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DBA Article September 2017

Brexit and Intellectual Property

Whilst the UK triggered Article 50 on 29 March 2017, at the moment and for the next two years, it is business as usual. However, discussions will be taking place to ensure a smooth transition of European IP rights held by UK businesses and individuals once Brexit takes place.

Intellectual Property

Are buildings protected?

Buildings can be protected by a wide range of intellectual property rights from copyright to trademarks or even passing off. Copyright subsists in any original creative work and will protect the drawings, diagrams, models and plans for a building as "artistic works" and written specifications as "literary works". The completed building itself may also be covered. Trademarks are useful to protect a brand, and if a building is part of the identity of a business then it is worth considering applying to register it as a trademark. It is not just the name of the building that can be protected but also the image or shape of the building or even the layout.

Patent

Unified Patent Court launch delayed

The entry into operation of the Unified Patent Court (UPC) will not occur in December 2017, the previously announced target date. This means the long-awaited Unitary Patent (UP) and UPC regimes will not be up and running, at the earliest, until sometime in 2018.

Design

UK to join the Hague Agreement in 2018

It has been announced that the UK intends to ratify the Hague Agreement for the International Registration of Industrial Designs by 31st March 2018 and will launch the service from the 6th April 2018.

Applicants will be able to seek protection of registered designs/design patents in over 66 territories (including all EU member states) through a single application. The system administered by the World Intellectual Property Office, provides a simple and cost-effective solution to multi-regional design protection.

Trademarks

Poundland Twin peaks v Mondelez Toblerone

Poundland has delayed the launch of the shape trade mark for their new chocolate bar "Twin Peaks" due to Mondelez the owner of Toblerone writing to them. Mondelez have their own shape trademark registration. Whilst the details of the letter are not known, unless Mondelez can show they have an identical mark, identical goods and services or a similar or identical mark with similar or identical goods and services plus a likelihood of confusion or association then it will be hard for Mondelez to prevent the launch of the Twin Peaks bar and its associated trade marks.

In light of the recent decision in the Nestle case (see below), Mondelez may want to tread carefully with their shape trademark, to avoid the risk of a third party challenging the validity of their registration.

Court of appeal ruling in KitKat case is a disappointment for Nestle

Nestle attempted to register a trademark for the four finger shaped chocolate bar, which was rejected. The Court of Appeal's decision means rival manufacturers could start making and selling products that look similar with the risk of litigation greatly reduced. To secure trademark protection, the applicant would need to be able to show that the shape of the product alone would indicate a brand in the mind of the purchaser.

Company Law

Corporate governance in large private businesses
The Department for Business, Energy and Industrial Strategy (BEIS) has published a Green Paper on corporate governance reform, the aim of which is to consider what changes might be appropriate to help ensure that the UK has an economy that works. The BEIS is seeking views on whether to apply enhanced standards of corporate governance to large, privately owned businesses with limited liability status.

Contract Law

Duty of good faith does not apply unless there is an express provision in the contract.
Despite the attempts of various litigants over the years the concept of a general duty of good faith is still unlikely to be implied by the English Courts into a commercial contract governed by English law where there is no express term imposing one.

General Data Protection Regulation (GDPR)

The GDPR is set to come into force on 25 May 2018 and the Information Commissioners Office (ICO) has warned businesses that there is no time to delay in preparing for "the biggest change to data protection law for generations". The ICO has published an updated Data Protection Self-Assessment Toolkit for Small and Medium Enterprises which includes a new element to help organisations assess their progress in preparing for the GDPR and it has updated its "12 steps to take now" guidance.

The GDPR's new accountability principle requires data controllers to be able to demonstrate compliance with the GDPR by showing the supervisory authority (the Information Commissioner's Office) and individuals how the data controller complies, on an ongoing basis, through evidence of:

- Internal policies and processes that comply with the GDPR's requirements.
- The implementation of the policies and processes into the organisation's activities.
- Effective internal compliance measures.
- External controls.

All data breaches should be notified to the ICO without undue delay and where possible within 72 hours.

Where an organisation has more than 250 employees, it will be mandatory for the organisation to appoint a Data Protection Officer, whose role is to provide knowledge, expertise, and independence to advise the organisation of its duties and conduct compliance in relation to the GDPR. Where there are fewer than 250 employees, it will not be mandatory but for best practice purposes it would be wise to appoint a Data Protection Officer in any event.

Organisations will need to carefully review existing procedures and policies. It may be appropriate to have a separate policy to deal with obtaining individuals' consent where different types of personal data is collected and processed. Employee handbooks should also be reviewed to ensure the policies and procedures for monitoring employees are compliant.

Employment Law

Employment Tribunal and Employment Appeal Tribunal fees unlawful
In a momentous decision, the Supreme Court has declared that Employment Tribunal (ET) and Employment Appeal Tribunal (EAT) fees are unlawful under domestic and EU Law. The effect of this significant decision is that all fees paid since 29 July 2013 must be reimbursed by the Government, and fees are no longer payable for future claims.

Since the decision that these fees are unlawful, a Claimant has successfully argued that as a result of the fees being unlawful she should be entitled to an extension of time to bring a claim where previously it had been rejected. The main arguments were that (i) all decisions made under the 2013 Fees Order, including the rejection of her original claim, were unlawful and (ii) it would be just and equitable for the time limit to be extended. It will remain to be seen if more of these claims will be brought. However, it is not clear how

such claimants would prove that it was the requirement to pay ET and EAT fees that prevented them from issuing a claim.

The House of Commons has acknowledged, "Conciliation and the number of cases referred to conciliation have had a strong impact on reducing the number of cases that need to go to court or a tribunal".

National Living Wage increase
The national living wage (NLW) will increase to 60% of median earnings by 2020. After 2020, the NLW will continue to rise in line with average earnings.

Monitoring workers emails
Workers have a right to respect for privacy in the workplace, and if an employer is going to monitor their emails and messages, the employer should (exceptional reasons aside) tell the worker that their communications might be monitored.
Employers will need to ensure they have clear policies and procedures on monitoring workers emails.

Equality and diversity what employers need to remember
A recent news article regarding the Cool Runnings movie and a carnival float in Wales (where the entrants painted their faces black) raised a number of queries about race harassment involving employees. Both involving an employee's race but also where an employee takes offence to something that isn't to do with their own race. Employers often make the mistake of assuming that this cannot give rise to a claim, but in such situations, complainants can rely on the provisions in the Equality Act 2010 to claim that they have personally suffered harassment. If this event had occurred in the workplace, as an employer, you would likely be liable for an act of harassment committed by an employee against other employees.

This demonstrates the importance of why all employees should receive regular equality and diversity / bullying and harassment training and ensure there is clear guidance available about what constitutes harassment.

Acas release guidance on supporting parents with ill or premature babies
New advice has been published this week to assist employers in supporting employees who have given birth to premature or ill babies.
ACAS advice includes:

- being compassionate and sensitive in all communication;
- being discrete - ask parents what they would like to tell their colleagues about their situation;
- making employees aware of statutory entitlements to leave, such as shared parental leave; and
- trying to be flexible in giving time off when parents return to work as the baby may have follow up appointments or treatment.

Employers should consider reviewing their policies and procedures dealing with parental leave.

Can an employer investigate social media profiles of a prospective employee during the recruitment process?
There is no specific prohibition on checking the social media profiles of candidates but there are risks associated with using social media for recruitment purposes. The main issue is the possibility of the employer discovering information about a candidate that could lead to inferences of discrimination if the candidate is subsequently unsuccessful.

Non-Compete clause set aside as it extended to shareholding in competing businesses
The Court of Appeal has set aside an injunction upholding a 6-month non-compete restrictive covenant. The restriction sought to prevent the employee from being concerned or interested in any competing business for a period of 6 months from termination, but did not contain an express limitation allowing the employee to hold a minor shareholding in a competing business for investment purposes. Restraint of trade clauses in employment contracts should be reviewed.

Voluntary overtime must be included in holiday pay
The EAT has upheld an ET's decision that regular payments for voluntary overtime must be taken into account in calculating employees' holiday pay. Under the EU Working Time Directive, holiday pay must

correspond to “normal remuneration”, and the ET was entitled to conclude on the present facts that the payment for voluntary overtime was made with sufficient regularity for it to fall within this definition.

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September 2017