KERLY'S LAW OF TRADE MARKS AND TRADE NAMES

FOURTEENTH EDITION

THOMSON
SWEET & MAXWELL

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LAW OF

TRADE MARKS

AND TRADE NAMES

FOURTEENTH EDITION

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FOREWORD

Just 111 years after its first publication in 1894, it is a pleasure to welcome this new, fourteenth and much revised edition of one of the classic textbooks of English law. *Kerly* has been for generations a mainstay of trade mark practitioners, and as a classic it combines the best of the old and the new. In particular, it is now not only a book on English law, but a book on European law.

The Trade Marks Act 1994, and the corresponding legislation in the other 24 Member States of the European Union, are in large part designed to implement the European Trade Marks Directive, and the legislation has to be understood in the light of that Directive. Although entitled the First Council Directive to approximate the laws of the Member States relating to trade marks, it is by no means merely a first step in the harmonisation of trade mark law; on the contrary, it provides rather complete harmonisation of the laws of the Member States on many of the basic features of trade mark law. Thus it lays down, among other things, the essential provisions governing the nature of a trade mark; the grounds for refusal or invalidity; the rights conferred by a trade mark; and the conditions governing the exhaustion of rights.

Courts and practitioners will therefore take an approach to the UK legislation which differs from their traditional approach and reflects the European source of the legislation. Often, indeed, as the courts have increasingly recognised, it is best to go straight to the Directive, rather than to the implementing provisions which are, at best, only a reflection of the original.

Alongside the Directive, the Community Trade Mark Regulation, whose terms often mirror those of the Directive, provides for a Community trade mark effective throughout the European Union. Decisions under the Regulation are taken by the Community Trade Mark Office ("OHIM") in Alicante, with appeal from the Boards of Appeal there to the European Court of First Instance and in the last resort to the European Court of Justice; but issues under the Regulation may also come before national courts.

The Directive and the Regulation are broadly framed, and will often call for interpretation—where necessary, by way of a reference from the national court to the Court of Justice. Under Article 234 (formerly 177) of the EC Treaty, wherever a decision on a question of Community law is necessary to enable it to give judgment, any national court may, and a court of last instance must, refer the question to the Court of Justice, whose case-law is binding on national courts.

The Court applies principles of interpretation which may differ from those of national law and from those traditionally applied by English courts. It will have regard to the purposes of the legislation, to the preamble (which may be lost sight of when the substantive provisions are transposed into national legislation) and to the context—including various international instruments. It may also have regard if necessary to the different

language versions of the Community texts: although that technique of interpretation seems increasingly implausible as more languages—currently 20—are deemed to be equally authentic.

As national courts have recognised, the Court of Justice is best placed to resolve points of principle in the interpretation of Community texts. Moreover its rulings, since they are binding on all national courts, will have the effect of maintaining the unity of the law.

Already the Court has ruled on numerous fundamental aspects of the Community legislation. Full account is given in this book of the Court's case-law—rightly, in view of its binding character; and the authors are willing to examine the implications of the case-law and how it might develop.

Some aspects of the case-law have been criticised—not least by English practitioners, and occasionally even by English judges. This is hardly surprising (have the decisions of any court on any important topic ever escaped criticism?), and I do not seek here to defend the case-law "globally"—although I must record that in many encounters with practitioners and judges across Europe, I have found a high level of appreciation for the main lines of the case-law.

This book reflects a steep learning curve in trade mark law and practice, even since the last edition in 2001.

National courts and practitioners are still adjusting to the European dimension, and recognising that past practice of national systems may have to be reconsidered. For their part, the European Court of Justice and the Court of First Instance are still confronting new issues of trade mark law, and are still learning from experience of, and reaction to, issues already handled. It is right to recognise, as does Chapter 1, that since the last edition of this work there has been substantial progress in resolving many of the moot points in the regime, but that there remain areas where criticism is both justified and necessary.

This edition also has benefited from much revision: fundamental issues have been rethought and the presentation is restructured. Reflecting more fully, as it now does, the European sources of trade mark law, while raising questions where appropriate about the direction of that law, this book will be an invaluable source for judges and practitioners not only in the United Kingdom but throughout the European Union.

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PREFACE

Kerly is now 111 years' old. Until the advent of the new EU law of trade marks in 1994, 99 years on from the first edition, not a lot really happened in UK trade mark law. There had been a few Acts, liberalising the law here and there (*e.g.* as to licensing and as to the kind of mark which could be registered) but the law was basically the same—one could still refer to and rely on old cases for many aspects. Trade mark litigation involving any issue of law was rare—people knew where they were without having to ask a judge. Since the war (I haven't counted them) I do not suppose there were more than 10 cases which went to the House of Lords.

The Directive of 1989 and its subsequent implementation changed all that.Trade mark law has become much more complicated, and, I am afraid to say, much more uncertain. Although it has never been possible to say exactly what a trade mark is or what it is for, it was possible to approximate towards it. Einstein once said that physics consisted of a series of approximations towards the truth. The same was somewhat true of the legal meaning of trade mark which developed under the old law—it became more precise without every actually achieving precision. Now we have moved back a lot, as the splendid discussion in Chapter 2 shows.

As I observed in an earlier Preface, the Directive seems to have been written on the basis that there were no lessons to be learned from history. All the experience of trade mark problems learned in the Member States over the previous 100 years or so was ignored. So the Court of Justice had to start from scratch—using a document which did not itself provide clear answers to any of the well-known problems (*e.g.* fundamentally, must a defendant be using the mark complained of as a trade mark, what is meant by "distinctive", what amounts to use and so on). The mass of cases in the last 11 years (by way of reference and appeal from OHIM) proves the uncertainty of the Directive itself. But it also shows the Court itself has no clear views of trade mark law—look for instance at the *Chiemsee, Baby Dry, Doublemint* and *Sat.2* series of cases discussed in Chapter 8.

Unfortunately, despite all the cases the clear impression one has is that things are less certain now then before. All too often the rulings of the ECJ in this area of law (I find the contrast, with, *e.g.* VAT where the rulings are pretty clear, remarkable) are not sufficiently precise for the needs of industry. A trade mark is a guarantee of origin? Yes but infringed if used on imports unless there is express permission; yes, but infringed if a notice of intention to parallel import from within the EU is given in time?And how can a mere colour ever really alone guarantee origin? What is the point of protecting a part of an advertising slogan? And is that really a guarantee of origin?

I do not know the reasons for the less-than-perfect guidance coming from the ECJ. Part of it is undoubtedly the fact that the Judges are not trade mark specialists and trade mark law is unexpectedly full of pitfalls, inherent ambiguities and complex concepts. Part of it may be that it is very difficult without experience to take a holistic approach (for instance what

counts as use for infringement should be the same as that which counts as use for the purpose of validity). Whatever the reason, the authors of a textbook on the subject are faced with a mass of cases, parts of which are inconsistent with others. The authors have to strive to set out that which is reasonably certain, discuss the problems and identify uncertainties and give sound opinion where that is possible. These authors have done that to a remarkable degree. This is a thoughtful edition of *Kerly.*

What has become even clearer is that the UK legislation has not been a helpful way of implementing the Directive. I remain at a loss to understand why, when a Directive is specific (as it is here) our legislators even begin to think it a useful exercise to try to re-write it or renumber it. *Kerly* has criticised this—and it is becoming customary in the courts to ignore the bits of the UK Act which are supposed to implement the Directive. One just goes straight to the Directive. In that connection I remain baffled by the recent amendment to the Act which is supposed to bring it in line with the interpretation of Art.5(2) of the Directive in *Adidas/Fitness World.* Whatever was the point? The language of our Act before amendment tracked the Directive—so our courts would follow the interpretation given by the ECJ anyway. If every time the ECJ interpreted a Directive we adjusted our implementing legislation (whether by Act of Parliament or Regulation under s.2 of the European Communities Act 1972) we would all go mad. And what if the ECJ changes its mind or qualifies its interpretation?It would be helpful if those responsible for UK trade mark legislation read *Kerly* and focussed on what really matters.

This is also a more rounded edition than last time. For however good its discussion of substantive law may be, a practical textbook must also explain how the system(s) implementing the law actually work—law does not exist in a vacuum, it depends on procedure for life. That is particularly true of a commercial subject such as trade mark law. *Kerly* recognises this—and so this edition not only has an explanation of procedure before the English courts, but also, for the first time, a valuable explanation of how things work in OHIM. The addition of David Keeling to the team of editors to deal with this was a masterful idea.You need someone who knows how a system works to write about it—no-one can understand legal procedure by reading rules, just as no-one could understand chess by simply understanding the rules—to understand that a knight moves 2,1 is not to understand what a knight does. David Keeling's contribution has made *Kerly* a more valuable book indeed.

Finally it will be noted that I am described as "Consulting Editor".No-one should assume that I have put any actual work into this edition—I am not entitled to any of the credit due to the masterful work of the actual authors. I am just proud to be associated with it.

Robin Jacob
Royal Courts of Justice
August 2005

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