

Autumn 2014

Welcome to the Autumn edition of the Moore Blatch Technology Update.

As usual, we've put together some articles on recent developments in technology and intellectual property law that we think you'll find interesting.

All our articles are in our new [blog](#) section on our website in addition to being reproduced in this PDF.

If you have any comments, ideas on what you would like to see in future editions or any other questions, please contact me on 023 8071 8078.

With kind regards,

[Dorothy Agnew](#)
Partner

Important changes to consumer contracts

New regulations [1] came into force on 13 June 2014 which apply to contracts made with consumers at a distance, off-premises and on-premises. The new regulations replace the distance and doorstep selling regulations [2].

Retailers will need to update their terms and conditions and may need to change their processes to ensure that they comply with the new regulations.

What has changed?

We have set out below some of the main changes introduced by the new regulations.

1. All consumer contracts

The changes that apply to all consumer contracts that fall within the scope of the new regulations include:

- The consumer's express consent must be obtained prior to taking additional payments; Businesses cannot use default pre-ticked boxes for additional payments;
- Goods purchased must be delivered to the consumer within 30 calendar days;
- A consumer who calls a telephone line operated by a trader about his or her contract must not be required to pay more than the basic rate for the call.

Updates this month

- Important changes to distance selling and other consumer contracts
- Are your technology licence agreements anti-competitive?
- DMA launches new code of conduct
- Short term work and visitor visas for IT staff
- Guidance on UK intellectual property rights

2. Contracts made on-premises

Where the contract is made at the trader's premises (including any movable retail premises where the trader usually carries out its activities), the trader must make certain information available to consumers before the contract is formed (this information is not required in day to day transactions performed immediately), including:

- The total price of the goods or services inclusive of taxes;
- All additional delivery charges;
- Any conditions relating to after-sales services and commercial guarantees.

3. Distance and off-premises contracts

Where the contract is entered into at a distance (such as over the telephone or via the internet) or "off-premises" (for example at the consumer's private home) the new regulations include the following rules:

- The timeframe for a consumer to withdraw from a sales contract without penalty is extended from 7 working days to a minimum of 14 calendar days;
- Where a cancellation right exists, a cancellation form in a prescribed form must be provided to the consumer. This must be provided to the consumer on paper or if the consumer agrees, another durable medium;

Autumn 2014

- The trader can require that the goods are returned within 14 days of cancelling the contract;
- The trader can deduct an amount for the diminished value of the goods being returned; but only if the information regarding the right to cancel has been provided to the consumer.

Businesses whose activities fall within the scope of these new regulations should take steps to ensure that their terms and conditions, websites and sales processes comply with the new regulations.

[1] Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013

[2] Consumer Protection (Distance Selling) Regulations 2000 and Cancellation of Contracts made in a Consumer's Home or Place of Work etc Regulations 2008.

Are your technology licence agreements anti-competitive?

If your business owns software, patents or know-how and you licence out your technology to other organisations for the purpose of producing goods and services you will need to review your licence agreements to ensure they comply with the new Technology Transfer Block Exemption which came into force on 1 May 2014 [3].

The new Technology Transfer Exemption replaces the 2004 Technology Transfer Block Exemption [4] and will remain in force until 30 April 2026.

The old Technology Transfer Exemption provided a safe harbour from competition law prohibitions for certain categories of licensing agreements as long as the agreements met the requirements of the exemption and in particular did not contain serious anti-competitive terms, and provided that the companies did not exceed certain market share thresholds.

With effect from 1 May 2014 businesses are no longer able to rely on the safe harbour provided by the old Technology Transfer Exemption instead they need to ensure that their licensing agreements meet the requirements of the new Technology Transfer Exemption.

The European Commission suggests the new Technology Transfer Exemption makes incremental improvements rather than radical changes to the old Technology Transfer Exemption. However, the new Technology Transfer Exemption contains some notable changes that will affect many software, patent and know-how licensing arrangements, for example:

No challenge termination clause: a right of termination, if the licensee challenges the validity of the licensed technology in a non-exclusive licence, is forbidden under the new Technology Transfer Exemption. Such termination rights are permitted in exclusive licences.

Exclusive licence-back obligations: an obligation on the licensee to give the licensor an exclusive licence to use improvements or new applications of the licensed technology developed by the licensee or to assign such rights to the licensor will now fall outside the new Technology Transfer Exemption and will require an individual assessment. Although it is worth noting that non-exclusive licence-back obligations are still covered under the new Technology Transfer Exemption.

Passive Sale Restrictions: both Technology Transfer Exemptions prohibit passive sale restrictions between non-competitors. The old Technology Transfer Exemption allowed non-competitors to restrict passive sales by the licensee into an exclusive territory or to an exclusive customer group allocated to another licensee during the first two years of an agreement. This exception to the general prohibition on passive sales has been removed in the new Technology Transfer Exemption. The new Technology Transfer Exemption and guidelines make it clear that this type of passive sale restriction may be allowed if the restraints are objectively necessary for the licensee to enter a new market. However this will now be assessed instead on a case-by-case basis.

Autumn 2014

Only time will tell whether this new self-assessment approach will create uncertainty for businesses.

There is a one year transitional period during which the new Technology Transfer Exemption will not apply to agreements already in force on 30 April 2014 which met the requirements for exemption under the Old Regulations but do not meet the new requirements under the new Technology Transfer Exemption.

Businesses who license their know-how, patents, software copyright and other similar technology should take steps to ensure that their licensing agreements meet the requirements of the new Technology Transfer Exemption.

[3] Commission Regulation (EU) No. 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements

[4] Commission Regulation (EU) No. 772/2004 of 27 April 2004 on the application of Article 81(3) of the Treaty to categories of technology transfer agreements

DMA launches a new code of conduct

The new DMA rules came into force on 18 August 2014. If you are a member, you are required to comply with their code of practice as part of your membership.

This will be of interest to members of the Direct Marketing Association (the DMA). The DMA is primarily concerned with marketing driven by the use of customers' data. If you are a member, you are required to comply with their code of practice as part of your membership.

The old code of conduct was fairly weighty and brittle; it was made up from 170 pages of prescriptive rules. The new DMA code has been created following an 18 month consultation period and it has an overall aim of service to every customer with fairness and respect. It centres on the following five basic principles:

1. Put your customer first;
2. Respect privacy;
3. Be honest and fair;
4. Be diligent with data;
5. Take responsibility.

These principles will each be underpinned by outcomes, making it generally simpler and easier to read. These outcomes work, in effect, as targets. They provide the reader with goals to aspire to in order to adhere to each principle.

The DMA code will be enforced by the Direct Marketing Commission (the DMC) which is an independent watchdog. The DMC are able to apply a range of sanctions including: making a formal recommendation to the DMA (recommendations could include to suspend a member or to cancel a party's membership entirely) or require the DMA to make a formal visit to the member.

The new rules came into force on 18 August 2014. It is hoped by changing to a principles-based approach even when there are developments in legislation and technology the rules will now be flexible enough still to apply. Protection of personal data has been an increasing concern.

Autumn 2014

Short term work and visitor visas for IT staff

One of the major risks for IT service companies with international projects is business visitor compliance. Staff are often needed for projects in the UK at short notice, often for a brief period. It's often difficult to obtain the permission to work, in any country, quickly; a project manager may therefore often ask could the employee simply arrive as a business visitor instead?

Business visitors are allowed to come to the UK for up to six months at a time. Many require a visa in advance of travel. Work in the UK, either paid or unpaid, is prohibited to people with this visa, but some activities related to business are allowed here. Some of the activities, presented as those which are "permissible", appear to allow employment.

The key to such assessments is the activity being undertaken in the UK. There is a list of what UK Visas and Immigration term as the "permissible activities" from page 4 of the document [here](#) but, although this is a lengthy document, it still doesn't give a definitive distinction between what is a "work activity" and a "business activity". This is a difficult issue to assess but the risk involved in getting it wrong is considerable.

The individual being refused entry to a country is the most obvious immediate immigration risk. Immigration officials tend to have wide discretion as to whether they admit visitors or not and decisions as to what is 'work' and 'business' often seem arbitrary. Such difficulties may also have an impact on future immigration applications. Fines of up to £20,000 can be imposed by the immigration authorities to penalise those who 'employ' people without the correct permission to work.

Employers may also find that any immigration problems with business visitors can lead to a compliance audit by the authorities and potential revocation of a licence to sponsor workers from overseas.

Travel to the UK generally requires careful consideration of the employee's proposed activity in the UK every time. Entry as a business visitor is not generally a suitable substitute for permission to work and there is significant risk to both the individual and the entity in the UK in hoping the travel will not be scrutinised.

Those responsible for global mobility should ensure these issues are addressed properly and there are suitable systems in place to identify risk.

Guidance note - UK intellectual property rights

Intellectual property covers a wide range of unique creations including symbols, names, brands, images, databases, inventions, books and artistic works.

Although ideas can not be protected the creations can all be protected by their owner or creator by intellectual property rights. Once protected the owners and creators can begin to benefit from their own work or investment by stopping others from using it without permission and charging others for the right to use it.

The first step in gaining protection is to identify what specifically needs to be protected and what intellectual property right can be used in order to achieve this.

We have put together a table that sets out a brief overview of the main different types of intellectual property rights [here](#).

Autumn 2014

Our team



Claire Haverfield
Partner
023 8071 6142
claire.haverfield@mooreblatch.com



Dorothy Agnew
Partner
023 8071 8078
dorothy.agnew@mooreblatch.com



Jeremy Over
Partner
023 8071 8025
jeremy.over@mooreblatch.com



Sarah Crookall
Senior Solicitor
023 8071 8044
sarah.crookall@mooreblatch.com



Rachel Mott
Solicitor
023 8071 8083
rachel.mott@mooreblatch.com

Technology Update has been produced by Moore Blatch LLP. This update is intended to set out general information, it is not intended to be a replacement for detailed legal advice. To the extent permitted by law, Moore Blatch LLP will not be liable by reason of breach of contract, negligence or otherwise, for any loss or consequential loss occasioned to any person acting, omitting to act, or refraining from acting in reliance upon this material, or arising from or connected with any error or omission in this material. Consequential loss means any loss of anticipated profits, damage to reputation or goodwill, loss of expected future business, damages, costs or expenses payable to any third party or any other indirect losses. The copyright in this material belongs to Moore Blatch LLP and it may not be reproduced in any form (in whole or in part) without the prior permission of Moore Blatch LLP.