With the arrival of the new year, it is an opportune time to review your franchise from a legal perspective.

**By Eugene Honey**

**Out with the old...**

**IN WITH THE NEW**

FRANCHISE REVIEWS SHOULD be attended to regularly and should include, *inter alia*, a review of your business model, system and operations manual, franchise agreement and disclosure document as well as your intellectual property, including trade marks, copyright and know-how.

**TRADE MARKS**

As your trade mark and brand are the cornerstones of your franchise system, it should be sufficiently distinctive to properly distinguish your goods and services from those of your competitors. Generally speaking, protection should be obtained firstly for the core word mark, as this provides broad registered trade mark protection. Next, consideration should be given to the device or logo, as well as all aspects of your corporate identity. If there are any important additional trade marks, such as slogans, key aspects or features of products, these should also be considered.

In addition to protecting all the trade marks in use and all parts of the brand, consideration should also be given to protecting your trade marks in all your classes of interest. In terms of the International Classification, there are 45 classes of goods and services and registered trade mark protection should be sought in all relevant classes.

Registered trade mark protection is particularly important in a franchise system for many reasons, not the least of which is that franchisees pay for the use of the brand and they assume therefore that competent registered trade mark protection has been obtained.

**COPYRIGHT**

In most franchise systems a great deal of copyright is also licensed to the franchisees. The primary types of copyright works would include the operations manual, website, software, intranet, corporate identity, promotional and corporate materials, and various other literary and artistic works.

Copyright comes into existence automatically and there is no facility in South Africa to register copyright other than in relation to films. A serious pitfall with copyright, however, is that generally speaking the author or creator of the work is the owner thereof. As a result, outsourcing creation or development work for the franchise system should always raise a red flag as there is a strong risk that the work, despite having been paid for by the franchisor, will in fact be considered the property of the developer/creator. To ensure that the franchisor acquires ownership of all outsourced work, it is advisable to enter into written copyright assignment agreements. Failing to do so may mean that the franchisor only has the right of use in relation to any such works.

**KNOW-HOW**

Although trade marks and copyright are protected by the Trade Marks Act and Copyright Act respectively, know-how is only protected by common law. Know-how includes processes, procedures, systems, expertise, formulae, recipes and other similar confidential information which has value and provides a benefit to the franchisor.

It is prudent to ensure that all such know-how, trade secrets and confidential information are protected either by way of...
confidentiality provisions in agreements or separate confidentiality agreements. All employees of the franchisor and franchisee should sign competent employment agreements which include provisions dealing with the protection of confidential information and intellectual property.

GOOD HOUSEKEEPING
Often the business model and system of the franchisor is fairly dynamic and subject to changes inspired by ongoing development and adaptations to market demand. Any such developments potentially enjoy intellectual property protection and these, as well as the remainder of the core intellectual property, should always form part of regular and ongoing strategic reviews and assessments.

To the extent that the business model and system — and presumambly the operations manual — is updated and developed, consideration may need to be given to the review of the franchise agreement and the disclosure document. These two documents must obviously comply with the requirements of the Consumer Protection Act (CPA) and where the franchisor is a member of the Franchise Association of South Africa (FASA), those requirements as well. The requirements for a CPA-compliant franchise agreement are set out in Regulation 2 of the CPA which contains approximately 50 points that should be dealt with or included in the franchise agreement.

Despite the substantial risks and vulnerabilities, as well as the potential fines and penalties, it is amazing to still, from time to time, see and deal with franchise agreements that are not CPA compliant.

The position is similar with regard to disclosure documents, where they are either not in use or are not compliant, sufficient, accurate and/or up-to-date, placing the franchisor in a position where it is vulnerable to a multiplicity of risks. As far as possible the disclosure document should be developed, enhanced and refined as the business system develops.

The operations manual is another extremely valuable document and tool in a franchise system. It manages, controls and develops the franchise system, including products and services.

Many franchisors are entrepreneurs who generally are not given to administrative tasks. To the extent that the administration and documentation is outdated and non-compliant, difficulties may arise as these are often exploited by errant franchisees, causing substantial difficulties, unwanted expenses and unwelcome legal costs. This of course moves the focus of the franchisor away from managing, developing and growing the franchise system to more of a defensive role, dealing with potentially costly and unnecessary ongoing difficulties.

It is therefore recommended that ‘housekeeping’ be brought up-to-date regularly, placing the franchisor in a competent and strong position to protect the franchise system and enforce its rights. In fact, prudent and competent franchisors constantly maintain their ‘housekeeping’ by reviewing and updating their documentation and business system.

To the extent that their documentation and ‘housekeeping’ are in order, possible vulnerabilities, difficulties and risks are minimised, leaving the franchisor free to grow and develop the franchise system, which are of course the primary objectives for most franchisors. □