



SALLIE SPILSBURY

MEDIA LAW

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TYPICAL CONTRACTUAL PROVISIONS

This chapter examines typical contractual provisions which are likely to be found in contracts relating to the media. The objective is to provide examples of the way in which certain of the principles considered in Part 1 have relevance in practice.

The chapter examines typical provisions contained in assignments and licences of intellectual property. It also looks at a special type of licence: namely, a book publishing agreement. It then goes on to consider confidentiality agreements and agreements between advertising agencies and their clients.

BOILERPLATE CLAUSES

Boilerplate clauses are provisions contained in most types of commercial agreements. They are reasonably standard in form and are generally uncontroversial. Examples of boilerplate provisions are as follows.

Entire agreement clause

Parties to a contract will normally wish to ensure that all their obligations are recorded in one agreement. They will also want to avoid evidential difficulties which may arise when one party to a contract alleges that the written agreement was amended or supplemented by oral representations and discussions. It is a common law principle that extraneous evidence cannot be used to vary a written contract. This rule is subject to a number of exceptions, in particular where the court is persuaded that the document does not reflect the entire agreement between the parties.

A simple entire agreement clause would state that:

This agreement shall constitute the entire agreement and understanding between the parties.

This type of clause will not exclude liability for pre-contractual misrepresentations. A separate clause will be required to achieve that effect. This might take the following form:

Each of the parties acknowledges and agrees that in entering into this Agreement it does not rely on and shall have no remedy in respect of any representation other than as expressly set out in this Agreement save that nothing in this clause shall operate to limit or exclude any liability for fraud.

Choice of governing law clause

Where the contract has an international element, it should expressly provide which national laws will govern the contract, for example, the laws of England and Wales.

Choice of jurisdiction clause

Where the contract has an international element, the clause should identify the country whose courts will have jurisdiction to hear disputes which arise under the contract.

Arbitration clause

Contracts often contain arbitration clauses or alternative dispute resolution clauses if the parties wish to avoid court proceedings in relation to any disputes which arise under the contracts.

Service of notices

A provision on how the notices under the agreement (for example, notices of termination) are to be served – this clause is designed to ensure that notices come to the attention of the appropriate party.

Severance

Parties who have agreed to enter into an agreement may subsequently find that part of it is unenforceable (for example, wide exclusions of liability may be void under the provisions of the Unfair Contract Terms Act 1977). The purpose of a severance clause is to make it clear that, in such a case, the parties intend the rest of the agreement to survive by means of the severance of the offending provisions from the rest of the agreement. The court also has a residual power to sever, irrespective of whether a severance provision is included. An example of a severance clause is:

The invalidity or enforceability for any reason of any part of this Agreement shall not prejudice the continuance in force of the remainder.

LICENCE AGREEMENTS

Licence agreements enable the exploitation of intellectual property rights, such as copyright or registered trade marks. A licence is essentially permission by the *licensor* to the *licensee* to make use of the right in question in the ways specified in the licence. A licence does not transfer ownership of the right which is the subject of the licence. It is simply a permission.

Licences may be exclusive, sole or non-exclusive.

An *exclusive licence* means that the grant of rights is exclusive to the licensee. No other party, including the licensor, may exercise the rights granted by the licence in the territory covered by the licence. Exclusive licences of copyright must be in writing and signed by or on behalf of the copyright owner.¹

A *sole licence* means that the licensee is the only party to whom the licensor grants rights *but the licensor retains the right to exploit the rights himself*. A sole licence of copyright may be in writing, or it may be an oral agreement. For reasons of certainty, it is better if the terms are recorded in writing.

A *non-exclusive* licence means that licensee may have to share the exploitation of the rights with other parties, including the licensor. The licensee has no exclusivity. A non-exclusive licence of copyright may be oral or written.

Where the right which is the subject of the licence is a registered trade mark, s 28 of the Trade Marks Act 1994 provides that the licence must be in writing signed for or on behalf of the licensor whether it is an exclusive licence, a non-exclusive licence or a sole licence.

A licensee will generally have to pay more for exclusive rights.

Scenario

X is the creator of a number of animated characters who appear in a weekly cartoon which is broadcast on national television. X owns the copyright in the drawings of the characters (artistic works). He wishes to grant a licence to Beinz, who are manufacturers of tinned foods. The licence will give Beinz permission to reproduce the drawings of the characters on the labels of their tinned products. What provisions should the licence contain?

1 CDPA 1988, s 92(1).

The parties

Care should be taken to ensure that the licensor and licensee are correctly identified in the agreement. For example, negotiations for the licence may take place with a director of the company, but the company should be named as licensor and not the individual director. Where a company has a separate trading name to its corporate name, the corporate name should be inserted into the agreement.

The territory covered by the licence

The licence should set out the territory in respect of which the permission applies. For example, X may grant rights in the drawings to Beinz for the UK only, or the grant of rights might extend further, perhaps across the European Community.

We saw in Chapter 6 that if the licence is silent on the extent of the grant of rights, the courts will imply the minimum term necessary to give business efficacy to the licence.² It is in both parties' interests to set out the terms of the licence as precisely as possible to avoid disputes arising in the future.

The licence term

Licences may be for a fixed term, an indefinite term or a fixed term with an option to extend a fixed term licence for a further period, which itself might be a fixed period or an indefinite period. Where renewal of a fixed term licence is envisaged, the licence should make clear whether the renewed licence will be on the same terms as the previous licence.

Termination provisions

The licence should state how it could be brought to an end.

Typical termination provisions are:

- provision for termination on breach of the terms of the licence at the option of the parties (sometimes the right to terminate will be restricted to material or serious breaches of the licence);
- provision for termination if a party becomes insolvent.

² See, eg, *Robin Ray v Classic FM* [1998] FSR 622, where the defendant claimed that it had the right to deal with the subject matter of the licence across the world. In the absence of any provision about the territory covered by the licence, the court implied the minimum term necessary to give efficacy – namely, that the licence applied to the UK only.

Licensees in the position of Beinz should seek to ensure that the termination provisions which can be applied against them are as narrow as possible.

The termination provisions should put a procedure in place for the termination to be effected. Typical contents of termination clauses deal with the following: is the party who is bringing the agreement to an end required to serve a notice of termination? How long should the notice be? What is to happen to stocks of the licensee's products which have made use of the right before the licence came to an end? Should there be a 'sell off' period to dispose of such stock?

The licensor generally seeks to reserve the right to terminate the licence if there is a change in control of the licensee. The licensee may also want the same right in relation to the licensor.

The rights which are being licensed

The scope of the licence should be clearly set out and the rights which are the subject of the licence should be precisely identified. In our scenario, the exact drawings to which Beinz is being granted rights should be identified and, ideally, they should be attached to the licence in the form of a schedule to the agreement.

As we have seen in Chapter 6, copyright gives the right to restrict reproduction of the work to the copyright owner. A well drafted licence will give Beinz the right to reproduce the works, but this need not be a once and for all grant of rights. The licensor may permit reproduction of the work in certain ways only.

In our scenario, Beinz may be granted the right to reproduce and publish the drawings on its tinned products or perhaps only on certain types of its tinned products. The licence might also extend to Beinz's promotional literature and advertisements for tinned products. If Beinz exceeds the limit of its authority, it will infringe copyright in the drawings. It is therefore very important for a party such as Beinz that it ensures that the licence is sufficiently wide for its purposes. If Beinz were to overlook obtaining a licence for use of the drawings in its promotional material, it could not use the drawings for advertising purposes without infringing copyright.

The consideration for the grant of the licence

Consideration for the licence usually takes one of two forms. The form of the consideration and the amount will be a matter for negotiation between the parties. The usual forms of consideration are:

Royalties

Royalties are generally expressed to be a percentage of sales revenue of the product which is the subject of the licence. In our scenario, the royalties would be paid by Beinz to X, based on the sale of the tinned products bearing the drawings of X's characters. Sometimes, a licence will impose minimum royalty obligations on the licensee.

Where the consideration is payable by way of royalties, the licence should provide the licensor with a right to inspect the licensee's financial records in order to verify the sales figures and the amount of royalties which should have been paid. The right is usually expressed to be exercisable on notice to the licensee and restricted to inspection in normal office hours.

Fees

Instead of or in addition to royalties, the consideration may take the form of a licence fee. This can be a one off payment or a recurring fee – for example, a fee payable annually.

Sometimes an initial (or upfront) fee will be payable as well as royalties or an annual licence fee. Such a payment is known as an advance, and may be recoupable against royalties. It is essentially a payment on account of future earnings.

Whether consideration is paid by way of royalties or fees, the licence should state when payment becomes due and payable.

Obligations on the licensee

A well drafted licence should allow the licensor to control the manner in which the licensee is able to use the rights granted by the licence. A licensor such as X will want these rights to prevent the use of the drawings by Beinz in a manner which is damaging to the integrity of the works.

This is done by imposing 'quality control' restrictions on the licensee. In our scenario, typical control measures include the right of X to inspect samples of the labels on Beinz's tins, and any promotional literature used by Beinz which bear the drawings, in advance of distribution to the public.

The licence may provide quite detailed restrictions on the way that the drawings are used, for example, by providing that the drawings can only be reproduced in the manner and the colours specified by the licensor.

Often, the licence will contain indemnity provisions under which the licensee will agree to indemnify the licensor against loss or damage caused by a breach of its obligations.

Warranties from the licensor

The licensor usually has to give warranties (which are essentially contractual promises) about the rights which are the subject of the licence. Typical warranties which would be given by X in our scenario are:

- X has the authority to enter into the licence;
- X owns the copyright which is the subject of the licence;
- the use of the drawings by Beinz in accordance with the terms of the licence of the rights granted will not infringe the rights of any third party.

The licence will usually contain indemnity provisions under which the licensor will indemnify the licensee for any loss or damage which it incurs as a result of a breach of its warranties. So, if Beinz is sued successfully for copyright infringement by a third party who claims to own copyright in the cartoon drawings which are the subject of the licence granted by X, Beinz could seek an indemnity against X for compensation for the legal costs and damages which it has to pay as a result of the action.

Moral rights

Moral rights were considered in Chapter 6. In summary, the creator of a copyright work has a right to be identified as the author of the work (provided that this right has been asserted) (*right of paternity*), the right not to have a work falsely attributed to him (*right against false attribution*), and a right to object to derogatory treatment of the work (*right of integrity*).

Where a licence grants a permission to use a work (for example, a cartoon drawing), the parties should not neglect to address the question of moral rights.

The rights may be waived by the owner of the moral rights. The waiver must be in writing³ and signed by the owner of the moral right. The waiver may be conditional or unconditional, and it may be expressed to be revocable. From the licensee's point of view, it should, ideally, be expressed to be both unconditional and irrevocable.

Remember that the owner of copyright in a work will not necessarily be the owner of the moral right. Moral rights will always reside in the author or creator of the work. They cannot be assigned. Copyright, on the other hand, may be assigned.

The above comments are made about a typical licence of intellectual property rights. We will now consider a more specific agreement involving the grant of a licence, namely, a typical book publishing contract.

3 CDPA 1988, s 87.

PROVISIONS IN A TYPICAL BOOK PUBLISHING CONTRACT

A typical publishing contract will deal with the following matters.

The rights granted to the publisher by the author

The rights granted under the book publishing agreement would generally be a grant of the right to produce and publish the author's book. The grant of rights is a licence of the copyright in the book (the book is a literary work for copyright purposes, provided that it is original). If the licence were not granted, the production and distribution of the book would be an infringement of the author's copyright.

The publisher will generally want to have an exclusive licence for the territory covered by the book.

The date for delivery of the book to the publishers

The conditions for acceptance and approval of the book by the publisher

Where a book has been commissioned, the agreement will generally oblige the publisher to accept a book which is in conformity with the terms of the commission.

The agreement will usually have the right to decline to publish a book which does not conform to the commission, for example, if it not to an acceptable standard, or if it is on a different subject matter from that originally agreed by the parties. If the publisher declines to publish a book on this ground, the agreement will generally provide that it will terminate.

It is usual for the agreement to provide that if it is terminated on the above grounds, the author may not offer the book for publication elsewhere (for example, if the author carries out improvements to the text) without first offering it to the publisher.

Competing works

The agreement will generally prohibit the author from involvement in any separate publication which might reasonably be considered to compete with or prejudice sales of the book which is the subject of the agreement without first obtaining consent from the publisher.

Warranties and indemnities

Warranties

The author will generally be required to make the following warranties to the publisher:

- that he has the authority to enter into the agreement;
- that he is the sole author of the book (if the author is a joint author, both authors must license the right to publish the work to the publisher);
- that he is the owner of the rights which are the subject of the licence (that is, that he has not previously assigned his copyright to anyone else);
- that the book is original to the author (if the book is not original, no copyright will subsist in it);
- that the book has not previously been published;
- that the book does not infringe copyright in any other copyright work (that is, that the author has not reproduced a substantial part of another work in which copyright subsists without consent from the copyright owner);
- that the book does not breach a duty of confidentiality (owed by the author to a third party. The duty of confidentiality may be express or implied.);
- that the book does not breach a duty to respect privacy owed to any party;
- that the book does not infringe any other rights of any party (this is designed to be a 'catch all' provision);
- that the book contains nothing libellous;
- that all factual statements contained in the book are true;
- that any instruction contained in the book will, if followed accurately, not cause any injury, illness or damage to the user;
- that the book contains no obscene or blasphemous material;
- that the book is not in breach of Official Secrets legislation;
- that the book is not in any other way unlawful (this is designed to be a 'catch all' provision).

The effect of these warranties is to place responsibility for compliance on the author. If the author were in breach of the warranty, for example, if the book were to contain libellous material, the author would be in breach of the publishing contract.

Indemnities

A book publishing agreement invariably provides that the author will indemnify the publisher against any legal expenses and damages which the publisher incurs as a result of the author's breach of the warranties provided for in the agreement.

If the publisher were to be successfully sued for defamation in respect of the book, it could, therefore, seek an indemnity from the author in respect of costs and damages.

Sometimes the indemnity also extends to claims made against the publisher which *allege* that the book constitutes a breach of warranty, even if the claims are not ultimately successful.

In those circumstances, the author will be obliged to indemnify the publisher for its legal costs and expenses – to the extent that these cannot be claimed from the unsuccessful claimant – even though the claim had no real merit.

Warranties and indemnities are normally expressed to survive the termination of the publishing agreement.

Reservation of the right to alter the book

The publisher generally reserves the right to alter the book in ways which appear to the publisher to be appropriate to modify or remove passages considered actionable. From the author's point of view, the agreement should provide for prior notification to the author before any change is made.

Rights clearance

The agreement will make provision for the clearance of rights in copyright works which are reproduced in the book. It is not unusual for this obligation to be put on the author.

Responsibility for publicity and promotion of the book

It is not unusual for matters relating to the production and promotion of the book to be at the discretion of the publishers.

A procedure for correction of proof copies of the book

Consideration payable to the author

The consideration payable to the author will generally be in the form of royalties. The royalties will be expressed to be a percentage of the sales revenue generated by sales of the book. The percentage amount may vary according to the form in which the book is published, for example, hardback, paperback or electronically.

Sometimes, an author may receive an advance payment from the publishers which is essentially a payment on account of future royalties.

The agreement should contain provisions about when the royalties will be paid to the author. Typically, this may be at three or six-monthly intervals with provisions for royalties which fall below a specified minimum figure to be rolled over into the next period. The agreement should also *contain* provisions about the procedure for overpayment of royalties, for example, will the amount of overpayment be deducted from future payments, or should the author have to account for it immediately?

Provision of a statement of sales to the author

The agreement will generally entitle the author to a statement of account providing details of its book sales over the accounting period in respect of which royalties are payable. This statement allows the author to identify how the royalty payment is made up.

Grant of right to inspect publisher's records of account

The author may be granted the right to inspect the financial records of the publisher in order to verify the amount of royalties payable to him.

Infringement of copyright in the book

The book will be a literary work in which copyright subsists. If, having been published, the copyright in the book is subsequently infringed by a third party, the commercial interests of the publisher may be jeopardised. Because its own interest is being jeopardised by the infringement, the publisher is unlikely to want to leave the decision whether or not to sue for copyright infringement to the author.

The basic rule is that infringement of copyright is actionable by the copyright owner.⁴ Where the publisher is an *exclusive* licensee, it has the right to bring proceedings for infringement of copyright against anyone except the copyright owner.⁵ This position applies to exclusive licensees only. Sole or non-exclusive licensees do not have the same rights. The exclusive licensee's

4 CDPA 1988, s 96.

5 *Ibid*, s 101.

rights are concurrent with the rights of the copyright owner. Where the exclusive licensee brings proceedings, the defendant can rely on any defence which would have been available had the action been brought by the copyright owner.⁶

Where the copyright owner and exclusive licensee have concurrent rights of action, the copyright owner or exclusive licensee may not, without the consent of the court, proceed with an action for copyright infringement unless the other is joined as a claimant or a defendant.⁷ The other party will be joined as a defendant where it does not willingly consent to being a party to the action. Where it is joined as a defendant in such circumstances, it is not liable for any costs in the proceedings unless it plays an active part in the proceedings.⁸

The above provisions do not apply where the application is for an interim injunction where the copyright owner or exclusive licensee may make the application alone.⁹

A well drafted exclusive agency agreement will put the above provisions into effect.

If the agreement is a sole or non-exclusive agreement where the copyright owner is the only party with the right to take action for an infringement of copyright, the agreement will place the author under an obligation to take such steps as the publisher deems necessary to protect its rights – which may include the commencement of proceedings. The agreement may provide that the publisher will indemnify the author for its costs and expenses incurred in taking the action. Note that, in some circumstances, an agreement to finance legal action can be unlawful under the law relating to champerty. A detailed treatment of champerty is beyond the scope of this book.

Grounds for termination of the agreement

An assertion of the moral right of paternity by the author

Boilerplate clauses

The licence should contain such boilerplate clauses as are relevant.

Relevant boilerplate clauses

Set out below is an example book publishing agreement which may be considered against the above commentary.

6 CDPA 1988, s 101(3).

7 *Ibid*, s 102(1).

8 *Ibid*, s 102(2).

9 *Ibid*, s 102(3).

Memorandum of Agreement

made this day of 200

between

of

(hereinafter called 'the Author', which expression shall include the plural and, where the context admits, include the Author's executors and assigns) of the one part and (hereinafter called 'the Publishers', which expression shall where the context admits include any publishing imprint whether under its present or any future style subsidiary to or associated with the Publishers, and the Publishers' assigns or successors in business as the case may be) of the other part.

Whereby it is mutually agreed as follows concerning a work original to the Author and provisionally entitled:

(hereinafter called 'the Work').

1 Rights granted

In consideration of the payments hereinafter mentioned and subject to the terms and conditions herein contained, the Author hereby grants to the Publishers throughout the world, for the legal term of copyright, the exclusive publishing rights, meaning the right to publish and exploit the Work in all media whether now known or as developed in the future or

to license such publication and exploitation including but not limited to publication in volume form in hardback or paperback or other binding and/or publication in electronic form, that is, the production of any system or program derived from or utilising the Work in whole or in part and designed for use in electronic information storage or retrieval systems now in existence or hereafter invented, and the licensing of all subsidiary rights in the Work.

2 Delivery of the Work

The Author has delivered/shall deliver material for the complete Work conforming to the specifications set out in Appendix A to this Agreement not later than

The Author agrees to retain an additional copy of all material.

Should the Author fail to deliver acceptable material and such other material as may be specified in Appendix A on the due date(s) or by such other date(s) as may be agreed by the Publishers in writing, the Publishers shall be at liberty to decline to publish the Work. If the Publishers so decline in writing, this Agreement shall terminate subject to the proviso that the Author shall not be at liberty to publish the Work elsewhere without having first offered the completed typescript to the Publishers on the terms of this Agreement.

3 Acceptance and conditions of acceptance and approval

The Publishers shall accept the Work provided that the material as delivered by the Author shall be technically competent and shall conform to a reasonable extent to the specifications set out in Appendix A hereto; and they shall have the right as a condition of acceptance of the Work to require amendments to ensure that the Work does so conform. If the Author is unable or unwilling to undertake such amendments or arrange for them to be made within such reasonable period of time as shall have been agreed by the Publishers, then the Publishers shall have the right to employ a competent person or persons to make the amendments and any fees payable shall be deducted from any sums due to the Author under the terms of this Agreement. The Work, as finally amended and marked for press, shall be subject to the Author's approval and such approval shall not be unreasonably withheld or delayed.

4 Competing work

While the Work is in course of preparation or in current publication:

- (a) the Author shall be entitled to use material written or compiled by him/her for the purposes of the Work in articles submitted to learned or professional journals and in papers presented at professional conferences PROVIDED THAT the Author shall make appropriate acknowledgment to the Work and the Publishers BUT
- (b) the Author shall not without the written consent of the Publishers write, edit or contribute jointly or severally to any work which may be reasonably considered by the Publishers to compete with or prejudice sales of the Work or the exploitation of any rights in the Work granted to the Publishers under this Agreement.

5 Warranties and indemnities

The Author hereby warrants to the Publishers and their assignees and licensees that he/she has full power to make this Agreement, that he/she is the sole Author of the Work and is the owner of the rights herein granted, that the Work is original to him/her, and that it has not previously been published in any form covered by this Agreement and is in no way whatever a violation or infringement of any existing copyright or licence, or duty of confidentiality, or duty to respect privacy, or any other right of any person or party whatsoever, that it contains nothing libellous, that all statements contained therein purporting to be facts are true and that any recipe formula or instruction contained therein will not, if followed accurately, cause any injury, illness or damage to the user.

The Author further warrants that the Work contains no obscene, or improper or blasphemous material nor is in breach of Official Secrets Acts nor is in any other way unlawful.

Where others contribute ('the Contributor') to the Work, the Author shall secure similar warranties under this Clause from the Contributor.

The Author shall indemnify and keep the Publishers indemnified against all actions, suits, proceedings, claims, demands and costs (including any legal costs or expenses properly incurred and any compensation costs and disbursements paid by the Publishers on the advice of their legal advisers to compromise or settle any claim) occasioned to the Publishers in consequence of any breach of this warranty, or arising out of any claim alleging that the Work constitutes in any way a breach of this warranty.

The Publishers reserve the right having first notified the Author to alter, or to insist that the Author alter, the text of the Work as may appear to them appropriate for the purpose of modifying or removing any passage which in their absolute discretion or on the advice of their lawyers may be considered objectionable or actionable at law, but any such alteration or removal shall be without prejudice and shall not affect the Author's liability under this warranty and indemnity.

All warranties and indemnities herein contained shall survive the termination of this Agreement.

6 Publishers' responsibility to publish

The Publishers shall, unless otherwise mutually agreed or unless prevented by circumstances beyond their control, at their own expense produce and publish the Work within three months of approval by the Author of the Work as ready for press in accordance with Clause 3 and Clause 11 of this Agreement.

7 Textual copyright material

Should the text of the Work contain extracts from other copyright works, the Author shall at his/her own expense obtain from the owners of the respective copyrights written permission (which shall be forwarded to the Publishers no later than on delivery of the material) to reproduce such extracts in the Work in all territories and editions and in all forms which are the subject of this Agreement.

8 Illustrations

The Author shall, on delivery of the Work, supply to the Publishers any photographs, pictures, maps, diagrams and other material which have been mutually agreed to be necessary for the proper illustration of the Work as set out in Appendix A.

In respect of any copyright material, the Author shall obtain from the owners of the respective copyrights written permission (which shall be forwarded to the publishers no later than on delivery of the material) to reproduce such material in the Work and in all territories and editions and in all forms which are the subject of this Agreement.

All illustrations supplied by the Author shall be in a form acceptable to the Publishers, but the Publishers shall have the right to reject such material or to require of the Author such substitutions or amendments as may in the reasonable view of the Publishers be required on the grounds of poor quality, excessive cost or otherwise.

The cost of supplying illustrative material, including copyright fees, shall be borne equally between the Author and the Publishers, such costs having been agreed in advance of such supply.

9 Index

If in the opinion of the Publishers it is desirable that an index be included in the Work, the Publishers shall prepare such an index at their own expense unless the Author notifies the Publishers in writing at the time of delivery of the material that he/she wishes to prepare his/her own index.

10 Production and promotion responsibility

All matters relating to the publication of the Work, including the paper, printing, design, binding and jacket or cover, the manner and extent of promotion and advertising, the number and distribution of free copies for the press or otherwise, the print number and the price and terms of sale of the first or any subsequent edition or impression of the Work shall be under the entire control of the Publishers.

The Publishers undertake to set the name of the Author in its customary form with due prominence on the title page and on the binding, jacket and/or cover of every copy of the Work published by them and shall use their best endeavours to ensure that a similar undertaking is made in respect of any editions/forms of the Work licensed by them.

11 Author's corrections

- (a) The Author undertakes to read, check and correct the proofs of the Work (and finished artwork) and return them to the Publishers within TEN days of their receipt.
- (b) If the Author fails to return the proofs duly read and corrected within the period provided, the Publishers shall be entitled to arrange for the proofs to be read and corrected and the cost of such reading and correcting shall be borne by the Author and shall be deducted from any sum which may become payable to the Author under this Agreement. The cost of all alterations and corrections made by the Author in the finished artwork and in the proofs (other than the correction of artist's, copy-editor's or printer's errors) in excess of 10 per cent of the cost of origination and/or origination of artwork shall be borne by the Author.

Should any charge arise under this Clause, the amount may be deducted from any sums due to the Author under the terms of this Agreement PROVIDED THAT the Publishers shall not invoke this sub-clause by reference only to alterations and corrections reasonably justified at proof stage by changes in the subject matter after completion and delivery of the Work.

- (c) All parts of the Work supplied by the Author shall, when done with, be returned to the Author if he/she so requests in writing. The Publishers shall take due care of material while it is in their possession but they shall not be responsible for any loss or damage to any part of the Work while it is in their possession or in the course of production or in transit or otherwise.

12 Royalties and fees payable on own editions

Subject to the terms and conditions set out in this Agreement, the Publishers shall make the following payments to the Author (either to the Author direct or to the Author's Agent under Clause 26 if appropriate) in respect of sales of the Work on all Home and Export Sales: a royalty of TEN per cent of the sum received by the Publishers on all copies of the Work sold by the Publishers wherever sold, less:

- (a) sums agreed by the Author and the Contributor as payable to the Contributor;
- (b) sums agreed by the Author and Publishers and paid in advance by the Publishers including but not limited to fees under Clauses 7 and 8 above.

The term 'sum received by the Publishers' in this Clause shall mean the amount received by the Publishers after deducting any discounts or commissions granted by the Publishers and any sales or similar taxes, duties or costs incurred by the Publishers in respect of sales of copies of the Work.

Where there is more than one Author of the Work, any payments under this Agreement shall be split equally between them unless the Publishers are notified otherwise in writing.

13 Subsidiary rights

In consideration of the payment by the Publishers to the Author of the following percentages of all moneys received by them in respect of the undermentioned rights, the Author hereby grants exclusively to the

Publishers such rights in so far as they are not granted by Clause 1 above to the Publishers during the term of this Agreement. The negotiation of and final agreement to terms of exploitation of rights granted under this Agreement shall be in the control of the Publishers who shall wherever practicable consult the Author concerning the sale of the undermentioned rights.

RIGHTS	PAYMENT DUE TO THE AUTHOR
(a) Quotation, extract and translation rights	40 per cent
(b) Sub-licensed paperback and hardback editions	40 per cent
(c)(i) Mechanical reproduction rights (that is, the right to license the reproduction of the Work or any part thereof by film micrography, gramophone record, compact disc, tape cassette, or by means of any other contrivance whether by sight or sound or combination of both, whether now in existence or hereafter invented for purposes of mechanical reproduction except in so far as reproduction is for use as part of or in conjunction with a commercial cinematograph film or videogram of such film)	40 per cent
(ii) Electronic publishing rights (that is, the right to license the production of any system or program derived from or utilising the Work in whole or in part and designed for use in electronic information storage or retrieval systems now in existence or hereafter invented)	40 per cent
(iii) Reprographic reproduction rights The Author and the Publishers shall license the Work non-exclusively to the Author's Licensing and Collecting Society and/or to the Publishers Licensing Society for the collective reprographic licences or licensing schemes operated by the Copyright Licensing Agency as agents for such Societies and the Author shall receive the Author's share of any proceeds from use of the Work under such licences or licensing schemes through the	

Author's Licensing and Collecting Society in accordance with such Society's standard terms and conditions

50 per cent

(d) Non-commercial rights for the print-handicapped

(that is, the right to convert the Work to Braille or to record it for the sole use of the blind and print-handicapped)

free of charge

General proviso

The Author on written request from the Publishers undertakes to waive his/her right to object to derogatory treatment of his/her work as provided for in section 80 of the Copyright, Designs and Patents Act 1988 when such a partial waiver is an essential condition of the exercise of any of the subsidiary rights set out in this Clause.

14 Statement of sales

- (a) The Publishers shall prepare accounts for the Work twice yearly to 30 June and 31 December following publication and the said accounts shall be delivered to the Author and settled within three months thereafter, provided however that no payment need be made in respect of any period in which the sum due is less than £50, in which case the amounts shall be carried forward to the next accounting date.
- (b) Upon reasonable written notice and during the Publishers' normal business hours, the Author or the Author's appointed representative shall have the right to examine the Publishers' records of account at the place at which they are normally kept, in so far as such records relate to sales and receipts in respect of the Work. Such examination shall be at the cost of the Author unless errors shall be found, to the disadvantage of the Author, in excess of 2.5 per cent of the amount due to the Author in respect of the last preceding accounting period, in which case the cost of such examination shall be borne by the Publishers. Any amount thereby shown to be due to the Author shall be paid to the Author on receipt by the Publishers of the Author's account relating thereto. No more than one such inspection shall be made in any 12 month period.

- (c) Any overpayment (which shall include any debit royalties caused by returns of copies of the Work for which the Author shall previously have received royalty payments from the Publishers) made by the Publishers to the Author in respect of the Work may be deducted from any sums due subsequently to the Author from the Publishers in respect of the Work.

15 Review copies

Any sums which may be received in respect of single specimen or review copies distributed to individuals, press or journals for review for the purposes of publicity shall be regarded as a contribution to the expenses of such publicity and shall not be accounted for as sales.

16 VAT

All moneys due under the terms of this Agreement are exclusive of any VAT due thereupon. The Publishers operate a self-billing system for the payment of royalties and to account for Value Added Tax. The Publishers therefore require details of the Author's VAT registration number where applicable which shall be supplied upon signature of this Agreement. Should the Author fail to supply a VAT registration number, the Publishers shall not pay VAT on any sums due under the terms of this Agreement.

17 Death of the author

In the event of the death of the Author, the following provisions shall apply:

- (a) All sums payable under the terms of this Agreement shall be paid to the deceased Author's estate on any edition in print at the time of his/her death and on any reprints of such an edition.
- (b) On the next edition subsequent to the Author's death including any reprints thereof, the entire copyright in the deceased Author's Work shall be assigned to the Publishers or as the Publishers direct and all sums payable under the terms of this Agreement shall be paid to the deceased Author's estate less any fees and/or royalties payable to an editor or reviser in the course of preparing such new edition for press.

- (c) The deceased Author's estate shall then cease to participate financially in any further editions but the Publishers reserve to themselves the right of continuing the use of the Author's name on any or all editions subsequent to the Author's death.

18 Copyright

The copyright in the Work shall remain the property of the Author EXCEPT THAT the copyright of the typographical and design of the Work shall remain the property of the Publishers and the copyright notice to be printed in every copy of the Work shall be in the Author's name, with the year of first publication.

Where others contribute to the Work, the Author shall arrange to acquire copyright in the contributions from the Contributors.

19 Infringement of copyright

It is agreed that if the Publishers consider that the copyright in the Work has been or is likely to be infringed, they shall on giving notice to the Author of such infringement be at liberty to take such steps as they may consider necessary for dealing with the matter and, if they desire to take proceedings, they shall, on giving the Author an undertaking in writing to pay all costs and expenses and to indemnify the Author against all liability for costs, be entitled to use the Author's name as a party to such proceedings, but at the same time to control, settle or compromise as they see fit. The Publishers shall further be entitled to take urgent proceedings in their own sole name for interlocutory relief without prior notice to the Author. Any profits or damages which may be received in respect of any infringement of the copyright shall after deduction of all costs and expenses be divided 30 per cent to the Author and 70 per cent to the Publishers. The provisions of this Clause are intended to apply only in the case of an infringement of the copyright in the Work affecting the interest in the same granted to the Publishers under this Agreement. The Author agrees to execute any documents and do any acts reasonably appropriate to give effect to the rights of the Publishers granted by this Clause.

20 Author's copies

The Author shall be entitled to receive on publication _____ copies of any printed edition and shall be entitled to purchase further copies at trade terms for personal use but not for resale and shall pay for such

copies within 30 days of invoice. The Author shall receive one copy of any sub-licensed edition on receipt by the Publishers from the sub-licensed publishers.

21 Revision of the Work

Should the Publishers consider that a new edition of the Work is necessary, the Author shall, without charge to the Publishers, edit and revise the Work during the currency of this Agreement and shall supply any new matter that may be needed to keep the Work up to date within a reasonable period. In the event of the Author neglecting or being unable for any reason to finish, revise or edit the work or supply new matter where needed within a reasonable period, the Publishers may procure some other person to finish or revise the Work, or supply new matter, and may deduct the expense thereof from royalties or other sums payable to the Author under this Agreement.

22 Termination of contract

- (a) The Author may terminate this agreement by summary notice in writing to the Publishers if the Publishers are in material breach of any of the provisions of this Agreement and have failed to remedy such breach within one month of notice to them from the Author of such breach.
- (b) Upon termination of this Agreement under (a) above, but subject to the terms of Clause 24, all rights granted herein shall revert to the Author without further notice, without prejudice to any rights of the Publishers or of third parties in respect of contracts or negotiations properly entered into by them with any such third party prior to the date of such reversion, and without prejudice to any moneys already paid or then due to the Author from the Publishers.

23 Reversion of rights

If the Work shall become out of print and unavailable in any English-language edition issued or licensed by the Publishers and if there is no agreement in existence between the Publishers and a third party for the publication within a reasonable period of a sub-licensed edition in the English language, then the Author may give notice in writing to the

Publishers to reprint or reissue the Work within 12 months. In the event of the Publishers' failure to do so, all the Publishers' rights in the Work (subject to Clause 24 hereof) shall terminate upon the expiration of the said notice, without prejudice to all rights of the Publishers and any third party in respect of any agreement previously entered into by the Publishers hereunder with any such party. Except nevertheless that no rights shall revert if it is not possible to reprint or reissue the Work for reasons connected with any war, strikes, lock-outs or other circumstances beyond the Publishers' control.

24 Moneys owing

Notwithstanding the foregoing provisions of this Agreement, the rights hereby granted to the Publishers shall not revert unless any moneys owing by the Author to the Publishers shall have been paid.

25 Moral rights

The Author hereby asserts his/her right to be identified as the Author of the Work and the Publishers undertake to use all reasonable endeavours to include the Author's assertion in any contract for volume rights with any licensee concerning any edition of the Work to be published in the United Kingdom EXCEPT THAT the Author acknowledges that the Publisher may in developing electronic or other editions of the Work, whether for sale or for publicity purposes, need to carry out some or all of the activities listed below provided that the Publishers shall wherever practicable consult the Author:

- (a) adaptation of form or structure of the Work to enhance its use;
- (b) publication of whole or part in combination with other works;
- (c) maintenance of the Work's accuracy by producing supplements and new editions;
- (d) preparation of abridgements and other adaptations of the Work.

26 Agency

The Author hereby authorises and empowers his/her Agent,

, to collect and receive all sums of money payable to the Author under the terms of this Agreement and declares that such receipt shall be a good and valid discharge to all persons paying such moneys to them and that the Agent shall be empowered to act in all matters arising out of this Agreement unless the Publishers are notified in writing otherwise by the Author.

27 Arbitration

If any difference shall arise between the Author and the Publishers touching the meaning of this Agreement or the rights and liabilities of the parties thereto, the same shall in the first instance be referred to the Informal Disputes Settlement Scheme of the Publishers Association of Great Britain and, failing agreed submission by both parties to such Scheme, shall be referred to the arbitration of two persons (one to be named by each party) or to a mutually agreed umpire in accordance with the provisions of the Arbitration Act 1996, or any amending or substitute statute for the time being in force.

28 Interpretation

The headings in this Agreement are for convenience only and shall not affect its interpretation.

29 Governing law

This Agreement shall be deemed to be a contract made in England and shall be construed and applied in all respects in accordance with English law and the parties hereto submit and agree to the jurisdiction of the English courts.

AS WITNESS THE HANDS OF THE PARTIES

For and on behalf of the Author:

(where there is more than one author, each author needs to sign)

Author

VAT registration number (if applicable)

Witnessed by:

Witness

Name and address

For and on behalf of the Publishers:

Managing Editor

Appendix A

Author

Title (provisional)

Series title (provisional)

Nature of the Work

As set out in the
Author's proposal to the
Publishers
dated/received

or

As attached to this
Memorandum of
Agreement

TEXT

Length

Medium for delivery

Computer disk and one
hard copy printed from
such disk with
no alterations

Date by which to be
delivered to the Publishers

ILLUSTRATIVE MATERIAL

Type

Extent

Date by which to be
delivered to the Publishers

Otherwise in accordance with Clause 8

ASSIGNMENTS OF INTELLECTUAL PROPERTY RIGHTS

Copyright and registered trade marks may be transferred by way of assignment. The assignment must be in writing and signed by the assignor before it is effective in law.¹⁰ Assignments need not be a once and for all transfer. They can operate to transfer the right for a limited period or for limited territories. It is possible to assign copyright for, say, 10 years, and at the end of that period the copyright will revert back to the original owner. An assignment may only transfer some of the rights which constitute copyright – for example, if a copyright owner assigns the broadcast rights in a musical work, it will retain the other rights which make up copyright.

Set out below is an example copyright assignment in relation to commissioned artwork. Readers will recall from Chapter 6 that, where work is commissioned, copyright belongs to the artist rather than to the commissioner unless an assignment is taken. When considering the terms of an assignment, it is important that the party to whom the rights are transferred (the *assignee*) ensures that it acquires the rights it needs. The person who assigns its rights is known as the *assignor*.

ASSIGNMENT

This ASSIGNMENT is made the [] day of [] 200[]

BETWEEN

(‘The Publisher’) to include the Publisher’s assigns or successors in business

And

(‘The Artist’) to include the Artist’s executors and assigns

(A) The Artist has created (an) original artistic work(s) at present entitled [] (‘the Artwork’) and wishes to assign his/her copyright in the Artwork to the Publisher in accordance with the provisions of this Agreement

(B) The Publisher agrees to take an assignment of the copyright in the Artwork from the Artist

10 CDPA 1988, s 90(3) and the Trade Marks Act 1994, s 24.

IT IS AGREED AS FOLLOWS:

- 1 The Artist assigns to the Publisher entire copyright whether vested contingent or future in the original artistic work at present entitled [] ('the Artwork') in any and all forms and media throughout the world and all rights of action and all other rights of whatever nature whether now known or in future created to which the Artist is now or may at anytime after the date of this Assignment be entitled by virtue of or pursuant to any of the laws in force in any part of the world TO HOLD the same to the Publisher its successors assignees and licensees absolutely for the whole period of such rights for the time being capable of being assigned by the Artist together with any and all renewals reversions and extensions throughout the world.

[Note the right transferred in this Assignment is copyright for all forms and media. Copyright is transferred throughout the world. The rights transferred relate to rights which are now known and which may become known in the future. This is intended to cover copyright in new forms of media which may emerge in the future. For example, 30 years ago, few people would have predicted the explosion in internet publishing. Assignments dating back to the 1970s may not be drafted in sufficiently wide terms to have transferred the electronic publishing or digital transmission rights. If the assignment were silent about future rights, it would be a question of construction as to whether the parties intended to confer such rights at the time of their agreement.¹¹

The assignment also states that it is for the whole period of the right plus any extensions of the copyright term which may be implemented in the future, for example, under new copyright legislation.]

2 PUBLISHER'S UNDERTAKINGS

- 2.1 The Publisher shall pay to the Artist the sum of £[] by [] subject to the delivery by the Artist of the Artwork by the delivery date such sum to be payable within (30) days of the receipt by the Publisher of the Artwork.

[As an assignment operates as a transfer of ownership of the rights in the work, the consideration takes the form of an initial lump sum payment rather than the royalty provisions which we saw above in relation to the licence.]

- 2.2 The Fee shall be inclusive of all expenses incurred by the Artist to produce and deliver the Artwork.

11 *Hospital for Sick Children v Walt Disney* [1967] 2 WLR 1250.

3 THE ARTIST'S UNDERTAKINGS

The Artist warrants and undertakes and agrees with the Publisher that:

- 3.1 The Artist is the sole creator of the Artwork and the sole owner of all rights of copyright and all other rights of copyright and all other rights whatever in the Artwork throughout the world.
- 3.2 The Artist has not assigned or licensed or otherwise disposed of any rights of copyright or any other rights in or to the Artwork and has not entered into any agreement which might conflict with the Publisher's rights under this Agreement.
- 3.3 The Artwork is original to the Artist and does not infringe any existing copyright or breach any existing licence.
- 3.4 There is no present or prospective claim or litigation anywhere in the world in respect of the Artwork which may in any way impair inhibit diminish or infringe upon the rights granted to the Publisher in this agreement.
- 3.5 To the best of the Artist's knowledge the Artwork is not defamatory of any third party.
- 3.6 That the Artist has full power to make this Agreement and to grant the Publisher the rights granted in it.

[The reader is referred to comments about warranties made in relation to the specimen book publishing agreement.]

4 INDEMNITIES

- 4.1 The Artist will indemnify and keep the Publisher indemnified against all proceedings, claims, demands, damages and costs (including legal costs or expenses incurred by the Publisher and any compensation, costs and disbursements paid by the Publisher to compromise or settle any claim) made against the Publisher in consequence of a breach of any of the provisions of clause 3 of this Agreement or arising out of any claim alleging that the Artwork is in any way a breach of the provisions of clause 3.

[The reader is referred to comments about indemnities made in relation to the specimen book publishing agreement.]

5 THE PUBLISHER'S RIGHTS AND OBLIGATIONS

- 5.1 All copies of the Artwork published by the Publisher shall contain the following notice:
- © (name of artist) (year of first publication)
- 5.2 The Publisher its assignees and licensees shall have the right to adapt, add to, delete from and/or alter in any way the Artwork.
- 5.3 The Publisher shall not be under any obligation to use or exploit the Artwork and if the Publisher in its sole discretion decides not to do so the Artist shall not have any claim against the Publisher for loss of opportunity to enhance the Artist's reputation or for any other reason whatsoever and shall not be entitled to payment on any sum other than the Fee to the extent the same falls to be paid.
- 5.4 The Fee shall be Full and Final consideration in respect of all rights granted to the Publisher and no Further sums shall be payable in connection with the use of the Artwork by the Publisher or anyone on its behalf.

6 OPTION ON FUTURE WORK

The Publisher shall have the first option to consider for publication subsequent artwork created by the Artist. Such artwork shall be the subject of a fresh agreement between the Publisher and the Artist. The Publisher shall exercise this option within six weeks of receipt of the Artwork. If the Publisher and the Artist are unable to agree terms the Artist shall be at liberty to enter into an agreement with another publisher provided that the Artist shall not accept terms less favourable than are offered by the Publisher.

7 OBLIGATION NOT TO COMPETE

The Artist shall not during the continuance of this Agreement prepare or publish (or collaborate in the production of) any Artwork similar to the Artwork or dealing with the same subject matter as the Artwork which is of a nature considered by the Publisher to be likely to compete with or affect prejudicially the sales of the Publisher's products or the exploitation of the rights granted to the Publisher by this Agreement

8 MORAL RIGHTS

The Artist unconditionally and irrevocably waives the benefit of its moral rights to which he is or may become entitled under the law in force in any part of the world.

[Remember that an assignment of copyright will not assign moral rights. These remain with the artist and, from the publisher's point of view, they should be waived.]

9 RELEVANT BOILERPLATE CLAUSES

SIGNED

.....

For and on behalf of the Publisher

.....

For and on behalf of the Artist

CONFIDENTIALITY AGREEMENTS

Scenario

The law relating to breach of confidence was considered in Chapter 5.

One of the matters examined in that chapter was the extent to which the law of confidence will protect confidential ideas or proposals submitted to publishers or film or television production companies. One of the difficulties which claimants are likely to encounter in this area is the need for them to show that the recipient of the information is under an express or implied obligation of confidence in relation to the information. In the interests of certainty, it is better to have an express obligation of confidence in place in the form of a confidentiality agreement. Note that the agreement need not be particularly formal. Often, a simple letter will suffice.

The agreement should deal with the following matters:

- (a) identify the information or material for which confidentiality is alleged. Do not forget that the information must be defined with sufficient precision. In Chapter 5, we looked at the case of *CMI v Phytopharm*,¹² where it was held that, where the claimant cannot identify with sufficient precision the information for which protection is sought, a claim in breach of confidence will not succeed;

12 *CMI-Centers for Medical Innovation GmbH v Phytopharm plc* [1999] FSR 235.

- (b) expressly state the purpose for which the confidential information is being disclosed;
- (c) place the recipient under an obligation to use the information only for the purposes set out in the agreement and, in particular, state that it must not be disclosed to a third party or otherwise used for any other purpose;
- (d) where appropriate, the obligation to keep the information confidential should be expressly extended to cover employees of the recipient by placing the recipient under a duty to extract confidentiality undertakings from those of its employees who come into contact with the material;
- (e) the agreement might also place the recipient under an obligation to return the confidential information to the sender upon demand;
- (f) for the avoidance of doubt, a well drafted confidentiality agreement will make clear that in disclosing the confidential information, the owner of the information is not granting any rights in the information, such as a licence to make use of any copyright which might subsist in the copyright work.

ADVERTISING AGENCY AGREEMENTS

In this last section of the chapter we consider the typical contents of an agreement between client and advertising agency.

Imagine that our notional food producer Beinz has engaged Image Advertising Agency (Image) to devise a marketing campaign for Beinz's tinned food products. What provisions would the agreement with the agency usually contain?

Most agencies will have their own standard terms and conditions which will form the basis of negotiation between client and agency.

The standard agreement will generally contain the following type of provisions.

The agency's duties towards the client

These will include:

- a description of the activities which the agent is undertaking on behalf of the client. This will typically set out the media in respect of which the agency is engaged to produce material – billboards, television campaigns, cinema advertising, etc, and the nature of the material which is to be produced;

- details of the approval process will be set out. Is it envisaged that Beinz will have the right of prior approval of the advertising material as it develops? Will there be regular meetings between Beinz and Image? If so, at what intervals will the meetings be held?;
- a schedule setting out relevant deadlines will generally be incorporated into the agreement.

Clearing materials

Who will be responsible for finding out whether third party consent is required for the use of material which is not created by the agency for the purposes of the Beinz campaign? If the obligation is to be placed on the agency (and, as a matter of practice, it generally will be, unless Beinz itself actually provides the material for the agency's use), the agreement should make the obligation clear. Image will then be under a duty to obtain permission for the use of the material before it is used. The agreement should specify that the approval should be in writing. The contract should also contain an *indemnity* from Image in favour of Beinz, under which Image will agree to reimburse Beinz for loss and damage suffered as a result of any claims which are commenced against it. The procedure for obtaining third party approval is set out in Chapter 18.

The ownership of material created for the campaign

The agreement should deal with the physical ownership of material created for the campaign – for example, who will own the original artwork for a poster? If Beinz wishes to acquire the artwork, the contract should contain an express provision to that effect.

The contract should also deal with ownership of intellectual property rights in the advertising material, for example, who will own copyright in the artwork? Remember that ownership of the physical art will not of itself mean that Beinz will own copyright in the art. If Beinz is to acquire copyright, it should take an assignment from the copyright owner. It is usual for an agreement between client and advertising agency to contain a provision that the agency will assign such copyright as it owns in material that it produces on the client's behalf. But this clause will not oblige the agency to obtain copyright from third parties which it commissions to do work on its behalf. Where Beinz wishes to acquire copyright in all material, including work which Image subcontracts to third parties, the agreement between Beinz and Image should oblige the agency to undertake to acquire copyright from third parties.

Material created for pitches

Ownership of copyright can be of particular relevance in relation to materials created by an agency for advertising pitches or beauty parades. The case of *Hutchinson Personal Communications Ltd v Hook Advertising Ltd*¹³ offers a warning of the difficulties that can arise if ownership of copyright in materials created for the pitch is not determined at the time of the pitch. Hook Advertising Ltd created a logo for Hutchinson as part of a pitch for Hutchinson's business. Hook's pitch was successful, and a contract between the parties was drawn up which stipulated that copyright in all material 'produced or created' by Hook for Hutchinson's advertising would vest in Hutchinson.

A dispute subsequently arose between the agency and the client about ownership of the logo. Hook argued that Hutchinson did not own copyright in the logo under the contract terms referred to above. The court found that the words 'produced and created for their advertising' which were contained in the contract did *not* cover material produced for the pitch. The words only covered material which originated during the term of Hook's appointment.

Special provision should therefore be made for material which originates outside an agency's term of appointment.

Agency fees

The agreement should provide for fees. The basis on which Image charge for their services should be set out. If a flat fee has been agreed, that should be made clear. If Beinz is to be charged out on a time basis, the agreement should clearly specify how the arrangement works.

If Beinz wish to place a ceiling on the fees which Image can run up without prior approval, the contract should set out this arrangement.

The contract should also state whether payment is to be made to Image if Beinz decides not to make use of the material which Image produces.

13 *Hutchinson Personal Communications Ltd v Hook Advertising Ltd* [1995] FSR 365.

