KERLY'S LAW OF TRADE MARKS AND TRADE NAMES

FIFTEENTH EDITION

SWEET & MAXWELL

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TRADE MARKS
AND
TRADE NAMES

FOREWORD

Authors of a legal text book aimed primarily at practitioners have a difficult task at the best of times. They need to set out those parts of the law which are settled beyond doubt and make it clear they are so settled. They also need to cover those areas of law which are uncertain, to indicate the degree of uncertainty and to predict which way the courts will go if a decision has to be made. Settled law, is akin to the system of fixed stars. Commercial men can steer by them. The greater the number of fixed stars the more certainly commercial men can navigate. By way of contrast the greater the ambit of uncertain law, of planets of unpredictable orbit, the more commercial men will find themselves at sea without clear guidance as to where they can steer and where there may be rocks.

These days editing *Kerly* is a particularly difficult task. For there are fewer fixed stars and more wandering planets than in most branches of the law. Predicting what the courts will decide is more like being an astrologer than an astronomer. Moreover the star pattern keeps changing so fast. The editing job must be rather like the Red Queen's race in Lewis Carroll's *Through the Looking Glass*. As the Red Queen said: "Now, here, you see, it takes all the running you can do, to keep in the same place." The tsunami of trade mark case law emerging from the Boards of Appeals, the General Court, the CJEU, not to speak of our own courts and the courts of other member States is, like a real tsunami, overwhelming. The areas of certain law are, I am sorry to say, much less than commercial men would wish—and the areas of uncertain law much greater than is good for business. The tsunami of case law demonstrates this only too well: if the law is predictable most people do not fight: there is no point in bringing or defending a case which is, as the case may be, pretty sure to fail because there is no point. But why not litigate if anything can happen? The numbers show people are doing just that. The only deterrent is cost—that matters less to the strong than the weak. That is why the current trade mark system favours big business rather than SMEs, why big brand owners are forever seeking to push the limits of protection back.

Of course some of the difficulty lies with the fact that the Directive and Regulation were written before the days of the internet. So things like how the law should deal with various types of internet use of a trade mark (as a keyword, for counterfeit goods sold over the internet, or use by the trade mark owner himself) have to be fitted in by the courts to provisions which did not have the internet in mind. When should an ISP or internet auctioneer be liable? What about others who might be involved, even innocently, in infringement—a credit card company for instance? Can a trade mark owner save his mark from a non-use attack merely by advertising his goods for sale anywhere on the internet? And so on.

However other difficulties have no such excuse for they were entirely foreseeable and avoidable. Thus for instance I said in the Preface to the 13th Edition (2001) of *Kerly* that the practice of allowing registration for goods or services as a class would lead to trouble. Compounding it as OHIM did by an offer of three for the price of one made it worse, as was so well described by Justice Fidelma Macken of the Supreme Court of Ireland in giving the 2011 Hugh Laddie lecture of the Institute of Brand and Innovation Law at my college. The enormity of selling monopolies as though they were like goods in a supermarket is actually

breathtaking. The reality now is that the cost of finding a mark which one can be reasonably sure will be free of problems across Europe has risen considerably—as any experienced trade mark attorney will tell you.

As for the scope of trade mark rights, the big brands have persuaded the courts that their trade mark rights should be more extensive and hence more anticompetitive than elsewhere in the world. One wonders whether that is the way to make Europe competitive.

Kerly's job is to describe all this as best as can be done. That, of course, the authors have done successfully. One can predict that it will be an essential work for the next few years, but also that the pace of change will require another edition in the quite near future.

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October 2011

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