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Chapter 1

Introduction

1.1 The subject matter

The aim of this book is to ground you thoroughly in intellectual property law. It is worth starting off with a brief overview of the central concepts and terms. This will give you an indication of the areas that the book will cover and help you to fit them all together as you continue through the book.

1.1.1 Patents

A patent is a monopoly right granted by the government through the Intellectual Property Office to an individual who has invented a product or process. The basic objectives for granting this right are: to inform the public through publication of details from the application of the latest technological advances; to provide an incentive for innovation and thereby stimulate economic activity; and to provide a reward for creative and innovative effort.

1.1.2 Copyright

This is an exclusive right to deal with original literary, dramatic, artistic and musical works. As well as protecting the fruits of creative effort, the legislation also protects those who have invested in those efforts by providing protection for sound recordings, films and published editions of literary work.

1.1.3 Database right

Information arranged in a methodical and systematic way, usually accessible by electronic means such as databases, was originally protected under copyright law. However, with the implementation of the EU Directive on the legal protection of databases by the Copyright and Rights in Databases Regulations 1997, a new database right was created.

1.1.4 Performers’ rights

These are linked with copyright but are aimed at providing protection for the actual performance of copyright works as distinct from the copyright works themselves.

1.1.5 Trade marks

Trade marks are words or symbols used in relation to goods and services that distinguish the owner’s goods and services from those of another. Current legislation allows for the possibility of distinctive smells and sounds also attracting protection. The law in this area restrains others from applying the owner’s brand to their goods and services. The trade mark owner’s rights are protected by statute, if registered, or by common law, where the rights in the trade mark are based on use and goodwill.
1.1.6 Designs

Designs which give visual appeal to mass-produced goods may be protected as registered designs, whereas designs which are merely functional are protected as unregistered designs. A child’s toothbrush in the shape of a Walt Disney character is an example of the former, whereas an item of garden equipment is an example of the latter.

1.1.7 Confidential information

Equitable remedies are available to restrain the use of trade secrets and other confidential information without the owner’s authority.

1.2 The protection provided

Legal recognition of intellectual property is provided by a negative form of protection. The legislation will usually describe the owner’s right as ‘exclusive’, thus, by implication, giving the owner the right to restrain others from using his intellectual property without authority.

It can be argued that the protection given is purely economic as the intellectual property owner is being provided with the exclusive right to exploit that property. However, since 1988, there has also been a recognition of moral rights under the Copyright, Designs and Patents Act 1988. The author of a work can, among other things, protect the integrity of the work using his right to object to derogatory treatment of the work under section 80. By its very nature intellectual property requires protection on an international level. For example, the author Alice Walker is an American national whose work is produced in the United States of America. Her work is also popular in the UK and other countries. Thus to afford her protection in the United States alone would be of little benefit. There has been a number of international agreements in existence since the nineteenth century to protect intellectual property owners internationally, but on the whole their purpose was to harmonise and regularise the criteria for protection, as well as to provide for reciprocity. Intellectual property owners must still enforce their rights through national courts and thus rely on the differing methods of protection that each domestic court may utilise. Added to this, intellectual property owners may be operating in jurisdictions where the system of intellectual property protection is less than they would enjoy at home. Concerns about the lack of intellectual property protection in certain states led to the Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement, 1994), one of the multilateral agreements signed to establish the World Trade Organization (WTO).

The Agreement is based on three principles. First, to establish minimum standards for the protection and enforcement of intellectual rights in all Member States. Second, each country must protect the nationals of other Member States by granting the rights set out in the Agreement. Third, members are required to provide the nationals of other states with protection that is ‘no less favourable’ than that provided to their own nationals. Added to this is the ‘most favoured nation principle’. This is stipulated in article 4(1), which states:

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.
The Agreement is administered by the WTO. It is sovereign states rather than individual intellectual property owners who will make use of the WTO’s Dispute Settlement Body, to complain about the lack of intellectual property protection.

1.3 Justification

It would appear that the protection of intellectual property rights conflicts with policies in the European Economic Area (EEA) to maintain free competition. However, it can be argued that the market economy is stimulated by the fact that consumers are assisted in making choices from a selection of goods by the use of trade marks, for example, which distinguish one trader’s goods from those of another. Further, because the trade mark informs the consumer about the quality of the owner’s goods, there is an element of consumer protection. Granting patents encourages innovation so more goods are available on the market.

Competition within the EEA is protected by articles 34–36 of the Treaty on the Functioning of the EU (TFEU), which provide for the free movement of goods, and articles 101–102, which legislate for free competition.

Nationally, the abuse of intellectual property is checked using a variety of means, for example, licences of right for patents are provided during the last four years of the 20-year term, and compulsory licences are also available for unreasonable underuse of the patent by the patentee. Section 144 of the Copyright, Designs and Patents Act 1988 restrains anti-competitive licensing in relation to copyright and section 238 does the same in relation to unregistered design rights.

The recognition and protection of intellectual property is vital in a market economy and as such is kept under review. In 2005, the government set up a review of the intellectual property system in the UK under the Financial Times journalist Andrew Gowers. The remit of the Review was to: ‘[E]xamine all elements of the intellectual property system, to ensure that it delivers incentives while minimising inefficiency …’.

We will consider the recommendations and conclusions of the Gowers Review where appropriate throughout the book.

1.4 Sources of law

Intellectual property law is mainly codified. Each of the main subjects of intellectual property is governed by statute and supported by delegated legislation. The following are the main statutory sources of law:

- Registered Designs Act 1949 (as amended);
- Patents Act 1977 (as amended);
- Copyright, Designs and Patents Act 1988;
- Trade Marks Act 1994;
- Copyright and Rights in Databases Regulations 1997;
- Council Regulation of 12 December 2001 on Community Designs; and

Confidential information and passing off are creatures of common law. Intellectual property cannot be protected merely on a national level and international influences can be found within the above legislation, most of which was passed to enforce the international obligations of the UK as well as to update the law. For example, one of the

More recent changes which have been made include Commission Regulation of 21 October 2002 implementing Council Regulation (EC) No. 6/2002 on Community Designs (2245/2002/EC), and the changes made to the Copyright, Designs and Patents Act 1988 by the Copyright Regulations, to implement the Directive of the European Parliament and the Council of the EU 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society.

A body of case law has developed on the interpretation of the above provisions by national courts and international bodies such as the European Patent Office (EPO). Common law also has a part to play in the areas of passing off and the law of confidence.

Intellectual property law is administered in the Chancery Division of the High Court, with appeals to the Court of Appeal and the Supreme Court. The Patents Court is also part of the Chancery Division and will hear cases regarding patents and registered designs. Since the passing of the Copyright, Designs and Patents Act 1988, there is also a Patents County Court.

As we have already indicated, the nature of the protection given for intellectual property is negative. The owners will usually go to court to restrain unauthorised use of their property by others. In some cases, the remedy sought is the interlocutory injunction. An interlocutory injunction is an order sought by the intellectual property owner as a first step in proceedings, before the substantive issues regarding ownership and infringement are considered. As a result, some of the case law that has developed has done so mainly from trial judges making a decision as to whether they are satisfied that the claimant has at least an arguable case, because that is all a claimant needs to show at the stage of seeking an interlocutory injunction.

Cases on intellectual property law are reported in specialist law reports as well as the standard reports. Students of intellectual property law can, therefore, also consult the Reports of Patent, Design and Trade Mark Cases (RPC) published by the Intellectual Property Office and the Fleet Street Reports (FSR) published by Sweet & Maxwell. Cases of the European Board of Appeal (EBOR) report on decisions concerning European patents. The European Intellectual Property Review (EIPR) is the main journal where academic work on the subject can be found.

**Summary**

- Intellectual property is a form of personal intangible property. The subject matter includes copyright, database right, registered and unregistered trade marks, patents, registered and unregistered designs, as well as the law of confidence.

- The legal protection is negative in the sense that the law can be used to stop others exploiting the intellectual property owner’s property.

- The market economy is arguably stimulated by this legal incentive to create. Competition law exists in the EU and UK to discourage abuse of the rights granted to those who create.

- Intellectual property law is mainly a creature of statute but has also developed through common law and equity.
There is a wealth of material on intellectual property (as on other subjects) to be found on the internet. Below is a list of useful website addresses for those interested in pursuing the topics raised in this book in further detail.

**American Intellectual Property Law Association:** www.aipla.org  
**Copyright Licensing Agency:** www.cla.co.uk  
**European Community cases:** www.curia.europa.eu  
**European Patent Office:** www.epo.org  
**Intellectual Property Law Server:** www.intelprolaw.com  
**Intellectual Property Office:** www.ipo.gov.uk  
**Intellectual Property Owners Association:** www.ipo.org  
**International Trademark Association:** www.inta.org  
**Internet Corporation for Assigned Names and Numbers:** www.icann.org  
**Nominet, internet registry for domain names:** www.nominet.org.uk  
**Office of the European Union:** www.oami.europa.eu  
**World Intellectual Property Organization:** www.wipo.org  
**World Trade Organization:** www.wto.org
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