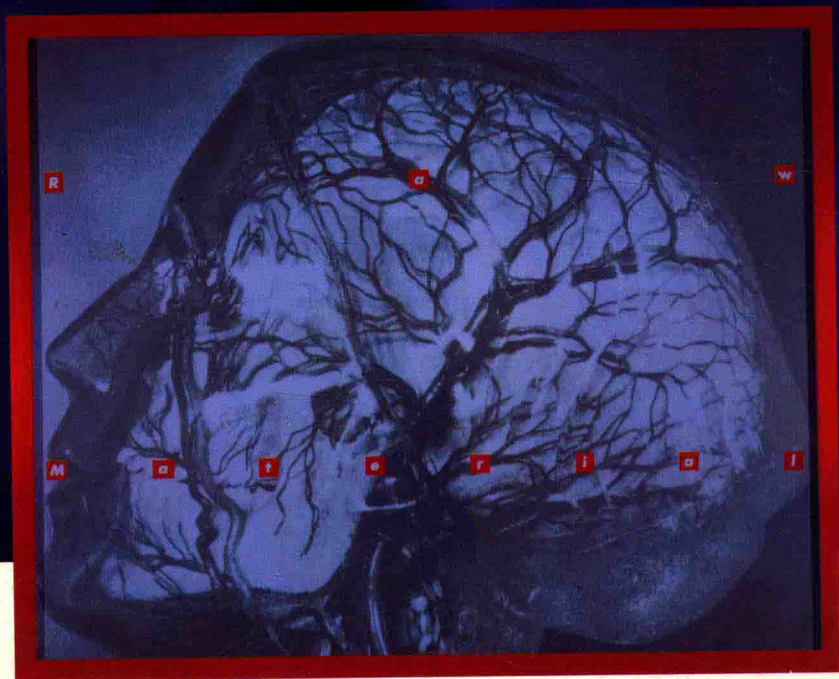


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# Intellectual Property Law



Lionel Bently  
Brad Sherman

# INTELLECTUAL PROPERTY LAW

LIONEL BENTLY AND  
BRAD SHERMAN

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For Liam and Joe

## PREFACE

Intellectual property law seems to be constantly in flux. Each year sees new international initiatives and regional developments. In the last decade we have witnessed the birth of TRIPs, the agreement of the WIPO Copyright and WIPO Performers and Phonograms Treaties, as well as the coming into force of the Madrid Protocol. At a regional level we have seen the creation of a Community Trade Mark, implementation of the Trade Marks Approximation Directive, numerous Directives in the field of copyright and related rights, the Biotechnology Directive, the development of Supplementary Protection Certificates, and most recently a revision of the European Patent Convention. Each new initiative, as it is implemented, spawns new questions for interpretation, and new case law. The resulting case law is not merely generated domestically by UK tribunals and courts. We now have a huge case law of relevance from outside the UK—from the European Patent Office, the Office of Harmonisation in the Internal Market, the Court of First Instance, the European Court of Justice, the EFTA Court, as well as the Dispute panels of the WTO. All this makes intellectual property law an increasingly difficult subject to manage or explain within a small compass. And, there are always more problems that arise, new technologies or cultural practices (as well as developments in neighbouring legal regimes, such as conflicts of law or human rights, and new proposals for change (at international, regional, and national levels), that need to be accommodated.

Reflecting this constant agitation, intellectual property law has gained increasing attention within universities. Not surprisingly, existing intellectual property courses are attracting more students, and new courses are being laid on. Related to this is the emergence of a burgeoning academic literature, with important contributions from both within and outside law schools. It is not possible to do justice in a book of this sort to the many and varied perspectives on intellectual property that are now represented in what is—thankfully—an increasingly interdisciplinary literature. We have instead tried to provide an overview of the law relating to the subject. In so doing we hope to provide a solid grounding in the law as a starting point from which various political, theoretical or other perspectives can be developed. While we have not assumed any prior knowledge of intellectual property, we intend this book to be more than just an introduction. It is aimed at providing a basis not just for undergraduates but also for postgraduate courses. Despite the immensity of the jurisprudence, we have tried to accommodate the case law of the European granting authorities as far as possible.

Writing this text has been a long and laborious task and we owe numerous debts of gratitude. We would particularly like to thank Stephen Hubicki and Michael Burnett for their excellent research assistance. We would also like to thank Arash Amel, Antonio Da Rosa, Aaron Dower and Jaishree Jaisinghani for their help.

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9 January 2000.

## ABBREVIATIONS

AC	<i>Appeal Cases</i>
AIPC	<i>Australian Intellectual Property Cases</i>
AIPJ	<i>Australian Intellectual Property Journal</i>
ALJR	<i>Australian Law Journal Reports</i>
ALR	<i>Australian Law Reports</i>
Annand and Norman (1994)	R. Annand and H. Norman, <i>Blackstone's Guide to the Trade Marks Act 1994</i> (London: Blackstone, 1994)
Annand and Norman (1998)	R. Annand and H. Norman, <i>Blackstone's Guide to the Community Trade Mark</i> (London: Blackstone, 1998)
<i>App Cas</i>	<i>Appeal Cases</i>
Arnold	R. Arnold, <i>Performers' Rights</i> (2nd edn., London: Sweet & Maxwell, 1997)
Art.	Article
BCAP	British Code of Advertising Practice
<i>Beav.</i>	<i>Bevan's Reports</i>
Beier and Shriker	F. K. Beir and G. Shriker, <i>From GATT to TRIPS</i> (Weinheim: IIC/VCH, 1996)
Berne	Berne Convention for the Protection of Literary and Artistic Works of 9 Sept. 1886 (latest version, Paris 1971)
<i>Bing NC</i>	<i>Bingham, New Cases</i>
Biotech. Directive	Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the Legal Protection of Biotechnological Inventions
Blakeney	M. Blakeney, <i>TRIPS: A Concise Guide to the Agreement</i> (London: Sweet & Maxwell, 1996)
Brussels	Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1968
CA	Court of Appeal
CA 1911	Copyright Act 1911
CA 1956	Copyright Act 1956
CANZ	Court of Appeal of New Zealand
CDPA	Copyright, Designs and Patents Act 1988
<i>Ch</i>	<i>Chancery</i>
<i>Ch App.</i>	<i>Chancery Appeal</i>
<i>Ch D</i>	<i>Chancery Division</i>
CIPA	<i>Chartered Institute of Patents Agents Guide to the Patents Act 1977</i> (4th edn., London: Sweet & Maxwell, 1995)

CIPAJ	<i>Journal of the CIPA</i>
CJJA	Civil Jurisdiction and Judgments Act
CLR	<i>Commonwealth Law Reports</i>
CMLR	<i>Commonwealth Market Law Reports</i>
CMLRev.	<i>Commonwealth Market Law Review</i>
Copinger	K. Garnett, G. Davies, and J. Rayner (eds.), <i>Copinger and Skone James on Copyright</i> (14th edn., London: Sweet & Maxwell, 1999)
Cornish	W. R. Cornish, <i>Intellectual Property</i> (4th edn., London: Sweet & Maxwell, 1999)
CPA	Civil Procedure Act 1998
CPC	Community Patent Convention
CPR	Civil Procedure Rules, SI 1998/3132
CPV	Community Plant Variety
CPVO	Community Plant Variety Office
CPVR	Council Regulation (EC), no. 2100/94 of 27 July 1994 on Community Plant Varieties
Cr App. Rep.	<i>Criminal Appeal Reports</i>
Cro Jac	<i>Croke Jacob Reports</i>
CTMIR	Commission Regulation (EC), no. 2869/95 of 13 Dec. 1995, implementing Council Regulation (EC), no. 40/94 on the Community Trade Mark; <i>OJL</i> 303, 15 Dec. 1995
CTMR	Council Regulation (EC), no. 40/94 of 20 Dec. 1993 on the Community Trade Mark
DACS	Design and Artistic Copyright Society
Database Dir.	Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases
Database Regs.	Copyright and Rights in Database Regulations 1997, SI 1997/3032
DCES	Department of Culture, Education and Sport
Dean	R. Dean, <i>Law of Trade Secrets</i> (Law Books Co., North Ryde, NSW, 1990)
Des. Dir.	Directive of 98/71/EC of the European Parliament and of the Council of 13 Oct. 1998 on the legal protection of designs, <i>OJL</i> 1998, 289/28
DTI	Department of Trade and Industry
Duration Dir.	Council Directive 93/98/EEC of 29 Oct. 1993 harmonizing the term of protection of copyright and certain related rights
Duration Regs.	Duration of Copyright and Rights in Performances Regulations 1995, SI 1995/3297



Dworkin and Taylor	G. Dworkin and R. Taylor, <i>Blackstone's Guide to the Copyright, Designs and Patent Act 1988</i> (London: Blackstone, 1989)
EBA	Enlarged Board of Appeal
EC	European Community
ECDR	<i>European Copyright and Design Reports</i>
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLR	<i>European Competition Law Review</i>
ECR	<i>European Court Reports</i>
EEA	European Economic Area
EHRR	<i>European Human Rights Reports</i>
EFTA	European Free Trade Association
EIPR	<i>European Intellectual Property Review</i>
Electronic Commerce Dir.	European Council Directive 2000/31/EC of 8 June 2000 on Certain Legal Aspects of Electronic Commerce in the Internal Market
EMLR	<i>Entertainment and Media Law Reports</i>
Ent LR	<i>Entertainment Law Review</i>
EPC	Convention on the Grant of European Patents, at Munich, 5 Oct. 1973
EPC Revision Act	Act Revising the Convention on the Grant of European Patents (EPC), Munich, 29 Nov. 2000, MR/3/00 Rev. 1e
EPO	European Patent Office
EPOR	<i>European Patent Office Reports</i>
EPR	European Patent rules
ER	<i>English Reports</i>
ETMR	<i>European Trade Mark Reports</i>
Fawcett and Torremens	J. Fawcett and P. Torremans, <i>Intellectual Property and Private International Law</i> (Oxford: Clarendon Press, 1998)
FCA	Federal Court of Australia
Fellner	C. Fellner, <i>Industrial Design Law</i> (London: Sweet & Maxwell, 1995)
Firth	A. Firth, <i>Trade Marks: The New Law</i> (Bristol: Jordans, 1995)
FSR	<i>Fleet Street Reports</i>
GATT	General Agreement on Tariffs and Trade
GRUR	Gewerblicher Rechtsschutz und Urheberrecht
Gurry	F. Gurry, <i>Breach of Confidence</i> (Oxford: Clarendon Press, 1984)
Hague	Geneva Act of the Hague Agreement Concerning

	the International Deposit of Industrial Designs, 1999
<i>H &amp; TW</i>	<i>Hall and Twells Chancery Reports</i>
Hansard	Hansard's Parliamentary Debates
<i>Hare</i>	<i>Hare's Chancery Reports</i>
HL	House of Lords
ICANN	Internet Corporation for Assigned Names and Numbers
<i>ICR</i>	<i>Industrial Court Reports</i>
<i>IIC</i>	<i>International Review of Industrial Property and Copyright Law</i>
<i>ILJ</i>	<i>Industrial Law Journal</i>
Info. Soc. Dir.	Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society
IPI	Intellectual Property Institute (formerly Common Law Institute of Intellectual Property)
<i>IPJ</i>	<i>Intellectual Property Journal</i>
<i>IPQ</i>	<i>Intellectual Property Quarterly</i>
<i>IPR</i>	<i>Intellectual Property Reports</i>
<i>IR</i>	<i>Irish Reports</i>
ITMA	Institute of Trade Mark Agents
<i>JPTOS</i>	<i>Journal of the Patent and Trademark Office Society</i>
<i>Jur</i>	<i>Jurist</i>
<i>KB</i>	<i>Kings Bench</i>
Know How Block Exemption	Commission Regulation (EEC), no. 556/89 of 30 Nov. 1988 on the Application of Article 85(3) of the Treaty to certain categories of Know-how licensing
Laddie <i>et al.</i>	H. Laddie, P. Prescott, and M. Vitoria, <i>The Modern Law Copyright</i> (2nd edn., London: Butterworths, 1995)
<i>LJCh</i>	<i>Law Journal, Chancery</i>
<i>LJChD</i>	<i>Law Journal, Chancery Division</i>
<i>LR</i>	<i>Law Reports</i>
<i>LR Eq</i>	<i>Law Reports (Equity)</i>
<i>LT (NS)</i>	<i>Law Times (New Series)</i>
Lugano	Lugano Convention of 16 September 1988
<i>Mac &amp; G</i>	<i>MacNaghten and Gordon's Reports</i>
<i>MacG CC</i>	<i>MacGillivray's Copyright Cases</i>
Madrid	Madrid Agreement Concerning the International Registration of Marks of 14 April 1891

Madrid Prot.	Protocol Relating to the Madrid Agreement, adopted at Madrid on 27 June 1989
MCPS	Mechanical Copyright Protection Society
Michaels	A. Michaels, <i>A Practical Guide to the Law of Trade Marks</i> (2nd edn., London: Sweet & Maxwell, 1996)
MIP	<i>Managing Intellectual Property</i>
Morcom <i>et al.</i>	C. Morcom, A. Roughton, and J. Graham, <i>The Modern Law of Trade Marks</i> (London: Butterworths, 2000)
OHIM	Office of Harmonisation in the Internal Market
OJ C	<i>Official Journal of the European Community</i> (C Series)
OJ EPO	<i>Official Journal of the European Patent Office</i>
OJ L	<i>Official Journal of the European Community</i> (L Series)
OJ OHIM	<i>Official Journal of the Office of Harmonisation in the Internal Market</i>
OJ Sp Ed	<i>Official Journal of the European Community</i> (Special Edition)
PA	Patents Act 1977
PA 1949	Patents Act 1949
PAC	Practice Amendment Circular (of the UK Trade Mark Registry)
Paris	Paris Convention for the Protection of Industrial Property of March 1883 (latest revision, Stockholm 1967, with 1979 amendments)
Paterson	G. Paterson, <i>The European Patent System: The Law and Practice of the EPC</i> (London: Sweet & Maxwell, 1992)
PCT	Patent Co-operation Treaty (1970)
PD	Practice Direction
PDO	Protected Designation of Origin
PGI	Protected Geographical Indication
Phonograms Treaty	Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms, Geneva, 29 Oct. 1971
Piracy and Counterfeiting Reg.	Council Regulation 3842/86 of 1 Dec. 1986 providing for measures to prohibit the release for free circulation of goods infringing certain intellectual property rights
PLR	Public Lending Right
PLRA	Public Lending Right Act 1979
PP	<i>Parliamentary Papers</i>
PPL	Phonogram Performance Ltd
Proposed Design Reg.	Proposal for Council Regulation (EC) on Community Designs COM (1999) final of 22 June 1999

Proposed Resale Right Dir.	Common Position (EC) no. 42/2000 adopted by Council on 19 June 2000 with a view to adopting Directive 2000/ /EC of the European Parliament and of the Council on the resale right for the benefit of the author of an original work of art ( <i>OJ</i> 2000 C 300/1, 20 Oct. 2000)
Proposed UM Dir.	Amended Proposal for a European Parliament and Council Directive approximating the legal arrangements for the protection of inventions by Utility Model (12 Aug. 1999) Brussels COM (1999) 309 final/2
Protocol on Jurisdiction	Protocol on Jurisdiction and the Recognition of Decisions in respect to the Right to the Grant of a European Patent
Protocol on Litigation	Protocol to the Community Patent Convention on Litigation
PRS	Performing Right Society
PVA	Plant Varieties Act 1997
PVSA	Plant Varieties and Seeds Act 1964
PW	<i>Patent World</i>
PWms	<i>Peere Williams Chancery Reports</i>
QB	<i>Queens Bench</i>
QBD	<i>Queens Bench Division</i>
QdR	<i>Queensland Reports</i>
r.	rule
RDA	Registered Designs Act 1949
RDAT	Registered Designs Appeal Tribunal
RDR	Registered Design Rules, SI 1995/2912
Reid	B. Reid, <i>A Practical Guide to Patent Law</i> (3rd edn., London: Sweet & Maxwell, 1999)
Related Rights Regs.	Copyright and Related Rights Regulations 1996, SI 1996/2967
Rental Dir.	Council Directive 92/100/EEC of 19 Nov. 1992 on rental and lending right and on certain rights related to copyright in the field of intellectual property
Ricketson	S. Ricketson, <i>The Berne Convention for the Protection of Literary and Artistic Works</i> (London: Kluwer & QMW, 1987)
RIDA	<i>Revue internationale du droit d'auteur</i>
Rio Convention	Convention on Biological Diversity of 5 June 1992 signed at Rio de Janeiro
Rome	International Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, Rome, 26 Oct. 1961

Rothnie	W. Rothnie, <i>Parallel Imports</i> (London: Sweet & Maxwell, 1993)
RPC	<i>Report of Patent Cases</i>
Russell-Clarke	M. Howe (ed.), <i>Russell-Clarke on Industrial Designs</i> (6th edn., London: Sweet & Maxwell, 1998)
Satellite Conv.	Convention Relating to the Distribution by Programme Carrying Signals Transmitted by Satellite, Brussels, 21 May 1974
Satellite Dir.	Council Directive 93/98/EEC of 27 Sept. 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission
SCCR	<i>Scottish Criminal Case Reports</i>
SCt	Supreme Court
Software Dir.	Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs
Sherman and Bently	B. Sherman and L. Bently, <i>The Making of Modern Intellectual Property Law</i> (Cambridge: CUP, 1999)
Sherman and Strowel	B. Sherman and A. Strowel (eds.), <i>Of Authors and Origins: Essays on Copyright Law</i> (Oxford: Clarendon Press, 1994)
Singer	R. Singer, <i>The European Patent Convention</i> , R. Lunzer (ed.) (London: Sweet & Maxwell, 1995)
SPC	Supplementary Protection Certificate
SPC (MP) Reg.	Council Regulation (EEC), no. 1768/2 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products [1992] <i>OJ</i> L182/1
SPC (PPP) Reg.	Council Regulation (EC), no. 1610/10 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products [1996] <i>OJ</i> L198/30–5
Strasbourg	Strasbourg Convention on the Unification of Certain Points of Substantive Law on Patents for Inventions (1963) ETS, no. 47
TBA	Technical Board of Appeal
TDA	Trade Descriptions Act 1968
Terrell	S. Thorley, R. Miller, G. Burkill, and C. Birss (eds.), <i>Terrells Law of Patents</i> (15th edn., London: Sweet & Maxwell, 2000)
TEU	Treaty Establishing the European Union
The Treaty	Treaty Establishing the European Community

TLR	<i>Times Law Reports</i>
TLT	Trademark Law Treaty, signed 28 Oct. 1994
TMA	Trade Marks Act 1994
TMA 1938	Trade Marks Act 1938
TM Dir.	First Council Directive 89/104 of 21 Dec. 1988 to approximate the laws of member states relating to trade marks
TMR	Trade Marks Rules 2000, SI 2000/136
<i>TM Rep.</i>	<i>Trademark Reporter</i>
<i>TMR Work Manual</i>	<i>Trade Mark Registry Work Manual</i>
TRIPs	Agreement on Trade related Aspects of Intellectual Property Rights 1994
TTR	Commission Regulation (EC) no. 240/96 of 31 Jan. 1996 on the Application of Art. 85(3) of the Treaty to certain categories of Technology Transfer Agreements
UCC	Universal Copyright Convention
UDR	Unregistered Design Right
UPOV	International Convention for the Protection of New Varieties of Plants of 2 Dec. 1961 (latest revision 19 Mar. 1991)
VRR	Commission Regulation 2790/99 on the application of Article 81(3) of the Treaty of Categories of Vertical Agreements and Concerted Practices
Wadlow (1995)	C. Wadlow, <i>The Law of Passing Off</i> (London: Sweet & Maxwell, 1995)
Wadlow (1998)	C. Wadlow, <i>Enforcement of Intellectual Property in European and International Law</i> (London: Sweet & Maxwell, 1998)
Washington	Treaty on Intellectual Property in Respect of Integrated Circuits, Washington, DC, 26 May 1989
WCT	WIPO Copyright Treaty adopted by the Diplomatic Conference on 20 Dec. 1996
Whitford Committee	Whitford Committee, <i>Report of the Committee on Copyright and Designs Law</i> , Cmnd. 6732 (London: HMSO, 1977)
WIPO	World Intellectual Property Organization
WLR	<i>Weekly Law Reports</i>
Worsdall and Clark	A. Worsdall and A. Clark, <i>Anti-Counterfeiting: A Practical Guide</i> (Bristol: Jordans, 1998)
WPPT	WIPO Performers and Phonograms Treaty adopted by the Diplomatic Conference on 20 Dec. 1996
WTO	World Trade Organization

## USEFUL WEBSITES

	<a href="http://www">http://www</a>
Advertising Standards Authority	<a href="http://asa.org.uk">asa.org.uk</a>
Chartered Institute of Patent Agents	<a href="http://cipa.org.uk">cipa.org.uk</a>
Competition Commission	<a href="http://competition-commission.org.uk">competition-commission.org.uk</a>
Community Plant Variety Office	<a href="http://cpvo.fr">cpvo.fr</a>
Department of Culture, Media, and Sport	<a href="http://culture.gov.uk">culture.gov.uk</a>
Department of Trade and Industry	<a href="http://dti.gov.uk">dti.gov.uk</a>
European Commission	<a href="http://europa.org">europa.org</a>
European Court of Justice	<a href="http://curia.eu.int">curia.eu.int</a>
European Free Trade Association	<a href="http://efta.int">efta.int</a>
European Patent Office	<a href="http://epo.co.at">epo.co.at</a>
Her Majesty's Customs and Excise	<a href="http://hmce.gov.uk">hmce.gov.uk</a>
House of Lords (judicial decisions)	<a href="http://parliament.the-stationery-office.co.uk">parliament.the-stationery-office.co.uk</a>
Institute of Trade Mark Agents	<a href="http://itma.org.uk">itma.org.uk</a>
Ministry of Agriculture, Fisheries, and Food	<a href="http://maff.gov.uk">maff.gov.uk</a>
Office of Harmonization in the Internal Market	<a href="http://oami.eu.int">oami.eu.int</a>
Parliamentary Debates	<a href="http://parliament.the-stationery-office.co.uk">parliament.the-stationery-office.co.uk</a>
The Patent Office (UK)	<a href="http://patent.gov.uk">patent.gov.uk</a>
Performing Rights Society	<a href="http://prs.co.uk">prs.co.uk</a>
Plant Varieties Office	<a href="http://maff.gov.uk">maff.gov.uk</a>
Public Lending Right	<a href="http://plr.uk.com">plr.uk.com</a>
UK Government	<a href="http://open.gov.uk">open.gov.uk</a>
UK Courts	<a href="http://courtservice.gov.uk">courtservice.gov.uk</a>
US Patent Office	<a href="http://uspto.gov">uspto.gov</a>
World Intellectual Property Organization	<a href="http://wipo.org">wipo.org</a>
World Trade Organization	<a href="http://wto.org">wto.org</a>

## TABLE OF CASES

- A & M Records v Video Collection [1995] EMLR 25 ... 113, 114, 121
- A Pressler & Co v Gartside & Co (1933) 50 RPC 240 ... 600, 609
- AB v South West Water Services [1993] QB 507 ... 1026
- AB Volvo v Erik Veng (UK) Case 238/87 [1988] ECR 6211 ... 15, 568
- Aberdale Cycle v Charles Twigg (1952) 69 RPC 137 ... 613
- Abernethy v Hutchinson (1824) 1 H & Tw 28; 47 ER 1313 ... 920, 924
- ABKCO Music & Records Inc v Music Collection Internation & Anr [1995] RPC 657 ... 141
- AC Edwards v Acme Signs [1990] RPC 621 ... 464
- AC Edwards v Acme Signs [1992] RPC 131 (CA) ... 464, 465, 466
- Acclaim Entertainment /Super Soccer League R 372/2000-1 (15 Sept 2000) ... 793
- Accurist Watches v King [1992] FSR 80 ... 900, 901
- Accutron Trade Mark [1966] RPC 152 ... 781
- Ackroyds London v Islington Plastics [1962] RPC 97 ... 933, 941
- Acohs Pty v RA Bashford Consulting Pty (1997) 37 IPR 542 ... 259
- AD 2000 Trade Mark [1997] RPC 168 ... 769, 779, 783, 785
- Ad-Lib Club [1976] FSR 256 ... 683
- Adhesive Dry Mounting v Trapp (1910) 27 RPC 341 ... 427
- Adidas Case C—223/98 [2000] FSR 227; [1999] 3 CMLR 895 ... 19, 1018
- Adolf Schindling/Illuminating Device T324/94 [1997] EPOR 146 ... 444
- Advanced Semiconductor Products/Limiting feature G1/93 [1994] OJEPO 541; [1995] EPOR 97 (EBA) ... 330, 358, 465, 467
- Adventure Films v Tully [1993] EMLR 376 ... 114
- AEI Rediffusion Music v Phonographic Performance [1998] RPC 335 ... 264
- AG Spalding Bros v AW Gamage (1915) 32 RPC 273 ... 708
- AGIP (Africa) v Jackson [1992] 4 All ER 385 ... 986
- Air Products/Redox Catalyst T171/84 [1986] OJEPO 95; [1986] EPOR 210 ... 460
- Air Products/Removal of Hydrogen Sulphide T271/84 [1987] OJEPO 405; [1987] EPOR 23 ... 455
- AIRC v PPL [1994] RPC 143 ... 291
- Aktiebolaget Manus v RJ Fulwood and Bland (1948) 66 RPC 71 (CA) ... 853, 854
- Aktiebolaget Volvo v Heritage [2000] FSR 265 ... 879, 1020
- Alan Clark v Associated Newspapers [1998] RPC 261 ... 680
- Alcan/Aluminium Alloys T465/92 [1995] EPOR 501 ... 441, 443
- Alexander Pirie & Sons' Application (1933) 50 RPC147 ... 841
- Alfred Dunhill v Sunoptic SA [1979] FSR 337 ... 1010, 1014, 1015, 1016
- Alfred Dunhill's Trade Mark Application [1982] RPC 145 ... 785, 786
- Aljose Fashions v Alfred Young & Co [1978] FSR 364 ... 1014
- Allen & Hanbury v Generics [1986] RPC 203 (HL) ... 515, 518
- Allen v Brown Watson [1965] RPC 191 ... 681, 682
- Allen v Rawson (1845) 1 CB 551; 135 ER 656 ... 476, 478
- Allen West & Co Ltd v British Westinghouse Electric & Manufacturing Co Ltd (1916) 33 RPC 157 ... 566, 605
- Allied Signal/Polyoefin fiber T793/93 [1996] EPOR 104 ... 421, 423
- Alpha Therapeutic Corpn/ FAST PREP R 111/98-1 (29 Oct 1998) ... 781
- ALZA/Infuser T514/88 [1990] EPOR 157 ... 466
- Amber Size & Chemical Co v Menzel [1913] 2 Ch 239 ... 953, 963
- American Cyanamid Co's Patent (Fenbufen) [1990] RPC 309 ... 537
- American Cyanamid/Melamine derivatives T279/93 [1999] EPOR 88 ... 432
- American Cyanamid v Ethicon [1975] AC 396 (HL) ... 1007, 1009, 1010, 1011, 1016
- American Cyanamid v Ethicon [1979] RPC 215 ... 451, 999
- American Cyanamid's Patent (Dann) [1971] RPC 425 ... 335, 450



- American Home Products *v* Novartis [2000] RPC 547 ... 460
- Amersham International *v* Corning [1987] RPC 53 ... 997
- Ames Crosta *v* Pionex International [1977] FSR 46 ... 1014
- Amoco Corporation/Alternative claims T153/85 [1988] OJEPO 1; [1988] EPOR 116 ... 419
- Amoena *v* Truelife (unreported, 25 May 1995, SRIS C/72/95) ... 636, 643
- Amp/Connector T66/85 [1989] EPOR 283; [1989] OJEPO 167 ... 465, 465
- Amp Inc *v* Utilux Proprietary [1972] RPC 103 ... 581, 583, 584, 585, 586, 588, 589, 595, 618, 766
- Anacon Corporation *v* Environmental Research Technology [1994] FSR 659 ... 52, 167
- Anchor Building *v* Redland Roof Tiles [1990] RPC 283 (CA) ... 500
- Anderson's Trade Mark (1884) 26 Ch D 409 ... 791
- Anheuser-Busch Inc *v* Budejovicky Budvar Narodni Podnik [1984] FSR 413 ... 685, 687
- Annabel's Berkeley Square *v* Shock [1972] RPC 838 ... 721
- Antec International *v* South-Western Chicks (Warren) [1998] FSR 738 ... 676, 708, 710, 713
- Antiphon's Application [1984] RPC 1 ... 351
- Anton Piller *v* Manufacturing Processes [1976] Ch 55 ... 989
- Antoni & Alison's Application/Vacuum Packing R 497-2 [1998] OJ OHIM 3/180; [1998] ETMR 460 ... 740, 741
- Apple Computer *v* Computer Edge [1984] FSR 481 ... 53, 54
- Apple Corporation *v* Apple Computer Inc [1992] FSR 431 ... 915
- Application by L Edwards Trade Mark (1946) 63 RPC 19 ... 804
- Application of Merri-Meyers Head (Trading as Comfort and Joy); Opposition of Jean Patou [1997] ETMR 577 ... 816
- Aquaculture *v* New Zealand Mussel (1985) 5 IPR 353 ... 931
- Aquaculture *v* New Zealand Mussel (1988) 10 IPR 319; [1990] 9 IPR 527; 3 NZLR (New Zealand CA) ... 973, 974
- Archbold *v* Sweet [1832] 172 ER 947 ... 252
- Argyll *v* Argyll [1967] Ch 302 ... 924, 940, 970
- Arlite Trade Mark [1995] RPC 504 ... 847
- Arsenal *v* Reed (6 Apr 2001; 1 May 2001) ... 868
- Arthur Fairest's Application (1951) 68 RPC 197 ... 805, 806
- Artifakts Design Group *v* NP Rigg [1993] 1 NZLR 196 ... 81
- Artistic Upholstery *v* Art Forma (Furniture) [1999] 4 All ER 277 ... 680, 691, 807
- Asahi Kasei Kogyo [1991] RPC 485 (HL) ... 315, 351, 417, 422, 460, 461, 462
- Ashmore *v* Douglas Home [1987] FSR 553 ... 86, 106
- Associated Colour Printers' Design 54 RPC 203 ... 572
- Associated Newspapers *v* Insert Media [1991] 3 All ER 535; [1991] FSR 380 ... 694, 696, 714, 715, 721
- Associated Newspapers Group *v* News Group Newspapers [1986] RPC 515 ... 196, 202, 205, 206, 1012
- Association of Independent Radio Companies (AIRC) *v* Phonographic Performance [1994] RPC 143 ... 264, 265
- Athanasios Kalfelis *v* Bankhaus Schroder Case 189/87 [1988] ECR 5565 ... 1001
- Athletes Foot Marketing Association Inc *v* Cobra Sports [1980] RPC 343 ... 685, 687, 1011
- Atlantic Works *v* Brady 107 US 192 (1883) ... 450
- Attorney-General *v* Blake [1996] FSR 727 ... 975
- Attorney-General *v* Blake [1998] 1 All ER 833 (CA) ... 940, 950, 953, 975
- Attorney-General *v* Blake [2000] 3 WLR 625 ... 122, 951, 974, 975
- Attorney-General *v* Guardian Newspapers [1987] 1 WLR 1248 (1253 Ch D, 1271 CA, 1282 HL) ... 929, 944
- Attorney-General *v* Guardian Newspapers (No 2) [1990] 1 AC 109 (117 Ch D, 174 HL) ... 106, 122, 925, 928, 930, 934, 944, 947, 948, 961, 966, 973, 974
- Attorney-General *v* Jonathan Cape [1976] QB 752 ... 939
- Attorney-General *v* Newspaper Publishing [1988] Ch 333 (CA) ... 971
- Attorney-General *v* Turnaround Distributors [1989] FSR 169 ... 929
- ATT/System for generating code T204/93 (unreported) ... 391
- Attwood *v* Lamont [1920] 3 KB 571 ... 951
- Au Printemps Trade Mark [1990] RPC 518 ... 796
- Auchinloss *v* Agricultural & Veterinary Supplies [1997] RPC 649 ... 507