

E-commerce essentials

The number of online businesses is growing at an ever-increasing pace. This has led to a multitude of legal, regulatory and transparency requirements.



I am often asked to review commercial contracts and notices for online businesses. Mostly, information will have been copied from another website. Many fail to appreciate that it is unlikely that the terms and conditions, privacy notice, or other information from another website will be suitable or appropriate for their own business.

Some of the key aspects online business owners should consider when starting up, reviewing, or updating their operations and their website are:

What constitutes a “commercial” or e-commerce website?

Any website which gives information about a company or a firm (including not-for-profit) could be considered as engaging in e-commerce. Therefore a number of issues should be considered by business owners when they are planning or periodically reviewing their existing operations and associated legal obligations:-

Intellectual property and websites

It is likely that your website will be or has been created by a web-designer, or perhaps a third party has been commissioned to design or modify your website. The first owner of any copyright subsisting in such work will be the author, i.e. the web-designer, not the commissioner. It is important to consider initially (ideally before the start of any website project) the following questions:

- who has the overall control of the website project, whether they have sufficient authority to enter into contracts with website designers, web-hosters and where appropriate, with financial institutions who will process credit card transactions?
- who owns the code and any materials in relation to the website?
- is there any written contract with the web-designer?
- has there been a written assignment of copyright from the web-designer to the business owner?
- have anyone's IP rights been infringed?
- who has access to the “back-end” of the site (will the web-designer's assistance be required every time a small change needs to be made to the site)?
- who provides back-up services/ disaster recovery plan?

Business tenancies – are you at risk?

As Brexit rumbles on, the UK's financial position remains in the spotlight. In particular, the commercial property sector faces its own challenges and for both commercial landlords and tenants alike, the continued uncertainty will no doubt cause some company officials to consider what their next steps might be to ensure their company's interests are protected.

According to the British Property Foundation statistics in 2016, over half of commercial property is let. Considering this, together with the current economic uncertainty, landlords and tenants need to be aware of their options to protect their own position and their relationships.

With directors potentially considering administration to protect their company as a going concern, the relationship of

landlord/tenant has scope to become vulnerable. Administration can be a sensible consideration for struggling companies. When a company is placed into administration, a moratorium operates to prevent any enforcement action in relation to debts which are incurred before, or even during, the administration without permission of the administrator or the court. But where does this leave the position concerning commercial premises?

Key aspects to consider and address

- Contract formation - include:
 - a clear link to your business' standard Terms and Conditions, which must be freely viewable and downloadable before acceptance; this should include an "I have reviewed and accept" box for the customer's acceptance after reading
- a separate link to your Privacy Policy or Privacy Notice informing the online customers how their personal data will be handled - www.ico.org.uk; this should also include a separate "I have reviewed and accept box", in particular where freely given informed consent is being relied upon by the business
- a separate link to your Cookie Policy
- Consumer contract regulations - consumer's right to cancel, among other rights
- Data protection - IP rights, contractual rights, regulatory requirements:
 - Privacy Notices - there is no such thing as a "standard" Privacy Notice (or policy); each business must consider its own course of dealings and the flow of personal data, including any international transfers (out of EEA)
- Electronic marketing rules - www.ico.org.uk
- Advertising, including through social sites - www.asa.org.uk

- Credit card capabilities - you must consider terms and conditions (including any regular validation or audit requirements of the card company and/or merchant) - www.pcisecuritystandards.org
- Carrying on online business in another jurisdiction
- Use of web-links/hyperlinks - consent of the copyright holder may be required
- Cyber-security - continued risk assessments/appropriate insurance
- The Equality Act 2010 (in respect of making websites accessible to those with disabilities)

Further assistance

If you are a consumer and you are concerned about a particular website or an online business, the Financial Conduct Authority website provides some guidance - www.fca.org.uk

If you are a business owner and require assistance in connection with the matters referred to in this article, please get in touch.

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Introducing the Birkett Long Intellectual Property Department

Jonathan Perlmutter has recently joined Birkett Long as Head of Intellectual Property, having spent nearly 13 years at a firm of patent and trade mark attorneys, latterly heading up their London operations. Jonathan and his team provide us with the ability to handle patent, trade mark, design, copyright and domain name work, and we are pleased to already have filed patent applications in the UK, China, Germany and the USA, as well as internationally via the PCT system.

Jonathan is tasked with building a firm of patent and trade mark attorneys for Birkett Long LLP and has already made a great deal of progress. He has brought a portfolio of substantial clients with him, including the high street retail chain CEX, and the software giant Vivaro Limited, alongside a variety of companies and individuals from different technical disciplines, situated locally and elsewhere; he has already worked for a number of our clients.

We are very pleased to enhance our offering in this area and are looking forward to introducing Jonathan and his team to you over the course of the year. If you want to get in touch in order to arrange a meeting, please do so on 01206 217600 or jonathan.perlmutter@birkettlong.co.uk

The general position for a landlord in this scenario is a difficult one. The landlord will likely become an unsecured creditor for unpaid pre-administration rent and therefore faces the risk of not recovering these monies. With regard to rent accruing post-administration, there are conflicting authorities as to whether ongoing rent is an 'expense' of the administration and can therefore be paid. The position now is generally that it can. However, if a landlord wants to regain possession, the right to forfeit (end) the lease on the basis of non-payment of rent may be lost if rent continues to be demanded/paid.

There may be alternative routes to re-gain possession in that instance, for example, if the objective is to re-let the property at a higher rent, forfeiture may be possible or if the lease provides scope to do so. Again, permission of the administrator or court will be required in

that instance and permission is by no means a given.

It is easy to see how this situation could be a costly exercise for commercial landlords. Ultimately the landlord will likely be required to consent to the assignment of the lease from the tenant company to a 'phoenix' company with the same contacts and suppliers but with no debt or liability; this of course is clearly not what was intended at the outset of the commercial relationship.

If you are a landlord or a tenant and you are worried about your position concerning your commercial premises and the options available to you, including in an insolvency scenario, then please do get in touch. We are able to advise on all aspects of commercial relationships and any disputes which may subsequently arise from these.



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How neutral are you and your business?

In trying to create some form of legacy, Theresa May is looking to have a UK legal commitment to reach net zero carbon emissions by 2050 and be the first major economy to do so.

Green campaigners have broadly welcomed the initiative. Chancellor, Philip Hammond has warned against it, due to cost and making some sectors of UK industry 'economically uncompetitive', unless our competitors follow suit. The Department for Business, Energy and Industrial Strategy's estimate is over £1 trillion.

There is a long way to go on this, but if it becomes law then you can expect some or all of the following to impact on you, your business and your family, to varying degrees:

- Increased electrification in the transport network, and accelerating phasing out of petrol and diesel vehicles
- Stopping biodegradable food waste going to landfill
- Increased use of carbon capture and storage
- Considerable pressure on farmers to change their methods and what they produce

With our reputation for innovation and technological advances, Essex businesses are well placed to benefit from these changes. Our Environmental and Energy Team links into our newly established Intellectual Property offering, so Birkett Long is uniquely positioned to assist anyone wishing to understand and implement changes ahead of any prospective legislation.

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To bring local businesses together, we are launching a quarterly Colchester Business Networking Breakfast on 18 September 2019.

Our new Managing Partner, Martin Hopkins, will launch the event and our first guest speaker will be Jacquie Russell, the Service Manager from Outhouse East, a local charity providing opportunities for LGBTQ+ people in Essex.

The ability to understand and be inclusive of all communities is a live issue that faces all businesses. Jacquie will talk to us about working for and supporting the LGBTQ+ community in Colchester and across Essex and will hold a live Q&A at the end of the session.

If you would like to attend, suggest a topic, or be one of our future guest speakers, then please email katie.robertson@birkettlong.co.uk