

# UPLOAD-IT - 1 August 2007

## COMPETITION LAW

- ***British Airways' collusion plans go into reverse thrust as OFT forces it to cough up £121.5 million for price fixing...***

The Office of Fair Trading (OFT) has decided to fine British Airways (BA) for colluding with Virgin Atlantic in fixing fuel surcharges for long-haul passengers contrary to the UK's Competition Act 1998 and the EU Treaty. The US Department of Justice has also said that it will fine BA US\$300 million for fixing prices of cargo flights and fuel surcharges for long-haul passenger flights, which is a criminal offence in the US. During the period of collusion period, fuel surcharges rose from £5 to £60. Virgin Atlantic prompted the OFT investigation and will not be fined, having secured full immunity for providing the OFT with information about the price-fixing. The OFT is also investigating whether any BA employee can be charged under the Enterprise Act 2002, which makes it a criminal offence to collude with others dishonestly to fix prices. The fine is the highest ever imposed by the OFT and would have been more had BA not admitted its wrongdoing and co-operated.

- ***European Commission sends Intel statement of objections about its anti-competitive behaviour...***

The European Commission has finally pulled out its finger and given Intel a statement of objections over a possible breach EU competition law. This follows a six-year investigation into how Intel has abused its dominant position in the computer chip market at the expense of rival manufacturers like AMD. The investigation revealed that Intel offered substantial rebates to manufacturers as long as they obtained the majority of their chips from Intel. It also allegedly offered incentives to computer makers to delay launching products with AMD processors in them. Another charge is that Intel engaged in predatory pricing by allegedly bidding against AMD at below cost. Intel has 10 weeks to respond to the statement of objections and can request an oral hearing. Ultimately, if the Commission does not like what it hears from Intel, it may issue a fine and other remedies. No doubt it is already getting its ducks in a row to fight the charges, so watch this space...

- ***High Court grants interim order against T-Mobile so Truphone not left hanging on the line - Soft Cellular Network v T-Mobile, High Court...***

Software Cellular Network Limited, trading as Truphone, wanted to launch a new voice over Internet protocol (VoIP) mobile phone service which operated through software that could be installed on Wi-Fi enabled smartphones. The service would be cheaper than normal mobile call costs as calls would be made via the Internet whenever possible and not over the mobile network. Truphone network users could receive calls from users of other mobile network operators (MNOs) such as Orange and T-mobile only if the Truphone numbers were activated by those MNOs, and that would involve the MNOs buying call termination services from Truphone. T-Mobile refused to buy the termination services and activate the Truphone numbers because it disputed Truphone's level of charges.

Truphone took the matter to court and claimed that T-Mobile was unlawfully abusing its dominant position in breach of competition laws in order to scupper the Truphone launch. In turn, T-Mobile argued that it did not have a dominant position in the market. It also argued that it would not activate Truphone numbers as Truphone was charging it excessive fees to calls connected to its network. These were not justified as the calls would be routed through the Internet (ie fixed line networks) so Truphone should not be charging mobile termination charges in the first place.

Truphone countered T-Mobile's arguments by stating that it would not be able to connect all calls via the Internet and that the rates T-Mobile proposed were so low that their business model would not work. Truphone asked the High Court to order T-Mobile to activate its numbers until resolution of the dispute at full trial and to achieve this, Truphone was prepared to accept T-Mobile's rates pending Ofcom's establishment of an appropriate rate.

Pending full trial, the High Court decided based on 'the balance of convenience' to grant an interim order in favour of Truphone. The Court noted that Truphone had met the first hurdle for an interim remedy of having a serious and arguable case that T-Mobile had a dominant position in the market and that its refusal to buy services from Truphone (as opposed to the usual situation of refusal to supply) could amount to abuse of that dominant position. The Court then decided that the balance of convenience was in favour of Truphone. If Truphone won the case at trial, payment of damages would not be enough to protect its position as Truphone may not commercially survive if it won. Truphone's loss as a result of the delayed launch could mean that it would not launch at all and the damage would be hard to quantify - whereas granting the injunction against T-Mobile would not affect T-Mobile's position quite as badly as it would be paying the charge rates it had originally chosen and which Truphone had accepted for the time being. As the injunction was commercially urgent for Truphone, the judge decided to grant the order and so T-Mobile has had to activate the numbers and pay the rates that it had proposed to Truphone as mobile termination charges.

## **CONTRACTS**

- ***High Court interprets what was meant by 'preferred supplier status' wording in contract – Proforce v Rugby, High Court...***

Proforce supplied temporary workers to Rugby. Their agreement said that Proforce had 'preferred supplier status', without further clarifying what that phrase meant in the contract. The contract had an 'entire agreement' clause. P claimed that R had failed to give it the opportunity to tender for supply of workers before using other agencies and had therefore breached the 'preferred supplier status' term in the contract. P claimed 'preferred supplier status' had the meaning in the negotiations before the parties had signed the contract. The High Court had granted R's application to strike out P's claim on the basis that what had been said in the discussions leading up to signing the contracts could not be used in evidence due to the entire agreement clause. However, the Court of Appeal overturned that decision in early 2006. Although not ruling that P was right - as the rights and wrongs will be fought in a subsequent full hearing - the Court of Appeal said that this was not an open and shut case and so it should go to full trial.

The matter has now gone to full trial and the High Court has found for Rugby as it decided that the words 'preferred supplier status' simply meant that the supplier was 'approved'. This did not grant any form of exclusivity to Proforce but just meant that Proforce did not need to go through any further tendering or evaluation to be a supplier of Rugby. The court came to this conclusion using established rules of interpretation from previous case law to construe the words in dispute, i.e. the ordinary meaning that a reasonable person having all the background reasonably available to the parties would give to such words but without looking at the parties' subjective states of mind. In looking at all the background circumstances of the case, rather than the parties' subjective meaning attached to the particular phrase, it was clear that the parties had used the phrase interchangeable with 'approved' when tendering in the first place for Proforce to be approved to act as a supplier.

Mahbuba Chowdhury, assistant editor of Upload-IT, comments as follows: 'This case shows the importance of defining and describing everything clearly in a written contract. Having spent considerable time and money in going to the Court of Appeal initially, the parties have now reached the High Court in round two of this long-running battle - and they may even go on further if they are both prepared to continue the fight. And all because they did not describe things clearly in the contract in the first place by using a throw-away phrase that had no obvious meaning.'

- ***House of Lords finally issues definitive ruling on amount of compensation to agents and says the amount should equal the value of their agency on termination - Lonsdale v Howard & Hallam, House of Lords...***

Lonsdale was a commercial agent for Hallam within the meaning of the Commercial Agents (Council Directive) Regulations 1993. Under those Regulations, agents who negotiate contracts for the supply of goods (which can include software supplied on media) to customers have certain rights. In particular, there is a right to compensation (or sometimes an alternative remedy called an indemnity) on termination. The Regulations implemented a European Union Directive, neither of which clarified the amount of compensation that should be payable. Cases have suggested differing bases for calculating the figures, with one view being that two years' gross commission should be a starting point for competent agents who had been agent over a reasonable time.

In this case, the High Court judge had initially assessed compensation as being £5,000, which was equivalent to six months' net commission. The judge had ruled that H's business had been in a deteriorating situation at termination. The Court of Appeal upheld the decision and said that the loss should represent the loss of the agency business in the circumstances with whatever goodwill attached to it. The two-year rule could not be supported. Mr Lonsdale took the matter to the House of Lords.

The House of Lords agreed with the Court of Appeal decision. It stated that the Court of Appeal was right not to follow the two-year rule, which had been based on French law and had no application in English law. It was for the courts of each EU state to decide on the method of calculation of compensation. One of the law lords, Lord Hoffman, said that the agent would get compensation based on the value of selling the agency on termination on the hypothetical basis that the agency had carried on and he had continued to receive commission. Accordingly, if sales had fallen, then the level of compensation would be lower. Alternatively, if the principal's business was doing well, the agent may be able to claim significantly more. This means that in future, agents will have to submit evidence to show the value of the agency at termination to receive the compensation it claims from its principal.

Paul Gershlick, editor of Upload-IT, comments: 'At last, there has been a definitive ruling from the House of Lords on how to calculate compensation to agents. This should give a bit more certainty than before, when the basis for calculating had been totally unclear. However, this case may leave more questions than it provides answers. The principal and agent would need to instruct independent valuers to work out what the agency business would have been worth if, hypothetically, it had continued. I question whether agents and principals could afford to pay for independent valuers in many cases. Also, for people who had expected that the Lonsdale case would put an end to large compensation claims by agents, they may be wrong. It depends on the facts. Oliver Segal, the barrister who won the argument before the House of Lords, told Upload-IT that awards may still be generous to agents, as he was aware of a recent award going for well over 10 times annual commission. It is therefore important that principals obtain specific legal advice on how to try to stop this arising when contracting with their agent in the first place.'

- ***Court of Appeal finds that a contractual discretion must be exercised in good faith and not withheld arbitrarily (unless the person is given absolute discretion to refuse) - Lymington Marina v McNamara, Court of Appeal...***

Mr McNamara had a licence from Lymington Marina (LM) to moor a yacht there. A clause in the licence allowed Mr McNamara to assign the licence to any person as approved by LM. LM could approve or withhold consent to the assignment 'in its absolute discretion'. The licence also allowed Mr McNamara to sublicense as long as the sublicensee was approved by LM. This time, there was no qualification as to the approval being 'in its absolute discretion'. Mr McNamara had inherited the licence from his father, so the licence had to be assigned to him. LM eventually agreed to the assignment. Mr McNamara wanted to grant sublicences to his brothers. LM refused to permit this as it argued that granting sublicences was only for occasional access to the marina and only for when the main licence holder was absent, and it believed that the sublicensees would be given much greater access in this case. Mr McNamara took the matter to court. The dispute reached the Court of Appeal.

The Court of Appeal found that LM's refusal to grant sublicences was unlawful as it was based on its mistaken assumption that licensees could not use the relevant clause in the agreement to grant successive sublicences. The Court of Appeal stated that the scope of LM's power of refusal under the licence as to who could be granted a sublicense was limited to the sublicensee's identity and their suitability to use the marina. The wording in the agreement did not give LM an absolute discretion to grant or refuse consent in relation to sublicences. Since LM had a discretion in the contract and the wording did not expressly give it the right to withhold it 'in its absolute discretion', the Court of Appeal said a term had to be implied that LM would exercise its power in good faith and not arbitrarily withhold it and a person acting reasonably might have come to the same decision. LM would not have had to show that its refusal was objectively justified as this would be too onerous, because (in that case) LM would have had to investigate the proposed sublicensee before coming to its decision. According to the interpretation of the scope of the grounds for refusing, LM had acted arbitrarily.

## **COPYRIGHT AND DATABASE RIGHTS**

- ***High Court implies exclusive licence in case of disagreement about ownership of program developed by software developer – Lawrence Wrenn v Steven Landamore, High Court...***

Mr Wrenn set up a business manufacturing interfaces for car manufacturers. He eventually incorporated a company called In Car Developments Limited (ICD). Mr Wrenn asked Mr Landamore to develop certain programs for him for use in certain kinds of interface. These were marketed through ICD. Relations between Mr Wrenn and Mr Landamore soured as Mr Landamore wanted to be paid for the programs and Mr Wrenn wanted access to the source code. The parties tried to resolve their dispute and entered into an agreement that another company, Integrated Multi-Media Solutions Ltd (IMMS), would own the rights in the software. Both people were 50% shareholders in IMMS. The parties could not agree on how to implement the agreement.

The High Court had to decide whether:

- 1) Mr Landamore's software was developed for Mr Wrenn personally or for ICD;
- 2) the agreement granted an exclusive licence to Mr Wrenn;
- 3) Mr Wrenn had a right to access the source code; and
- 4) Mr Landamore had a right to royalties.

The High Court decided that Mr Wrenn has engaged Mr Landamore personally. The evidence before the court proved that Mr Landamore was promised a royalty. The agreement was clear that IMMS owned the copyright in the software. However, the judge had to imply an exclusive licence to make the arrangement between the parties commercially workable. In doing this, the judge followed previous case law about the right for commissioners of copyright materials to use materials commissioned for them. The judge also implied a term that Mr Wrenn be given access to the source code. In this case, the software was developed specially for Mr Wrenn so the court granted an exclusive licence but if the software developer planned to use the source code for other software, it is likely that the court would have implied a non-exclusive licence. The main consideration for the court was to imply terms that would make the arrangement between the parties commercially workable and no more.

- ***Employee's business contacts list held to be employer's property by High Court – PennWell Publishing v Isles, High Court...***

Mr Isles was a journalist and publisher who came to work for PennWell. Mr Isles had brought with him a list of business contacts that he had built up over the years. He added this list to his Outlook email contacts systems at work. He added further contacts to this list while being employed by PennWell for the purpose of PennWell's business. After a while, Mr Isles and two other colleagues decided to set up their own business to compete with PennWell. Before he left, Mr Isles removed the contacts lists from his work computer. It included all the contacts he had brought with him, his personal contacts and those that he had added while at PennWell. He had also periodically removed contacts from Outlook and imported them into an Excel file. Only about 20% of the contacts had been added while he was at PennWell.

The High Court had to decide whether the contacts list was owned by PennWell. PennWell claimed that the list was prepared and maintained on PennWell's computers and was for the purposes of employment so it belonged to PennWell. In addition, Mr Isles' employment contract stated that all documents, hardware and software provided for his use by PennWell was PennWell's property and must be returned at the end of his employment. PennWell agreed that Mr Isles owned the part of the list which pre-dated his employment. However, Mr Isles claimed that the list (as continually developed) was a list of his contacts developed as a journalist throughout his career so it was his personal information which he could retain. The company's email policy (which Mr Isles did not receive) stated that the email system of the company could only be used for business purposes and could not be used to send messages not related to the employee's job. The contract did not contain a non-compete clause.

The case was more about who owned the contacts list than whether it was confidential, as the High Court found that the contacts list was not a trade secret of PennWell. The Court decided that the contacts list belonged to the employer since the list was recorded on Outlook, it was a part of the employer's computer system and was also backed up by the employer. Also as a database, it had been developed by an employee in the course of his employment so it should belong to the employer. If Mr Isles had maintained the list as a separate private address book to which he added journalistic contacts for career purposes, then it would have been his but this was not the case.

The case highlights the need for employers to have a clear employment contract and email policy to support their claims to ownership of materials on the company's email

systems. It is also useful to have a non-compete clause in employment contracts, although there was none here.

- ***Music stops for AllofMP3.com as illegal download site is shut down after influence of British diplomacy on Russian Authorities...***

AllofMP3.com – the second most popular site for music downloads in the UK after iTunes - has been shut down. Whilst iTunes is a legal file-sharing site, AllofMP3.com was not 'legit' according to the British Phonographic Industry (BPI). It claimed that, for this reason, allofMP3.com charged its punters cut-price download prices since it was not paying the artists or record companies to use the music. The site has now been shut down by the Kremlin following diplomatic pressure from the British government.

BPI (which represents major UK recording companies) won the right to sue allofmp3.com's owners, MediaServices, in the UK but had yet to start its action for illegal file-sharing. MediaServices has another site – allTunes.com - which is still available. It has other sites that it uses to offer cut-price downloads as well. MediaServices has always claimed that its downloads are legal since it pays Russian collection societies/authorities for the tracks that it offers.

- ***Honeywell accused of allowing music files to be shared on its computer systems by employees...***

Honeywell, the engineering firm, has been accused of allowing large numbers of music files to be illegally shared via its computer systems by its employees. The BPI - the UK record music trade body - has reported that the firm has been under investigation for two months and that a number of employees are now helping the police with their enquiries. Under UK copyright laws, it is a criminal offence to copy music without permission in the course of a business or otherwise than in the course of a business to such an extent that it prejudicially affects the copyright owner. It is also an offence to share music files on a home computer but the BPI has turned a blind eye on people who do this even though it is illegal. This is the first time that the BPI has investigated a business for digital music piracy in the workplace. This serves as a warning to businesses to put in place appropriate acceptable IT use policies and clamp down on staff that breach those policies.

- ***Hertfordshire market operator convicted of money laundering over related copyright offences for illegal sale of DVDs, CDs and software by stall holders...***

The directors of Wendy Fair Markets Limited, Nicholas Hobday and Sally Ward, have been convicted of money laundering in St Albans Crown Court. The conviction followed an investigation by BPI (the UK record music trade body) and FACT (the UK's film anti-piracy body) that the company was benefiting financially from people who sold counterfeit and pirated DVDs, computer programs and CDs in its Bovingdon market. It is a crime for anyone to receive or handle the proceeds of crime under current money laundering regulations. The BPI claims this is the first time that a market operator has been convicted for accepting money that it knew was earned through criminal means. Seven traders may also face custodial sentences since they were convicted of copyright offences. The BPI is keen to clamp down on market and boot sale operators that turn a blind eye to fake products sold on their sites 'whilst raking in the profits'.

- **High Court finds that copyright in badge design is valid and badge design cannot be copied when reproduced as a badge – *The Flashing Badge Company v Brian Groves, High Court...***

The Flashing Badge Company (Flasher) owned the copyright in 25 badge designs. Each of them was distinctive. Each badge's outline shape followed, and was dictated by, the outline of the artistic design which formed the subject matter of the face of the badge. If the graphic design on the badge was removed, the same outline for the shape of the badge would remain. Mr Groves imported and sold badges that were identical to Flasher's badges. Flasher brought proceedings for infringement of copyright in the badge designs and applied for summary judgment.

Section 51 of the Copyright, Designs and Patents Act 1988 (CDPA) states that it is not an infringement of any copyright in a design document or a model recording or embodying a design for anything other than an artistic work or a typeface, to make an article to the design or to copy an article made to the design. A 'design' means any aspect of shape or configuration other than surface decoration. Flasher argued that section 51 did not provide a defence since the design was for an artistic work of a particular shape (the shape being part of the artistic work), and the configuration of the badge simply followed that shape. The artistic work on the face of the badge was mere surface decoration, which was excluded from the definition of 'design' in the CDPA.

The High Court agreed with Flasher. It found that each design document incorporated two designs: an artistic work and a work of the outline of the badge as an artistic work. Section 51 did not apply to designs for artistic works but it did apply to the design of a badge whose *shape* followed an artistic work. However, the section 51 defence did not apply to surface decoration. Therefore, summary judgment was granted to Flasher. The judge further commented that the badge designs could exist independently of the shape of the badge and could be applied to any other surface or material so they were surface decoration and not a part of the shape or configuration of the badges themselves.

- **Landmark ruling by Belgian court that an ISP must filter or block out traffic for music piracy...**

A Belgian Court has ordered an Internet Service Provider (ISP), Scarlett Extended, to block out or filter its network of Internet traffic that it thinks is copyright-infringing material. The E-Commerce Directive states that ISPs are not responsible for the activities of their customers and do not have to police their illegal activities. However, a conflicting provision in the Copyright Directive states that copyright holders can get court orders against intermediaries to stop people infringing their copyright. The Belgian court in this case gave priority to the Copyright Directive at the expense of ISP's rights under the E-Commerce Directive. It ordered Scarlett to block the material within six months. The action was brought by the Belgian author and composer body – the Belgian Society of Authors, Composers and Publishers (SABAM). It is believed to be the first court ruling in Europe that has required ISPs to block music-sharing traffic, but this ruling may be replicated across Europe - so ISPs beware...

## **DATA PROTECTION/PRIVACY/CONFIDENTIALITY**

- **High Court grants injunction to stop BBC identifying vulnerable adult in documentary – *T v The British Broadcasting Corporation, High Court...***

The BBC wanted to show a documentary on adoption. The documentary featured T, a vulnerable adult with a mental disorder. T could not give her informed consent to

participate in the programme as she did not have capacity. The documentary showed how T's two-year-old daughter was going to be adopted by foster parents. It included footage of T and her daughter's last meeting before the adoption was finalised. The Official Solicitor, representing T, applied for an injunction to stop T being identified in the broadcast as it would be an intrusion into her privacy.

The High Court granted the injunction on the basis that T did not need to be identified for the BBC to maintain the public interest. There could not be any dispute as to whether Article 8 of the European Convention of Human Rights (which has been given legal force in the UK by the Human Rights Act 1998) applied as there were few things more intimate than a mother's last meeting with a daughter she would not be allowed to see again. The woman's Article 8 rights outweighed the BBC's Article 10 rights to freedom of expression in this case. The judge could see no advantage to T in identifying her in the broadcast and the risk of potential harm to her by people who would identify her from the documentary and a violation of her privacy was sufficient to allow the injunction. The BBC could still have the documentary without identifying her personally.

- ***HBOS loses 62,000 customers' data in the post...***

HBOS, the bank, has recently told 62,000 of its customers that they were at risk of identity theft as their data had been stored in an unencrypted disc and sent out in the post. The disc was then lost. HBOS has stated that it should have encrypted the data and sent the disc by secure courier but human error caused it to be sent in the way it was. In March this year, HBOS accidentally posted data of 75,000 customers to a woman in Aberdeen who had asked for her bank statement to be sent. The Information Commissioner has also named and shamed the bank (among others) for dumping customer information without shredding it in pavement bins.

- ***Newcastle City Council releases credit and debit card details of council tax payers by mistake...***

Newcastle City Council has admitted that it released the credit and debit card details of 54,000 fine payers and tax payers covering transactions made between February 2006 and April 2007. The good news was that the information was released in an encrypted file and did not include and PIN numbers or security code numbers. The Council also stated that it closed down the servers affected and tightened security to prevent any further problems occurring.

- ***Cheshire man gets 'done' for Data Protection Act fraud...***

A Cheshire man, Christopher Williams, has been sent to prison for 20 months after pleading guilty to defrauding businesses by falsely claiming to be an agent of the Information Commissioner's Office. Mr Williams pretended to be collecting registrations with the Information Commissioner's Office by sending fake forms to companies requiring them to register and pay a fee to him of about £100 under the Data Protection Act 1998. He managed to obtain at least £400,000 from people in doing this. Earlier this year, Francis Boyd was sentenced to two and a half years in jail for being involved in bogus agencies. Both may have to pay back the money they stole through the Proceeds of Crime Act.

## **DATA RETENTION**

- ***Data Retention (EC) Regulations approved by House of Lords and due to come into force 1 October...***

The Data Retention (EC) Regulations 2007 have been approved by the House of Lords and are due to come into force on 1 October 2007. The new law implements the EU's Data Retention Directive. Telecom companies need to keep a record of all mobile and fixed-line phone calls for 12 months. This is to help the police and

security services to investigate terrorist attacks and other serious crimes. Only details of the timing, dates, duration and parties to the communication would be retained, not the contents themselves. The new law does not yet include Internet traffic, including calls made over the Internet (or VoIP). The Directive states that the law has to apply to Internet data by 15 March 2009.

### **DEFAMATION**

- ***UK businessman threatens Google with defamation action for not doing enough to stop access to defamatory comments available via its web search engine...***

Mr Brian Retkin, a businessman from Wembley, has instructed lawyers to sue Google for continuing to allow access to inaccurate and damaging statements posted about him and his businesses. If the action succeeds, it will be a landmark decision as it will mean that search engines could become responsible for the content of the Internet. In the case of Google, the success of Mr Retkin's case would mean that Google would be held accountable for the content of 11.5 billion web pages!

The story began with an anonymous posting on an Internet discussion board which stated that Mr Retkin (the director of dotworlds – a domain name registrar) had profited from the 9/11 attacks by seeking to offer registration of domain names of a patriotic nature to US customers. The postings (which originated from the US) also stated that he conducted his business fraudulently. Mr Retkin spent three years trying to persuade Google to remove the statements permanently from its website search results as the statements kept on popping up at other Internet addresses accessible via links to Google's search results. In the US, judges have decided that search engines cannot be sued for defamation for statements on web pages. In the UK, though, such actions may be successful where the search engine has notice of the complaint and does nothing to remove the offensive statements. The defence applies in the UK if an Internet service provider did not know of the defamatory statement and then acted promptly to stop it appearing when it was brought to its attention. However, defamation and the Internet is a growing area and is currently a very uncertain area of law. Google has commented that it has no control over web pages linked to its search results and has done everything it can in this case to blacklist the offending links and remove the offensive material.

### **GENERAL IP**

- ***Facebook founder sued for misuse of trade secrets in the US...***

The founders of ConnectU, a rival of Facebook's, the popular social networking site, have launched a case against Mark Zuckerberg, the Facebook founder, in the US. The ConnectU founders claim that Mr Zuckerberg stole their ideas while they were at Harvard and that he misappropriated their trade secrets. At university, the ConnectU founders had wanted Mr Zuckerberg to write code for a computer program for them but he stalled and used their ideas instead to create Facebook. The judge in the case has not been impressed by ConnectU's claims so far and ordered it to file fresh evidence to support its claims. Facebook has 31 million users, while ConnectU has a mere 0.2% of that figure.

### **HARDWARE**

- ***Obligations of distributors in the WEEE regulations come into force...***

The need for distributors to comply with their obligations under the Waste Electrical and Electronic Equipment ('WEEE') Regulations 2006 is now a legal requirement

following the coming into force of certain parts of the WEEE Regulations on 1 July of this year. The other parts of the regulations were brought into force in January 2007 and April 2007. The Regulations implement the WEEE Directive. The Regulations set out criteria for the collection, treatment, recycling and recovery of WEEE such as computer hardware, TVs, videos, telecoms, hi-fis and electronic tools and toys.

Businesses that are subject to the Regulations include manufacturers, resellers that buy equipment from outside of Europe, and retailers. The Regulations state that 'producers' need to finance the collection, treatment, recycling, recovery and safe disposal of WEEE. The cost to each producer is calculated based on the relevant producer's market share. A 'producer' is anyone who manufactures and sells or resells equipment under its own brand, or imports or exports equipment. Producers must also join approved producer compliance schemes ('PCSs'). Distributors (ie retailers) must now either offer free designated collection facilities or join a collective distributor take-back scheme. 'Producers' will be the ones responsible for transporting the waste from the designated collection facility to the authorised treatment facility.

'Producers' will also be required to insert a crossed out wheelee bin on all their new equipment to identify it as having been put on the market after 13 August 2005, and they will also be required to identify themselves on the equipment.

## **IT AND INTERNET USE**

- ***IBM generously hands over IP to everyone to help people use its software...***

IBM has decided to grant 'universal and perpetual access' to the intellectual property related to more than 150 of its open standards. Open standards are technical agreements that help software writers to ensure that their software works with other software. The access will be to everyone and not just the open source community. The access is not available to people taking legal action to block further interoperability.

- ***New version of GPL open-source software licence issued...***

The Free Software Foundation (FSF) has issued version 3 of the GNU General Public Licence (GPL). The Free Software Foundation is a US not-for-profit organisation aimed at promoting free use of software. The GPL is used in the distribution of most open source software, including the Linux operating system. Although open software is free to use, the GPL requires all users to provide the full source code to the rest of the open source community.

People who use version 2 for their software do not have to upgrade to the new licence except where they combine GPL version 2 licensed code with GPL version 3 licensed code. Some key differences between the versions are as follows:

- People are prohibited from using digital rights management software within GPLv3-licensed programs if it prevents modification of that software (referred to as the "anti-tivoisation" provision).
- People are prohibited from distributing GPLv3-covered software if the licensee agrees to pay royalties to a distributor in return for a patent licence to the licensee's customers. The rationale behind this is to stop exclusive deals between patent-holders and distributors similar to the one made between Microsoft and Novell.

- There is a clause explicitly releasing licensees from liability for infringing patents owned by distributors or creators of GPLv3-licensed programs. In GPLv2, there had only been an implicit licence to use the patents.
- ***Two IT bully boys (SAP and Oracle) get into schoolyard fight over enterprise software secrets...***

Just when you thought that their rivalry could not get any more bitter, IT giants SAP and Oracle have clashed again over another legal issue...this time involving industrial espionage. Oracle has recently accused SAP of hacking into its customer support website and downloading its software in infringement of its copyright. The accusations are directed more particularly at staff at TomorrowNow, a firm bought by SAP in 2005. Oracle has claimed in a federal court in San Francisco that the downloads took place after the takeover and were part of SAP's competitive strategy against Oracle. SAP has admitted that TomorrowNow had carried out 'inappropriate downloads' but that SAP had not accessed the material.

Oracle and SAP have been locked for years in the battle for the highly lucrative market for enterprise software. The latest instalment in their on-going battle is no surprise for most IT insiders even though the accusations get more and more bizarre as the years pass...

- ***London gets free Wi-Fi...***

London is to get a free Wi-Fi network thanks to the free-hotspot.com Group and MeshHooper, the Wi-Fi network infrastructure, company joining forces. They will together offer free Wi-Fi access across a 22km stretch along the River Thames. The service is free as long as the user agrees to view a 15 to 30 second advert from its sponsor every 15 minutes. The speed of the service is only 256kpbs but users can pay extra to get an ad-free service that is also twice as quick.

### **MISLEADING ADVERTISING**

- ***OFT threatens to ground travel companies who issue misleading price info on the Internet...***

The Office of Fair Trading (OFT) has threatened travel companies and airlines with High Court action if they continue to mislead customers over prices of tickets online. The problem that OFT has with online advertising of holiday prices is that the travel companies will offer a certain price online then add hidden charges such as 'extra facility supplements' and 'fuel supplements' when the customer tries to book the deal online so that the customer is left to pay a much higher price than was originally advertised. The OFT gave the companies until May to comply and most major travel companies have yet to comply but the ones that have complied have complained to the OFT that others are being allowed to get away with breaking the law. The OFT has therefore decided that the next step is to give the offending companies an ultimatum to mend their ways or they would face a High Court injunction to stop the travel companies issuing misleading price advertising.

- ***New ASA chairman to tackle misleading claims of Internet advertisers...***

The new Advertising Standards Authority (ASA) chairman, Lord Chris Smith, has said that he wants to deal with misleading claims in Internet ads. The ASA - the UK advertising regulator - has a remit over paid-for advertising placements but the vast majority of complaints are about advertisers' websites rather than actual ads. The ASA therefore does not have remit over false general claims on websites. However, on his first day in the job, Lord Smith called for a change in the law so that he can regulate misleading claims in websites generally. Since the law has not yet changed,

websites have plenty of time to make as many false claims as they want without the ASA intervening as long as it is not in paid-for advertising space. (They may still be pulled up by customers for misrepresentation, though.)

## **TELECOMS**

- ***ICSTIS fines Eckoh for breaching its code in Richard and Judy competitions...***

The Independent Committee for the Supervision of Standards of the Telephone Information Services (ICSTIS) - the body that regulates premium rate charged services in the telecommunications sector - has imposed a fine of £150,000 on Eckoh Limited, the telephone service provider behind the 'You Say, We Pay' competition on Richard (Madeley) and Judy's (Finnegan) Channel 4 chat show. The company was fined as it had breached the Code of Practice applicable to premium rate telephone services. ICSTIS found that the company had misled viewers in the way it had operated the competition. The complaint against Richard & Judy's programme was that the game continued to accept £1 calls from people who mistakenly thought they could enter the game even after the participants had been selected. In one week, apparently over 30,000 people who had no chance of becoming a contestant had paid for their phone calls. ICSTIS said that it would have imposed a larger fine if Eckoh would have been in trouble with ICSTIS before or if the company's breach would have resulted from a wilful intention to defraud customers rather than merely a result of its errors and failings. This is the biggest ever fine imposed by ICSTIS.

## **TRADE MARKS AND PASSING OFF**

- ***High Court refuses to allow registration of mouse-on-wheels trade mark as it affects distinctiveness of competitor's telephone-on-wheels trade mark – Direct Line Insurance v esure Insurance, High Court...***

esure Insurance Limited (esure) applied to register the shape and appearance of a computer mouse on wheels as a trade mark in class 36 (financial services). Direct Line Insurance Plc (Direct Line) opposed it as it had earlier trade marks, consisting of a telephone on wheels since there was a likelihood of confusion, including the likelihood of association, on the part of the public between esure's mark and its marks. Direct Line also argued that the registration of esure's mark was likely to take unfair advantage of, and/or cause detriment to the distinctive character and repute of Direct Line's registered trade marks.

The Registrar agreed with Direct Line and would not allow the registration to go ahead. He thought that although there was no likelihood of direct confusion, there may be indirect confusion. He also ruled that the registration would affect the distinctiveness of Direct Line's trade marks and esure's trade mark was free-riding on the reputation and goodwill of Direct Line's trade marks. esure took the matter to the High Court.

The High Court found that the Registrar's decision that the registration of esure's mark would confuse punters and cause them to link it to Direct Line's undertaking was not supported by any evidence. However, the High Court ruled that the Registrar was right to find that the distinctive character of Direct Line's trade marks would be reduced by esure's application and that Direct Line could not be confident that the money it spent promoting its marks would not also benefit esure's marks and reputation. For that reason, esure's trade mark application failed. This has raised the question of whether Direct Line's strong marketing campaigns have enabled it to monopolise any trade mark 'on wheels'.

- **CFI says that 'lokthread' mark is descriptive of 'lock threading bolt' –**

**MacLean-Fogg v OHIM, European Court of First Instance...**

MacLean-Fogg applied to register the trade mark 'lokthread' as a European Community Mark (CTM) for certain type of nuts and bolts products. The Office for the Harmonisation in the Internal Market (OHIM) refused the application as the mark was descriptive and lacked distinctiveness. MacLean-Fogg appealed the decision.

The CFI agreed with the OHIM and said that the mark was descriptive. The mark was a combination of two descriptive words since 'lok' was similar to the word 'lock' in English and 'thread' was identical to the corresponding word in English. For a mark that combined two words to be registered as a trade mark, it had to consist of an unusual combination of words which created an impression that was sufficiently far-removed from the meaning derived from the combination of meanings attributable to its constituent parts. This was not the case here. The CFI looked up the words in the dictionary and one was descriptive of the intended uses of the goods and the other was descriptive of the technical characteristics of the goods. The CFI thought that 'lokthread' meant a thread that locked or was used as a locking mechanism. Therefore, the CFI said OHIM was right to reject the trade mark application.

- **CFI says 'cor blimey', there is no similarity between the 'cor' mark and the 'dor' mark so as to cause confusion – Henkel v OHIM, Court of First Instance...**

Serra y Roca SA applied to register the mark 'Cor' as a Community Trade Mark (CTM) for scouring products, soap and essential oils. Hengel KgaA opposed the mark as it owned the mark in 'Dor' in Germany for dishwashing and cleaning products.

The Office for Harmonisation in the Internal Market (OHIM) Board of Appeal thought that, taken as a whole, the two marks were not really similar so there was no likelihood of confusion for the German consumer. Henkel appealed the decision.

The Court of First Instance (CFI) followed previous case law. The CFI stated that it had to assess the likelihood of confusion globally and to consider the marks visually, conceptually and phonetically. The CFI had to assess the likelihood of confusion in relation to the reasonably well-informed and reasonably observant and circumspect German consumer. Based on the overall impression, the two marks were not visually, phonetically or conceptually similar. The weighting was stronger for visual aspects of the mark in this case, as consumers in self-service goods such as supermarkets would pay more attention to the look of the mark rather than how it sounds. The words were pronounced differently since one was in Spanish and the other in German. The 'Dor' mark was in gothic script so there was a figurative difference. In addition, as the first letter of the word was different, this was significant. In light of these differences, there was no likelihood of confusion, so the appeal failed.