

# LICENSING YOUR PRODUCT – 1

## Should you use a commercial Agent?

BY  
DR ROSANNA COOPER

In the last few articles, we have looked at how to protect your business and intellectual property rights and we should now turn to the means of licensing your products. The crucial question is whether to use a commercial agent or a distributor, writes Dr Rosanna Cooper. In this article I will focus on the legal issues surrounding the use of commercial agents and in the next few months, I will deal with distribution of your products.

Many commercial agents and their principals fall foul of the laws governing commercial agency simply because they are unaware of their existence. Commercial agency arrangements are governed by the Commercial Agents (Council Directive) Regulations 1993 (“the Regulations”) and they came about primarily to protect commercial agents. The thinking behind this was that commercial agents generally tend to build up goodwill for principals and, therefore, if the agency agreement is terminated and this is not due to the default of the commercial agent, then the agent would have to be compensated. See our recent update on breach of commercial agency agreements at [http://www.rtcoopers.com/commercial\\_agency\\_agreement.php](http://www.rtcoopers.com/commercial_agency_agreement.php)

Our commercial lawyers have advised on numerous cases where principals do not know the law and find themselves having to compensate an agent, which usually means paying out large sums of money to the agent because they have breached the Regulations.

### **Who is a commercial agent?**

According to the Regulations, a commercial agent is “*a self-employed intermediary who has continuing authority to negotiate the sale or purchase of goods on behalf of another person (the "principal"), or to negotiate and conclude the sale or purchase of goods on behalf of and in the name of that principal*”.

You should note that the Regulations do not apply to the provision of services.

Many businesses use agency arrangements, where one party (acting as a principal) engages the other (often referred to as a commercial agent) to solicit orders for goods from customers. The agent finds the contracts and the principal normally concludes them, which allows the principal to develop a new/existing market through the agent.

### **Who is the principal?**

It is often the case that a principal would be either a manufacturer or supplier of goods. The principal appoints a commercial agent to act on his behalf and pays the agent a commission. The agent is meant to devote effort, skill and expenditure in making the agency arrangement work.

### **How do the Regulations affect an agency arrangement?**

There are a number of restrictions imposed upon an agency arrangement by the Regulations. If the parties have not taken steps to enter into an agency agreement, then if there is a dispute between the parties, they may find that they are in breach of the Regulations and the principal may have to compensate the agent.

### **What if the parties fail to enter into an agency agreement?**

If there is no agreement in place and there is a dispute, firstly it would have to be established whether an agency arrangement exist and secondly, evidence would be required to prove each other's case.

### **Agency Agreement**

There are numerous ways in which the Regulations may affect the agency arrangement, and it is imperative that these matters are expressly set out in a carefully drafted, comprehensive agency agreement. It is advisable for the parties to enter into an **agency agreement** which would include the following key terms and conditions:-

- **Territory** – the commercial agent is usually given a territory for supplying the goods which could be exclusive (i.e. to the exclusion of all other parties).
- **Duties of the Agent** – the Regulations place a number of obligations on both parties, which are very broad and sometimes onerous, but the Regulations do not allow either party to derogate from those duties. The agreement should specify the obligations on the agent during the term of the agreement. Careful drafting is required to ensure that both parties are protected under the agreement.
- **Duties of the Principal** – the main obligation of the principal is to pay the agent commission.
- **Term** – the length of the agreement must be specified.
- **Commission** – commission is payable during the period of the agreement to an agent usually as a percentage of the net invoice price of the product sold through the agent or of the cash received by the principal from those sales. A lower commission may also be granted in respect of the principal's sales to customers in the agent's territory not concluded through the agent. There are only a few instances where the commercial agent would not be entitled to commission for work carried out during the agency relationship, and it is important that your agency agreement sets out clearly what is excluded and what is not (and remember, this must be within the scope of the Regulations). Commission is also payable to the agent on a transaction concluded after the agency agreement has been terminated. In forthcoming issues of *Inventique*, we will be looking at common agency disputes and how to resolve them, including the decision in the recent case of *Lonsdale v Howard & Hallam Ltd [2006]*.
- **Change of agent's during transaction** – a principal must ensure that there is a fair system in place to deal with the situation where an agent's contract is terminated before a transaction is concluded. Where another agent is engaged, who concludes the deal; there will be issues of apportionment of commission.
- **Conversion of fixed period agencies** – where you are a party to an agency agreement and assuming it is for a fixed term, if upon expiry of this term both parties continue to perform their obligations, it will immediately convert into an agency for an indefinite period. This has real implications for payment of

- commission, compensation and/or indemnity, as will be explained in the following issues of Inventique. It also has implications for notice periods.
- **Notice periods** – there are strict notice periods that apply to an agency arrangement.
  - **Restraint of Trade** – stops the agent providing similar services in the territory on termination or expiry of the agency agreement.
  - **Intellectual Property Rights (IPRs)** – prevents the agent from registering the IPRs of the principal.
  - **Termination** – what will trigger termination and what are the consequences of termination? It would depend on the reason for termination and who terminates the agency agreement. It is possible that an agent might be entitled to payment either on compensation or on an indemnity basis (this will be dealt with in a later article).
  - **Entitlement to compensation and/or indemnity on termination of the relationship** – this is a key area of an agency arrangement and one which has to be addressed carefully **before** entering the arrangement, especially by the principal. In essence, the agent's right to compensation or indemnity will arise whenever an agency agreement protected by the Regulations comes to an end, save in a list of excepted circumstances.

In following issues I will look more closely at compensation and indemnity, and disputes that arise in this area....

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*Dr Rosanna Cooper is the principal of RT Cooper Solicitors specialising in commercial law. Dr Cooper may be contacted on 020 7488 2985 or by email: [enquiries@rtccopers.com](mailto:enquiries@rtccopers.com). Website: [www.rtcoopers.com](http://www.rtcoopers.com)*