

Copyright *for* Artists



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1. How the Law protects the Arts

1. The law protects the following:

1.1. **Artists and Authors**

Original artistic works such as drawings, engravings, photographs, sculptures and architectural plans and models, dramatic works (plays, screenplays and ballets), literary works (novels, poems and songs but also computer programs and flowcharts) and musical scores
Films, sound recordings, broadcasts and published editions

1.2. **Actors, Dancers, Singers, Musicians and other Performers**

1.3. **Designers**

Fashion designers, web designers and many other things

1.4. **Craftsmen and Women**

Those who make things with their hands

1.5. **Brand Owners**

Suppliers of goods or services that are recognized by a name or logo

2. Types of Protection

2.1. **Copyright**

Protection of original artistic, dramatic, literary and musical works, broadcasts, films, sound recordings and published editions from unauthorized copying, publication, performance, broadcasting or translation

2.2. **Rights in Performance**

Protection from unauthorized filming, taping, broadcasting or other fixation

2.3. **Designs**

Three main types of protection:

2.3.1. **New designs having individual character:** these may be registered as **registered designs** at the Designs Registry of the Patent Office for the UK under the Registered Designs Act 1994¹ or as **registered Community designs** at OHIM (Office for Harmonization in the

¹<http://www.patent.gov.uk/design/legal/act.pdf>

Internal Market)² at Alicante for the whole European Community under the provisions of the Community designs regulation;³

2.3.2. **New designs having individual character:** these enjoy temporary protection as **unregistered Community designs** throughout the EC from being copied even if they are not registered with OHIM or the Designs Registry as ; and

2.3.3. **Original Designs of Articles or Parts of Articles:** these enjoy 10 years protection as **unregistered designs** from plagiarism in the UK so long as the designs are created by a UK or EC national, national of a country offering reciprocal protection to UK nationals or articles made to the design are first marketed in the UK

2.4. Crafts

Some works of artistic craftsmanship are protected by **copyright** as artistic works others may be protected by **unregistered design right**. It is now possible to register such works as **registered designs** or as **registered Community designs**.

2.5. Brands

Signs capable of distinguishing one supplier's goods and services may be registered with the Trade Marks Registry of the Patent Office as **registered trade marks** for the UK under the Trade Marks Act 1994⁴ or at OHIM for the whole European Community as **Community trade marks** under the Community trade mark directive.⁵

3. Economic and Moral Rights

3.1. Distinction

The right to prevent unlicensed copying, publication, broadcasting or adaptation of a copyright work and the right to prevent illicit recording or taping of a performance is called an “**economic right**” **probably** because it impacts on the income that can be derived from the exercise of the right but international agreements to which HMG is party required Parliament to confer rights upon artists, authors and performers rights that protect the dignity of their works that are known as **moral rights**. This is an essentially continental concept which was imported into English law by Chapter IV of Part I of the Copyright Designs and Patents Act 1988⁶. In the case of performers, these have been available only since 1 February 2006 by virtue of The Performances (Moral Rights, etc.) Regulations 2006.⁷

3.2. Moral Rights for Artists and Authors

3.2.1. Available only for artistic, dramatic, musical, some literary works⁸ and films;

3.2.2. Rights to be identified as artist, author or director⁹, to object to derogatory treatment¹⁰ of the author's work and to object to false attribution of someone else's work.¹¹

² <http://oami.eu.int/>

³ Council Regulation (EC) No 6/2002 of 12 December 2001 on Community designs (consolidated version) http://oami.eu.int/en/design/pdf/reg2002_6.pdf

⁴ <http://www.patent.gov.uk/tm/legal/tmact94.pdf>

⁵ Council Regulation (EC) No 40/941 of 20 December 1993 on the Community trade mark as amended <http://oami.eu.int/en/mark/aspects/reg/reg4094.htm>

⁶ <http://www.patent.gov.uk/copy/legislation/legislation.pdf>

⁷ <http://www.opsi.gov.uk/si/si2006/20060018.htm>

⁸ Not computer programs, typeface designs and computer-generated works (s.79 (2) CDPA)

⁹ S.77

3.2.3. Right to be identified as author, artist or director may have to be asserted.

3.3. Moral Rights of Performers

The 2006 Regulations introduce a right not be identified as a performer and a right to object to derogatory treatment into part 2 of the Copyright Designs and Patents Act 1988.

4. Monopolies and Protection from Copying

- 4.1. Monopolies are the exclusive right to an economic activity. The exclusive right to make, sell or use a specified product or use a specified process is a patent. A registered design confers an exclusive right to make a product to a particular design. A registered trade mark confers an exclusive right to supply goods or services by reference to a particular sign. Such a right can be infringed quite unwittingly.
- 4.2. Copyright and unregistered design right merely prohibit copying. Third parties are not prohibited from making similar works. They are prevented only from copying.
- 4.3. Rights that require registration such as patents, registered designs and trade marks generally confer monopolies. Those that come into being automatically such as copyrights and rights in performances confer protection from copying.

5. Enforcement

- 5.1. In general intellectual property rights are enforced by their owners through civil proceedings. This can be very expensive and uncertain, particularly in England and Wales where the parties rather than the court decide the issues to be tried and the evidence to be considered.
- 5.2. Some copyright and performance right owners have banded together to form associations known as **collecting societies** to license the use of their members work, collect royalties and licence fees and sue those who refuse to pay them. Examples of collecting societies include the **PRS** (Performing Right Society)¹² which collects and distributes licence fees for the public performance and broadcast of musical works and the **MCPS** (Mechanical Copyright Protection Society)¹³ which collects and distributes mechanical royalties generated from the recording of music onto many different formats.
- 5.3. Some intellectual property infringements (particularly piracy and counterfeiting)¹⁴ are criminal offences as well as actionable wrongs. The Patent Office has recently joined forces with other agencies in the public and private sectors to deter and detect such wrongdoing.¹⁵ The Patent Office has published an "At a Glance Guide to Offences"¹⁶ on its website.

¹⁰ S.80

¹¹ S.84

¹² <http://www.prs.co.uk/>

¹³ <http://www.mcps.co.uk/>

¹⁴ Intentional copyright and trade mark infringement on a commercial scale

¹⁵ See IP Crime at <http://www.patent.gov.uk/about/enforcement/ipcrime.htm>

¹⁶ <http://www.patent.gov.uk/about/enforcement/offenceguide.htm>

2. Registration of Designs and Marks

6. Trade Mark Registration and Passing off

6.1. Passing off

It is actionable at common law to induce members of the public) whether intentionally or not) to market goods or services in such a way that purchasers are induced to acquire them in the belief that they are the goods or services of another supplier:

6.1.1. selling goods under another supplier's name, mark or packaging;

6.1.2. selling goods or services under a confusingly similar name, mark or packaging (e.g. the misspelling of a name or the adoption of a similarly shaped bottle)

Such conduct is known as **passing off**.

6.2. Elements of Passing off

The complainant must show:

6.2.1. **Reputation or Goodwill:** The complainant or his or her product or service must be known or recognized in the market place by reference to a name, logo, style of packaging or other distinguishing feature. He or she usually acquires such reputation or goodwill through advertising and sales.

6.2.2. **Misrepresentation:** The wrongdoer must have marketed goods or services under a name, logo or style likely to deceive or confuse the complainant's customers.

6.2.3. **Damage:** The complainant must have suffered or be likely to suffer some kind of loss or damage such as fewer sales or association with a bad product.

It is obvious that the law of passing off benefits traders who are established in a market but not those who are entering it.

6.3. Trade Mark Registration

Traders wishing to enter a market may reserve space to develop a brand by registering the name, logo or other sign by which they wish to be known as a trade mark in the trade mark registry of the country or territory in which they wish to supply goods or services. In most countries, it is not necessary for them actually to have marketed goods or services under that sign. It is enough that they intend to do so and, in the European Community at least, they are allowed 5 years in which to launch such marketing.

6.4. Requirements

The main conditions of registration are:

6.4.1. the mark must be capable of registering one supplier's goods or services from those of all other's (thus "BREAD" or "BAKER" would not do for bread but "HOVIS" or "WARBURTON" will); and

6.4.2. the mark must be one that is not the same as or similar to one that has been claimed or used by another trader for the same or similar goods.

6.5. Registration Routes

The applicant must first decide which countries and territories he or she wishes to market his goods or services. If he or she wishes to market them only in the UK the applicant will apply to

the **Trade Marks Registry** of the Patent Office. If he or she wants to market them in the UK and some other EC member or members he or she has the choice of applying to OHIM for a Community trade mark (which will give protection throughout the whole EC) or to the trade mark registries of each individual country for trade mark registration. If the latter, much of the paperwork and hence some of the cost can be avoided by making an application under the **Madrid Protocol** (Protocol relating to the Madrid Agreement concerning the International Registration of Marks)¹⁷. Under this Protocol, the national patent office of any of the Madrid Protocol members will examine the application on behalf of all other members. An application must be made under the Protocol if the applicant wants to apply for a mark in one or more countries outside the EC.

6.6. Application Procedure

Procedures differ from registry to registry but essentially there must be:

- 6.6.1. a search to make sure that the mark may be registered;
- 6.6.2. an application specifying the mark, the class or classes of goods or services for which it is to be registered and the specific goods or services for which the mark is to be registered.
- 6.6.3. an examination by staff known as examiners to make sure that the registration is in order.
- 6.6.4. publication to give third parties an opportunity to object.
- 6.6.5. further examination and consideration if informal objections are received or a hearing or other judicial proceeding if someone wishes to oppose the application.
- 6.6.6. registration in the absence of any opposition or resolution in favour of the applicant.

6.7. Provisional nature of Registration

An application is granted if the examiner can see no reason to refuse it but it may be challenged at any time if a third party produces evidence to suggest that it should never have been granted or if the registration should be revoked for non-use within 5 years or some other good reason.

6.8. Registration of Designs

The process is very similar except that there is no formal examination or publication. If the paperwork is in order it will proceed to grant. However, the registration can be challenged at any time after registration on the grounds that the design was not new, it does not have individual character or some other good reason. There is also no equivalent to the Madrid Protocol for design registrations to which HMG is party. Applications must be made either to individual design registries or to OHIM.

6.9. Professional Help

Though it is possible to apply to register trade marks and designs without professional help and many members of the public do, help is available from members of the Chartered Institute of Patent Agents¹⁸ ("**patent agents**") and Institute of Trade Mark Attorneys¹⁹ ("**trade mark agents**"). Several good patent and trade mark attorneys are members of the Huddersfield Intellectual Property Forum.²⁰

¹⁷ http://www.wipo.int/treaties/en/ip/madrid/trtdocs_wo032.html

¹⁸ www.cipa.org.uk

¹⁹ www.itma.org.uk

²⁰ www.hip.org.uk