

CONTENTS

	<i>Page</i>
Preface	v
Table of Contents	ix
Table of Cases	xix
Table of European Material	xxvii
Table of National Legislation	xxxi
Table of International Treaties, Conventions and Agreements	xxxiii

PART ONE FOUNDATIONS

	<i>Para.</i>
Chapter 1 Origins and Rationales	1-001
1.1 Justifying Design Law	1-002
1.2 Historical Origins	1-003
1.2.1 From Artist to Craftsman	1-004
1.2.2 Industrial Revolution and Britain	1-005
(a) Competition and Innovation	1-006
(b) Factory Systems	1-007
(c) Consumer Growth	1-008
(d) Wedgwood and Boulton	1-009
1.2.3 Aftermath of the Industrial Revolution	1-010
(a) Retail and Advertising	1-011
(b) Machine and Ornamentation	1-012
(c) Utilitarian Perspectives	1-013
(d) Economic Pressures	1-014
1.2.4 Twentieth Century and Bauhaus	1-015
Chapter 2 Legal Etymology	2-001
2.1 Legal Aspects	2-002
2.1.1 Industrial Property or Artistic Property?	2-002
2.1.2 Non-consensus at International Level	2-003
2.2 Social and Economic Factors	2-004
2.2.1 Technology, Competition and Design	2-004
2.2.2 Market-related Definition	2-005

CONTENTS

2.3	Design Classification	2-006
2.3.1	Product Design	2-007
2.3.2	Environmental Design (Including Building)	2-008
2.3.3	Graphic and Service Designs	2-009
2.4	Terminology	2-010
	(a) Copyright Law	2-011
	(b) Design Law	2-012
	(c) Works of Applied Art	2-013
Chapter 3 International Perspectives		3-001
3.1	The Major Intellectual Property Instruments	3-002
3.1.1	The Berne Convention	3-002
	(a) Protectable Subject Matter	3-003
	(b) National Treatment and Designs	3-007
	(c) Illustrative Decisions on National Treatment (art.2(7))	3-008
	(d) Protection Criteria	3-012
	(e) Rights Conferred	3-014
	(f) Duration of Protection	3-015
3.1.2	The Paris Convention	3-016
	(a) Protectable Subject Matter—Utility Models and Industrial Designs	3-017
	(b) National Treatment and Designs	3-018
	(c) Priority of Filing	3-019
	(d) Forfeiture of Design	3-021
	(e) Miscellaneous Provisions	3-022
3.1.3	The TRIPS Agreement	3-023
	(a) General Provisions	3-024
	(b) Copyright	3-025
	(c) Industrial Design	3-026
	(d) The European Union and TRIPS	3-034
3.2	Design Related Conventions and Agreements	3-035
3.2.1	The Hague Agreement	3-035
	(a) Problems with the Hague Agreement Prior to the Geneva Act	3-036
	(b) The Geneva Act	3-037
	(c) Filing an International Design Deposit	3-038
	(d) The European Union and the Geneva Act 1999	3-041
3.2.2	Locarno International Classification for Industrial Designs	3-042
Chapter 4 Repair Parts: A Law and Economics Perspective		4-001
4.1	A Dilemma	4-001
4.2	Market Failure and Competing Substitutes	4-002

CONTENTS

4.3	Compulsory Licensing	4-003
4.4	Complementary/Complex Products with Components	4-004
4.5	Controlling the After Market Through Refusal of Protection	4-005
4.6	The “Repair” Clause—A Comparative Analysis	4-006
4.6.1	European Union Law	4-007
	(a) Drafting History	4-008
	(b) The Failed Three-year Approach	4-009
	(c) The Failed Compulsory Licensing Approach ...	4-010
	(d) The Unsatisfactory Directive Approach	4-011
	(e) Commission Proposal for an EU Repair Clause	4-012
4.6.2	United States	4-013
4.6.3	UK Law	4-014
4.7	A Law and Economics Approach to Repair Parts—UK and US	4-015
4.7.1	Lifetime Costs	4-015
4.7.2	Switching costs	4-016
4.7.3	Market width	4-017
4.7.4	Relationship with Competition Law—EU Approach	4-018
4.7.5	Essential facilities doctrine	4-019

PART TWO EUROPEAN UNION

Chapter 5	An Overview	5-001
5.1	History of EU Design Policy	5-001
5.2	Justification for EU Design Law	5-002
5.3	Design, Copyright or Trade Mark?	5-003
5.3.1	Registered Design Rights	5-004
	(a) National Design Rights and the Design Directive	5-005
	(b) Community Design Regulation	5-006
5.3.2	Unregistered Rights	5-007
	(a) Unregistered Design Right/Copyright	5-007
	(b) Unfair Competition/Passing Off	5-008
5.3.3	Other Registered Rights	5-009
	(a) Patents and Utility Models	5-010
	(b) Trade Mark	5-011
Chapter 6	Registered Community Design	6-001
6.1	Protectable Designs	6-001
6.1.1	Definition of Design	6-001
6.1.2	Definition of Product	6-002

CONTENTS

6.1.3	Appearance	6-003
6.1.4	Aesthetic, Industrial and Functional	6-004
6.1.5	Nature and Types of Products	6-005
6.1.6	Parts, Component Parts, and Complex Products ...	6-006
6.1.7	Typographic Typefaces	6-007
6.1.8	Written Documentation, Prototypes and Models	6-008
6.1.9	Computer Programs and Semi-conductor Typographies	6-009
6.2	Excluded Designs	6-010
6.2.1	Functional Features	6-011
	(a) A Theoretical Perspective	6-012
	(b) The Amp Approach	6-013
	(c) The Multiplicity of Forms Approach (Pre-Lindner)	6-014
	(d) The Lindner Decision	6-015
	(e) Abstract Subject Matter	6-016
6.2.2	Interconnection Features	6-017
	(a) Mechanical Interconnections	6-018
	(b) Function of Interconnections	6-019
	(c) Modular Exception	6-020
6.2.3	Contrary to Public Policy or Morality	6-021
6.3	Criteria of Protection	6-022
6.3.1	Novelty	6-023
6.3.2	Individual Character	6-024
	(a) Overall Impression	6-025
	(b) Informed User	6-026
	(c) Product Field	6-027
	(d) Designer's Degree of Freedom	6-028
	(e) Summary	6-029
6.3.3	Visibility Criterion	6-030
	(a) Component Part of Complex Product	6-031
	(b) Assembly	6-032
	(c) Visible During Normal Use	6-033
6.3.4	Prior Art and Disclosure	6-034
	(a) Drafting History	6-035
	(b) Reasonable Trade Knowledge	6-036
	(c) Relevant Sector and Product—Green Lane Products v PMS International	6-037
	(d) Date of Disclosure	6-038
	(e) Confidential Circumstances	6-039
	(f) Grace Period	6-040
6.4	Scope of Protection	6-041
6.4.1	Different Overall Impression	6-042
6.4.2	Nature of Product	6-043

CONTENTS

6.4.3	Freedom of Designer	6-044
6.5	Infringement	6-045
6.5.1	Exclusive or Anti-Copying Right?	6-045
6.5.2	Infringing Activities	6-046
	(a) Use	6-047
	(b) Making	6-048
	(c) Offering the Product or Putting it on the Market	6-049
	(d) Using a Product	6-050
	(e) Importing, Exporting and Stocking	6-051
	(f) Threatened Infringement	6-052
	(g) Exhaustion of Rights	6-053
6.5.3	Deferment of Publication	6-054
6.5.4	Direct Infringement	6-055
6.5.5	Indirect Infringement	6-056
6.5.6	Territorial Factors	6-057
6.5.7	Prior User Rights	6-058
6.6	Excepted Acts and Defences	6-059
6.6.1	Private and Non-Commercial Purposes	6-060
6.6.2	Experimental Purposes	6-061
6.6.3	Citations or Teaching Purposes	6-062
6.6.4	Use, repair and reconstruction of design on foreign transport	6-063
6.6.5	Spare Parts	6-064
6.7	Ownership	6-065
6.7.1	First Ownership	6-066
6.7.2	Employee and Commissioned Designs	6-067
6.7.3	Claims to Entitlement	6-068
6.7.4	Dealings with a Unitary CDR	6-069
	(a) Applicable Law	6-070
	(b) Assignment and Transfer	6-071
	(c) Security, Rights in Rem and Bankruptcy Proceedings	6-072
	(d) Licensing	6-073
	(e) Effects Vis-à-Vis Third Parties	6-074
6.7.5	Position under National Law	6-075
6.8	Duration of Protection	6-076
	(a) Initial Term	6-076
	(b) Renewal and Restoration (Restitutio in Integrum)	6-077
6.9	Invalidity	6-078
	(a) Procedural Rules	6-079
	(b) Presumption of Validity	6-080
	(c) Grounds of Invalidation	6-081

CONTENTS

(d) Prior Conflict	6-082
(e) Persons Entitled to Bring Invalidation Proceedings	6-083
6.10 Registration Procedure	6-084
6.10.1 Formalities and Multiple Registrations	6-085
6.10.2 International and Exhibition Priority	6-086
6.10.3 Examination	6-086
Chapter 7 Unregistered Community Designs	7-001
7.1 Relationship Between the Registered and Unregistered Regimes	7-001
7.2 Protectable Designs	7-002
7.2.1 General Criteria	7-002
7.2.2 Disclosure in the European Union	7-003
7.3 Infringement	7-004
7.3.1 Scope of Protection	7-004
7.3.2 Presumption of Validity and Burden of Proof—art.85(2)	7-005
7.3.3 Copying	7-006
7.3.4 Prohibited Acts	7-007
7.4 Ownership and Protection	7-008
7.4.1 Ownership and Entitlement	7-008
7.4.2 Term of Protection	7-009
7.5 Invalidation	7-010
Chapter 8 Distinctive Shapes, Trade Marks and Unfair Competition	8-001
8.1 Justifying Shapes Trade Marks	8-001
8.1.1 Function of Trade Marks	8-001
8.1.2 Definition of a Mark	8-002
8.2 Shape Exclusions—art.7(1)(e)	8-003
8.2.1 Shapes and Distinctiveness	8-004
8.2.2 The Philips v Remington Guidelines	8-005
8.2.3 Nature of the Goods—art.7(1)(e)(i)	8-006
8.2.4 Technical Results—art.7(1)(e)(ii)	8-007
8.2.5 Substantial Value—art.7(1)(e)(iii)	8-008
Chapter 9 Copyright and Unfair Competition	9-001
9.1 Cumulation Principle under EU Law	9-002
9.1.1 EU Copyright Law	9-002
9.1.2 Design/Copyright Interface	9-003
9.1.3 Unfair Competition	9-004
9.2 Why Harmonisation is Impossible	9-005
9.2.1 Copyright Cannot Be Harmonised by Design Legislation	9-006

CONTENTS

9.2.2	Designers do not Need Copyright	9-007
9.2.3	No one can Define "Originality" or "Artistic Work"	9-008
9.2.4	Copyright is not for Designs	9-009
9.2.5	Political Compromise	9-010
9.3	Copyright Protection in the United Kingdom	9-011
9.3.1	Legislative History	9-011
9.3.2	Basis of Protection	9-012
9.3.3	Engravings	9-013
9.3.4	Sculpture	9-014
9.3.5	Works of Artistic Craftsmanship	9-015
9.3.6	Limitations to Copyright—s.51	9-020
9.3.7	Limitations to Copyright—s.52	9-021
9.4	Unfair Competition Law	9-022
9.4.1	Rationale of Unfair Competition Law	9-022
9.4.2	Overlap of Protection	9-023
9.4.3	Examples	9-024
	(a) Netherlands	9-024
	(b) United Kingdom	9-025
	(c) Germany	9-026
	(d) Italy	9-031

PART THREE UNITED STATES

Chapter 10	Design Patent Law	10-001
10.1	Legislative History	10-002
10.2	Protectable Designs	10-003
10.2.1	Definition of Design	10-003
10.2.2	Article of Manufacture	10-004
10.2.3	Portion of an Article	10-005
10.3	Novelty	10-006
10.3.1	Statutory Rules	10-006
10.3.2	Standard of Novelty	10-007
10.4	Originality	10-008
10.5	Non-obviousness	10-009
10.5.1	Graham v Deere	10-009
10.5.2	Standard of Non-obviousness	10-010
10.6	Ornamentality	10-011
10.6.1	Non-functional	10-011
10.6.2	Aesthetic and Eye Appeal	10-012
10.6.3	Visibility	10-013
10.7	Functionality	10-014

CONTENTS

10.7.1	Not Ornamental	10-014
10.7.2	Determining Functionality	10-015
10.8	Scope of Protection and Infringement	10-016
10.8.1	Scope of Protection	10-016
10.8.2	Test for Infringement : Gorham v White	10-017
10.8.3	Ex-post Gorham—Points of Novelty Test	10-018
10.8.4	The Egyptian Goddess Abolishes “Point of Novelty”	10-019
10.8.5	Construction of claims – the Markman rule	10-020
10.8.6	Effect of Egyptian Goddess	10-021
10.9	Rights and Duration	10-022
Chapter 11 Copyright Law		11-001
11.1	Historical Background	11-001
11.1.1	Early Jurisprudence	11-001
11.1.2	Mazer v Stein	11-002
11.1.3	Partial Accumulation of Protection	11-003
11.1.4	“Pictorial, Graphic and Sculptural Works” Under the 1976 Copyright Act	11-004
11.2	The “Separability” Doctrine	11-005
11.2.1	Physical Separability	11-006
11.2.2	Conceptual Separability	11-007
	(a) Kieselstein-Cord Approach	11-007
	(b) Carol Barnhart Approach	11-008
	(c) Brandir Approach	11-009
	(d) Other Circuits’ Approaches	11-010
11.3	“Useful Article”	11-011
11.4	Conditions and Scope of Protection	11-012
11.4.1	Feist Doctrine	11-013
11.4.2	Commonplace Features	11-014
11.5	Rights Conferred and Duration of Protection	11-015
11.5.1	Economic Rights	11-015
11.5.2	Moral Rights	11-016
11.5.3	Duration of Protection	11-017
Chapter 12 Trade mark and Trade Dress		12-001
12.1	Trade Mark Under Lanham Act	12-002
12.2	Trade Dress Under Lanham Act	12-003
12.3	Functionality Doctrine	12-004
12.4	State Unfair Competition Law	12-005
12.5	Vessell Hull Design Protection	12-006

CONTENTS

PART FOUR
LOOKING TOWARDS THE FUTURE

Chapter 13 The Future 13–001

13.1 Two Tier Regimes 13–002

13.2 Alternative Paths 13–003

13.3 Holistic Approach 13–004