

The Modern Law of Copyright and Designs

Fourth Edition

Volume 2

Chapters 33–66



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The Modern Law of Copyright and Designs

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ANTI-COMPETITIVE PRACTICES, EU LAW AND FREE MOVEMENT OF GOODS

1 INTRODUCTION

33.1 This chapter is concerned with the restraints imposed by domestic and European law relating to anti-competitive practices on the enforcement and exploitation of copyrights, publication rights, performers' rights, registered and unregistered design rights and database rights. We deal separately in other chapters with the compulsory licensing of these rights.¹ The impact of domestic competition law in the field of copyright and related rights has been largely ineffective. Conversely the impact of EU law has been profound and far-reaching. In addition to the attempt of the European Union to harmonise or partially harmonise various aspects of the law of copyright and related rights directly by the various Directives considered elsewhere in this book,² European law impacts upon the law of copyright and related rights in three principal ways. The first is in the field of free movement of goods. The ECJ has developed a substantial body of case law relating what has become known as the 'doctrine of exhaustion of rights'. The second area is competition law. Finally, the EU rules prohibiting discrimination on grounds of nationality govern the manner in which the UK and other Member States confer copyright and related rights upon each other's nationals and the extent of protection which they receive.

¹ See ch 25, paras 25.60 ff (copyright and related rights), ch 32, para 32.84 (database right), ch 47, paras 47.4 ff (UK unregistered designs), ch 58, para 58.4 (UK registered designs).

² The rental and lending rights, the publication right, the communication right, the distribution right for some works, performers' property rights and the database right have all been introduced pursuant to EU obligations and the term of copyright has been extended to life plus 70 years for the same reason.

33.2 European competition law was so much more effective than domestic competition law that the UK substantially reformed domestic competition law and adopted a new system incorporating provisions which mirror those which had been in place in European law for many years. This was done by the Competition Act 1998. The Enterprise Act 2002 then reformed the system of oversight of the market, providing for market investigation references and merger references to the domestic Competition Commission.

33.3 *Anti-competitive practices*

33.3 Finally, we have adopted the new article numbering of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU) following the entry into force of the Treaty of Lisbon on 1 December 2009. It was only in the previous edition that we had to adopt the revised article numbering of the Treaty of Rome following the Treaty of Amsterdam, but no sooner have practitioners started to become used to an ‘article 82 defence’ as opposed to an ‘article 86 defence’ than they must now re-adjust to an ‘article 102 defence’. There is an added difficulty that arises from two sets of old numbering, where some of the cases refer to the pre-Amsterdam numbering and some the post-Amsterdam numbering. The following table should help to relieve confusion in respect of articles referred to in this work.

Old article numbering of Treaty of Rome (post-Treaty of Amsterdam)	Older article numbering of Treaty of Rome (pre-Treaty of Amsterdam)	Current article numbering and location, following the Treaty of Lisbon	
		TFEU	TEU
10	5		4(3)
12	7	18	
24	10	29	
28	30	34	
29	34	35	
30	36	36	
49	59	56	
81	85	101	
82	86	102	
94	100	115	
95	100a	114	
229	172	261	
230	173	263	
232	175	265	
234	177	267	
249	189	288	
295	222	345	

2 THE EUROPEAN UNION AND THE EUROPEAN ECONOMIC AREA

33.4 Since the accession of the UK to the Treaty of Rome and the coming into force of the European Communities Act 1972,¹ the provisions of the Treaty (and its replacements) have been directly applicable in the UK as part of our law. This has had a significant effect on intellectual property rights and their enforceability; the major impact coming from the rules relating to competition, arts 101 and 102, TFEU,² and the principle of the free movement of goods, arts 34 and 36, TFEU.³ The principles and their application to intellectual property rights were mainly developed from the case law of the Euro-