



**ENTREPRENEURIAL
BUSINESS LAWYERS**

REDUCING B2B eRISKS

INTRODUCTION

There are a variety of eRisks or ePitfalls which businesses need to be wary of in the B2B arena. Many of these are novel because the development of the Internet is a unique situation; normally the law follows custom and practice but in this case a new market has been parachuted in to an existing body of sometimes conflicting laws and regulations which pre date the creation of the market. Often these eRisks or ePitfalls can either be reduced or avoided. This briefing note is intended to assist with this process by highlighting 10 key eLaw issues in the B2B arena.

PROTECTING YOUR IDEAS

There is a common misconception that trade secrets and business ideas are afforded protection under our Intellectual Property Laws such as the Law of Copyright and the Law of Patents. Unfortunately you can only receive copyright protection for the expression of an idea. With patents you can only patent a practical application such as a process or a product. Businesses therefore need to ensure that they use suitable confidentiality provisions in their contracts. Often a detailed confidentiality or non-disclosure agreement is appropriate; particularly with start-up companies discussing new business ideas and concepts with potential investors. Sensitive documents should whenever possible be marked as “confidential” to avoid confusion.

COMMISSIONING IPR WORK

Do not assume that you own the software or graphic designs which you get commissioned by third party specialists. Without an assignment of IPR (which needs to be in writing) you will often only have a limited licence to use the work which has been created for you. A corporate logo designed for a letterhead or corporate brochure does not necessarily mean you can use it for your website. You should consider getting an assignment signed at the time the work is first commissioned. This should avoid any “ransom” which may be asked for if sought subsequently. Even though there may be situations where an assignment is not appropriate you should think about escrow arrangements in case the licensor goes into liquidation or becomes unreasonable. This is particularly the case with software products and the development of websites. With an assignment of copyright you also want to require the author to waive his or her legal rights as an author.

WEBSITES

Many businesses discover that they do not own the software underlying their websites for the reasons stated in the above paragraph. Businesses should enter into a development contract not only to deal with IPR ownership and suitable IPR warranties and indemnities but also to link staged payments of the price to acceptance testing and software delivery. Other issues including hosting, maintenance, training, warranty periods and termination

should also be covered. If the relationship goes sour, businesses need to ensure they have access to the computer source code to instruct new developers to not just repair defects but to make improvements to the website without breaching the copyright of the original developers.

DOMAIN NAMES

Make sure that you register domain names which are the same as your trade marks and corporate identifiers. Businesses should also register their domain names as trade marks and be aware of the risks of trading with a .com domain name rather than a .co.uk domain name. Care should be taken to renew domain name registrations and businesses may consider subscribing to a domain name watching service to look out for cybersquatters. The risks of falling victim to a cybersquatter can often be avoided by registering domain names in different domains and by registering obvious variations or abbreviations.

PROTECTING YOUR BRAND

In addition to registering appropriate domain names, businesses should consider incorporating companies with the same names as their products and brand. Just like domain names these are allocated on a first-come first-served basis. Applications should be made for obtaining a registered trade mark. Even before a registered trade mark is awarded (with the ® symbol) the “TM” symbol may be used to provide “commercial” protection as an interim measure. Copyright notices should be used wherever possible, especially on business plans and websites. Pre-registration checks are also sensible to ensure your business does not infringe third party trade marks which could result in a costly re-branding exercise. Businesses should also be aware of novel abusive trade mark practices with websites, such as metatag infringement, framing, deep-linking and stuffing. Website Conditions of Use can help tackle these abuses as well as warn website users which trade marks belong to your business.

STAFF USE OF I.T SYSTEMS

Any business which allows its staff to use its I.T. systems, particularly for sending e-mails and Internet access, should seriously consider introducing a policy dealing with such use. The policy should highlight the legal risks, set out the do's and don'ts and give good practice guidance. If access is abused by an employee, resulting in dismissal, without such a policy in place any dismissal might be unfair with the employee arguing at an employment tribunal that it was not made clear to him or her what was unauthorised and authorised by the employer. Adequate disclaimers on all external e-mail footers should be set up as the default setting at all work stations.

I.T. SECURITY & DATA BREACHES

It may be appropriate in certain circumstances to add legal warning notices to I.T. systems as well as dealing with computer misuse in your Website Conditions of Use. As well as using suitable firewalls, business should also allocate passwords for authorised users. If your website or I.T. systems are hacked into you may get little comfort from the knowledge that legal recourse is available against the offender if your business has lost valuable information. The horse may have already bolted the stable.

In addition businesses must take adequate security precautions in respect of the personal data they hold about individuals (e.g. credit cards details & contact details) by ensuring that adequate encryption and other security measures are employed. If such measures are not taken then a breach of security by a hacker (or inadvertently caused by staff eg by installing a software upgrade) could result in a claim being made against the business for breaching Data Protection legislation. This legislation will also be breached where a business instructs third parties (eg website developers) to process personal data of customers on behalf of the business without a written contract in place. Tight quality control procedures should also be introduced to reduce the risks of data breaches as these are often caused by human error.

SECURING YOUR SKILLS

Many businesses will publicise that one of their most valuable assets is their staff. Certain staff members may have had access to commercially sensitive information about your business a trade secrets. Often these staff members have valuable technical skills and know-how which should be protected. Businesses should therefore take care to ensure that where these staff members carry out consultancy work for clients or customers, the contracts dealing with the provision of services also contain non-solicitation clauses. Employment contracts should also contain provisions dealing with confidentiality, restrictive covenants, gardening leave and IPR to ensure that rival businesses are less likely to benefit from head-hunting your staff.

ON-LINE CONTRACTS

The risks of liability are increased with on-line contracts due to the global nature of the Internet. Businesses should make sure that their websites contain the correct sale details and further that products are displayed as “offers to treat” rather than “offers” to ensure that contracts are not inadvertently concluded with no products in stock. The task of restricting the conclusion of on-line contracts to only nationals of “friendly” countries is also made easier by the “offer to treat” system.

Specific advice should be sought when drafting on-line contracts particularly with warranty, indemnity and exclusion of liability clauses. Businesses should also ensure that all of their on-line contracts include choice of law as well as jurisdiction clauses. This could make all the difference with a B2B contract dispute being heard in a Scottish court rather than a foreign court. Specific advice should be sought in relation to B2C contracts as foreign consumer rights may apply regardless of the terms of the Scottish on-line contract.

INSURANCE

You should seriously consider undertaking a risk analysis assessment of your business and obtaining insurance against all or some of these eRisks. Some of these may include the

cost of disruption to your on-line business including down- time, infringement of IPR rights and security and data breaches. Specialist insurance is available from a variety of insurers.

CONCLUSION

There are clearly a number of eLaw issues which should be considered by businesses. Like everything in business it's about risk management and assessing the costs of preventing a problem rather than having to deal with one.

While all reasonable care has been taken in the preparation of this guide, no responsibility is accepted by MBM Commercial LLP for any errors it may contain, whether caused by negligence or otherwise, or for any loss, howsoever caused, occasioned to any person by reliance on it. Individual advice should be sought before considering any of the matters detailed in this guide.

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