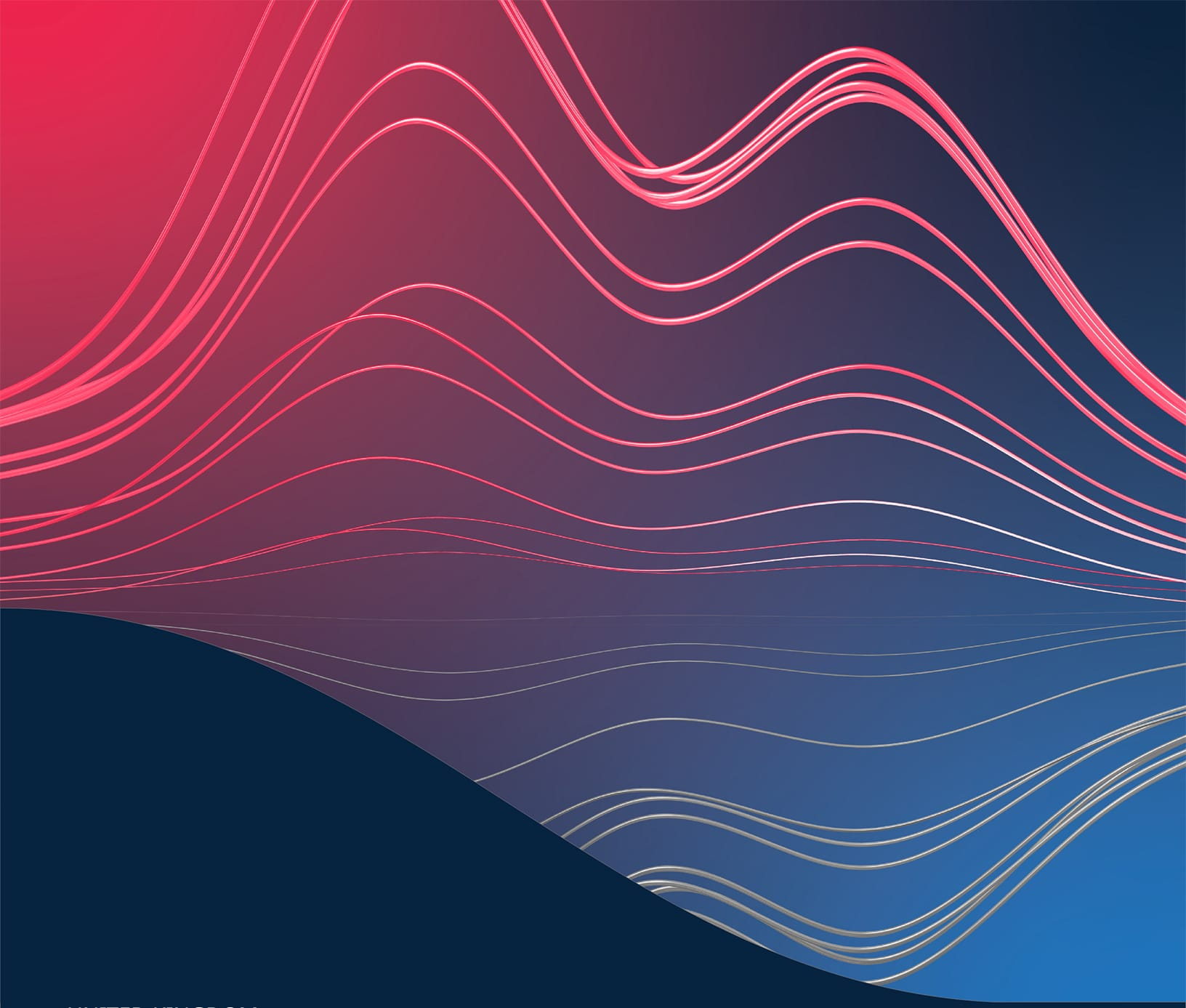

UNITED KINGDOM

Global Expansion Guidebook: Intellectual Property and Technology

DLA PIPER

Introduction

Welcome to the 2026 edition of DLA Piper's *Global Expansion Guidebook – Intellectual Property and Technology*.

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics companies need to know. The *Global Expansion Guidebook* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

Intellectual Property and Technology

Inside this guide, we outline crucial aspects of IPT laws in over 40 jurisdictions that are particularly relevant to businesses seeking to expand their operations globally. We also summarize some fundamental commercial terms that customarily appear in IPT-related agreements.

You will find answers to such common questions as:

- Which jurisdictions recognize moral rights?
- What does my business need to do to have an enforceable assignment of intellectual property from an employee, from a consultant?
- What kind of liability can be excluded from a commercial contract?

With this edition, we've also included a section for each country that discusses the enforceability of electronic signatures.

Our goal is to make the guide as readable and informative as possible, providing you just the background you need to get an overview of the IPT laws in the selected jurisdictions. This is not a substitute for professional legal advice. If you have questions regarding specific matters, we encourage you to contact one of our contributors listed in the contributors section of this guide. With nearly 500 dedicated IPT lawyers around the globe, DLA Piper's IPT group is ready to handle your legal needs wherever you do business.

Also, please note that the guide's use of the term "trademarks" also refers to service marks, unless specifically addressed separately. The summary of intellectual property covers only the most commonly used categories worldwide (for example, we have not addressed plant patents). We have also referred to international treaties and conventions with their most commonly used names and not their formal titles (such as the TRIPS Agreement, the Berne Convention, the Paris Convention and the Patent Cooperation Treaty). We hope that you find this guide valuable and we welcome your feedback.

This publication is provided to you as a courtesy, and it does not establish a client relationship between DLA Piper and you, or any other person or entity that receives it.

This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

DLA Piper and any contributing law firms accept no liability for errors or omissions appearing in this publication and, in addition, DLA Piper accepts no liability at all for the content provided by the other contributing law firms. Please note that intellectual property and technology law is dynamic, and the legal regime in the countries surveyed could change.

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United Kingdom

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Intellectual property framework

Overview

Intellectual property rights are governed by a variety of statutes and common law. The substantive provisions are generally equally applicable throughout the United Kingdom (comprising England, Wales, Scotland and Northern Ireland).

Commercial contract framework

Overview

The UK has 3 distinct legal systems:

i. English law applicable in England and Wales
ii. Northern Irish law applicable in Northern Ireland
iii. Scots law applicable in Scotland

This overview relates only to English law, which is the predominant jurisdiction used for purposes of commercial contracts in the United Kingdom.

Commercial contracts are governed by domestic legislation, case law and international treaties in certain circumstances. There are specific rules that may apply to certain types of commercial contracts. There are often more stringent rules for consumer contracts (*ie,* contracts made between a business and a consumer to address the often unequal balance between the parties). Generally, business-to-business contracts are free to contract on terms that they agree, subject to each of the parties acting reasonably (*ie,* not taking an unfair advantage and abusing their positions of power). That said, the English courts do not like to imply terms, and a distinction is drawn between a bad bargain and unreasonableness.

The interpretation and enforceability of commercial contracts is generally a matter for the courts, and a number of common-law principles have evolved through case law. Each contract and clause will, however, be determined on an individual basis depending upon the facts of the case in question and some well-established interpretive rules.

In addition, there are a number of statutes which are likely to require contractual protections drafted into the majority of contracts. For example, the Bribery Act 2010, which has extraterritorial effect and potential criminal sanctions for non-compliance; the Transfer of Undertakings (Protection of Employment) Regulations 2006, which provide that in certain circumstances employees of one contracting party may transfer to the other contracting party; and contracts with public sector authorities are generally subject to a more rigorous statutory framework.

For the latest on legal developments related to Brexit, please see our Brexit information page found here.

Copyrights

Nature of right

Copyright protection is available for works covered by the categories protected by the Copyright Act, which include artistic, literary (including software), dramatic, musical, sound recording, film, broadcasts and typographical arrangements. Literary, dramatic, musical or artistic works must be original to qualify for protection.

Copyright owners have the exclusive right to prevent others copying the work, issuing copies of the work to the public, renting, lending, performing, showing, communicating works to the public or making an adaptation of the work.

Knowingly dealing with infringing copies is also prohibited as "secondary infringement."

There is no requirement for a copyright to be registered and no copyright registration system.

Legal framework

The UK became a signatory to the Berne Convention in 1887.

Copyright Designs and Patents Act 1988, as (extensively) amended (**Copyright Act**) governs copyrights.

Copyright and Rights in Databases Regulations 1997 provides separate sui generis rights in relation to databases in which an investment has been made in obtaining, verifying or presenting their contents.

Duration of right

Provided the work qualifies for protection, protection arises automatically on creation of the work.

For literary, dramatic, musical and artistic works, duration is the author's life plus 70 years after the author's death, unless it is computer generated, in which case copyright subsists for 50 years from the end of the calendar year in which it was made. Film copyright expires 70 years after the last death of the director, author and composer. Copyright in broadcasts expires 50 years from the end of the year of the broadcast.

Copyright in typographical arrangements of published editions expires 25 years from the end of the year of 1st publication.

Ownership / licenses

Joint ownership of copyright is recognized and arises automatically where a work has more than 1 author. Joint ownership can create limitations on the ability of a joint owner to independently exploit the relevant work.

Remedies for infringement

Principal remedies are injunctions (or interdicts in Scotland), damages or an account of profits, delivery up, seizure or destruction of infringing goods. No statutory damages are available. The starting point for the damages calculation is generally a reasonable license fee. Aggravated damages for flagrancy are possible.

It is also possible to prevent the import and export of infringing copies. Criminal penalties are additionally possible for certain infringements.

Mask works / topographies

Nature of right

The equivalent to a "mask work" right is a semiconductor topography right. However, this is rarely used. Integrated circuit layouts are protected through use of other intellectual property rights (*eg,* copyright).

The right protects a UK unregistered design (within the meaning of the Copyright Act) which is:

i. A pattern fixed or intended to be fixed in or upon:
   - A layer of semiconductor product
   - A layer of material in the course of and purpose of the manufacture of a semiconductor product

ii. The arrangement of patterns fixed, or intended to be fixed, in or upon layers of a semiconductor product in relation to one another.

A semiconductor product is defined as an article consisting of at least 2 layers, at least 1 composed of semiconducting material, and in or upon 1 or more of which a pattern is fixed. The article must have as a purpose the performance of an electronic function.

The right is infringed by reproducing the design, either by making articles based on the design or by creating design documents for the purpose of making such articles.

Legal framework

Design Right (Semiconductor Topographies) Regulations 1989 (as amended) govern semiconductor topographies.

Duration of right

Provided the design qualifies for protection, protection arises automatically on creation of the design.

Protection expires 15 years from when the design was first recorded or an article made to it or, if the design or an article made to the design is made available anywhere in the world during that 15-year period, 10 years from the end of the calendar year in which the design or an article made to the design was first made available anywhere in the world.

Ownership / licenses

The designer is the first owner of any semiconductor topography right if the design is not created under commission or in the course of employment.

For commission, the commissioner is the first owner of any semiconductor topography right, subject to agreement to the contrary. If created in the course of employment, the employer is the first owner of the right, subject to any agreement to the contrary between the parties.

Remedies for infringement

Injunctions (or interdicts in Scotland), damages, or an account of profits, delivery up, seizure or destruction of infringing products.

Patents

Nature of right

Patents are a registered right which may be obtained to protect inventions (which may include, for example, chemical compounds, products, systems, processes and methods). Designs are protected by means of design rights, not by design patents. To be patentable, an invention must:

- Be novel
- Involve an inventive step over the prior art
- Be capable of industrial application (which will be satisfied in almost all cases)
- Not solely consist of excluded subject matter (such as discoveries, scientific theories, mathematical methods, aesthetic creations, business methods and computer programs)

Therefore, business methods and computer programs are patentable provided the invention makes a technical contribution to the art over and above the fact it is a business method or computer program.

It is possible to apply for a patent within the UK through the national route, the Patent Cooperation Treaty or under the European Patent Convention (a centralized process administered by the European Patent Office).

A patent owner may prevent third parties performing certain specified activities in relation to products or processes embodying the invention, or products derived from a patented process, including manufacturing, offering for sale and using a product or using or offering for use a process knowing that such use is an infringement in the UK.

It is also an infringement to supply, or offer to supply in the UK, means relating to an essential element of the invention for putting the patented invention into effect in the UK where the supplier knows that the means are suitable for and are intended for that purpose.

Legal framework

The United Kingdom became party to the Patent Cooperation Treaty in 1978 and the Paris Convention in 1884. The Patents Act 1977 governs patent law in the UK and brings into effect much of the European Patent Convention in national law, such that patent law has been largely harmonized across Europe.

Duration of right

Patents have a duration of 20 years from the filing date, subject to payment of renewal fees and so long as the patent is not invalidated. For patents protecting pharmaceutical products and plant protection products, supplementary protection certificates are available to extend duration up to the lesser of 5 years after expiry of the patent or 15 years from 1st marketing authorization.

Ownership / licenses

The UK has a 1st-to-file system. Subject to an employee's responsibilities and duties, ownership of employee-inventions will normally vest in the employer, though it is best to expressly provide for this in the employment contract.

Co-owners are considered to have an equal undivided share in a patent subject to agreement to the contrary and consequently cannot assign or license their share without consent of the other unless otherwise agreed, which may pose challenges for co-owners in exploiting their inventions

There are certain advantages to be obtained from registering assignments (or assignations in Scotland) and licenses (*eg*, binding 3rd-party acquirers), but there is no strict requirement to do so.

When granting licenses, it is generally advisable to include quality control and use provisions and controls on sublicensing.

Remedies for infringement

The patent proprietor or an exclusive licensee can sue for infringement of a patent. Remedies for infringement can include injunctions (or interdicts in Scotland), damages or an account of profits, an order for delivery up, seizure or destruction, as well as a declaration of validity and/ or infringement. No statutory damages are available.

Damages are compensatory only. Where the patentee has licensed their patent, the starting point for the damages calculation is generally a reasonable royalty fee, though, where the patentee exploits the patent, they may claim in respect of lost profits. It is additionally possible to prevent the import of infringing products.

Patent proprietors should be aware that the Patents Act provides an actionable right against those who make unjustified threats of patent infringement proceedings.

Trademarks

Nature of right

A registered right which may be obtained to protect a distinctive, non-descriptive sign consisting of words, slogans, designs, letters, numbers, domains, shapes, smells, sounds, colors, gestures or moving images that can be represented graphically and can be used to distinguish goods and services of one undertaking from those of another, subject to various grounds for refusal including conflicts with prior rights.

A trademark is infringed by use of an identical sign for identical goods or services for which the mark is registered, or by use of an identical/similar sign for identical/similar goods or services for which the mark is registered where there exists a likelihood of confusion on the part of the public. Additional protection is given for well-known marks.

Legal framework

The United Kingdom became member of the Madrid Protocol in 1995.

The United Kingdom became party to the Trademark Law Treaty in 1996.

Trademarks are governed by the Trade Marks Act 1994, as amended.

Duration of right

Trademarks are perpetual (subject to renewal every 10 years and as long as the trademark is not revoked).

Ownership / licenses

The UK registry (UKIPO) has a first-to-file system, though the registration may be refused or revoked if it conflicts with prior rights including unregistered rights.

There are certain advantages to be obtained from registering assignments (or assignations in Scotland) and licenses (*eg*, binding 3rd-party acquirers of the mark), but there is no strict requirement to do so.

When granting licenses, it is generally advisable to include quality control provisions to preserve the mark's reputation and distinctiveness, and controls on sublicensing.

Remedies for infringement

Remedies for infringement include injunctions (or interdicts in Scotland), damages or an account of profits, orders for erasure, removal or obliteration of offending sign, orders for delivery up or destruction. There is also a customs seizure regime.

There is an actionable right in the UK against those who make unjustified threats of trademark infringement. Companies should take care when writing to a 3rd party alleging infringement or use of a similar mark.

Trade secrets

Nature of right

The status of trade secrets as an item of property is not clear; the more generally accepted view is that trade secrets are not property. However, trade secrets may be protected either through a breach of contract action, where a non-disclosure agreement exists or can be implied, another obligation of confidentiality, a common-law action for breach of confidence, or by a statutory trade secrets action.

A common-law action for breach of confidence is based on the principle that, for information received in confidence, a person cannot take unfair advantage of that information or prejudice the person giving the information. The same principle applies both in Scotland and in England.

To qualify, information must have the "necessary quality of confidence" and must be "disclosed in circumstances importing an obligation of confidence" (*eg*, imposed by contract), implied by the circumstances of disclosure, or implied due to the relationship between the parties, such as employer/employee. However, in employer/employee relationships in particular, there are limits as to how far information can be protected after termination of the relationship (*ie,* information must be confidential to a sufficiently high degree, with highly confidential trade secrets possibly being protected indefinitely).

In addition, trade secrets are protected under the Trade Secrets (Enforcement, etc.) Regulations 2018.

These regulations define a trade secret as information that:

- Is secret (*ie,* is not generally known or readily accessible to persons within circles that deal with such information)
- Has commercial value as it is secret and
- Has been subjected to reasonable steps by the person in control to keep it a secret.

The meaning of "reasonable steps" will be developed as the courts apply this law. Labeling something a trade secret is unlikely to be enough of itself.

The regulations prevent unlawful acquisition, use or disclosure of trade secrets (including unauthorized access). "Unlawful" requires the act to be unauthorized, or contrary to honest commercial practices.

Legal framework

Trade secrets are governed by the Trade Secrets (Enforcement, etc.) Regulations 2018 and case law.

Duration of right

Trade secret protection has a potentially indefinite term.

However, information can lose the necessary quality of confidence and hence no longer be protectable, for example, if it enters the public domain, becomes out of date or loses its commercial value. In addition, where the obligation of confidentiality arises under a contract, the duty of confidentiality will only apply for the duration specified in the contract.

Ownership / licenses

Trade secrets are protected by the common-law tort action of breach of confidence and the 2018 Regulations. They do not give rise to property rights or "ownership" in the conventional sense. They may be exercised by anyone who is able to establish the necessary conditions (described above). Contractual licenses to use trade secrets may be granted; while there is no legal requirement for these to be in writing or signed by either party, it is generally desirable for them to be signed and in writing, for certainty and evidential purposes.

Remedies for infringement

Injunctions (or interdicts in Scotland), damages or an account of profits, and delivery up or destruction of records of confidential information illegitimately retained are possible remedies for misappropriation.

Other key IP rights

Nature of right

Passing off

The tort (or delict in Scotland) of passing off relates to misrepresentations made by one trader that damages or may damage the goodwill of another. It can be used to protect unregistered business and product names, logos and "get-up."

The "classic form" of passing off is generally defined by reference to 3 requirements:

Goodwill in the UK attached to goods or services

- A misrepresentation by the defendant to the public (intentional or not) leading the public, or likely to lead the public, to believe its goods or services are those of (or connected with) the plaintiff

The plaintiff suffers or is likely to suffer damage due to that misrepresentation.

However, the misrepresentation may be as to other matters, such as:

- That the plaintiff's goods are those of the defendant (*ie,* reverse passing off)
- Misrepresentations as to quality
- False endorsement

The misrepresentation must be one which confuses or deceives the public or is likely to do so. Goodwill has been described as the "benefit and advantage of a good name or reputation..." or the "attractive force that brings in customers." Goodwill can be limited to certain areas or geographic locations.

An extended form of passing off requires:

- A misrepresentation made by a trader in the course of trade to prospective customers or ultimate consumers, which is calculated to injure the business or goodwill of another (*ie,* such injury must be reasonably foreseeable)
- Which causes actual damage to a business or goodwill

Designs

There are 2 main types of design rights in the UK: registered designs and unregistered design right.

A registered design is a monopoly right and can protect the whole or part of a product resulting from features of lines, contours, colors, shape, texture or materials of a product or its ornamentation. This can include, for example, packaging, get up, graphics and typefaces parts of products, icons, maps or web design.

Registered designs must be new (*ie,* not previously disclosed or available to the public anywhere in the world) and have individual character (*ie*, creating a different overall impression on the "informed user" taking into account design freedom). There are exceptions to this, and features dictated by function (“must fit” and “must match” exceptions) cannot be protected. To obtain a registered design, it is necessary to register with the UK Intellectual Property Office (UKIPO). The UK is a first-to-file system, although a registration may be refused or revoked if it conflicts with prior rights.

Unregistered design right arises automatically when a design is recorded in a design drawing or an article has been made to the design. Unregistered design right subsists in the shape or configuration of the whole or part of an article that is original and not commonplace and has been recorded in a design document or an article made to the design and that has been created by a qualifying person. Unregistered design right protects the appearance of functional products and does not protect any surface decoration, nor does it protect methods or principles of construction, which should (if eligible) be protected with patents. Unregistered design right is not a monopoly right, as it only prevents copying.

Legal framework

Passing off

Case law governs actions for passing off. Such actions are not the subject of legislation, although it is possible to rely on passing off to oppose trademark applications by 3rd parties under trademark law.

Designs

The Registered Designs Act 1949 (as amended) governs registered designs. The Copyright Designs and Patents Act 1988 (as amended) governs unregistered designs.

Duration of right

Passing off

There is no fixed duration; however, goodwill must subsist. It is possible that a business may have residual goodwill for a period after it has stopped trading under the relevant name, logo or "get-up".

Designs

Registered designs are protected for up to 25 years, subject to payment of renewal fees (every 5 years), unless the registration is subsequently challenged and invalidated.

Unregistered design protection lasts for the lesser of 15 years from when the design was first recorded or an article made to it, or 10 years from the end of the calendar year when the design or an article made to the design is made available for sale or hire anywhere in the world.

Ownership / licenses

Passing off

Goodwill can be jointly owned and is considered to be a form of property right that can be transferred like any other property right.

As a general rule, goodwill accrues to the business that has generated the relevant goodwill, and not to individual employees.

Designs

The UK has a 1st-to-file system in respect of registered designs. Registered designs may be assigned or licensed.

For unregistered design right, the designer will generally be the 1st owner of the right, though if the design has been created in the course of employment the employer is likely to be the 1st owner.

In the last 5 years of an unregistered design right, any person is entitled to a license. If parties cannot agree on the terms, the Comptroller General of Patents, Designs and Trademarks will settle the terms; this can be a lengthy process, but an infringer can manufacture products pending settlement of the terms.

Remedies for infringement

Passing off

Available remedies include injunctions (or interdicts in Scotland), damages or an account of profits, and delivery up, seizure or destruction or modification of packaging, products, marketing materials and similar.

Designs

The proprietor of a registered design may prevent any use of the design or any design which does not produce a different overall impression on the informed user (taking into account design freedom). The registered proprietor or exclusive licensee of a registered design have the right to sue for infringement. Available remedies include injunctions (or interdicts in Scotland), damages or an account of profits, and delivery up, seizure or destruction of goods.

Unregistered design right is not a monopoly right and only gives the proprietor the right to prevent copying. However, if infringement is found, the same remedies are available as for registered designs.

There is an actionable right in the UK against those who make unjustified threats of design right infringement proceedings. Companies should therefore take care when writing to a 3rd party alleging infringement or use of a similar design.

Intellectual property in employment context

Employees

With respect to copyright and design rights (including semiconductor topography designs), where an employee (as distinct from independent contractors) makes a work in the course of employment, the employer will be first owner of the copyright in the work, subject to agreement to the contrary.

Inventions belong to the employer if the invention was made in the normal duties of the employee or specifically assigned duties.

Consultants / contractors

For copyright in commissioned works, the contractor will own the copyright subject to a written agreement to the contrary. The preferred approach is for a commissioner to take an assignment of all existing and future copyright in the works and any associated materials or documents and obtain a waiver from the contractor of their moral rights in the same.

Without express written provisions to the contrary, legal title in an invention will vest in the contractor unless a court implies a term into the contract granting ownership to the commissioner.

Registration of commercial agreements

Key commercial contract considerations

There are no general registration requirements for commercial agreements, save for certain real estate and finance documents.

There is a distinction in English law between 2 main forms of contract – those executed under hand (ie, simple contracts) and those executed as a deed. A contract made under a deed requires additional formalities to be satisfied but does not require consideration to pass between the parties in order to be binding. Simple contracts must include consideration to be valid.

Documents governed by Scots law are not executed by way of a deed. Statute sets out formalities which can be followed in order to ensure documents are self-proving.

Some commercial agreements may need to be disclosed in certain circumstances, for example, in relation to public companies and contracts with public sector authorities.

Recognized language of commercial agreements

There is no general requirement that contracts be in English language in order to have legal effect. In relation to consumer contracts and notices, however, a trader must ensure that the written terms of the consumer contract and written consumer notices are in plain and intelligible language. The courts may strike down limitations or similarly onerous provisions in consumer facing contracts which are not worded sufficiently clearly or with sufficient prominence.

Country-specific issues for online content

Not applicable.

Enforceability of online/clickwrap/shrinkwrap terms

The legal enforceability of shrinkwrap terms has historically been somewhat debated by academics (though common commercial practice). The Consumer Rights Act 2015 sets out a consumer's rights and obligations under business-to-consumer supply contracts for digital content (business-to-business being out of scope). There is an expectation that for clickwrap contracts to be enforceable, there must be a positive, affirmative action in order for consumers to be bound by the contract (for example they are required to actively click a box before continuing) and again for Shrinkwrap, these terms must be brought to the attention of the consumer and accepted in a positive manner (for example by clicking an "accept" button).

Consumers have statutory rights against the business supplier regarding the quality and title of digital content supplied, whether that be downloaded online or supplied as part of physical goods such as DVDs and CDs.

There are a number of requirements which relate to online terms which govern transactions entered into or services provided over the internet. For example, the Consumer Contracts (Information, Cancellation and Additional Charges) Regulations 2013 set out details of the information that must be provided by the trader as well as how they must treat any cancellations and returns.

In 2024 the Digital Markets, Competition and Consumers Act was introduced to strengthen consumer rights in response to an ever-changing digital market. This Act prohibits unfair commercial practices such as those which mislead consumers or are aggressive to induce a purchase.

Governing law

Parties are free under Scots and English law to choose the governing law and jurisdiction of a contract as well as any arbitration institution they may see fit. Generally, both the Scottish and English Courts uphold an express choice of law. However, such freedom of choice is unlikely in the case of a consumer contract. Moreover, in some circumstances, an express choice of law may be challenged and the applicable law modified (*eg,* if a different law has been chosen solely to avoid the application of the UK's "unfair contract terms" legislation). In the event that there is no express choice of law in the contract, then, for contracts created on or after December 17, 2009, the provisions of Rome I Regulation apply. For contracts created before December 17, 2009, the provisions of the Rome Convention apply.

Arbitration is often used by parties to resolve commercial disputes. It is private and confidential and governed by the Arbitration Act 1996 and, in Scotland, Arbitration (Scotland) Act 2010. There are also a number of alternative dispute resolution procedures. These include mediation, early neutral evaluation and adjudication. Traders other than health service providers now have access to alternative dispute resolution (ADR) providers in their sectors should they choose to resort to the ADR to resolve any disputes with consumers concerning contractual obligations arising from a sales or service contract.

Key commercial contract terms

Enforceability of warranty disclaimers

In a contract for the sale of goods, the Sale of Goods Act 1979 (SGA) implies a number of terms into an agreement. It is possible, to a certain extent, to disclaim some but not all of these implied terms. The terms implied by the SGA include a condition that the seller has the right to sell the goods (Section 12), that the goods conform to their description (Section 13), that the goods are of satisfactory quality (Section 14) and a condition that the goods supplied will be reasonably fit for purpose (Section 14).

Where there is a supply of goods, terms are also implied (but similarly, may to an extent be disclaimed) by the Supply of Goods and Services Act 1982 (SGSA) relating to the description (Sections 3 and 11C) and the quality (Sections 4 and 11D) of the goods transferred. In a Supply of Services, terms are implied relating to the care and skill with which the work is performed (Section 13), requiring the work to be carried out within a reasonable time (Section 14) and that, where consideration is not expressed in the contract, the party contracting the supplier will pay a reasonable charge. Sections 13 and 14 are covered by common law rather than statute in Scotland.

The extent to which terms implied by the SGA and the SGSA may be excluded is largely controlled by the Unfair Contract Terms Act 1977 (UCTA). In a commercial contract, some of the implied terms, such those relating to quality or fitness for purpose, can be disclaimed (commonly referred to as “excluded”) but only insofar as this is “reasonable.”

A typical approach is to expressly exclude an implied term, replacing it in the commercial contract with a more specific expressed term to cover the same issue. For example, the contract might exclude implied terms as to quality or fitness but expressly include terms agreeing that the goods will conform with the bespoke specification.

The restrictions in UCTA do not apply to international supply contracts (where contracting parties have places of business in different countries and the goods either cross from one country to another or where offer and acceptance take place in different countries).

The rules set out above in this section do not apply to consumer contracts. The Consumer Rights Act 2015 sets out a consumer's statutory rights over the quality of the goods, services and digital content that are supplied and the consumer's statutory remedies for the trader's breach of the supply contract. For example, the same quality requirements of the SGA and the SGSA referred to above are treated as the terms of the consumer supply contract for goods and services while similar, but different, rules apply to digital content. There are a number of terms in consumer contracts which cannot be excluded. The terms of consumer contracts and notices may also be considered unfair and not binding on consumers.

Enforceability of exclusions/limitations of liability indemnification

With some notable and important exceptions, commercial entities are largely free to agree between themselves how to apportion this risk and to limit their respective liability to each other. These can take varied forms from the complete exclusion of liability for specific types of loss to requiring claims to be made within a specific time frame.

Parties cannot, however, exclude or limit liability for:

- Certain implied warranties
- Death or personal injury caused by their, or their employees', negligence
- Fraudulent misrepresentation

Other provisions seeking to exclude or limit liability (eg, certain types of actions, such as negligence, or certain losses or claims, such as wasted management time) commonly may need to pass the "reasonableness" test set out under UCTA for them to be valid and enforceable; this will, however, depend on a range of factors, including whether a supplier is contracting on its standard terms and the balance of bargaining power between the parties (in addition, please see the comments as to international supply contracts included in enforceability of warranty disclaimers).

English and Scottish contract provisions are construed Contra Proferentum (against the party that drafted them); therefore, care should be taken to ensure clarity and accurate drafting of liability clauses. Equally, where there is any ambiguity in an exclusion of liability clause, this will be interpreted against the party seeking to limit or exclude its liability, so care should be taken when drafting to avoid ambiguous terms.

Liability will continue throughout the contract and may not cease after the contract has been fulfilled, terminated or expired, subject to statute and any warranties and indemnities set out in the contract.

It is common practice for the parties to agree on the total amount which can be claimed in the event that a contract is breached and to expressly state this cap in the contract. As explained above, such a cap on liability may be subject to the reasonableness test depending on the circumstances.

Indemnification

Indemnities are generally enforceable as a promise to be responsible for another's loss on a pound-for-pound basis. In addition, depending on the drafting, indemnities may not be subject to a duty of mitigation on the party making such indemnity claim (albeit that case law is not consistent on this point).

Because indemnities are primary obligations, they can remain valid even if the underlying transaction is set aside for any reason. This is different to the provision of a guarantee, which, as a secondary obligation, is dependent on the primary obligation existing.

An indemnity remains subject to the usual contractual principles of offer, acceptance, intention to create legal relations and consideration just like any other contractual terms.

Electronic signatures

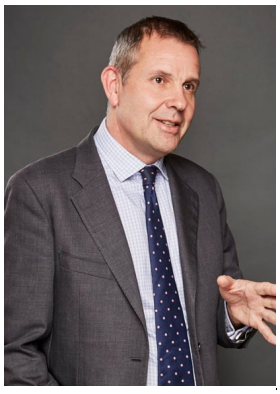
The making of electronic contracts online is commonly accepted, and there is no general prohibition at law to using electronic signatures to execute contracts. However, using electronic signatures can be difficult where there is a legislated set of formalities for executing contracts, such as in transactions involving the sale of real property or in the execution of deeds (including a deed of guarantee), and it is still commonplace for these agreements to be executed manually.

An electronic signature is widely defined under the Electronic Communications Act 2000 and can be anything that is incorporated into or associated with any electronic communication or electronic data for establishing the authenticity and/or integrity of that communication or data. Electronic signatures can be in a variety of forms, such as by:

- Typing the signatory's name in an electronic document or email
- Scanning a written signature
- Clicking a button on a website or
- Using a signature made on a screen or entering some other form of digital signature that is unique to the signatory.

Regardless of its form, it must be clear that the electronic signature is authentic and that the signatory intended to be bound by that communication or data.

Intellectual property and technology lawyers



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