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Contemporary Intellectual Property

Law and Policy

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& Graeme Laurie



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Contemporary Intel

Law and Policy

For Nadine

With sincere thanks & best wishes for the future

Acknowledgements

We first conceived of this book in the late 20th Century (prompted by Blackstone Press and the enthusiasm of its Founder, Alistair MacQueen, and Margaret Cherry). Since then, it has changed publishers, undergone numerous revisions, doubled in size, seen research assistants come and go, and cost us countless hours away from our families and friends; but, in the final analysis, it has been worth it. The one feature which has steadfastly remained throughout this gestation period has been our desire to produce an intellectual property textbook with a difference. We believe that we have succeeded in doing so. Part of our inspiration to write this book came from what we perceived to be a gap in the intellectual property law market in terms of pedagogy: the subject-matter is ripe for a more engaging, visually-stimulating approach which takes advantage of the inherent nature of a discipline that permeates our lives at every turn. But another reason behind our decision to undertake this project was a wish to link our teaching and research interests and to provide a further outlet for the dissemination of our research. Our first thanks must go, therefore, to the Arts and Humanities Research Council which has funded our research centre in intellectual property and technology law since 2002 and will continue to do so until 2012. Many examples of work carried out under the auspices of our centre have found their way into this book.

Our second thanks go to the School of Law at the University of Edinburgh which hosts and rigorously supports the centre and which has provided the authors with a comfortable academic home for many years. It has also brought us into contact with generations of students eager to learn about intellectual property law and who have urged us to write the book that we have. We are particularly grateful to those who have served as research assistants on this project, including Arne Kolb, Dinusha Mendis, Elizabeth Smith, and Peter Webster. Our colleague, Abbe Brown, stepped in at the last minute to take over the chapter on Breach of Confidence and this proved to be the final push that was needed. We're in your debt, Abbe – it may never have happened without you!

The publication process can be a long and arduous one, but we have been ably guided, first, by Fiona Kinnear and, then, Philippa Groom of Oxford University Press. We understand that we were one of Philippa's final commissions before being promoted: best of luck for the future and we hope we were not too difficult! We appreciate too the time and effort of the OUP reviewers who commented on early drafts and have helped to make this a better book. We believe the law to be stated as accurate as of 31st January 2007. URL references were also accurate as of this date, but have been affected by the UK Patent Office becoming the UK Intellectual Property Office in April 2007, with a consequent change to its website address. Up-to-date URLs will be found on our own companion website. We have however managed to change references to 'the Patent Office' in our text.

We each have personal thanks to pass on to families and friends who have lost time with us because of this project but we prefer to communicate those in private. Collectively, however, we have one final thanks to give to Nadine Eriksson-Smith

who has been the Administrator of our Centre since its inception and who has become a good friend. This book appears at a time when our Centre is moving into a new phase and when Nadine is moving on to new projects. Thank you, Nadine, for all your help, humour and support over the years. This book is dedicated to you.

Hector MacQueen
Charlotte Waelde
Graeme Laurie
June 2007

About the authors

This book is unlike any other on intellectual property law. It does not attempt a simple trawl through the legal provisions that make up this discipline. Rather, it sets intellectual property protection within its wider social context and explains the tensions and dynamics that operate in that world and which shape the law over time. We are particularly interested in the contemporary challenges to modern intellectual property law; hence the title of our book. We have sought to produce a text which both introduces students, primarily undergraduates, to the laws in this area, and which at the same time helps them to understand the policies that lead those laws to be the way they are. The world of intellectual property is full of contradictions, competing interests, political agenda, and, sometimes, ideology. Our aim has been to help students understand these tensions by explaining how law is shaped within their contours. It is, in other words, to help students appreciate intellectual property law within the 'real' world.

There is no denying that intellectual property law can be difficult. The law can sometimes seem dense and impenetrable, and it is a challenge in itself just to keep up with developments. We have divided the responsibility for writing this book among four authors because of the enormity of the task, but we each share a common vision which is to make the study of intellectual property law accessible, engaging and fun. The challenge should not be difficult to meet: intellectual property law is an amazingly vibrant and dynamic discipline which has a bearing on the daily lives of each and every one of us. We want the students who use this book to engage with the subject and we have written it accordingly. We explain below the various elements used in the text to achieve this. It is another feature of the book that is unique.

Intellectual property law is an extremely diverse and expanding field and it has not been possible to offer complete coverage of all areas which make up the discipline while meeting our objectives outlined above. We do not believe that one book can serve both ends, and we prefer innovation and difference. This having been said, the book offers critical analysis of all of the main areas of intellectual property law, both under statute and at common law, and ensures that every issue is considered from each of the national, European and international perspectives.

A further and final feature of this book which helps it to stand out is its contemporary presentation and layout, and its use of images. No other legal subject can be understood or come alive in quite the same way as intellectual property law because so much of the field is concerned with visualisations of creations. And no other intellectual property textbook contains so many images to illustrate key issues. In a pertinent demonstration of the power of intellectual property law in practice, it proved not possible to include all the images we wanted. Sometimes locating the copyright owner was not straightforward and sometimes our publishers' requests for permission to reproduce an image were refused even though it was for use in an educational text. As you will come to appreciate, this is but one example of the legal and political complexities of the subject. Where we have not obtained illustrative material for use in the book itself, we have sometimes been able to provide references to where it may be found, or to give a relevant link in the book's Online Resource Centre (see further below).

Distinguishing features of this book

This book embodies an holistic account of intellectual property law as an organic and developing discipline. Its key features include:

- An in-depth and up-to-date account of the current law with particular emphasis on the contemporary challenges in each of the main areas of the discipline;
- A consideration of the underlying policies which have shaped each of the areas of the law to date;
- Critical analysis of the forces that drive these policies with a view to predicting how intellectual property law might develop in the future;
- Identification of the tensions that arise for intellectual property law as a result of influences from other policy areas, such as the single European market, competition law and human rights discourse;
- Evaluation of the 'success' with which intellectual property law has responded to new challenges as these have arisen, including the Internet, the advent of the new genetics, and calls for better protection of the personality;
- A broad contextualisation of the discussion in domestic, European and international spheres, ensuring that students understand that intellectual property law is truly a global discipline.

This book is full of features that are designed to help students engage with the subject-matter, to acquire and refine critical and reflective skills, and to remain up-to-date with the fast-paced developments that typify intellectual property law. This guide is a step-by-step walk through these features and you should pay close attention to ensure that you get the most out of the book.

The book is divided into parts, each of which deals with a discrete area of intellectual property law. The beginning of each part contains an overview of what will be covered and an account of the key sources of law. Internet links to the actual text of these instruments are also provided.

Learning objectives

Each chapter gives an account of the learning objectives that you should be able to meet once you have worked through the chapter. For example, the first learning objective in Chapter 2 states: 'By the end of this chapter you should be able to describe and explain the development of copyright, and its rationale.' If you cannot meet the objectives, then you need to work through the chapter again!

Key points

Every chapter uses key points to highlight essential features of the chapter or area of law that you need to know. These help to focus your study and serve as valuable milestones as you move through the different parts of the book.

Key extracts from legislation

Every legal case tells a story, and we have designed the format of the book to ensure that crucial extracts and legal points are clearly communicated to the reader.



the chapters should be able to describe and explain the objectives for registered intellectual property rights, exploitation strategies used for copyright, patents and trade marks, the rules of statutory controls on exploitation and their purpose, circumstances in which compulsory licences might be granted for the exploitation of intellectual property rights, emergent exploitation strategies in the light of expansion of the scope and subject matter of IPAs, the means of civil and criminal enforcement procedures and remedies available for infringement of IPAs, recent developments and proposals on enforcement and remedies emanating from the IC, and how these fit into, and may complement, the current framework, the measures to be based on TRIPS and their contribution to global intellectual property enforcement.

The rest of the chapter looks like this

Assessment [1] 4-21.61

Both interim

The scope. The scope and final instruments (instruments) are available in 17 instruments actions. The scope of a final instrument is currently a matter of debate. Delivery up and damages are both available as remedies. Damages are not available against non-traders (except possibly for trade marks and passing off). Additional damages are available for copyright, rights in performers and unregistered design rights. (For discussion on implementation of the Enforcement Directive and the impact on copyright damages, see para 21.127.)

Case

In the Registered Designs Act 1949 as it stood between 1989 and 2000, the design of spare parts for cars had been applied to articles as well as to the cars themselves. The House of Lords held that in general such parts had not been made available to consumers apart from the vehicle itself. They applied the then definition of 'article' for RDP in any article of manufacture (including any part of an article) that is made and sold separately (RDC v 2811). The application in respect of the design of a wing mirror, a vehicle seat, a steering wheel, wheels and wheel covers were allowed to proceed, these being items where substitution of a like item from the part being replaced were possible while leaving the general shape and appearance of the whole unaffected. The House held that there was an essential difference between an item designed for incorporation in a larger article, whether as an original component or a spare part, which would be unrecognisable as an article, and an item designed for general use, albeit stored provisionally as well with the manufacturer's own articles, which would be registrable as an article.

We highlight systematically important web pages where you can check out the most up-to-date developments in your chosen area of study. Website addresses themselves will be updated on the book's Online Resource Centre

We ask questions throughout each chapter to help you assess your developing knowledge. These will usually be factual questions or 'reminder' questions and the answer can normally be found within the text itself.

These points are designed to encourage you to think more widely about particular ideas and legal issues raised in a chapter. Guidance on answering discussion points will appear on the Online Resource Centre at

Exercises can be used to help you with coursework and assignments that require you to undertake further research and read more widely about particular topics.

Every chapter ends with suggestions for additional reading which are specially selected to highlight key areas of the chapter and to help you to take your learning further.

develop a number of differently branded products of the same kind. Ariel versus Prad is an example of later brand competition. ¹⁴ Consumers are interested in the quality and the price of the ¹⁵ as, for many products, after sales service.

For the Commission
cooperation (Case Guidelines on the application of Article 81 of the EC Treaty to horizontal joint ventures)

10.18 A horizontal agreement is one between actual or potential competitors, operating at the same level of the production or distribution chain. Such an agreement may cover, for example, research and development, production or purchasing. Horizontal agreements may restrict competition where they involve price fixing or market sharing, or where the market power resulting from the horizontal cooperation causes negative market effects with respect to prices, output, innovation

processes arranged to promote, assess or support art; restaurants, shops, parks, theatres and other recreational activities related to geography, topography, architecture or science.

operations and not vice versa? What differentiates 'substantial property' under the Paris Convention from the criteria protected under the Berne Convention? Does this remain a distinction in the modern age?

Why Two Conventions?

More countries to these conventions undertaken to provide two key elements of protection: the first is national treatment of foreigners, which, as the name suggests, means that any individual working protection in a signatory country both of his own citizens must be dealt with on the same terms as if he were a national of that country. Second, these statements sought to establish certain baselines of protection, as the above definitions indicate, to ensure that the same kinds of property were protected in the various treaty states. The obligation to provide this level of protection is however very basically drafted. For example, the UK does not have a movable law to match

new society. The laws set questions or persons requiring examination, thereby providing a partly filtered policy of innovation for British society. Importantly from 1701, no person was to be considered as a candidate for a patent if they had previously obtained a patent for the invention for which the patent was offered. The patent acted as an incentive to innovation to disclose their inventions early and to allow others to build on their expertise. No monopoly over the

advantages of the patent system compared to the patent system? Equally, what are the disadvantages?

What are the advantages of the patent system compared to the patent system? Equally, what are the disadvantages?

an system did not survive, but the Royal Society continues its struggle against monopolies. A contemporary example of this is the subject of Chapter 7 which was launched in 2005. This instrument was drawn up by a distinguished group of interested individuals and parties concerned about the ever expanding nature of intellectual property rights and the possible consequences for the public domain of their aggressive enforcement. The Charter calls on governments and other bodies to adopt new strategies for thinking about, and protecting, intellectual property and the public interest. It consists of nine statements of principle which

146. 'Must fit' also applies to semiconductor topographies, and so the pattern of the interfacing area of a chip is unprotected.

of the 'must fit' exception to (1) the case of an oven to be built when used; and (2) the Lego brick. With regard to (2), bear in mind that A. Consider R 1981 AC 217 held that the design of the original Lego brick was still a design for a design to be eligible and yet unable to attract a CD?'

Consider into a w:

19. In Interflora, the 'must fit' exception does not altogether deprive spare parts of IED protection only features which permit the spare part to be fitted to the original piece of equipment are regarded as a result. The Government Initiative piloting the CIPA through the House of Commons in 1988 provided the example of an agitator for a Hoover vacuum cleaner to illustrate this point. The agitator was connected to the cleaner by fittings at either end and only these features were caught by the exception. The remainder of the agitator – some 80% of it – was protected by IED. In the courts have set a number of adjustments to ensure continued the sector.

ases on Copyright (15th edn, 2005), Chapters 4, 6, 11 and 12

6. Winstanley, Modern Law of Copyright (10th edn, 2003), Chapters 10, 10A, 15, and 21

in Sherman, Intellectual Property Law (10th edn, 2004), Chapters 5, 7, 10, 11, 12

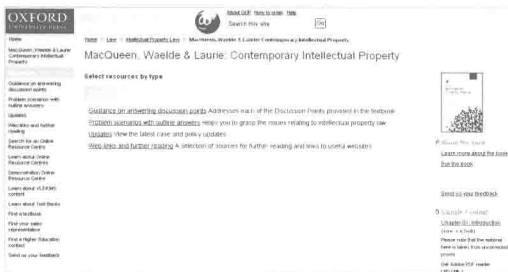
Comish & Lewis, Intellectual Property (15th edn, 2001), Chapters 10.6, 11.6, 12.1, 13.1, 13.1.1, 13.1.2

A. Maffei with S. Rickatson, Innovation and Intellectual Property: Ownership and Exploitation (2001)

J. Alderson, The Moral Rights of Authors and Performers: An Institutional and Comparative Analysis (2008)

10.18 See also J. R. P. B. (1997), European Commission of Intellectual Property Law (1997), 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Guide to the Online Resource Centre

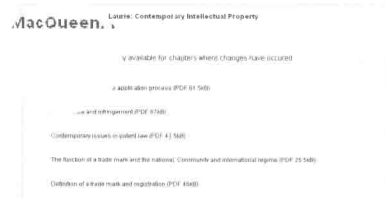


<http://www.oxfordtextbooks.co.uk/orc/macqueen>

This book is accompanied by a dynamic Online Resource Centre (ORC) which is designed to enhance your learning experience and which contains the following features:

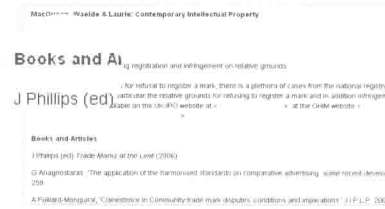
Updates

Every Part and chapter of the book will be updated twice a year with recent developments, changes in law and policy, and other information relevant to your study of intellectual property law.



Further reading and web links

Recently published sources for further reading will be added to the ORC, to help you in your research. New and updated web links will be provided together with links to images which can help your understanding of the law.



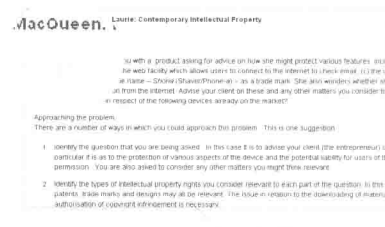
Guidance

Guidance on addressing each of the discussion points in the book will be provided in the ORC to aid your understanding of the subject-matter and help to refine your analytical skills.



Problem scenarios

The ORC contains a number of problem scenarios which involve many different areas of intellectual property law. These are intended to help you understand that real-life intellectual property issues do not fall neatly into separate boxes and to give you experience of advising on interlinking problems. Guidance on the answers will be provided.



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