

UPLOAD-IT - 1 DECEMBER 2008

COMPETITION LAW

- ***European Commission shatters vehicle glass cartel with record €1.4 billion fine...***

The European Commission has shattered a vehicle glass cartel and imposed a record fine of almost €1.4 billion (£1.17 billion) on four car glass manufacturers. The four manufacturers cheated the car industry and car buyers for five years by discussing target prices and agreeing market-sharing and customer allocations in secret meetings in hotels and airports. During the operation of the cartel from 1998 to 2003, the manufacturers controlled approximately 90% of the European market for new and replacement car glass used in windows and sunroofs.

Of the four, Saint-Gobain of France received the highest fine ever ordered against an individual company after the Commission increased its initial fine by 60% to €896 million because it was a repeat offender. The Commission ordered Pilkington of Britain to pay €370 million, Asahi/AGC of Japan to pay €113.5 million and Soliver of Belgium to pay €4.4 million. Asahi's fine was reduced by half after it had assisted the Commission by providing information that helped to break the cartel. The European Competition Commissioner said that the high level of fines reflect the large market that was affected by this cartel and the seriousness of the case.

CONTRACTS

- ***Law Commissions oppose dilution of UK consumers' refund rights...***

The English and Scottish Law Commissions ('Law Commissions') have voiced their opposition to provisions of the European Commission's proposed Consumer Rights Directive that would remove the rights of UK consumers to obtain a refund for faulty goods. UK law currently gives consumers the right to get their money back if they are sold something that is not the same as what they agreed to buy or if it is faulty - provided that the refund is claimed within a reasonable time.

The proposed Directive states that the consumer would in the first instance need to request a repair or replacement - and only if there was a problem with the repair or replacement would the consumer be entitled to a refund. As the proposed Directive (if passed) would prevent EU Member States from having more or less stringent provisions than those contained in the Directive, the UK would be required to repeal UK consumers' initial right to obtain a refund, thereby diluting the existing rights of UK consumers.

The Government has asked the Law Commissions to consult on the law of consumer remedies in light of the proposed Directive, in addition to another consultation being carried out by the Department for Business, Enterprise and Regulatory Reform. The Law Commissions' recommendations include:

- ◆ that the right to a refund should expire 30 days from delivery - after which time, in most cases, consumers would only be entitled to a repair or replacement goods;
- ◆ that consumers should be able to claim a refund for any defect in goods even if the defect is 'minor', provided that the claim is made within the above time limit.

(This is contrary to the provisions in the proposed Directive which would limit a consumer's right to a refund if there is only a minor problem with the goods); and

- ◆ that consumers should be able to request a refund or reduction in price after two failed repairs or one failed replacement.
- **High Court rules that deleted words can aid contract construction –**

Mopani Copper Mines v Millennium Underwriting, High Court...

Mopani Copper Mines ('Mopani') claimed under its insurance contract with Millennium Underwriting ('MU') after the copper smelting plant Mopani was constructing suffered operational damage. A dispute arose as to whether the insurance actually covered operational damage. It emerged that during the negotiations words to cover operational damage, in addition to construction risks, had been inserted into the contract but had not been included in the final version. The High Court confirmed that it was open to the court to use words deleted from the final contract to aid contract construction in certain circumstances - including to indicate what the parties had agreed not to agree in the contract. However, the High Court warned that there may be many different reasons why words have been deleted from a contract and care must be taken as to what inferences if any can be drawn from them.

CYBERCRIME/SECURITY

- ***New law which clearly bans denial of service attacks and hacking tools comes into force...***

The Police and Justice Act 2006 has come into force. Amongst other things, the Act tightened up cybercrime laws which had been introduced in the pre-Internet era under the Computer Misuse Act 1990. The 1990 Act made it an offence to gain unauthorised access to computer data (hacking) and make unauthorised modifications to computer contents. However, the 1990 Act had not made it clear whether so-called denial of service attacks - where someone bombards a server with repeated requests in order to bring the server to collapse - is unlawful. In 2006, the High Court had said that denial of service attacks were unlawful, but this new law puts the point beyond doubt by adding a new offence into the 1990 Act. The 2006 Act also increased the severity of sentence for breach of the 1990 Act - people could now face 10 years in prison.

In addition, the 2006 Act introduced a new offence which has now also just been brought into force - the offence of making, adapting, supplying or offering (or obtaining for purposes of supplying) an article (which catches any program or data including a password) either intending to use it to help commit a 1990 Act offence or believing that it is likely to be used in connection with an offence under the 1990 Act. This new provision has been criticised as potentially catching the supply of software tools used by IT security service providers. Critics have argued that this law could catch dual use tools which check if a network is insecure or not but which hackers use to scan for insecurities in a system in order to launch an attack. The question of whether suppliers are in breach of this provision will come down to their assessment as to whether it is 'likely' that the article will be used for malicious purposes.

DATA PROTECTION/PRIVACY/CONFIDENTIALITY

- ***BNP members 'outed' after members' list exposed...***

Members of the British National Party have had their identities exposed after a website was set up that revealed their names, contact details, and in some cases ages and occupations. Some of those members have been sacked or suspended from their jobs. The list contained details of the 13,000 or so members of the far right party. The party claims that this was done by an ex-employee in breach of the Data Protection Act and Human Rights Act and it has reported the matter to the police. The Information Commissioner's Office – the UK's data protection regulator – is also considering whether to take any action.

Paul Gershlick, editor of Upload-IT, was interviewed live on Sky News about the story. He said, 'There would seem to be a data protection breach by the person who posted the details on the Internet. However, questions may also be asked about the BNP itself and whether it should have allowed a single person access to so many people's details and also whether it took adequate security measures to prevent the data from getting out.'

- ***Senior EU privacy watchdog warns organisations to err on the side of caution when dealing with Internet data...***

The European Union's Data Protection Supervisor, Peter Hustinx, has warned organisations to err on the side of caution and treat all Internet data as personal data if they are unsure whether it is in fact personal data. Whilst Internet data, such as activity or server logs or a record of Internet protocol ('IP') addresses, can count as personal data in some circumstances, it will not always do so. However, Hustinx has advised that companies gathering IP addresses should just treat them all as personal, with all the restrictions that entails.

Hustinx also said that for IP addresses to count as personal data there was no requirement for the processing organisation to know the name of the individual whose activity it was monitoring. He said, 'Identifiable (in the sense of the word) personal data is singling someone out. We do not need to know someone's birth date, address, surname, first name etc...So if we deal with a computer, an IP address, which is showing special behaviour in terms of the transactions we can follow, then in a reasonable world that is individuals.' Hustinx's views are in contrast to a recent ruling by a Court in Munich which provisionally ruled that IP addresses could only be personal data when tied to named, identified individuals.

- ***NHS data waste needs better treatment...***

Confidential patient data held by the National Health Service has been found in skips, gardens, cars and the street during the last two years. Some data had also been sent to the wrong patients and details of an entire GP practice was stolen. These were the findings of a disclosure following a Liberal Democrat request under the Freedom of Information Act. Following these disclosures, the Lib Dems are calling for the Government to stop its plan for a national patient database and system, which is so far costing approximately £13bn to implement (and rising). The Lib Dems are claiming that the NHS reports as many data incidents as the whole of the private sector put together. They are calling for a second opinion on the NHS's processes for dealing with personal data.

- ***Government Gateway blocked after contractor loses memory stick containing user names and passwords...***

Access to the Government Gateway site was temporarily blocked after the contractor in charge of the site, Atos Origin, reported the loss of a memory stick containing the user names and passwords of a number of users the Gateway site as well as user's

personal data. The memory stick was later recovered from a pub car park near the contractor's offices and it was discovered that the personal data had in fact been encrypted. In a statement from the Information Commissioner's Office it was reported that the Information Commissioner 'expects the Government to take appropriate damage limitation steps as its first priority.'

This is not the first time personal data has been lost by a Government contractor. PA Consulting had its £1.5m contract terminated by the Government earlier this year after it lost a memory stick containing personal data of every prisoner in England and Wales. For more on that story, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2803>.

- ***Government announces proposals for strengthening the ICO's powers and new law to create a gateway for data sharing powers...***

New laws strengthening the powers available to the Information Commissioner's Office ('ICO') to regulate the Data Protection Act and increasing the powers of the Government to permit or require the sharing of data have been announced by the Justice Secretary, Jack Straw.

Under the proposals, the ICO would be given the power to fine data controllers (without having to warn them first) for deliberate or reckless loss of data and to inspect public bodies without requiring their consent to ensure they are complying with the Data Protection Act. The Government, however, rejected the ICO's request to inspect and audit private sector organisations without their consent. Changes to the ICO's funding arrangements have also been announced. A tiered fee structure based on the size of the organisation is to replace the current flat-rate notification fee of £35. Whilst this will give the ICO more money to enable it to enforce data protection legislation, it may result in larger organisations paying £1,000 rather than £35 to register.

In addition to the ICO's new powers, there is to be a new statutory duty on the ICO to prepare, publish and review a code providing practical guidance on how organisations can share personal data. The Government is also set to legislate to create a gateway for data sharing powers, which will be subject to Parliamentary controls. Taking this one step further, the Government intends to bring forward legislation to give the Secretary of State a power to permit or require the sharing of personal information between particular persons or bodies if 'a robust case' can be made to use that power.

Jack Straw said: 'The changes we propose today will strengthen the Information Commissioner's ability to enforce the Data Protection Act and improve the transparency and accountability of organisations dealing with personal information.' However, Liberty, the human rights group, has opposed the new powers - in particular the power to allow the Secretary of State to permit and require data sharing. Liberty said, 'Bypassing Parliament to remove data sharing protections undermines fundamental privacy protections and ultimately our democratic traditions.'

The proposals are part of the Government's response to the Data Sharing Review, a report published by Information Commissioner Richard Thomas and Dr Mark Walport, a director of Wellcome Trust. The report was commissioned by the Government in October 2007 after a string of data security blunders by public organisations.

DOMAIN NAMES

- ***Unauthorised reseller allowed to keep branded domain name...***

ITT, a pressure gauge maker, has failed to persuade WIPO to transfer 13 domain names that included 'ITT' from Douglas Nicoll and his company. ITT complained to a WIPO panel under the UDRP procedure that: the names were confusingly similar to its registered trade marks; the registrant had no legitimate rights in the domain names; and they had been registered and used in bad faith. The UDRP is the Uniform Domain Name Dispute Resolution Policy and it provides a quick arbitration procedure for disputes over top level domain names such as '.com'. WIPO deals with top-level domain name disputes and is one of the accredited arbitration bodies that can hear domain name disputes under the UDRP procedure.

WIPO ruled that the use of a manufacturer's trade mark within a domain name by an unauthorised reseller was legitimate if all of the following conditions were satisfied:

- ◆ The registrant must actually offer the goods or services.
- ◆ The registrant must only use the site for selling the trade marked goods, and not for using the name to attract users to a site that offers other goods.
- ◆ The website under the domain name must clearly show the registrant's relationship with the trade mark owner.
- ◆ The registrant must not register so many domain names involving the brand that the brand owner is unable to properly use any domain names that include its brand.

- ***First 'no' advertising domain name launched...***

A new top-level domain, .tel, has launched. It is the first top level domain that does not allow for pay-per-click advertising as customers cannot host a website on the domain name server. The domain will use the domain name server to store contact information directly, rather than storing Internet protocol ('IP') addresses for a web server which then delivers html content for download. Phone numbers, web addresses and email addresses will be delivered on a standard page in a suitable format to the computer, phone or Blackberry that looked up the domain name.

Cybersquatters often acquire domain names of famous organisations to use them as a medium for pay-per-click advertising or in hope of selling them to the organisations for an inflated price. It is thought that many cybersquatters will be deterred from applying for .tel names because of the inability to earn advertising income. However, some activity is still likely. NetNames, a domain name registrar, said, 'As with the launch of any new domain, businesses need to ensure they have taken the appropriate steps to register their new .tel domain before they become available on wide distribution. This will protect their brands from any online speculators, maximising their online presence.' Trade mark holders have two months to register their domain names from 3 December before the domain names will be open for general sale at a premium. Six weeks after the 'premium period', names are expected to cost between US\$15 and US\$25 per year.

FREEDOM OF INFORMATION

- ***Information Commissioner gives guidance on commercial interests exemption under Freedom of Information Act...***

The Information Commissioner's Office – the UK's data regulator – has provided guidance on the two most important exemptions under the Freedom of Information Act 2000 for businesses that deal with public bodies. The 2000 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. Public

bodies do not have to disclose information if they are able to argue that an exemption applies.

One exemption that is of particular interest to commercial entities that do business with public bodies is where disclosure is likely to prejudice someone's commercial interests. The ICO has just released guidance on using that exemption. The guidance says that the public body must explain why the exemption applies. It must not just speculate that a third party's commercial interests would be likely to be prejudiced, but the public body must ask that third party for their opinions (where possible). If the third party does not explain its concerns, then the public body should not speculate.

The ICO has also issued guidance regarding the exemption for disclosure of confidential information. Information within a contract does not usually qualify for this exemption unless the information within the contract was originally confidential information that had been obtained from the third party. Confidentiality clauses within a contract may require the public body to consult before disclosure; however, those clauses in themselves cannot prevent the body from disclosing the information if it is required to do so under the Act.

The ICO added that public bodies should inform anyone with whom they contract that the contract may have to be disclosed under the Act.

The ICO gave a third piece of guidance relating to the tension between the Act and data protection laws. When data is requested which involves personal data, the public body should consult the Data Protection Act 1998. However, the ICO warned against bodies refusing disclosure just because it contained data about living individuals – any refusal would need to explain why this was the case.

IT AND INTERNET USE

- ***Amazon is still top of the shops in the online ratings...***

Amazon has retained its top spot position as the UK's most visited on-line retailer for the period of August to November 2008. It was followed by Argos, Play.com and Tesco in IMRG's most recent quarterly Hot Shops list. IMRG - a membership community for the e-retail industry - together with Capgemini have tracked visitors to online UK retailers. The latest research shows that the most popular shops are currently those that sell event tickets, fashion, groceries and computers. In the current economic downturn, the travel sector suffered the most in the last quarter falling further than expected for the time of year.

- ***Google unveils map of ancient Rome...***

A map of ancient Rome is the first historical city to feature on Google's 3D map tool, Google Earth, after this was unveiled at an event in Rome. The map allows users to visit the virtual city, which includes more than 6,700 buildings and more than 250 place marks linking to key sites, in a variety of languages. Bernard Frischer of the University of Virginia, which worked with Google to create the map, said: 'The project is a continuation of five centuries of research by scholars, architects and artists since the Renaissance, who have attempted to restore the ruins of the ancient city with words, maps and images.'

JURISDICTION

- ***Claim against Second Life avatar leads to questions as to whether the courts have jurisdiction over virtual worlds...***

A claim for trade mark infringement made against an avatar - a 3D representation of a real person - operating in the Second Life virtual world has led to questions being asked as to the extent of the jurisdiction of courts over virtual worlds. Richard Minsky is suing avator Victor Vezina and two directors of Linden Lab (owner of Second Life) over the use of the word 'SLART'. Vezina opened an art gallery called 'SLart' in Second Life in 2007 but Minsky obtained a US trade mark for the word in March 2008.

In his complaint to the US District Court of New York, Minsky stated that his attorney, an avatar called Juris Amat, sent Vezina a 'cease and desist' order on 6 March 2008, which Vezina failed to respond to. It is also alleged that Linden Lab was asked to notify Vezina to cease and desist from an unauthorised use of my SLART trade mark in Second Life. Linden Lab has since taken down the offending sign but Victor Keegan, the writer who is Vezina in the virtual world, has commented that this case raised key questions including whether the writ of the US courts rule in virtual worlds.

MISLEADING ADVERTISING

- ***Revised TV and radio advertising codes published...***

Revised versions of the Television Advertising Standards Code and the Radio Advertising Standards Code have been published by the Broadcast Committee of Advertising Practice ('BCAP'). The changes take into account the requirements of the Consumer Protection from Unfair Trading Practices Regulations 2008 ('Regulations'), which came into force on 26 May 2008, and the responses to BCAP's public consultation held in June 2008. The Regulations introduce a general prohibition on traders treating consumers unfairly, and require businesses not to mislead consumers through acts or omissions, and not to subject them to aggressive commercial practices. (For more on the Regulations, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2613>).

- ***ASA finds ZV Snore Solution Spray name is misleading...***

The Advertising Standards Authority ('ASA') has found that the name ZV Snore Solution Spray is likely to mislead consumers into thinking the product could cure snoring - a claim which the producer of the product, ZipVit Ltd ('ZV'), could not substantiate. The ASA told ZV not to feature the product name again in future marketing material unless it had been registered as a trade mark.

The ASA's willingness to take action against misleading product names which have not been trade marked, as well as other misleading advertising claims, should be borne in mind by traders devising new product names. In particular, traders should ensure that names do not promise or imply more than the product delivers. The distinction drawn by the ASA between product names which are trade marked and those which are not should act as a further incentive for traders to ensure that significant names and slogans are trade marked.

MISLEADING SELLING

- ***Phones 4U commits to changing practices which breach consumer protection legislation...***

Phones 4U Limited has committed to changing a number of its practices which breach consumer protection laws relating to the sale of mobile phones and related contacts. Ofcom secured the undertakings from Phones 4U after an investigation revealed that Phones 4U had breached consumer protection legislation in ways likely to harm the collective interests of consumers. The undertakings are good news for consumers as they require Phones 4U to:

- ◆ change its handset returns policy to address the previous restrictions and exclusions of consumers' rights and remedies under the Sale of Goods Act 1979;
- ◆ change its 'chequeback' terms and conditions to address unfair terms which created to an imbalance in the rights of consumers and the obligations of Phones 4U; and
- ◆ make various commitments in relation to its sales practices, focusing particularly on the representations it makes to consumers regarding network coverage, contract buy-out offers, mobile plan characteristics, 'unlimited' Internet usage, cancellation rights and upgrades.

If the undertakings are breached by Phones 4U, Ofcom could apply to the court for an Enforcement Order to enforce the undertakings. The ultimate sanction would be a substantial fine for contempt of court if Phones 4U breaches an Enforcement Order.

TAX

- ***Tax threshold rises for imports, making non-EU goods cheaper...***

HM Revenue and Customs has introduced some pre-Christmas cheer for cash-strapped consumers. It has increased the point at which customs duty is applied for online purchases from outside of the EU, from £18 up to £105. Under EU rules, any purchases from anywhere in the EU have no import duty. The change takes place on 1 December.

TRADE MARKS AND PASSING OFF

- ***European Court ruling makes it very hard to argue that third party is diluting its trade mark - Intel v CPM, European Court of Justice...***

Intel - the computer chip-maker - owned various trade marks in the 'Intel' mark. CPM registered 'Intelmark' for marketing and telemarketing services. Intel applied for a declaration of invalidity of the mark at the UK's Trade Mark Registry because it claimed that the mark would be taking unfair advantage of or would be detrimental to the reputation and distinctive character of its own 'Intel' marks, contrary to UK and EU trade mark law. Intel's application was rejected by the hearing examiner and again on appeal to the High Court. The Court of Appeal referred the matter to the European Court of Justice to rule.

The European Court of Justice ruled that to succeed for a claim like this where someone may be said to be free-riding off the back of someone else's reputation despite the fact that the relevant goods and services were different, someone in Intel's position had to show both a link between the marks and harm or serious

likelihood of harm. Just proving a link was not enough. The fact that the first mark is unique and has a huge reputation does not necessarily imply a link, but a global assessment must be made on the hypothetical average reasonably well-informed and observant and circumspect consumer to see whether the later mark calls the earlier one to his mind. In establishing whether there is a link, the court should take account of the degree of similarity between the respective marks, the similarity between their goods and services, the strength of the earlier mark's reputation and whether it was unique.

However, it does not stop there – that's only the test to establish a link. The court added that, in order to show that the use is detrimental to the distinctive character of the first mark, the trade mark holder needs to be able to show that a change, or serious likelihood of change, in the economic behaviour of consumers will occur. This is very hard to do in practice and may limit the ability of famous brands to stop others from copying them, even if consumers recognise the name of the brand by association and the distinctiveness of the earlier brand is compromised.

- ***European Court of First Instance rules that national courts must decide on circumstances as to revocation for five-year period for non-use –***

Rajani v OHIM, European Court of First Instance...

Rajani applied to register ATOZ as a European Community trade mark. His application was published in October 2001. Artoz-Papier AG opposed the application based on its conflicting prior registration. Artoz-Papier had applied for registration of its mark through the international process known as the Madrid Protocol. Although Artoz-Papier had applied under the Madrid Protocol in March 1996, the German trade marks registry only eventually accepted its application in February 1999. In response to Artoz-Papier's opposition of Rajani's application, Rajani asked Artoz-Papier to prove that it had used its trade mark. Under EU trade mark laws, a registered trade mark can be challenged for non-use if not used within a period of five years. The question was: when did that five year-period start?

Artoz-Papier did not show evidence of use, but it argued that its registration in Germany did not take place until February 1999 and that was when the period started. OHIM (the Community Trade Marks registry) agreed with Artoz-Papier, and now so has the European Court of First Instance. It rejected Rajani's argument that the period started in March 1996, when the international registration under the Madrid Protocol started. Since EU law and the Madrid Protocol did not make it clear when the 5-year period started, this depended on the relevant national law (in this case, Germany). Under German law, the date of registration in Germany – February 1999 – was the relevant date for starting the calculation.

This case shows that trade mark laws have still not been totally harmonised yet in the EU. The decision is in keeping with the one between Häupl v Lidl last year. For more on that case, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2101>.

- ***Lego builds on its list of defeats as it fails to register its brick as a trade mark -***

Lego v OHIM, European Court of First Instance...

Lego applied to register the three-dimensional shape of a traditional Lego brick as a registered trade mark in Europe in 1999. An objection to the application was filed by a competitor toy brick company and in 2004 the registration was cancelled by the Office for the Harmonisation of the Internal Market ('OHIM'). After Lego's appeal to the OHIM's Grand Board of Appeal ('Board of Appeal') failed, it took its case to the European Court of First Instance ('CFI'). However, Lego suffered a further defeat as

the CFI backed the Board of Appeal and ruled that the three-dimensional shape was invalidly registered.

Whilst the law permits the shape of goods or of their packaging to be registered as trade marks, it is not possible to register marks which consist exclusively of the shape of goods which is necessary to obtain a technical result. This is because to allow such a trade mark would give the owner of the mark a monopoly over the technical result. The CFI ruled that, even if the technical result could be achieved by other shapes using the same or another technical solution, a three-dimensional shape consisting of the shape of the goods which is necessary to obtain a technical result are precluded from registration. The CFI also found that Lego bricks would not escape this rule on functionality by simply adding non-essential characteristics to the mark if all the essential characteristics perform a technical function. The CFI decision highlights how difficult it is to register three-dimensional shapes as trade marks.

UNSOLICITED COMMUNICATIONS

- ***Spammers only need to convert one email out of every 12.5 million into a sale to make a profit...***

To make a profit, senders of spam (or unsolicited) email only need to get one person out of every 12.5 million emails that they send to buy something. For that reason, it still pays to send out lots of unwanted emails, even if the vast majority ignore them. This was according to research from the University of California. Even despite the poor conversion rate of 0.00001% in the experiment, the University calculated that the owners of a major spamming network could easily earn over £1m a year.

- ***Facebook spammer ordered to pay record damages of \$873m by a US court...***

A US court has ordered a spammer to pay damages of US\$873m to Facebook for hacking into members' profiles and bombarding users with four million junk mail messages. This was a record payout under the US federal CAN-SPAM Act. The court also granted an injunction against the spammer, Adam Guerbuez, prohibiting him from accessing the social networking site. Whilst Facebook is unlikely to be able to recover a substantial proportion of the award from the spammer, Facebook said that the award represented a powerful deterrent to anyone who would seek to abuse Facebook and its users.