PREFACE TO THE SIXTH EDITION

The wheel has come full circle – time for a new edition of 'Blanco's little book'. Despite all the changes in IP law over the years, the heart of what that greatest of all IP lawyers, Thomas Blanco White, wrote in the three little pamphlets just after the War remains unchanged – for this book tries not so much to expound the detail of the law (which has changed a lot) but how it actually works. Whether the reader is a student or businessman or even a lawyer from outside this area of law, what we intend is what Blanco intended: that the essential nature of living IP law should be described. That is why there are no footnotes, few case references in the text and little attempt at any detailed exposition. What we want is the reader to come away with a good idea of how it all works in practice.

It is that which makes this book special and different – what Blanco achieved with his pamphlets. Some of the text, we are glad to say, remains his. And some of it is so relevant now that we wish economists and competition lawyers would not only read it but understand it. One of the authors (Robin Jacob) even read a passage from the 1947 pamphlet at the 2008 European Commission's presentation of its preliminary findings in its Pharma Inquiry. The Commission thought it had discovered new things about the patent system – what it called 'patent clusters'. But Blanco described them back in 1947 and you will find the same passage here in Chapter 5 (see 'Improvement Patents'). It was all there from Blanco all those years ago. No other work we know contains such a description – yet that is part of how the patent system works both now and at least since the modern era of patents started with the procedural reforms of the mid-nineteenth century. Perhaps it goes back to Boulton and Watt.

Actually, therefore, we regard ourselves as *custodians* of this book, rather than authors. Our job has been to *preserve* it by bringing up to date such detail as it contains but to avoid changing it. We hope we have succeeded.

Since our intended readership goes wider than students and includes non-IP lawyers, economists, businessmen and journalists for example, we have changed publishers from Sweet and Maxwell to Hart. A work as idiosyncratic as this did not fit well with Sweet's model of major textbooks and student specific works. They kindly let us go even though they had the contractual right to the next edition (though not the copyright!). Richard Hart's imprint will, we confidently expect, be a more appropriate home. Things have begun well – Rachel Turner of Hart never complained once that we were over a year late!

Huge thanks to Bryan Lewin MBE who knows more about criminal IP law in practice than anyone else in the country. We also give great thanks to Tom Leonard and Ryan Pixton of Kilburn and Strode who not only provided the

information about official fees and the likely costs of patent and trade mark attorneys but also pointed out stuff in the old edition which needed changing.

Robin Jacob, UCL and 8 New Square, Lincoln's Inn
Matthew Fisher, UCL
Daniel Alexander, 8 New Square, Lincoln's Inn

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Imitation, Monopoly and Control

This book is about the law of commercial and industrial monopoly and imitation, and how it works: imitation by one manufacturer of another's products, imitation by one trader of the names and badges by which another's goods or business are known; imitations, deliberate or not, accidental or on purpose. It is about how the law deals with the appropriation of the fruits of other people's labour. And it is also about how people can acquire monopoly rights to do certain profitable things (such as make certain products or sell them under particular names), and how those monopolies are protected and kept from getting out of hand. Thirdly, it is about how people can control the use other people make of their creative work. These subjects overlap to the point of inseparability in much of what follows.

Kinds of Intellectual Property

'Intellectual property' ('IP') is the umbrella term now used to cover all the various rights which may be invoked to prevent imitations of various sorts. But contrary to quite a lot of current woolly terminology and thinking, actually the rights are quite distinct. For legal purposes they have to be considered individually. In practice, the kinds of imitation and the applicable rights often overlap. There are numerous examples of such overlap. The manufacture of a particular industrial item might infringe a rival's patent. But it may also infringe design rights of various sorts, some of which come into play if there has been copying, others even if there has not. For another example, industrial designs are given protection in theory to protect the work of the designer – to protect the artistic element in manufacture. In many cases, however, the main value of design protection is to supplement the manufacturer's trade marks by securing to him exclusive rights in the 'get-up' of the goods – a function that in legal theory belongs rather to the law of passing off or registered trade marks. For a third example, patent protection can be used in such a way as to build up the reputation of a trade mark for the patented goods such that the effect of the monopoly that the patent gave can be felt long after it has expired, because the trade mark has by then become so well established.

Exactly how to go about using, reinforcing and challenging the various monopoly rights to best commercial advantage is a matter for complex strategic assessment.

Quite often it is possible to do almost as much with an unchallenged monopoly (such as a granted patent) as with one that is secure (such as a *valid* patent) because the costs and risks for a competitor of breaking the monopoly by legal action are often very high. The mere possession of a patent, however rubbishy to a lawyer's mind, may be of real value for commercial purposes and it will encourage others to think of ways of 'designing around' the monopoly, rather than face an action for infringement, once substantial resources have been committed. Because of the substantial costs for people of finding out exactly what it is they can do by going to court to get a judge to tell them, a great deal of IP law in practice involves not squabbling in court over the existence or scope of rights, but getting into the best position for reaching agreement on who should to be allowed to do what.

Even a weak intellectual property right (or a collection of them) can often be licensed to a large company for a lot of money, partly because it can be cheaper to pay a modest licence fee per product than to risk any one patent being upheld and disrupting sales.

In the modern commercial world, considerations are rarely national. Because IP rights tend to be somewhat different in their effect in different countries, even if a right seems hopeless in one country, it might be different elsewhere. That difference can be used to try to obtain commercial advantage. So, one Court of Appeal judge who thought that a patent was clearly invalid in England referred to the fact that, in Holland, it had been upheld as an instance of 'quot homines, tot sententiae' ('there are as many opinions as there are men'). A patentee – and to some extent other right-owners – have a number of shots at a commercial rival because cases are judged by humans who sometimes have reasonably held differences in view. In some cases, maintaining a market in one country may be very valuable, even if the rest of the world is lost. The consequence is that it can really pay to have a go in obtaining the rights in question and, often, in enforcing them.

'Exclusive Rights'

Most of the legal rights with which this book is concerned are rights to stop other people doing things – what an old cynic once called 'the grit in the wheels of industry'. For some reason (or possibly none), Acts of Parliament and EU legislation do not put it like that; thus the proprietor of a registered industrial design is said by the Act to have 'the exclusive right' to do certain things with the design, and the other rights are expressed in similar language. But what is meant is, not that the owner of the design, or patent, or copyright concerned has, by that ownership, the right to do anything he could not otherwise do, but that he has the right – subject to questions of validity, the right *to exclude all others.* This is worth emphasising: the position is too often not understood. In particular, there are some people who take the trouble to secure patents for inventions who believe that, somehow, possession of the patent secures to them the right to manufacture