CORNISH, LLEWELYN AND APLIN

INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS

SEVENTH EDITION

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INTELLECTUAL PROPERTY:

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Seventh Edition

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INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS

PREFACE TO THE SEVENTH EDITION

Intellectual Property used to be regarded by most judges, lawyers, industrialists, politicians, journalists, civil servants and individual inventors and creators as a recondite specialism that was best left to small bands of people who knew what it was about. Today it is too important and too controversial for such casualness to pass muster. The reach of the various types of protection—by patents, copyright, trademarks and so on—has expanded and at the same time the relevant law has become far more complex than before. Legislation—primary and secondary—streams forth. The decisions of courts form a rising tide. Keeping our readership up to date necessitates a Seventh Edition on the heels of the Sixth. To cope with the flood of new material William Cornish and David Llewelyn are very pleased now to be joined by Dr Tanya Aplin. She becomes the specialist in the team responsible for matters of copyright and design law.

The book deals with IP issues arising under the law of the United Kingdom. The subject has to be surveyed at the levels of purely national law, European Law and international law. Over the last four decades, the Europeanisation of IP law has been striking, for all that the fundamental structures given to the different types of IP have varied in critical respects. Not least remarkable has been the active pursuit by the institutions of the European Union of rights that extend to the whole Internal Market, and the harmonisation of equivalent rights under the laws of Member States, despite the absence of explicit constitutional power to intervene in the IP field. Only under the Lisbon Treaty of 2008 has this been rectified by Article 118 of the Treaty on the Functioning of the European Union. Evolving operative schemes from the legal and administrative experience of European states has involved many compromises, and some of them are ripe for reconsideration, according to important interest groups. Yet what has emerged in Europe so far has provided a model for legislation in the field across the globe. Since most countries around the world are members of the World Trade Organisation, and are obliged therefore to comply with the high-level standards of its Agreement on Trade-related Aspects of Intellectual Property rights (TRIPs), the European models have had a timely significance.

Concerning the patent systems in Europe, for decades it had been thought politically intractable to secure amendments to the European Patent Convention of 1973. However, "EPC 2000", which does provide for a limited

number of changes, was finally given effect on December 13, 2007. The London Agreement, also of 2000, which concerns the language regimes applying to European patents, also gained assent. But the hope of finally securing a Community Patent under a regime prescribed by an EU Regulation has so far remained elusive, largely because of disagreements about whether it is necessary to translate such a patent into the EU's 23 official languages.

As to basic doctrine, attention in recent years has shifted away from differences in the courts of EPC states over the proper approach to determining the scope of patents, towards the criteria of validity. The requirements have been the subject of major decisions from the House of Lords or the Court of Appeal, which restate with considerable subtlety the criteria by which the requirements for patentable subject-matter, novelty, inventive step, industrial capability, adequate disclosure and the proportionality between description and claims fall to be judged. Some of these decisions go to the adaptation of the law to meet the demands for patents upon biotechnological and digital inventions. As we go to press, the Enlarged Board of Appeal of the European Patent Office has published its self-regarding opinion that the decisions of its Boards of Appeal have not treated the exclusion of computer programs from the patent sphere inconsistently. Accordingly, there is nothing for the Enlarged Board to set right. Our first regret about this curious decision is that in this edition we have not been able to deal with its contentions at any length.

In relation to copyright, the harmonisation achieved by the InfoSoc Directive is beginning to be tested, with an ever-increasing number of references to the ECJ concerning the scope of the rights of reproduction and communication to the public and the meaning of "fair compensation" when it comes to the private copying exception. Such rulings will inevitably make the impact of harmonisation more pronounced. An incipient jurisprudence has also started to develop around the Resale Royalty Right Directive and a handful of rulings on the Database Directive have confirmed the extent of *sui generis* protection for databases. Meanwhile, national courts continue to struggle with the issue of originality for copyright databases, particularly for functional yet highly commercial compilations of data. The battle at the EU level to extend the term of protection for performers and producers of sound recordings, so vehemently fought over since 2008, has been temporarily stayed while the Commission assesses the potential impact on audiovisual performers. Internet piracy, particularly of films and music, continues to cause much anxiety amongst rightholders and ISPs have been at first cajoled and later forced into the role of policeman. The national frameworks for encouraging or obliging ISPs to intervene, such as that introduced in the UK by the Digital Economy Act 2010, have been hotly contested. Finally, the ambitious agenda set by the Gowers Review for reform of UK copyright exceptions has rapidly declined into a more modest set of proposals, favouring mostly libraries, archives and educational institutions. Parodists

and private users have been abandoned, as have users of orphan works, during the last minute rush to pass the Digital Economy Act 2010.

Concerning designs, we have seen an emerging clarity on the notional informed user as well as the relationship between validity requirements and infringement provisions. However, quirks remain between the multi-layered systems of designs protection, such as the availability of financial remedies for innocent infringement of UK registered designs, but not for Community designs. In the unique area of UK unregistered designs attempts to broaden protection to include design concepts have been (quite rightly) rejected by the courts.

As to the ever-burgeoning law on trade marks and unfair competition, the flood of cases before national and EU courts has continued unabated since the last edition. The ECJ has tried valiantly to give guidance to national courts. Occasionally this has been a success; but more frequently the result has been even more confusion and complexity. What is clear is that trade marks have become much easier, and cheaper, to obtain (and maintain) and the scope protection has expanded considerably. It remains to be seen whether this position will survive the ongoing review of the overall functioning of the EU trade mark system being carried out by the Max Planck Institute in Munich at the behest of the EU Commission; but there are growing signs of disquiet at the profusion of trade marks and their capacity to derail what most neutral observers would regard to be legitimate competition.

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