

UPLOAD-IT - 1 AUGUST 2008

COMPETITION LAW

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

The European Commission has sent Intel a further statement of objections regarding alleged abuse of its dominant position in breach of Article 82 of the EC Treaty. These further objections follow on from the Commission's original allegations made in July 2007 that Intel had been abusing its dominant position in the computer chip market at the expense of rival manufacturers like AMD. For more on the first statement of objections, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2116>.

In the supplementary statement of objections, the Commission is concerned by the following conduct by Intel:

- ◆ Providing substantial rebates to a leading PC retailer as long as it sold only Intel-based PCs.
- ◆ Making payments to induce a leading manufacturer to delay launching products with AMD processors in them.
- ◆ Providing substantial rebates to the same leading manufacturer as long as it purchased all of its laptop computer chips from Intel.

Intel has 8 weeks to respond to the supplementary statement of objections. If the Commission does not like what it hears from Intel, it may issue a fine of up to 10% of Intel's annual turnover and impose other remedies. The Commission clearly has its 'bit' between its teeth in its campaign against Intel, so watch this space...

- ***OFT says there's no smoke without fire as it fines supermarkets and tobacco company £173.3 million for ripping off smokers...***

The Office of Fair Trading ('OFT') has confirmed that supermarkets and Gallaher, a tobacco company, will pay a total of £173.3 million in fines and costs for ripping off smokers by colluding on prices. Gallaher is to pay most of the fine - £93 million. Asda, Somerfield, Threshers and One Stop convenience stores must also pay some of the fine but theirs were lower following their prompt admissions and co-operation. Sainsbury's is to be spared a fine altogether (provided it continues to assist the OFT) after it blew the whistle on the pricing scam in the first place and handed over all documentation relating to the unlawful practices.

The investigation continues into Imperial Tobacco, Tesco, Morrisons, Safeway, the Co-op and Shell, which are all fighting the allegations. Under the Competition Act 1998, they can be fined up to 10% of their turnover. The chief executive at the OFT, John Fingleton, spoke out about the OFT's crackdown on cartels and price fixing, stating, 'The OFT's objective is to make markets work well for consumers and the economy alike. A cornerstone of this is the principle that companies should set their prices independently.'

- ***Competition Commission to investigate BBC, ITV and Channel 4's 'Video on Demand' website...***

The proposed website launch of three of the UK's biggest TV broadcasters' video libraries is likely to be delayed following a referral to the Competition Commission of the broadcasters' plan to collectively offer all of their programmes via a single

website. The Office of Fair Trading has referred the joint venture over concerns that it is anti-competitive.

BBC, ITV and Channel 4 are proposing to offer its Video on Demand customers a one-stop shop called Kangaroo for 'downloads to rent' and 'downloads to own' programmes. The OFT wants the investigation to consider whether the joint venture will create a dominant position in the market that could enable the companies to charge higher prices to customers.

CONTRACTS

- ***House of Lords impose limits on remoteness of contractual damages claims - Transfield v Mercator, House of Lords...***

The House of Lords has imposed a restriction on the amount of damages that can be claimed if there is a breach of contract. This ruling was given in the case of a late re-delivery of a chartered vessel. Transfield hired a ship from Mercator for a period to end no later than 2 May 2004. Mercator subsequently contracted to let the ship to new charterers for four to six months beginning no later than 8 May 2004 for \$39,500 per day. Transfield did not return with the ship until 11 May 2004, by which time the market had fallen and the new charterers would only agree to take the ship at a reduced price of \$31,500 a day.

Transfield was in breach of contract. The House of Lords had to consider whether Transfield was liable to pay damages for either (a) the difference between the daily rate and the prevailing market rate for the use of the ship for the number of days that it was late; or (b) the difference between what Mercator would have got from the new charter had the ship been returned on time and what Mercator actually got from the new charter.

The House of Lords ruled that the liability of Transfield should be limited to the difference between the market rate and the charter rate for the over-run period. The Lords considered that it was important to ascertain what was the intention of reasonable parties to this sort of ship hire contract. Would the hirer have assumed the risk for a big loss caused by a relatively short delay in re-delivery? Was an extraordinary loss measured over the whole term of the new charter sufficiently likely to result from the breach of contract in the first charter contract to make it proper that the loss would have 'flowed naturally from the breach' or that the loss 'should have been within the defaulting party's contemplation'? Otherwise, the type of loss would have been too remote to be claimable. Here, the House of Lords decided that it would not have been the common intention of the parties for the first hirer to be responsible for the extraordinary loss from the next charter.

The House of Lords ruled that it would be wrong to suppose that the parties were contracting on the basis that Transfield would be liable for any loss, however large, as a result of a delay in re-delivery where it had no knowledge or control over the new charter entered into by Mercator. This was a risk that Transfield could not reasonably considered to have assumed in the absence of some premium in exchange. A hirer would also not be able to quantify the likely losses that an owner may suffer and it was not expected in the market that the hirer would assume that risk. Although it would be unusual to depart from ordinary general rules on remoteness of damage, limitations on the extent of liability in certain types of contract due to general expectations in certain markets - such as banking and shipping - could occur.

- **Termination notice must be clear and unequivocal to be effective -**

Leofelis and Leaside v Lonsdale, Court of Appeal...

Leofelis appealed against a decision in favour of Lonsdale, which had been awarded damages for misrepresentation and breach of contract. Leofelis argued that the agreement between the parties had already been terminated prior to Lonsdale's claim for breach of contract. However, the appeal failed because termination had not been done conclusively.

Leofelis had granted a licence giving Lonsdale exclusive rights to use its trade marks, subject to any pre-existing licences that may have been granted. Leofelis warranted to Lonsdale that there were no pre-existing licences and this was subsequently disputed by Lonsdale. In February 2006, prior to that dispute, Leofelis had written to Lonsdale to terminate the licence between the parties for breach of the licence by Lonsdale. Leofelis anticipated that Lonsdale would object to the termination, and the termination notice therefore stated that Leofelis intended to terminate the licence, but it would fulfil its obligations pending determination of the validity of such termination by the courts.

The High Court ruled in favour of Lonsdale. The Court of Appeal agreed and said that the termination notice could only be effective if the notice was clear and unequivocal, something that could not be said for the notice given by Leofelis. It was impossible and wholly inconsistent for Leofelis to terminate the agreement, while purporting to continue the agreement pending a decision by the courts. The Court maintained that an effective notice of termination had to be clear with the ability to be acted on immediately by the parties without uncertainty of other inconsistent conduct.

Gemma Adie, assistant editor of Upload-IT, comments: 'This case is yet another illustration for ensuring that contracts are terminated effectively and subsequent actions are not taken to distort this intention. Failure to do things correctly from a legal standpoint would severely affect someone's rights under the contract.'

COPYRIGHT AND DATABASE RIGHTS

- **Cross-border football broadcasting - copyright infringement or freedom of trade? European Court to decide - FA Premier League v QC Leisure, High Court...**

The High Court has agreed with publicans and decoder equipment dealers to ask the European Court of Justice to rule on whether showing Premiership football using foreign satellite services and non-UK decoder cards is legal in accordance with the EU treaty permitting the free movement of goods and services between EU Member States. The High Court judge believed it was appropriate for the ECJ to consider the matter, which could be of 'serious detriment to consumers as regards both price and cost' throughout the EU. He highlighted that laws relating to protection of intellectual property rights and freedom of trade conflicted and it was appropriate for the ECJ to clarify a matter which would have far-reaching implications.

The Football Association Premier League (FAPL) has recently sued a number of pubs for showing Premiership football using decoder systems to receive the programmes from foreign broadcasters. The FAPL argued that the use of that equipment and the sale of decoding equipment infringed its copyright to the broadcasting rights. The January 2008 edition of Upload-IT reported the case of publican Karen Murphy's conviction of dishonestly receiving and showing football matches in a pub without paying BSkyB. For more on that case, please click here: <http://www.upload->

it.com/editArticle.aspx?ID=2377. Her case has now been referred to the ECJ and will be considered as part of the ECJ's overall review.

At present, the FAPL sells the broadcasting rights to each Premiership football match as a package to foreign broadcasters. The broadcaster is then permitted to sell decoder cards to its customers in order to receive the programme. The price charged for the decoder cards varies significantly within the EU. In the case of Ms Murphy, she obtained a Greek decoder card for £900 to avoid paying BSkyB, the licence owner, its licence fee of £6,000. This case has major implications, because if the ECJ rules that UK businesses can obtain equipment and services from other EU countries, this may significantly hit the amount of money that football receives from broadcasting rights. The High Court judge believed the ECJ should rule in favour of the publicans, but watch this space to see what's the final result...

- **Google ordered to disclose user details of all YouTube users...**
As part of a multi-billion dollar US copyright infringement action by the English Football Premier League and Viacom - the owner of some of the biggest names in cinema and TV including MTV, Nickelodeon and Paramount Pictures - a US court has ordered Google to disclose the user habits of anyone who has ever viewed videos on YouTube. Viacom claims that some 160,000 unauthorised video clips have been viewed on the site by millions of users infringing its copyright in those videos. Viacom claims that the data is to be used in its efforts against Google and not to take action against individual users. Viacom has criticised Google for not doing enough to prevent the infiltration of copyright protected material on to the site at the outset. Privacy campaigners have called the decision to order disclosure of the users' log-in names, IP addresses and video habits disproportionate.
- **Facebook Scrabulous game reforms as Wordscraper...**
Scrabulous - the popular game found on Facebook, the popular social networking site - has recently been suspended in the US and Canada, a decision made by brothers Rajat and Jayant Agarwalla who had founded the Facebook game. The move came following legal action by Scrabble's North American rights owners, Hasbro, for copyright and trade mark infringement. The application - which has attracted more than 500,000 users each day - has been re-launched under the name *Wordscraper* with some alterations to its features, including allowing users to design their own playing boards and having circular tiles.
- **EU proposes to increase copyright protection for sound recordings to 95 years...**
The European Commission has proposed a Directive to extend copyright protection from 50 years to 95 years for performers whose sounds have been recorded. The Commission wants to bring protection for performers more in line with composers (and their estates), who receive royalties for up to 70 years following their death. Critics of the extension argue that extending the protection too much could damage the music industry as a whole, and also individual artists, libraries, academics, businesses and the public. The UK Government may oppose the proposed extension following the Gowers' Review of intellectual property in December 2006, which considered and dismissed extending the term. The Gowers Review even considered reducing it below the current 50 year term but ultimately concluded that it should remain at 50 years. The Commission is also proposing that the law is changed so protection for composers runs from the death of the last surviving author.
- **Ryanair flies into victory in the battle against 'screen scrapers'...**
Ryanair - the low cost airline - has soared to victory by successfully obtaining an injunction in a German Court preventing Vtours from screen scraping its website.

Ryanair argued that Vtours had infringed both its copyright and its terms of use. Screen scraping occurs when a website extracts data from other sites before using that data for its own use, such as offering for sale flights from other operators.

Ryanair opposes screen scraping because consumers are misled into paying 'handling charges' for Ryanair's flights when they could purchase the same flights with no handling charge on www.ryanair.com. Ryanair is also concerned that many screen scrapers fail to properly communicate Ryanair's terms and conditions, policies or up-to-date flight changes and information to customers, who mistakenly believe that they have made bookings directly with Ryanair. Ryanair has also just commenced a screen scraping case in the Irish courts against Bravofly.

Screen scraping is rife in travel industry and whilst some websites welcome the extra business it brings, many airlines are mounting challenges against it. Last month, Upload-IT reported that easyJet had reportedly written to several websites advising them to cease scraping information from easyJet's website or face legal action. For more on that article, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2698>. The battle continues...

- ***BPI warns music pirates 'file-sharing is not anonymous, it is not secret, it is against the law' as ISPs finally agree to tackle the issue...***

The British Phonographic Industry ('BPI') – the body representing major UK recording labels – has finally persuaded Internet service providers ('ISPs') to recognise their responsibility to deal with illegal file-sharers on their networks. The Government has struck a deal with six major ISPs in the UK which commits the ISPs to work towards a 'significant reduction' in the illegal sharing of music and the development of legal music services. BT, Virgin, Orange, Tiscali, BSkyB and Carphone Warehouse have all signed up to the Memorandum of Understanding drawn up by the Department for Business, Enterprise & Regulatory Reform which covers consumers who are uploading or downloading music illegally.

Geoff Taylor, chief executive of BPI, has said that this significant step by ISPs has taken years of persuasion. He said, 'The focus is on people sharing files illegally; there is not an acceptable level of file-sharing. Musicians need to be paid like everyone else. File-sharing is not anonymous, it is not secret, it is illegal'. Upload-IT has previously reported that BPI had threatened legal action against Carphone Warehouse unless it agreed to co-operate with BPI's demands to police file-sharing. For more on that article and other linked articles, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2593>.

Users suspected of illegally sharing music can now expect to receive warning letters from their ISPs. Virgin and BT have already sent out letters to customers identified by the BPI as persistent music pirates. Under further measures proposed by the Government in its consultation paper, hard-core file-sharers could see their broadband connections slowed, and their content filtered.

- ***US film industry body sues websites for inducing copyright infringement by providing links to unauthorised sites...***

The Motion Picture Association of America is suing websites Fomdb.com and Movierumor.com for providing links to unauthorised copies of films. The MPAA – a body representing the American film industry – claims that those sites are making substantial profits by facilitating copyright infringement via links from their websites, albeit that they are not directly responsible for the third party websites providing the copies of the films. The MPAA says: 'These sites contribute to and profit from

massive copyright infringement by identifying, posting, organising, and indexing links to infringing content found on the Internet that consumers can view on-demand.'

The law suits follow other recent successful actions brought by the MPAA against people who had links to pirated content, including awards of US\$2.7 million against Showstash and a US\$1.3 million judgment against Cinematube.

CYBERCRIME/SECURITY

- ***E-crime video launched to protect Barclays customers...***

In its continuing battle against cybercrime to boost confidence for its online customers, Barclays has launched a five-minute video with helpful tips on how to limit the risk of becoming a victim from Internet fraud. Barclays hopes the video, together with its other security systems, will instil customer confidence and make them more aware of potential security threats.

Other recent attempts by Barclays to bolster online security for its customers include Pinsentry - a two-factor authentication tool - which has so far achieved 100% record at preventing fraud since its introduction last November with 1.5 million customers using the system. Last month, Barclays also introduced free security software from Kaspersky, featuring a spam filter, anti-virus and firewall protection.

- ***New malicious web page detected every five seconds as hackers turn to websites to steal information...***

A new malicious web page is detected every five seconds as websites have become the largest source of malware (or malicious software) threats to business. These are the findings of a report by Sophos, the security business. Websites have become the preferred method for hackers attempting to infect business computers due to increased email protection measures that are now in place, although email continues to present a danger. Hackers inject code into legitimate websites which are then used to steal user names and passwords from visitors to the sites. They can also use the invisible code to take over computers to send spam or launch denial of service attacks. Sophos recommends that businesses use web filtering to protect their staff when visiting other sites and ensure that their own websites do not become infected.

Samantha Lloyd, assistant editor of Upload-IT, comments: 'It is important that businesses ensure that their websites are a secure and safe place where they can interact with their customers. If a customer finds out that it has received an infection from a particular website it may put them off visiting the website again, which is likely to have a detrimental effect on the business.'

DATA PROTECTION/PRIVACY/CONFIDENTIALITY

- ***High Court awards Max Mosley record damages for breach of right to privacy – Mosley v News Group Newspapers, High Court...***

The High Court has awarded Max Mosley £60,000 after finding that *The News of the World* newspaper had infringed his right to privacy under the Human Rights Act 1998. That was a record level of damages for a breach of privacy claim. *The News of the World*, published by News Group Newspapers Limited, published an article and photos accusing Mr Mosley of paying five prostitutes to dress up in German Nazi-style uniforms for sadomasochistic sexual practices. This was also repeated on *The News of the World* website, together with clips of the video footage.

Under the Human Rights Act 1998, everyone has a right to respect for his private and family life and also the right to freedom of expression. Where both of these rights are engaged, the court must balance these rights taking account of the justifications for interfering in each right and the issue of proportionality. The High Court considered that in order to determine which right should take precedence it was necessary to consider the facts and decide whether the intrusion on Mr Mosley's privacy was proportionate to the public interest supposedly being served by it.

The High Court confirmed that Mr Mosley had a reasonable expectation of privacy in relation to sexual activities carried on by consenting adults on private property. After reviewing the evidence, the High Court rejected the claim by *The News of the World* that the events had a Nazi theme or that the publication of the footage and photographs could be justified on the basis that they were illegal or immoral. The Court concluded that neither the publication of the visual images nor the article could be justified in the public interest. The High Court did not go so far as to award Mr Mosley the exemplary damages (damages exceeding his loss) that he had claimed but ruled that damages for infringement of privacy could include distress, hurt feelings and loss of dignity. The compensatory damages awarded reflected the unlawful intrusion into Mr Mosley's private life whilst affording him some degree of solace.

Mr Mosley had previously failed to secure an injunction to prevent *The News of the World* from repeating the video footage because it would make very little practical difference and would be a futile gesture given that the video was already so widely available on the Internet. For more on that part of this case, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2600>.

In an unusual move – especially considering his concerns for his privacy - Mr Mosley has since commenced libel proceedings against *The News of the World* in respect of the same reports. The scandal continues (thanks to Mr Mosley)...

- ***PCC upholds complaint against local paper after showing video footage of inside of woman's home...***

The Press Complaints Commission ('PCC') has upheld a complaint against the Scarborough Evening News for publishing pictures in its newspaper and video footage on its website of inside Carolyn Popple's home. The footage and photographs were obtained after the police had invited the paper to cover a series of police drugs raids. The paper claimed that there was a public interest in showing the material because drugs had been found at the house. However, despite the police finding a small amount of cannabis, Ms Popple was never charged.

The PCC – the self regulatory body of the newspaper industry - found that the newspaper had breached its Code of Conduct. It ruled that 'showing a video and publishing a picture of the interior of the complainant's house, without her consent, was clearly highly intrusive, particularly when the coverage contained information likely to identify her address. The fact that the police had invited the newspaper on the raid explained how the footage had been obtained but it did not absolve the editor of responsibility for ensuring that the subsequent publication of the material complied with the Code.'

In February 2007, the PCC began regulating audio and video content published online by newspapers in addition to printed content. This is not the first time the PCC has come down on a newspaper for breaching its Code with online content. The *Hamilton Advertiser* was told off for breaching the Code last year after publishing video footage on its website of pupils misbehaving in class. For more on that case, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2206>.

- **Data Regulator calls for banning of sale of electoral roll...**

Local authorities should not sell the electoral roll to marketers. That is one of 19 recommendations of The Data Sharing Review, a Government commissioned report following last year's well publicised loss of 25 million people's details on the child benefit database. The report suggests the sale of the electoral roll by local authorities 'sends a particularly poor message to the public that personal information collected for something as vital as participation in the democratic process can be sold to anyone for any purpose'. The report was made by the Information Commissioner, Richard Thomas, and Dr Mark Walport, a director of the Wellcome Trust. Among their other recommendations were the following:

- ◆ Clear statements on use of personal data should form part of all organisations' corporate governance.
- ◆ Data controllers should review their systems of internal controls at least once a year, and directors should be required to report to shareholders on whether they have done so.
- ◆ As a measure of increasing transparency, Fair Processing Notices should be re-named 'Privacy Policies'. They should be in clear English and prominently displayed in organisations' literature.
- ◆ Organisations should publish and regularly update lists of those parties with whom they share, exchange or sell data.
- ◆ Clear language should be used in opt-in and opt-out tick boxes.
- ◆ Organisations should do what they can to enable people to correct information about them.
- ◆ Organisations which share personal data should review and enhance staff training on handling data.
- ◆ Data controllers should avoid collecting unnecessary personal information.
- ◆ The Information Commissioner – the data protection watchdog – should be notified of serious data breaches – ie those which are likely to cause substantial damage or distress. Failure to notify those breaches should be taken into consideration when the Commissioner assesses any penalties handed down for breaching data protection rules.

The Commission has called on the Government to implement its recommendations within 18 months.

- **House of Lords tells Scottish Information Commissioner not to be so quick to grant freedom of information request and re-consider personal data in anonymised statistics - Commission Services Agency v. Scottish Information Commissioner, House of Lords...**

A request for statistics of the location of child leukaemia patients in Dumfries and Gallaway was made by a Member of the Scottish Parliament under the Freedom of Information Scotland Act 2002. This was refused by the Common Services Agency, which considered the statistics to constitute 'personal data' under Section 1 of the Data Protection Act 1998 and therefore be exempt from disclosure. The Scottish Information Commissioner agreed that the information was personal data but said it

should be disclosed in a 'barnardised' form - a method of anonymising data relating to small numbers of people.

The House of Lords rejected the Commissioner's decision as an error of law. The Commissioner had failed to consider whether the barnardised data sufficiently removed the identities of the children who were the subjects of the data. The Lords referred the matter back to the Commissioner to re-consider whether the data in its anonymised form, when read together with other information held by CSA, could still identify the children concerned. The information should only be disclosed if the Commissioner found that it was fully anonymised.

The case highlights a potential weakness in the UK's Freedom of Information laws when they are balanced against data protection laws: they only consider whether the data is personal data when read together with other data held by the party responding to a data request rather than by the person requesting the information. The disclosing party will normally also retain the data in its original form, and therefore the anonymised data will still be considered as personal data, even though the data may be meaningless to the person requesting the data.

- ***Google's controversial Street View tool to launch in the UK...***

Google has been given the green light by the Information Commissioner's Office - the UK's privacy regulator - to launch its controversial Street View application in the UK. The tool shows pictures of streets taken by Google so as to provide real images of the location being viewed. Privacy campaigners have been concerned that the images may be intrusive or embarrassing to unsuspecting individuals, but the ICO is satisfied that precautions including blurring of faces and number plates, as well as pictures not being shown in real time, would adequately protect people's privacy.

Mark Weston, head of Commercial/IT/IP at Matthew Arnold & Baldwin, recently told Sky News that it was important to protect people's privacy; but this development should be seen as part of the evolution of the massive expansion of potential data available on the Internet, and people would see tools such as Street View as quite normal in just a few years' time.

- ***European Court of Human Rights rules failure to keep private data confidential breached right to privacy - I v Finland, ECHR...***

The European Court of Human Rights ('ECHR') has ruled that the failure of a hospital to guarantee the security of an individual's private data - namely confidential medical records - amounted to a breach of her right to privacy under Article 8 of the European Convention on Human Rights ('Convention'). The case was brought by a Finnish woman who had worked in an eye clinic in a public hospital, where she was also receiving treatment in a different clinic for HIV, between 1989 and 1994.

In 1992, the applicant told her doctor that she suspected her colleagues were aware of her illness. Subsequently, the hospital's data access practice, which up until that time allowed all hospital staff free access to the patient register, was changed so as to restrict access to the treating clinic's personnel. In 1996, after the applicant had left employment at the hospital, she requested information as to who had accessed her confidential patient records but the hospital could only provide her with details of the last five people who had accessed them. Again, the hospital implemented changes to its procedures to enable it to identify any person who had accessed a patient record.

The applicant's claim against the district health authority responsible for the hospital's patient register, for its failure to keep her records confidential, was

rejected by the domestic courts as a result of the lack of evidence that her records had been unlawfully accessed. However, the ECHR ruled that the applicant's rights under Article 8 of the Convention had been violated and awarded her damages. It stated that Article 8 could involve a positive obligation to adopt measures designed to secure respect for private life even between individuals. It found that although Finland did have in place privacy laws which required medical data to be properly protected, the records system in place in the hospital was not in accordance with those laws. The ECHR concluded that the applicant's medical data had not been adequately protected against unauthorised access.

This case underlines that there is a specific duty requiring public bodies to ensure that they have implemented measures to protect personal data from unauthorised access and disclosure. Few claims have been brought by individuals in the UK under the Data Protection Act 1998. This ruling may open the door to claims for breach of Convention rights being brought against the UK Government for data breaches by public bodies.

- ***MoD admits to losing 748 laptops in the past four years...***

The Ministry of Defence has admitted that 659 laptops have been stolen and 89 others lost since 2004. Put another way, that's around one laptop every two days. Out of the 748 laptops that have gone missing, only 32 have been recovered. The revised figures, almost twice the number originally stated, were revealed after it was discovered that there had been 'anomalies in the reporting process'. 121 USB memory sticks have been lost or stolen during the same period. Meanwhile, in a bid to tighten up on its security, the MoD has recalled 20,000 laptops so they can be encrypted. Last month, Upload-IT reported how the Burton report had made 51 recommendations to the MoD to improve its systems to protect data. For more on that article, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2701>.

DATA RETENTION

- ***Regulator's warning against Government phone and Internet super-database plans...***

The Government's plans to create a giant database of all phone, Internet and email usage across the UK are a dangerous threat to privacy, according to the Information Commissioner, the UK's data protection regulator. In the light of a string of high-profile data security breaches, there are concerns over how the Government could guarantee protection of large volumes of personal data stored on one single database. Currently, police and intelligence agencies can make a request to telecoms and Internet service providers and the request may be queried by an independent body. Under the new proposals, the Government would already have access to the data without having to request use of the data being questioned.

Richard Thomas, the Commissioner, said he is clear that targeted and authorised interception of communications can be invaluable in fighting terrorism and other serious crime. However, he has called for a full public debate about the justification for, and implications of, a specially-created database that holds details of everyone's telephone and Internet communications, which would be potentially accessible to a wide range of law enforcement authorities. The Government insists that no decision has yet been taken on creating the database.

DEFAMATION

- ***Damages awarded for defamatory fake Facebook profile – Applause Store Productions and Firsht v Raphael, High Court...***

Creation of a fake profile on Facebook – the popular social networking website - by a former school friend has resulted in an award of £22,000 in damages to businessman Matthew Firsht and his company, Applause Store Productions. The High Court found that Grant Raphael had created a Facebook profile making false allegations about Firsht's sexual orientation and a group 'Has Matthew Firsht lied to you?' with the intention of causing embarrassment and anxiety to Firsht.

Raphael had claimed that strangers had created the profile during a party at his flat by using personal information on Firsht that had been found next to his computer. The High Court judge found that defence 'utterly implausible' and stated 'as far as the tort of misuse of private information is concerned, I accept Mr Firsht's evidence that it caused him, a very private person, great shock and upset.'

During the case, the High Court heard how Raphael and Firsht had been old school friends but had fallen out over business. Firsht - whose Applause Store Productions company finds audiences for shows such as *Big Brother* and *Britain's Got Talent* - was awarded £15,000 in damages for defamation and £2,000 for invasion of his privacy. Applause received £5,000 for libel.

DOMAIN NAMES

- ***Once a domain name has been transferred under .com dispute resolution process, it's for the original owner to prove to court he has rights in it - Patel v Allos Therapeutics Inc, High Court...***

Mr Patel - the registrant of domain name *allostherapeutics.com* - used the site as a public forum for criticising Allos, the biopharmaceutical company. Allos succeeded in showing that Mr Patel was a cybersquatter and got the domain name transferred to it under the Uniform Domain Name Dispute Resolution Policy ('UDRP'). The UDRP provides a quick and cheap way for domain name disputes to be heard. Mr Patel complained about the ruling to the High Court.

The High Court struck out Mr Patel's claim as being without merit. Once it had been transferred under the UDRP, it was for the original registrant to demonstrate an interest in his rights in winning the domain name back. He had to prove he had some right in the domain name – which he failed to do. His claim to the High Court was therefore dismissed.

FREEDOM OF INFORMATION

- ***Suffolk Council ordered to disclose full tendering document for works done by contractor 18 months previously...***

The Information Commissioner's Office has ordered Suffolk District Council to disclose a copy of a tendering document submitted by a contractor in 2004 for a contract to carry out the repairs and maintenance work at a leisure centre. The request had been made under the Freedom of Information Act 2000. The Act gives people anywhere around the world the right to see information held by more than 100,000 UK public bodies about the way decisions are made and public money spent.

The Council had previously refused to provide a complete copy of the document on the basis that it contained financial information, and the Council argued that this was exempt from disclosure under the Act. To qualify for the exemption, the Council had to show that prejudice would be likely to occur to the commercial interests of the Council or the contractor, that this prejudice was real and of substance, and that the public interest was in favour of refusing disclosure.

The Council argued that disclosure would reveal commercially sensitive information about the contractor and how it had priced the tender. However, the ICO ruled that the Council had failed to provide evidence or convincing arguments to show that the concerns raised, in relation to the risk of prejudice to the contractor's commercial interests, were concerns of the contractor rather than merely the Council's opinion on the issue. In particular, the request for the information had been made some 18 months after the contract had been awarded. The ICO also rejected the Council's claims that disclosure would be detrimental to the Council's ability to achieve the best value for money in future work, as council contracts could be a lucrative business or source of revenue for commercial organisations.

This decision is likely to provide useful guidance to public bodies seeking to establish that the exemption from disclosure applies on the grounds of prejudice to the commercial interests of a contractor. In those situations, the public body should consult with the contractor to see whether there is really prejudice, rather than just draw its own conclusions.

INTERCEPTION OF COMMUNICATIONS

- ***UK's surveillance laws violated right to privacy...***

The European Court of Human Rights ('ECHR') has ruled that the UK's wide and secretive surveillance laws violated the right to privacy under Article 8 of the European Convention on Human Rights. The UK was taken to the ECHR by the civil liberties groups, Liberty and the Irish Council for Civil Liberties, which claimed that their legally privileged and confidential communications had been intercepted between 1990 and 1997.

At the time of the alleged interceptions, the broad discretion of the UK authorities to intercept communications between the UK and any body outside the UK was contained in the Interception of Communications Act 1985. That Act has now been superseded by the Regulation of Investigatory Powers Act 2000. The ECHR recognised that the regulation of surveillance by its very nature required some element of secrecy. However, the ECHR found that the nature of the UK's arrangements were not sufficiently clear or transparent to protect against the abuse of power, the scope or the manner of exercise of the wide discretion by the UK authorities to intercept and examine external communications. The ECHR pointed out that the UK 'had not set out in a form accessible to the public any indication of the procedure to be followed for examining, sharing, storing and destroying intercepted material.'

MISLEADING ADVERTISING

- ***ASA raps Virgin again – this time because 'Hate to Wait?' Virgin broadband customers were still waiting during peak times...***

The Advertising Standards Authority (ASA) has upheld a complaint from BT about Virgin Media's advertisement 'Hate to Wait?'. The advertisement claimed customers

could receive fast Internet speeds for downloading songs and TV shows, but BT complained that due to Virgin's traffic management system usage caps during peak hours limited the volume of data that could be downloaded. As a result, the download times advertised could often only be achieved during off-peak hours.

The ASA requested that Virgin Media clarify its peak time download speeds for its broadband packages to ensure the customers received the quality of service expected. Virgin Media was also told to change the terminology used to describe download speeds from 'megabits' to 'megabytes'.

The ASA administers the CAP Code - a code of practice governing the content of adverts and marketing communications. Although the Code does not have legal force, it is best practice to comply with it, as failure to do so can result in bad publicity and ultimately an inability to obtain advertising space.

This was Virgin Media's second brush with the ASA in as many months. For more on last month's infringement, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2712>.

- ***Sage competitor's 'Bag of bits' comparative advertising banned for denigration...***

Interprise Solutions' advertising campaign 'Sick of Sage?' has been banned for taking unfair advantage and denigrating Sage, the financial software supplier. The advertisement showed a man deserted on a beach and reaching for the sky with a 'SOS' message written in pebbles. The headline statement 'Sick of Sage' together with a claim that Sage's products were a 'bag of bits' was ruled by the Advertising Standards Authority (ASA) to be breaking the CAP Code on denigration and unfair advantage in comparative advertising. The ASA stated: 'We considered that readers would infer from this that Sage users experienced distress when using the Sage products and needed rescuing'.

While the Sage logo had not been used in advertising, the ASA ruled that it was clear the advertisement had referred to the international software company and was taking unfair advantage of Sage's trademark and denigrating the Sage products.

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- ***Bradford & Bingley's property woman of the year competition misleading...***

The judging criteria of Bradford & Bingley's property of the year competition has been criticised by the Advertising Standards Authority (ASA). The ASA received a complaint from an entrant who had been shortlisted but did not win. She complained that she had not been asked for any evidence on which her performance could be judged. The factors stated in the Bank's advertisement for the competition were found to be inconsistent with the four categories applied by judging panel when assessing entrants. The Bank's selection criteria had not been made clear to entrants.

The ASA has ordered that the Bank must change the way it operates its future competitions to meet the CAP Code. The CAP Code requires all competitions to be legal, honest and truthful, and dealing fairly with all entrants. The CAP Code is a code of practice governing the content of adverts and marketing communications. Although the Code does not have legal force, it is best practice to comply with it, as

failure to do so can result in bad publicity and ultimately an inability to obtain advertising space.

TRADE MARKS AND PASSING OFF

- ***Mouse-on-wheels trade mark likely to cause confusion with famous telephone on wheels mark, as court avoids use of experts to decide whether customers are confused - esure Insurance v Direct Line Insurance, Court of Appeal...***

esure's trade mark application for a 3-D mouse-on-wheels has been rejected by the Court of Appeal, which upheld a Trade Marks Registry decision and subsequent High Court confirmation finding that the proposed trade mark was likely to be confused with Direct Line's familiar red telephone-on-wheels logo. Of most significance in this case, the Court of Appeal found that the hearing officer was correct in applying his own knowledge and experience, rather than expert evidence, to form his decision that there was a likelihood of confusion between the two trade marks.

Mrs Justice Arden in the Court of Appeal made the following interesting observations in upholding Direct Line's opposition and rejecting esure's trade mark application:

- ◆ There was little benefit in using expert evidence in cases involving the effect on the general public, except perhaps in cases involving specialist markets. The hearing officer had sufficient experience in assessing the viewpoint of an average consumer, without needing evidence in support.
 - ◆ Where further evidence is required to assist with assessing public opinion, the preferred method is to commission consumer surveys rather than call on an expert. However, consumer surveys are expensive to produce and often the questions posed do not produce the responses to assist a particular set of circumstances. If consumer surveys were to be used as evidence, Mrs Justice Arden supported the approach of encouraging the parties to seek directions from the court prior to a case advancing to establish the scope of the surveys and where possible agree to the questions to be asked.
- ***eBay fined by French court in landmark ruling over counterfeit goods, but wins in US Tiffany case...***

eBay is to appeal a record fine after a Paris court ordered the online auction site to pay €40m (£31.6m) to luxury goods company Louis Vuitton Moët Hennessy ('LVMH') for negligence in allowing trading in counterfeit goods, including Louis Vuitton, Christian Dior and Givenchy. The court also ruled that eBay was not permitted to sell the Dior, Givenchy, Kenzo and Guerlain designer perfume brands as only specialist dealers were permitted to sell them. Despite eBay's verified rights owner scheme ('VeRO') - which enables brand owners to ask eBay to remove counterfeit goods from auction - the French court found 'serious faults' in eBay's processes which led to them allowing counterfeit sales and thereby damaging the reputation of the luxury brands.

LVMH welcomed the ruling as 'a groundbreaking decision that will help protect creativity', while eBay geared itself up to fight the decision on behalf of 'consumer choice and the livelihood of law-abiding sellers that eBay empowers everyday'. eBay defended its anti-counterfeiting procedures, which includes a dedicated anti-fraud squad, and claimed that it spends more than £10m a year to fight fraud. Last year, eBay took down 2.2 million potential counterfeit listings and suspended 50,000

sellers suspected of selling counterfeit goods. eBay has faced similar cases in June for the sale of fake Hermes bags and legal action from L'Oreal in various jurisdictions.

Meanwhile, a US court has ruled that eBay's anti-counterfeiting procedures are sufficient and that it is not responsible for all trade mark infringement on its site. The US District Court in New York has ruled that eBay is not responsible for trade mark infringement 'based solely on their generalised knowledge that trademark infringement might be occurring on their Web sites' and that the ultimate burden must rest with the trade mark owner. Tiffany, the jeweller, had sued eBay for trade mark infringement resulting from the sale of counterfeit Tiffany items on eBay.

The US court ruled that, once it knew or had reason to know that particular sellers were infringing the Tiffany trade marks, eBay had taken appropriate action to remove listings and suspend services to sellers. That was sufficient protection for trade mark holders. The US court also ruled that eBay could use third party trade marks such as Tiffany in advertising on its home page and in sponsored links on other sites.

Samantha Lloyd, assistant editor of Upload-IT, comments: 'The French case has serious implications for eBay's business model, and those of similar platforms, as they envisage minimum supervision of the forum for the introduction of buyers and sellers to one another. The cost of listing items could get far too expensive if eBay is required to vet every auction and listing for counterfeits, with the result that law-abiding sellers could have to go elsewhere to sell their goods.'

UNSOLICITED COMMUNICATIONS

- ***Britain receives more spam than any other country...***

Britain is now the favourite target for spam and phishing scams, with almost a quarter of the world's unsolicited email being directed to British Internet users. These are the findings of an experiment by McAfee, the software security company, in which UK and international volunteers were provided with a PC with no firewall protection and a fresh email address. The 50 volunteers from ten countries managed to clock up a total of 104,000 unwanted emails between them in a mere 30 days.