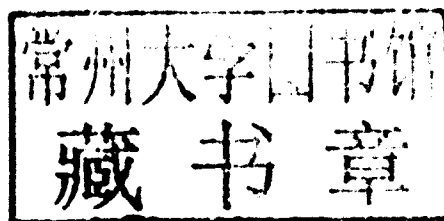
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INTELLECTUAL PROPERTY OVERLAPS

Intellectual property rights, conventionally seen as quite distinct, are increasingly overlapping with one another. There are several reasons for this: the expansion of IPRs beyond their traditional borders, the creation of new IPRs especially at EU level, the exploitation of gaps in the law by shrewd lawyers, and the use of unfair competition as an alternative when IPRs are either not available at all or expired. The convergence of several IPRs on the same subject-matter poses problems. As they are normally envisaged as water-tight categories, there are very few rules which cater for the sort of regime clash that any overlap of IPRs necessarily entails. This book's aim is to find appropriate rules to regulate overlaps and thereby avoid regime conflicts and undue unstructured expansion of IPRs. The book studies the practical consequences of each overlap at the international, European and national levels (where the laws of France, the UK and Germany are reviewed). It then analyses the reasons for the prohibition or authorisation of overlaps. This analysis enables the determination of criteria and principles that can be used to (re) map the overlaps to achieve appropriateness and legitimacy.

Preface

The area of intellectual property overlaps has in recent years been discussed by a growing number of contributors, but as we came to realise when thinking about writing a book on this topic, remarkably, there is no comprehensive study on the issue, particularly so from a comparative angle. This came as even more of a surprise to us given that the topic comprises very interesting theoretical questions which also have great practical relevance. We have therefore attempted to conceive this book for an audience of both academics and practitioners. To that end, it includes concise descriptions of the positive law but also in-depth normative analyses and proposals to solve the twin problems caused by the cumulation of intellectual property rights in the same subject matter or product, namely regime clashes and overprotection.

As is the case with most books, we have benefitted from kind and precious help along the way. We would like to thank the publishers, especially Richard Hart and Rachel Turner for their valuable recommendations; two anonymous referees for their insightful comments on our proposal; Simon Baker, Phillip Elam, Dr Marcella Favale, Manuel Kleinemenke, Dr Felix Stang and Pierre-Yves Thoumsin for research assistance; Brendan Barnes for reviewing the English language in parts of the book; Professor Lisa Ramsey for her comments on the international chapter; and finally each other.

We have attempted to set out the law as it stands at 31 May 2010, but where possible we have taken into account important developments up to proof stage.

ESTELLE DERCLAYE AND MATTHIAS LEISTNER
Nottingham and Bonn, September 2010

Abbreviations

AC	Law Reports Appeal Cases
All ER	All England Law Reports
<i>Ann Ind Prop</i>	<i>Annales de la Propriété Industrielle, Littéraire et Artistique</i>
CA	Court of Appeal
Cass	Court of Cassation (France)
Cass Civ	Court of Cassation (France), civil chamber
Cass Com	Court of Cassation (France), commercial chamber
CDPA	Copyright, Designs and Patents Act 1988
CFI	Court of First Instance
Ch	Chancery Division
Ch Com	Chambre commerciale
CPR	Canadian Patent Reporter
CPVR	Community plant variety right
CRDR	Community registered design right
CTM	Community trademark
CTMR	Community Trademark Regulation
CUDR	Community unregistered design right
ECJ	European Court of Justice
ECDR	European Copyright & Design Reports
ECR	European Court Reports
ECT	European Community Treaty
EDV	essentially derived variety
EMLR	Entertainment and Media Law Reports
EPC	European Patent Convention
EPO	European Patent Office
<i>EPOR</i>	<i>European Patent Office Reports</i>
ER	English Reports
EU	European Union
EWCA	Court of Appeal, Civil Division (England & Wales)
<i>FSR</i>	<i>Fleet Street Reports</i>
<i>GRUR Int</i>	<i>Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil</i>
<i>GRUR-Prax</i>	<i>Gewerblicher Rechtsschutz und Urheberrecht Praxis im Immaterialgüter- und Wettbewerbsrecht</i>
<i>GRUR-RR</i>	<i>Gewerblicher Rechtsschutz und Urheberrecht Rechtsprechungs-Report</i>
IPC	Intellectual Property Code (France)
IPR	intellectual property right
IPRs	intellectual property rights
<i>JCP E</i>	<i>Juris-Classeur Périodique édition Entreprise</i>
<i>JCP G</i>	<i>Juris-Classeur Périodique édition Générale</i>
MCAD	Misleading and Comparative Advertising Directive

OHIM	Office for the Harmonisation of the Internal Market
OJ	Official Journal
PC	Privy Council
<i>PIBD</i>	<i>Propriété Intellectuelle Bulletin Documentaire</i>
PVRA	Plant Variety Rights Act 1997
RDA	Registered Designs Act 1949
RPC	Report of Patent Cases
TFEU	Treaty on the Functioning of the European Union
TGI	Tribunal de Grande Instance (France)
TMA	Trademark Act 1994
TPM	technological protection measure
Trib Com	Tribunal de commerce (France)
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
UCPD	Unfair Commercial Practices Directive
UDR	unregistered design right
UKHL	UK House of Lords
UK UDR	UK unregistered design right
UK PVR	British plant variety right
UPOV	International Union for the Protection of New Varieties of Plants
WCT	WIPO Copyright Treaty
WLR	Weekly Law Reports
WPPT	WIPO Performances and Phonograms Treaty

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