

## Welcome to the second edition of insight

The Brabners Chaffe Street LLP commercial team is pleased to bring you the second edition of **insight**.

We thank you for your feedback on the first edition. We welcome any comments you may have regarding this or future editions. If there are any particular topics which you would like us to cover please let us know.

The issues addressed in this edition are prevalent to all businesses and often overlooked, such as interest on late payments, distance selling regulations and the standard terms and conditions on which companies do business.

There is also an update to the UKIPO practice that affects both registered trade mark owners and new applicants. We also look at the current proposals under review to allow copying for personal use, reminding us that currently making copies even for private use may be unlawful.

In addition to the hard copy we send out, **insight** is available electronically. If you would like to receive it in this format please let us know by using the contact details on the back page.

## Overdue payments - are you paying interest?


The Late Payment of Commercial Debts (Interest) Act 1998 and Late Payment of Commercial Debts Regulations 2002 are designed to combat late payment in commercial, non-consumer transactions by automatically giving all businesses (including public sector bodies) the statutory right to claim interest and debt recovery costs on the late payment of commercial debts by other businesses.

Late payment is deemed to run from the end of the agreed credit period. If no credit period has been agreed or if the agreed credit period is excessive the courts may specify a default credit period of 30 days. The payment due date from which such credit period runs will normally be the date of receipt of invoice or the date of receipt of the applicable goods or services.

Interest is calculated on a simple (rather than compound) basis at 8% above Bank of England base rate. It can be claimed merely by the supplier notifying the purchaser that it is claiming interest under the legislation, preferably in writing, including details of the amount owed, total interest accrued to date, continuing interest, original invoice details and full name and address to whom payment should be made and method of payment. Interest can be claimed up to six years after the claim first arose.

In addition, debt recovery costs of up to £100 for each late payment can be claimed although that entitlement does not affect the supplier's other rights and the supplier may still go to court to recover additional fees and charges paid.

Where the parties have agreed a specific rate of interest or compensation for late payments in their contract the right to statutory interest and debt recovery costs described above does not apply provided that such agreed interest and compensation is 'substantial', failing which a court may apply the statutory rights in place of what the parties have agreed. Courts take a number of factors into account in determining whether or not agreed interest and compensation is substantial, including equality of the parties' bargaining position and common industry custom and practice – broadly speaking, it should cover the supplier for losses incurred due to late payment and act as a deterrent and it must be reasonable in all the circumstances to allow the contractual compensation to replace the statutory provisions.



# Trade Mark Practice Rule Change, Relatively Speaking

Following new legislation which came into force in October 2007, the UK Intellectual Property Office (IPO) will no longer raise “relative grounds” objections to UK trade mark applications based on earlier marks of third parties.

## What are relative grounds?

Trade marks applications may be refused on absolute and relative grounds. Absolute grounds depend on whether the mark is inherently registrable (for example, trade marks must be distinctive). Relative grounds, which are the subject of the rule change, depend on earlier trade mark rights belonging to third parties. Identical trade marks for identical goods or services will be blocked by earlier marks, while trade marks that are not wholly identical but similar may be blocked if there is a likelihood of confusion with the earlier mark or the later mark takes unfair advantage, or is detrimental to, the earlier mark.

## What do the changes mean?

Fundamentally, the law about whether a trade mark may be registered or not has not changed. However prior to October last year, the IPO would undertake a search of the trade mark register for earlier marks, raise them as relative ground objections and refuse an application if those objections are not overcome by the applicant.

Under the new practice, although the IPO will not refuse an application on relative grounds, owners of earlier trade marks can bring an opposition based on these relative grounds. The IPO still carries out a relative grounds check and notifies the applicant of conflicting marks, giving the applicant the opportunity to voluntarily

withdraw, amend its specification, or otherwise attempt to distinguish its application from any cited mark. If the applicant takes no action or fails to convince the IPO that its mark can be distinguished from any cited mark, the IPO will notify the owners of those marks to make them aware of the new application.

All UK trade mark owners will be notified automatically of later applications that the IPO deems to conflict. European Community Trade Mark and International trade mark owners will need to opt in to receive notification of conflicting applications. Trade mark owners should also continue to use trade mark watch services and/or monitor the registers for new applications as the IPO may not always identify applications which conflict.

## Conclusion

While the rule change does not affect the registrability of any particular mark, it has two significant effects. Firstly, it speeds up the process of advertisement of applications, as they will now be advertised even where the IPO identifies conflicting earlier marks (a marked change in the speed of processing applications has been noticed since October 2007).

Secondly, trade mark owners will be notified if the IPO considers a later application to conflict with the earlier mark, but the burden of objecting to such a later application now lies with the trade mark owner in opposition rather than the IPO itself. It is very important, therefore, for rights owners to monitor the trade mark registers to ensure the distinctiveness of its brand is not diluted by the later registration of similar marks.

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# Distance Selling Regulations: Keeping them in Sight

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The Consumer Protection (Distance Selling) Regulations 2000 apply to contracts:

- for the sale of goods or the provision of services within the European Union;
- concluded between a supplier and a consumer;
- under an organised distance sales or service provision scheme run by the supplier;
- where the supplier communicates with the consumer without ever coming face to face with the consumer up to and including the point at which the contract is concluded (for example, communication by post, fax, e-mail or telephone).

Where a business normally deals with consumers face to face, the Regulations are unlikely to apply to an occasional order that is taken, for example, over the telephone or by e-mail. The Regulations will also not apply to contracts relating to financial services for consumers.

## BEFORE ENTERING INTO THE CONTRACT

The supplier must provide the consumer with clear information about the goods and services it is providing before entering into the contract, particularly the following:

1. the identity of the supplier;
2. a description of the main characteristics of the goods or services offered;
3. the price of the goods or services offered;
4. details of any delivery cost;
5. details of how payment can be made;
6. arrangements for delivery of the goods or performance of the service;
7. the fact that the consumer can withdraw from the contract at any time during the “cooling off period” of 7 working days (although note that there are certain exceptions where this does not apply); and
8. if the contract is to supply goods or services continuously or recurrently, the minimum duration of the contract.

Prior to conclusion of the contract, or in good time before or during performance of the contract (in contracts for the sale of goods, the latest time will be the time of delivery of the goods), the supplier must then provide the consumer with written confirmation of this information, along with the following further information:

1. information about the consumer's right to cancel;
2. who is responsible for the cost of returning the goods to the supplier if the consumer cancels;
3. the geographical address of the place of business of the supplier to which the consumer may address any complaints; and
4. information on any after-sales services and guarantees.

### AFTER ENTERING INTO THE CONTRACT

Cancellation rights (in addition to the cooling-off period) apply to all distance contracts governed by the Regulations, except for a specific list set out in the Regulations, unless the parties agree otherwise.

For those contracts where the consumer does have the right to cancel, this right is unconditional and generally lasts for 7 working days from the day after the contract is concluded. The consumer is entitled to a refund within 30 days of cancellation, even if the goods were not defective. Following cancellation, the consumer is only under a duty to restore the goods to the supplier at the consumer's own premises (following a written request by the supplier) and in the meantime take reasonable care of them. These duties cease if the consumer safely returns the goods or the supplier does not request that the consumer deliver the goods within 21 days of cancellation (this period may be extended up to 6 months where the contract expressly provides that the consumer must return the goods). If a consumer fails to return the goods or take reasonable care, the supplier is not permitted to delay the refund but can take action against the consumer for breach of statutory duty.

Finally, the supplier must perform the contract within 30 days from the day after the consumer sent his order to the supplier, unless the parties agree otherwise. If the contract is not performed within the 30 day period, the contract shall be treated as if the consumer never entered into it, but the consumer will still have remedies for non-performance!

### FURTHER DANGERS! BE AWARE:

1. Suppliers in breach of the Regulations can be sued for compensation by consumers who have suffered damage as a result of the breach. The power to consider complaints or seek court orders for compliance with the Regulations rests with the Director General of Fair Trading.
2. In cases where suppliers fail to provide the requisite information the cancellation period may be extended up to 3 months and 7 working days.
3. Suppliers may seek to recover direct costs of returning goods where the consumer has cancelled a contract, but only where this is expressly stipulated in the written information provided. However, if goods are faulty, the supplier will always be required to cover the cost of returning those goods.
4. The Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982 also apply. If goods and services do not conform to the contract, and the consumer exercises its right to reject them, the supplier will have to refund. In addition, if any fault develops in the first 6 months, the law presumes that the fault existed at the point of sale unless the supplier can prove otherwise.

## When was the last time you reviewed your standard terms and conditions?

All too often businesses rely upon standard terms and conditions which they have used for years or which they may have taken from their competitors. Many also assume that the way in which they draw attention to those terms will ensure that they form part of the contract. However, unfortunately it is often only when they experience difficulty with a customer or supplier and difficulty relying on and enforcing those terms in practice that they realise it would have been more cost effective to have taken proper advice regarding those terms and the way in which they present and use them to ensure that they comply with the current law, cover all aspects of their business and, last but by no means least, will actually form part of the contract.

In this issue, we will look at some of the more common and important areas for many sets of terms. In the next issue, we will look at how businesses should ensure that the terms are properly incorporated into their contract with the customer or supplier.

**Delivery** - under the Sale of Goods Act 1979 (which applies to contracts where a seller transfers ownership of goods to a

buyer), unless otherwise agreed, delivery will be deemed to take place at the seller's premises by the seller making the goods available for collection and delivery must be made within a reasonable time.

**Risk/Title** – from a seller's perspective a retention of title clause is essential in contracts for the sale of goods to ensure that the seller retains ownership of the goods until it has received full payment for them.

**Payment** - under common law, the time for payment of the price is not automatically of the essence so the supplier cannot terminate the contract if the buyer fails to pay on time unless the terms specifically permit this.

### Implied Undertakings

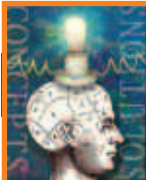
– the Sale of Goods Act 1979 implies undertakings on the seller as to conformity of goods with description or sample or as to their quality or fitness for a particular purpose. Under the Unfair Contract Terms Act 1977 (UCTA), these cannot be excluded or restricted where dealing with a consumer; they can if dealing with a

business but only if it is reasonable to do so;

- the Supply of Goods and Services Act 1982 (which applies to contracts for services or contracts for materials) implies similar undertakings as the 1979 Act though these may be excluded or varied whether dealing with a consumer or business, again subject to the reasonableness test in UCTA.

### Limitation of Liability

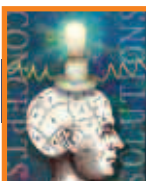
- a term excluding or restricting liability for death or personal injury caused by negligence is ineffective;
- under UCTA, when dealing on standard terms, the following provisions will only be enforceable if they are "reasonable":
  - if the supplier excludes or restricts its liability for breach of contract;
  - if the supplier claims to be entitled to render a contractual performance substantially different from that which was reasonably expected of it;
  - if the supplier claims to be entitled to render no performance at all.



## DID YOU KNOW?

The phrase “sole and exclusive” does not have a legal meaning in the UK and should be avoided as it is contradictory. A party granting “exclusive” rights is prevented from exploiting the rights itself or from granting the rights to any other party. A party granting “sole” rights may exploit the rights itself but may not grant the rights to any other party.

***Bear this in mind in relation to agreements such as licences and distribution/agency agreements, in order to determine the scope of each party’s rights.***



## DID YOU KNOW?

An effective way of proving the date of creation of a work protected by copyright is to post the document to yourself so you have a postmarked, sealed envelope containing the work which can be later examined by a court.

***Bear this in mind if you have produced works such as designs, specifications or other literary and artistic works where it may subsequently be helpful to be able to show the date of creation to enable you to bring or defend proceedings for copyright infringement.***



## DID YOU KNOW?

Domain name disputes do not have to result in expensive or costly litigation. Nominet runs a free dispute resolution service for all domain names ending “.co.uk”.

***Bear this in mind if you believe someone has registered a “.co.uk” domain name in bad faith, for example where it matches the name of your business.***

## STOP PRESS ... STOP PRESS

# Shifting Formats



New proposals have been put forward by the UK Intellectual Property Office that would allow consumers to make copies of their music and film collections for their own personal use.

The proposals are intended to address the growing problem of format shifting where people are digitising their DVD collection and copying their CDs and converting them to MP3 files so that they can be played on digital music players. Under the current law this is technically an infringement of copyright.

The new proposals would create a limited exception that permits the making of copies for personal use provided that the owner does not sell, loan, give away or share the copy or retain the copy if he/she no longer possesses the original. The exception would not extend to file-sharing which would remain an infringement.

Further exceptions are also proposed in relation to the creation of parodies, caricatures and pastiches and the proposals also suggest that the restrictions on copying by libraries and other educational facilities should be relaxed to allow them to make copies of works such as sound recordings, films and broadcasts.

The initial consultation has closed but a second consultation based on the results of the first is due later this year. For more information go to [www.ipo.gov.uk/consult-copyrightexceptions.htm](http://www.ipo.gov.uk/consult-copyrightexceptions.htm)

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Brabners Chaffe Street LLP is a leading corporate and commercial law firm based in the North West. Its business focus is on providing the full range of legal services to the mid corporate sector, specialised services to the plc and larger corporate, plus private client services to business owners and other high net worth individuals.

This briefing is for general guidance purposes only and should not be used or relied upon for any other purpose.

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