

UPLOAD-IT - 1 April 2007

COMPETITION LAW

- ***Microsoft's continuing strangle-hold of market share in work group server market a problem for the EU competition authorities...***

The EU competition authorities have lashed out against Microsoft again as a result of the software giant gaining market share in the work group server market (office servers which connect computers to each other and to printers). The European Commission considers that Microsoft is abusing its dominant position by not releasing its operating system software source code so that other providers of work group servers can provide the smooth interoperability of its servers with Windows. This is in spite of a 2004 ruling requiring Microsoft to provide this information.

In March 2004, the European Commission fined Microsoft €497m for abusing its dominant position, contrary to Article 82 of the EC Treaty. It upheld two different complaints. One was that Microsoft had withheld vital information about Windows from makers of server software, thereby gaining an unfair advantage over them for its own server software products. The other was that it unfairly bundled (or tied) its Media Player software into Windows, which had the effect of excluding competitors from selling competing products. In July 2006, Microsoft was given a further fine of €280.5 (£194 million) for not complying fully with the requirement to reveal complete and accurate application programming interface information in a timely manner. The Commission believes this information has still not been provided and is threatening fines of up to €3m per day until there is compliance. Meanwhile, the Commission is concerned that Microsoft's failure to comply has seen it grow its market share in the work group server market from 45% in 1999 to 75% now.

- ***EU Commission records notices of alleged breach of competition law to professional video tape suppliers...***

The European Commission, the body in charge of enforcing EU competition law, has been investigating arrangements between suppliers of professional videotapes. These types of tape are used to record optical signals for films made by a camera, computer or other similar means. The tape is for special video recording equipment and is used by professionals such as television stations, producers and the like. The Commission suspects that the suppliers are part of a price-fixing cartel and has sent out notices of a statement of objections to them of alleged infringement of Article 81 of the EC Treaty. Article 81 prohibits agreements which have as their object or effect the distortion of competition and may affect trade between Member States. The parties have two months to respond before the Commission takes further action.

CONTRACTS

- ***Fine arts storage company gets turned to stone by sculpture purchaser due to failure to bring terms and conditions to purchaser's attention - Ofir Scheps v Fine Art Logistic Ltd, High Court...***

S had bought a sculpture while it was being stored by an auction house. S asked FAL (a storage and transport company) to transport the sculpture to restorers. FAL claimed that the sculpture was destroyed by accident. S sued FAL for £600,000 for the losses he had suffered as a result of losing the sculpture, being the value of the

sculpture and the rise in value of the sculpture after it was lost. FAL claimed that the agreement between FAL and S incorporated its standard terms of business which limited its liability to £350 per cubic metre of a sculpture's volume - amounting to a total of under £600 in this case. FAL claimed that it was usual practice in the transport and storage industry for service providers to have standard terms of business and so S must have been aware of this when he asked FAL to transport the sculpture.

The High Court found that FAL had not provided S with a copy of its standard terms and conditions nor referred to them at any stage. Given S's own background, it was likely that he knew that he would have to contract with FAL on some terms and conditions. However, FAL was not entitled to rely on its terms and conditions as there was nothing that was said or indicated between the parties that would objectively have led FAL to conclude that S would understand that it was going ahead based on FAL's terms and conditions. Accordingly, its terms and conditions were not incorporated into their agreement and therefore the attempted limitation of liability was not incorporated into the agreement either. S was awarded damages for the loss he had suffered.

As an aside, the court went on to consider whether FAL's attempts to limit its liability would have been reasonable - if FAL's terms and conditions would have formed part of the contract. Attempts to limit liability must be reasonable under the Unfair Contract Terms Act 1977 in order to be enforceable. Cases are decided on their own facts. In this case, the court decided that it would be reasonable to limit liability for expensive items to a limited price per square metre, but again FAL would have fallen down by not bringing the limits more clearly to S's attention as one of the factors in deciding reasonableness is whether the customer knows or should have known of the existence of the limitation.

Paul Gershlick, editor of Upload-IT, comments: 'This case shows the importance not just of having well-drafted terms and conditions but having proper business processes that ensures the terms and conditions actually form part of the contract. As this case also shows, even if the terms and conditions had applied, care should be taken as to how to limit liability. Otherwise, an attempted limitation of liability clause could be struck out as being unreasonable and therefore unenforceable.'

- ***Court of Appeal casts doubt on the application of 'entire agreement' clauses – Lloyd v Sutcliffe, Court of Appeal...***

L controlled N Limited, which had options to buy two sites - one at Dunchurch Road and one at Willes Road. S, an experienced developer, entered into an oral contract with L to develop the sites and in return S would get a share of N Limited and they would share in the company profits. The oral contract was modified so that Willes Road would be transferred to another new company owned by L (and someone else) but S would still be involved with re-developing it. The parties entered into a shareholders agreement for N Limited shares (ie in relation to the Dunchurch Road site). This agreement contained an entire agreement clause, which stated, 'This Agreement supersedes any previous agreement between the parties in relation to the matters dealt with herein and represents the entire understanding between the parties in relation thereto.' The parties spent money and the relationship subsequently broke down.

The facts of the case turned on whether the entire agreement clause applied to the Willes Road development as well. The court found in favour of S. L disagreed on the grounds that the entire agreement clause prevented any extraneous materials from being taken into account.

The Court of Appeal stressed that the shareholders agreement was the entire agreement between the parties only 'in relation to the matters dealt with in it'. Since the agreement did not really deal with Willes Road, that was not covered by the ambit of the clause. This shows that entire agreement clauses may well work as long as it is clear what is covered by matters 'in relation to the agreement' but it MAY be construed narrowly if linked matters are not actually covered by the agreement.

The Court of Appeal also found that the entire agreement clause only dealt with matters arising before the date of the agreement and not afterwards. L and S had reiterated their understanding about Willes Road by words and conduct after entering into the agreement.

- ***High Court says a term defined in contract cannot be interpreted according to pre-contract negotiations – Chartbrook v Persimmon Homes, High Court...***

Chartbrook claimed that Persimmon owed it £4.6 million under a development contract as an 'Additional Residential Payment' (ARP), which was an expressly defined term in the development agreement. Persimmon claimed that the amount payable under the contract was really just £900,000 and most of this had been paid already. Persimmon wanted to bring evidence of the parties' pre-contract negotiations to support its claim as to the real intended meaning of the term. Persimmon argued that when the parties are in agreement over the meaning of a term during the negotiations then they should be allowed to use evidence of the negotiations to prove this in construing the contract. This is the so-called 'private dictionary principle'.

The High Court sided with Chartbrook. In general, when construing the meaning of contracts, courts consider the meaning given by a reasonable person who had all the background knowledge of the parties, but without looking into the parties' pre-contract negotiations. However, the private dictionary principle was an exception to that rule, so that courts can look at the agreed meaning given by parties to a particular term used in a contract. The High Court said it would be bound to follow the private dictionary principle under previous case law (even though it did not like the principle), but limited the principle only to cases where terms used in a contract had not been expressly defined in that contract. The court said there would be a lot of commercial uncertainty if the courts allowed the use of pre-contract negotiations to construe contracts. It commented that if it allowed parties to raise pre-contract negotiations when construing contracts, it would adversely affect third parties' rights – contracts are frequently assigned to third parties and how would they know how the contracts are to be interpreted if their meaning depended on the negotiations of the original contracting parties? If the parties had an express definition of a term in the contract, as was the case here, then that definition should prevail over any meaning given to that term in the negotiations.

- ***House of Lords finds that a buyer can reject goods even after they have been repaired if the buyer is not given sufficient information about the repair – J&H Ritchie v Lloyd, House of Lords...***

J&H bought a power harrow from L. J&H noticed that the harrow did not work properly so it stopped using it. L agreed to take the harrow back to inspect it and possibly repair it. L found that there was a serious defect in the product since two major parts were missing. L ordered the parts and fixed the harrow. L told J&H that the harrow was fixed and ready for collection. J&H wanted to know what the problem with the harrow had been but L refused to say. J&H found out the cause of the defect informally but wanted to be sure that all had been fixed properly, so when

L continued to refuse to provide that information J&H wrote to L to reject the harrow under the Sale of Goods Act 1979. L argued that as the goods were now of factory gate standard J&H had to accept them.

The case ended up at the House of Lords. The House of Lords found that L was in breach of the contract of sale. J&H, in allowing L to inspect and repair the goods, had not accepted them. At the same time, J&H had not yet rejected them either. The Sale of Goods Act did not bind a buyer to accept goods if it had agreed to them being repaired. The court construed that the repair service was provided under a separate repair agreement. This did not affect the original contract for sale. The court said it was an implied term of the repair agreement that J&H would not rescind the contract for sale while the harrow was being repaired. It was also an implied term that L would tell J&H what the problem was so that J&H could decide how to test the goods and make a properly informed decision as to whether to accept or reject them. L's outright refusal to tell J&H what was wrong breached this implied term and allowed J&H to rescind the repair agreement, even though the harrow was fixed. Once J&H had rescinded the repair agreement, it was also entitled to rescind the original contract of sale as well. The House of Lords commented that the particular facts of this case and the complicated nature of the goods in question was a factor in its decision and a term requiring provision of information would not necessarily be implied in every case.

COPYRIGHT AND DATABASE RIGHTS

- ***Court of Appeal decides that writer of 'The Da Vinci Code' is not a copycat - Michael Baigent v Richard Leigh and Random House, Court of Appeal...***

In this case, Michael Baigent and Richard Leigh, two of the three authors of the book 'The Holy Blood and the Holy Grail' (HBHG), claimed that Dan Brown, the author of 'The Da Vinci Code' bestseller, had infringed their copyright. In a bizarre twist, Baigent and Leigh actually sued Brown's publisher, The Random House Group Ltd, which also happened to have been the publisher for HBHG. Baigent and Leigh acknowledged that copyright protected the expression of an idea rather than the underlying ideas themselves. Those lines can sometimes become blurred and this case was seen as a test case for where copyright protection started.

Baigent and Leigh accepted that Brown had not copied any text, but instead claimed a form of non-textual infringement in that they alleged that he had copied the 'Central Theme' of HBHG. According to them, their book had made a series of connections together which had never been done before and Mr Brown had copied what they claimed amounted to the themes, the architecture and the 'Central Theme'. They claimed the Central Theme consisted of 15 key parts, including the theory that Jesus married Mary Magdalene, they had children and their descendants became the Merovingian French dynasty.

However, both the High Court and the Court of Appeal have decided that on the facts the claimants had not even clearly made out their Central Theme. The Court of Appeal commented that the Central Theme was not a theme of HBHG but more a selection of features of HBHG collated for forensic purposes rather than emerging from a fair reading of the book as a whole. Even if there had been a central architecture of HBHG, they were of too high a level of abstraction to be protected by copyright. The elements that were copied did not amount to a substantial part of the original work. What amounted to substantial depending on considering the facts of the particular case.

The Court of Appeal also set out a helpful checklist for copyright infringement cases as follows:

- What were the similarities between the alleged infringing work and the original copyright work?
- What access, direct or indirect, did the author of the alleged infringing work have to the original copyright work?
- Did the author of the alleged infringing work make some use in his work of material derived by him, directly or indirectly, from the original work?
- If the defendant claimed that no such use was made, what was his explanation for the similarities between the alleged infringing work and the original copyright work?
- If, however, use was made of the original copyright work in producing the alleged infringing work, did it amount, in all the circumstances, to 'a substantial part' of the original work?
- What were the circumstances or factors which justified evaluating the part copied in the alleged infringing work as 'a substantial part' of the original copyright work?

The Court of Appeal was keen to avoid the use of copyright to monopolise research, general ideas, theories and argument. Baigent and Leigh, who have been left with legal costs of approximately £3m, have criticised the decision as being an 'ominous one for those who wish to research a book of their own and come up with their theories', adding that it is a 'carte blanche for those who would rather not bother, but simply take another author's ideas and adapt them.'

- ***Court of Appeal snookers game producer in confirming that copying 'look and feel' of software or computer games does not amount to copyright infringement – Nova v Mazooma Games, Court of Appeal...***

Nova designed, made and sold video arcade games, including Pocket Money, a pool game. Nova brought a copyright infringement action against the suppliers of two other pool arcade games, Jackpot Pool and Trick Shot.

The High Court agreed with Nova that it was possible to have copyright protection in its graphics. However, on the facts, there was no substantial similarity between the graphics.

As for the general features of the way the game worked, there was copyright protection in the underlying program. However, following the case of Navitaire v easyJet in 2004, the High Court said that although there were some similarities in the games, there was no copyright in the outputs of the game itself. The instructions in the underlying software itself had not been copied - the program code had been written without reference to the other program code. Ideas and principles underlying software are not protectable by copyright.

The Court of Appeal has now agreed with the High Court judge's decision. It also found that the series of animation sequences was not a graphic work and so did not get protection.

Nova also claimed that it had written preparatory design materials describing how the game should work and therefore there had been infringement of that literary copyright. However, the UK courts decided that those design materials merely comprised jottings and ideas and the key features of the game were not represented on them. Even if the design documents fully described how Pocket Money worked,

the design documents would have protection as literary works only. The ideas within the document and any functionality referred to could be reproduced without infringing copyright in the document since copyright did not seek to protect ideas but their expression. The Court of Appeal also commented that if the courts allowed copyright protection for general ideas then it would stifle creativity and that copyright law would become an 'instrument of oppression rather than the incentive for creation which it is intended to be'.

- ***Russian head teacher made to stand (trial again) in the corner (of Russia) in Microsoft piracy case...***

A Russian head teacher will be prosecuted again for software piracy after a ruling of the Russian courts. The head teacher, Mr Ponosov, had bought 12 new computers for his school but these contained unlicensed versions of Microsoft's operating system. A lower court had ruled earlier that a prosecution would be 'trivial' and a waste of time following pressure from Vladimir Putin and Mikhail Gorbachev, the current and former presidents. However, the higher courts have ordered that the prosecution case should go ahead. Some commentators say that the reason behind the move is to quell international pressure on Russia to crackdown on piracy, since Russia is second only to China in using illegal software and music copies. Microsoft has confirmed that it will not be pursuing any civil action against Mr Ponosov or the school.

- ***German games developer zaps file sharers of its games and tries to win 600 points (or rather pounds) in the process...***

Zuxxez Entertainment AG, a games developer, has unleashed Davenport Lyons – a London law firm – on 500 UK peer-to-peer file sharers of its game Dream Pinball 3D – which is as yet unlicensed in the UK but due to be launched here in June. The file sharers were disclosed through court orders served on 18 Internet service providers after computer forensic experts had identified the IP addresses of the downloaders. IP addresses are unique data which identifies any computer connected to the Internet. Letters were sent out to the culprits asking them to pay £600 and to promise to not share computer games again. If they refused, they would face prosecution and court costs of many thousands of pounds. Davenport Lyons is very conscious of the security of the operation and has refused to disclose which of its employees and partners are involved. Some recipients of the letters have claimed that they had no idea that the games were on their machines and had been planted there by viruses, but Davenport Lyons' response has been to say that security of the users' machines is not its concern.

CYBERCRIME/SECURITY

- ***Google claims that its filters reduce click fraud...***

Google has stated that only 0.02% of clicks that it charges to advertisers are a result of fraud. Google has said that the invalid or potentially fraudulent clicks are filtered out of its systems by filters and offline analysis. Some industry estimates have suggested that up to about 15% to 20% of clicks on ads are fraudulent.

Click fraud occurs where visitors to websites click on paid-for advertising or a sponsored link without any intention of purchasing anything or seeing what is on the linked-to site. The people who click on the links in this way may be people acting on behalf of website owners who receive commission from the search engine provider, or sometimes it is a competitor looking to run down the advertiser's advertising budgets. Under Google's and other search providers' – such as Miva's – business models, advertisers pay on a per click basis for each of their adverts or sponsored links that users click on. The search engine passes some of that money onto the website owner on whose page the advert has been clicked.

- ***TK Maxx gets more than it bargained for with hackers accessing its customers' data...***

Hackers have stolen payment card details of at least 45 million customers of TJX, the US retailer that owns the TJ Maxx and TK Maxx stores. The data was accessed via TJX's systems in Watford and Massachusetts over a 16-month period. Because of the hackers' actions, the retailer has been unable to discover how or when the hacking was done, the actual data stolen or the effects on customers. However, the retailer added that most of the data was out-of-date, so customers did not need to worry. The attack may have affected the retailer's customers and transactions in Europe, North America and the Far East. This data theft is the largest one yet uncovered.

DATA PROTECTION/PRIVACY/CONFIDENTIALITY

- ***Information Commissioner disposes of 11 financial institutions for unacceptable breaches of the Data Protection Act...***

A number of banks and financial institutions and the Immigration Advisory Service have been told that they breached the Data Protection Act 1998 (DPA) in disposing of personal information in bins outside their premises. The Information Commissioner, the Regulator in charge of enforcing data protection law in the UK, has asked the culprits to sign undertakings to comply with the DPA. Refusals to do so could lead to further enforcement action and possible fines.

- ***Manual selection of data from records that had once been on a computer did not amount to 'processing' and therefore not caught by Data Protection Act 1998 - Johnson v MDU, Court of Appeal...***

David Johnson was an orthopaedic surgeon who had been a member of the Medical Defence Union. The MDU was a mutual society designed to provide its members with professional indemnity insurance cover and other benefits. A number of complaints about Mr Johnson had been made over a number of years. The MDU considered his case and decided not to renew his membership, which Mr Johnson claimed had caused him professional embarrassment. The MDU did not give its reasons for not renewing. Mr Johnson claimed that the MDU had unfairly processed his data contrary to the Data Protection Act 1998 and accordingly he should be compensated.

The High Court decided that in relation to most of the MDU's files there had been processing but this was not unfair. The MDU had developed its risk assessment policy over a number of years and its policy was a commercial matter. The MDU had a contract with its members under which the members had agreed that the MDU would have a sound risk-assessment policy and the MDU had absolute discretion over termination of a member's membership. It was not for the court to pass judgment on that. Mr Johnson had consented to his data being used for those purposes and so the MDU's use of that data to reach its decision was not unfair processing under the Act. Mr Johnson appealed the decision that the processing was not unfair and the MDU appealed because it did not think that its risk analysis was 'processing' under the Act in the first place.

The Court of Appeal held that there was no 'processing' of data since the data was selected by a person using her own judgment and not via an automatic process. The EU Data Protection Directive, which underpins the Act, states that the data protection law will apply to the processing of personal data wholly or partly by automatic means or to the processing of data that forms part of a relevant manual filing system. Just because the selection was based on information that had at one time been recorded

in a computer did not amount to processing as it was not being done by automatic means. One of the three judges disagreed with the decision contending that the Act should be interpreted widely. The Court also rejected Mr Johnson's appeal, so even if it would have amounted to 'processing', this would not have been unfair processing. Given the disagreement of one of the judges, an appeal to the House of Lords may be needed to clear up the issue.

DATA RETENTION

- ***Home Office launches consultation on the draft Regulations implementing Data Retention Directive...***

The Home Office has published a consultation document on the proposed draft Regulations to bring into force the EU Data Retention Directive. When implemented by each Member State, the new law will require telecoms providers and Internet service providers to be forced to retain communications data for between six months and two years. The UK's draft Regulations stipulate a period of 12 months. Only details of the timing, dates, duration and parties to the communication would be retained, not the contents themselves. Member States could introduce periods longer than 24 months where they face 'particular circumstances warranting an extension for a limited period'. The communications data would be made available to police on request for investigating, detecting and prosecuting 'serious crimes'. The definition of 'serious crimes' had been left to Member States. The consultation will close on 11 June 2007 and the UK has until September to implement most of the Directive, although it is likely that application to Internet service providers is likely to be postponed until 2009.

If implemented, the draft Regulations would allow the Home Office to reimburse additional expenses incurred by the providers in complying with the Regulations as long as these are notified in advance to the Home Secretary. The Directive had stayed silent on this issue, so this is a generous concession from the Government to the communications service provider industry, which had lobbied against the cost of it having to comply with laws designed to help the police.

DOMAIN NAMES

- ***Retailer left with nasty taste in mouth and sues domain tasting registrars in the US for \$12 million in damages...***

Neiman Marcus, the US retailer, is suing two domain name registrars, Name.com and Spot Domains, for 'domain tasting' domain names which contained its brand names or variations of its brand names. The registrars regularly engage in domain tasting – a new and growing phenomenon which involves registering lots of domain names for five days or less and then cancelling ones that do not attract enough Internet traffic. Often, the domain names are then re-registered for a limited period before being cancelled again, in effect tying up the names. The five day cancellation period means that the registration costs the registrars nothing as they have a five-day grace period before having to pay for them. The retailer's gripe with the registrars is over the 40 names that are being tasted and is suing for US\$12m in the Colorado District Court for its registrations of names including 'neimanmarcus.com' and 'neimanmarcucs.com'. The retailer has already successfully stopped Dotster Inc – another registrar – from domain tasting names that were similar to Neiman Marcus' brands.

- ***Numbers of cybersquatting disputes reaching WIPO increased by 25% in 2006...***

WIPO has reported that the numbers of cybersquatting disputes it received in 2006 increased by 25% as compared with 2005. WIPO is one of the accredited arbitration bodies which hears domain name disputes under the Uniform Domain Name Dispute Resolution Policy, which provides a quick arbitration procedure for disputes involving registration by so-called 'cybersquatters' of top-level domain names such as '.com'.

WIPO puts this increase down to the evolution of the domain name registration system and in particular the way software is used to automatically register expired domain names or 'parking' them on pay-per-click portal sites, domain name tasting and the new top-level domains. 'Domain name tasting' is the new and growing phenomenon which involves registering domain names for five days or less and then cancelling ones that do not attract enough Internet traffic. Often, the domain names are then re-registered for a limited period before being cancelled again, in effect tying up the names. The five day cancellation period means that the registration costs the registrars nothing as they have a five-day grace period before having to pay for them.

EMPLOYEES

- ***Court of Appeal dismisses employee's claim to have right to register patents in own name rather than employer's – LIFFE v Pinkava, Court of Appeal...***

The Court of Appeal has upheld the decision of the High Court that an employee's invention in relation to a task undertaken for his employer automatically belonged to his employer under the Patents Act 1977 even though the invention had a wider application, and had arisen out of work not specified in his original employment contract.

LIFFE employed Pavel Pinkava (PP). During his employment, LIFFE asked him to develop an exchange-tradable credit derivative. While doing this project, PP devised a system that permitted trading on exchange of certain types of swaps and he continued to develop this while at work. PP left LIFFE's employment and applied for US patents for the subsequent inventions in his own name. LIFFE claimed that, as employer, it should really have owned the patents under the Patents Act 1977 either on the basis that it was part of his normal duties or specially assigned duties.

The High Court decided that LIFFE automatically owned the inventions as the duties were 'specially assigned'. The Court of Appeal also sided with LIFFE, but instead found that the inventions arose out of the employee's normal duties. It commented that the High Court should not have only referred to the terms of the employment contract to decide whether the inventions were made in the course of PP's normal duties or not. It was possible for some duties not specified in the original employment contract to evolve and become part of PP's normal duties as an employee. The Court of Appeal did not change the overall decision as it still thought that the inventions belonged to the employer.

GAMBLING

- ***CAP and BCAP places bets by issuing new codes of practice for gambling ads...***

The Committee of Advertising Practice (CAP) and its broadcast committee, BCAP, have now amended their codes of practice to take account of the change in gambling laws.

The CAP regulates all types of advertising except for adverts that are broadcast, which are dealt with by BCAP. When it comes into force in September, the Gambling Act 2005 will remove current restrictions on gambling advertisements on television and other media and give Ofcom, the communications regulator, the authority to issue rules for broadcasts advertising gambling activities. Since Ofcom has delegated the regulation of broadcast advertising to the Advertising Standards Authority (ASA), it has fallen to BCAP to draft the proposed rules on broadcasts and the Gambling Commission (which is authorised by the Act to draft rules governing non-broadcast advertising of gambling) has invited CAP to draft the proposed rules for non-broadcast advertising in relation to gambling to ensure that all the rules are consistent with each other.

The new rules state that ads must not:

- condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, emotional or social harm.
- exploit the susceptibilities, aspirations or inexperience of children and young or vulnerable persons.
- suggest that gambling is a solution for financial concerns.
- appeal to children or young persons or be directed at people under 18.

If the ASA finds a breach of the rules, it has the power to ask for the ad's withdrawal. The Gambling Commission can also suspend a licence, issue fines or invoke criminal proceedings if an entity is in breach of its licence terms.

The regulations will become enforceable on 1 September 2007 at the same time as the rest of the Gambling Act 2005 is due to come into force. For further information on the codes of practice, please go to www.cap.org.uk.

- ***Many premium-rate phone quizzes will be deemed to be lotteries under the Gambling Act 2005...***

The Gambling Commission, the regulator in charge of enforcing the Gambling Act 2005, has stated that many businesses that run premium rate phone quizzes will soon have to be licensed to run a lottery when the Act comes into force in September. According to a Gambling Commission paper on the new laws, many television quizzes that do not have any real skill would qualify as a lottery. A lottery is where people pay to enter, there are prizes and these are awarded based on chance. The Commission said operators of the quizzes can choose between becoming genuine free prize draws, genuine competitions (where success depends on the exercise of skill, judgement or knowledge) or licensed as a lottery. There will be strict rules as to who can qualify for a lottery licence.

GENERAL IP

- ***Patent Office changes name to 'UK Intellectual Property Office'...***

Following a recommendation in the Gowers' Review of Intellectual Property, the Patent Office has decided to change its name to the UK Intellectual Property Office. The change reflects the wider role that the Office will take in the future in enforcing intellectual property rights in the UK. Ron Marchant, chief executive of the Office, said that the Patent Office name had been misleading for businesses as it did not clearly show that it covered other forms of intellectual property, such as trade marks and designs. The change of name will be accompanied by a change of slogan - from 'for innovation' to 'for creativity and innovation' - and will take effect on 2 April.

IT AND INTERNET USE

- ***More UK advertising money spent on web than newspapers...***

In 2006, expenditure in the UK on online advertising overtook that spent on newspaper advertising. That is according to a report issued by the Internet Advertising Bureau and PricewaterhouseCoopers. Online advertising spending increased by 41.2% to £2.0bn, whereas for newspapers the increase was just 0.2% in 2006 to £1.9bn. Meanwhile, TV advertising spending actually fell by 4.7% to £3.9bn, so it looks like the Internet is gradually becoming the preferred medium for advertisers...

- ***US loses its 'super-geek' title to Denmark in new report issued by World Economic Forum...***

A new rankings table for the impact of technology on the development of nations has shown that the US is no longer the 'top-dog' when it comes to technology matters, according to a World Economic Forum report. The countries were assessed on the integration of technology in business, the infrastructure available and government policy for favouring technical innovation. The deterioration of the US's political and regulatory environment was a reason for the fall to seventh spot, according to the report. Denmark and Sweden now lead the world in technological advances. Finland, Switzerland, the Netherlands, Iceland and Norway also reached the top 10 in the table. The UK came ninth. The expanding economies of China and India showed a downward trend by falling quite a few places in the table in comparison to last year's results.

- ***Turkish website visitors denied access to YouTube...***

A Turkish Court has ordered that access to the popular video-sharing website at www.youtube.com be suspended after video clips insulting the founding father of the Turkish state - Mustafa Kemal Ataturk - were shown on the website. The clips caused a storm of protest and were removed by YouTube. However, the court order went further and ordered suspension of the whole site. Laws in Turkey make it a criminal offence to make offensive statements against Ataturk and the Turkish state. Turk Telecom, Turkey's largest telecoms company, has obeyed the court order and suspended access from Turkish surfers to the website.

- ***Female blogger finds that there are lots of blogging bullies out there...***

Kathy Sierra, a well-known blogger, has found that she was one of a number of victims of death threats and other threats of violence online. When she reported the incidents of what has happened, she has discovered hundreds of other people who have come forward and told her that they were suffering the same fate. The recent

revelations have led to calls that there should be a self-regulatory blogging code of conduct.

TRADE MARKS AND PASSING OFF

- ***High Court invalidates registered trade mark for classic Brazilian football badge - Score Draw Limited v Finch, High Court...***

Mr Finch had registered a trade mark for the badge of 'CBD', the former governing body of Brazilian football. The badge is no longer used by Brazil's football governing body as it has changed its name but the badge appeared on football shirts for the Brazilian team in the past, such as the team that won the 1970 World Cup. Mr Finch had licensed his trade mark for use by the Old-Fashioned Football Shirts Company but his mark was challenged by other manufacturers of historic football shirts.

The High Court found that the badge did not function as a mark of origin of trade. The High Court commented that the relevant public would associate the badge with the historic Brazilian football teams and not Mr Finch's products. Therefore, it was not distinctive enough to be a registered trade mark. In the past, in the case of Arsenal v Reed, a football club's badge has been held out as a trade mark, but in this case the badge had lost its capacity to act as a designation of trade origin.

- ***Court of Appeal agrees that there is no smoke without fire when implying consent to parallel imports of Cuban cigars - Mastercigars v Hunters & Frankau Ltd, Court of Appeal...***

This case related to a dispute about the importation into the UK of famous brands of hand-rolled Cuban cigars, known as 'habanos'. The Cuban owner and UK sole distributor of the cigars were concerned about businesses such as Mastercigars which had imported the 'habanos' from Havana and then imported them into the UK other than through Hunters & Frankau, the official UK distributor. H&F persuaded HM Customs and Excise to seize some of Mastercigars' imports based on the allegation that they were counterfeit. Mastercigars applied for a declaration that the consignment was not counterfeit nor did it infringe the Cuban trade mark owner's rights and that they should be released by HM Customs and Excise. The Cuban company and UK distributor also alleged trade mark infringement based on 'parallel importing' of the cigars.

Under European Union laws relating to parallel importing, trade mark owners can stop goods bearing their trade marks from being imported without their unequivocal consent into the UK if those particular goods have not been offered for sale in the European Economic Area before (although they usually cannot stop goods from being parallel imported from one EEA country into another). Mastercigars claimed that the Cuban trade mark owner had agreed to the parallel imports by encouraging retail outlets in Havana to sell large quantities of 'habanos' that would clearly be used for exporting.

The High Court had initially decided that the Cuban trade mark owner had not consented to the 'habanos' being imported into the EEA. However, on appeal, the Court of Appeal looked more closely at the Cuban trade mark owner's actions and whether in reality it had any control over what official outlets were doing. The Court of Appeal noted that the outlets' invoices had wording in French, Spanish, English and German about customs clearance. German was not spoken anywhere outside the EEA, so the Cuban trade mark owner was expecting exportation to Germany. The official outlets in Cuba had also placed a US\$25,000 limit per individual sale on

Havana retailers so (with such a high limit) the Court of Appeal inferred that the Cuban trade mark owner had expected some of these consignments to end up in the markets of its distributors for commercial sale. Furthermore, in this case, the trade mark owner had been able to exercise control over the Cuban outlet's actions. Therefore, the Court of Appeal found that the Cuban trade mark owner knew what was happening and had practical control over what was happening. It had therefore unequivocally and impliedly renounced its trade mark rights in relation to importing into the EEA - something that is very rare to be shown. Showing implied consent in parallel importing is extremely difficult as it requires more than just turning a blind eye - this was one of the rare cases where unequivocal implied consent could be shown.

UNSOLICITED COMMUNICATIONS

- ***UK victim of spam wins over £1,000 from spammer...***

In what is believed to be just the second such award, an individual has won damages for receiving an unsolicited commercial email (or spam) contrary to the Privacy and Electronic Communications (EC Directive) Regulations 2003. Gordon Dick was sent the email by Transcom Internet Services. He claimed that his email address had been harvested by Transcom from an email group that they were both signed up to via Nominet, the UK domain name registry. Transcom alleged that Mr Dick's email address was on its files as he had contacted the company. There is some dispute as to whether the parties agreed to settle the case or whether the matter reached final judgment, but either way Transcom must pay Mr Dick £750 in damages plus over £600 for his expenses. Transcom was aggrieved because it had sent Mr Dick just a single email and it felt that Mr Dick could have clicked on the unsubscribe button or let it know that he did not want to receive further emails, but instead he had proceeded instead with court action. Mr Dick specialises in providing electronic marketing services and is a non-executive director of Nominet.

Paul Gershlick, editor of Upload-IT, comments: 'This case shows that businesses can be sued for sending just a single unsolicited email, even if they provide opt-out options. It is therefore worth getting the processes right and avoiding the cost, hassle and bad PR of being sued for being a 'spammer'.'