



## Mark O'Shea

*Commerce & Technology  
Partner and Head of Franchising  
at Rawlison Butler LLP*

# Protecting your brand and intellectual property

**The cornerstone of any franchise is the business format or system to be replicated.**

From a legal perspective, that format or system comprises a mixture of confidential business information and intellectual property rights (IPR) that will be licensed to franchisees on strict terms. Those terms will be reflected in the franchise agreement but more on that in next month's article.

### IPR

*So what are "intellectual property rights", why are they important, do you need to protect them and, if so, why?*

Essentially, the franchisor will have spent a considerable amount of time, effort and money in building up the franchise business and in generating goodwill in the name and brand. You only have to think of the well-known franchise operations - Burger King, Clarks Shoes, ChipsAway, Dairy Crest, Domino's Pizza, Dyno-Rod, McDonalds, Saks, Scottish & Newcastle Pub Enterprises, Select Appointments, Subway, Thorntons, Tumble Tots, Toni & Guy and Wimpy - to see the power, importance and value of a recognisable brand. Reputations are hard to establish but can be damaged irreparably in an instant.

### Types of IPR

*Intellectual property rights can take a number of forms, and the protection afforded by the law differs depending on what rights are being protected. Key forms of IPR include:*

A trade mark or service mark is any sign or indication that is "capable of being represented graphically and capable of distinguishing goods or services of one undertaking from those of other undertakings". They can be registered or unregistered and they protect names and/or logos but not all names or logos are registrable. Even some scents and multi-dimensional shapes are capable of being registered. Infringements of registered trade marks are generally easier to enforce.

A patent can be granted in respect of an invention provided that it is "novel", involves "an inventive step" and is "capable of industrial application". Registration protection can last for up to 20 years but fees are expensive and increase over time. A cheaper alternative can be to maintain a trade secret but that may not always be feasible.

Copyright protection is afforded to the creator of "literary, dramatic, artistic or musical work" which includes manuals, compilations, databases and software. In the UK there is no formal registration process for copyright protection which will exist by the very fact that a copyrightable work has been created.

Protection is also available for design right and registered designs.

### Confidentiality

The protection of confidential information is essential. The franchise manual will usually contain the "Crown Jewels", namely the know-how, systems and methodologies of the business format being franchised. Together with the trade name and brand, these comprise what will be licensed to the franchisee to enable him or her to operate the franchise.

Franchisors jealously guard their manuals which are highly confidential and which are not usually made available to the franchisee in advance of the franchisee's commitment through signing the franchise agreement. A well-drafted franchise agreement will normally contain stringent terms regarding the updating, use, non-disclosure, copying and return of the manual.

### Goodwill

The value in the Franchisor's name, brand and intellectual property is known as the "goodwill".

Franchisors will want to own and retain the goodwill including that generated by the franchisee in operating the franchise. However, it is generally recognised that a franchisee will create goodwill in the franchise they operate and develop, and the bfa (British Franchise Association) certainly encourages its franchisor members to permit their franchisees to derive some financial benefit, on sale or transfer of their franchise to another franchisee, from the goodwill that they themselves have generated when running the franchised business.

The Rawlison Butler LLP franchise team can assist you with protecting and enforcing your intellectual property rights as well as providing more general advice on franchising.

For further information visit [www.rawlisonbutler.com](http://www.rawlisonbutler.com) or email Mark at [moshea@rawlisonbutler.com](mailto:moshea@rawlisonbutler.com)

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*Rawlison Butler LLP's commercial law practice is experienced in advising franchisors and franchisees, and is an Affiliate member of the bfa. Mark O'Shea is Commerce & Technology Partner and Head of Franchising.*

**T:** 01293 527744

**E:** [moshea@rawlisonbutler.com](mailto:moshea@rawlisonbutler.com)

**W:** [www.rawlisonbutler.com](http://www.rawlisonbutler.com)