Legal Developments

Commercial/IP/IT – December 2009

Competition Law

Intel faces anti-competition federal lawsuit but has paid AMD US$1.25bn to end 12 year dispute…

Intel is facing a federal lawsuit after being accused by the New York Attorney General of using 'bribery and coercion' to force computer manufacturers to purchase its central processing unit computer chips (known as CPUs) rather than those of its competitors. CPUs are the main hardware component of a computer, for which Intel is the major global manufacturer. Intel's only real competitor in this market is Advanced Micro Devices, which made 12% of CPUs last year compared to Intel's 80.5%. The anti-competition federal lawsuit is a result of an investigation carried out into Intel's practices over a period of almost two years. Intel faces accusations of using 'illegal threats' and having been engaged in a 'worldwide, systematic campaign of illegal conduct' to stamp down its rivals. It is claimed that Intel made payments to computer makers, amounting to millions, and in some years billions, of dollars each year in exchange for them agreeing only to buy Intel's CPUs. Such payments were withdrawn if Intel subsequently thought a firm was working too closely with one of its competitors.

Meanwhile, in a dramatic turn of events, Intel has paid AMD US$1.25bn in a bid to end the ongoing legal disputes between the companies over sales tactics. In return for the billion dollar settlement, AMD has agreed to withdraw all litigation and regulatory complaints worldwide. Under the terms of the settlement, the companies have agreed to enter into a five year cross-licensing agreement for patent rights.

Earlier this year, the European Commission fined Intel €1.06billion (£948million) for anti-competitive practices – the highest individual fine ever imposed by the Commission. Following years of investigations, the Commission found that Intel had engaged in illegal abusive conduct to exclude competitors from the market for CPUs between 2002 and 2007. Whilst the European Commission has acknowledged the settlement between Intel and AMD a spokesman for the European Union stated that this does not change Intel's duty to comply with European antitrust law. Intel is continuing its appeal against the fine.

Contracts

Supreme Court gives long-awaited ruling that banks' charges cannot be considered for reasonableness under Consumer fairness laws – OFT v Abbey National, House of Lords…

Under the Unfair Terms in Consumer Contracts Regulations 1999, as between a supplier and a consumer, any contractual terms not individually negotiated shall be unfair and therefore unenforceable if it causes a significant imbalance in the parties' rights and obligations to the consumer's detriment. The assessment of a term's fairness shall not relate to the definition of the main subject matter of the contract or to the adequacy of the price or remuneration. Aside from the fairness test, suppliers' standard terms and conditions with consumers need to be in plain English.

The Office of Fair Trading wanted to bring a test case to see if banks' current account charges were fair. In particular, it was concerned on behalf of consumer bodies that overdraft charges were excessive. Several banks co-operated and they fought a test case that eventually went to the Supreme Court (previously known as the House of Lords). Rather than fight the entire battle as to the issue of fairness of the actual terms, the initial battle surrounded whether the overdraft charges were excluded from an assessment of fairness. The issue was whether the charges were part of the price or remuneration and so should not be considered. The High Court and Court of Appeal ruled that the terms were in plain, intelligible English, but sided with the OFT

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on the fairness point. Now, in one of its first judgments since being formed, the Supreme Court has given its landmark judgment that affects millions of people. It has gone the other way and sided totally with the banks on this issue.

The Supreme Court ruled that the banks were correct in saying that the charges were part of the payment in exchange for a global package of services. The Court of Appeal had no basis for having said that some bits of the goods or services or price were 'essential' items and more important than others. Any monetary price or remuneration or goods or services provided would fall within the exemption. Banking services were part of a package of services and the price paid by consumers included the charges for going overdrawn. It is irrelevant that the charges are contingent or not incurred by the majority of customers. Even if some goods or services are ancillary to the overall banking service, if the charges for them are under the same contract then they are all part of the price for the purposes of the exemption. The OFT was also wrong to argue that the admin charges were default charges – consumers were not in breach of contract by going overdrawn, but it was expected that they may go into overdraft from time to time and they would have to pay a charge for using that service. Those charges were an important part of the banks' revenue streams and were not intended to be seen as defaulting on the terms.

As Lady Hale from the Supreme Court said, consumer law aims to give consumers informed choices rather than to protect them from making choices that may be unwise for them. Paul Gershlick, editor of www.Upload-IT.com and a Partner at Matthew Arnold & Baldwin LLP, says: 'This is a great result for the banking sector and most banking customers - banks would otherwise have had to charge for their services in other ways and a different result could have spelt the end for free retail banking. The judgment is also good, because there has been a lot of uncertainty in the business world about charging extra 'admin' costs. This ruling shows that as long as the charges are presented in a clear way with the contract terms, if they form part of the same overall contract for the goods or services, their amount cannot be challenged. The aim of the 1999 Regulations is to protect consumers against terms which they may not be aware of in the small print, but consumers should be taken to have paid enough attention to what they have bought and what they are paying for that.'

Estate agent entitled to commission for introduction under sole agency where contract entered into 16 months later – Shamas Charania v Harbour Estates, Court of Appeal...

C looked to sell a property and entered into a sole agency agreement with H. H arranged over 100 viewings, including four to Y. The property was not sold during the period of the agency and C ended the relationship with H. More than a year later and 16 months after Y's previous viewing, Y contacted C's niece, who was occupying the property while C was abroad. Y asked C's niece about buying the property, but did not mention that he had seen the property while H was marketing it. Y eventually bought the property. H found out and wanted commission.

The High Court initially and now the Court of Appeal have ruled that H was entitled to commission. The test was whether the purchaser had become a purchaser as a result of the introduction by the estate agent. Y had viewed the property four times during the period in which H was the agent and Y had purchased the property as a result of H's introduction. There was a causal link between the introduction and the ultimate purchase.

Paul Gershlick, editor of www.Upload-IT.com and a Partner at Matthew Arnold & Baldwin LLP, comments: 'Estate agents will be pleased to see that they have finally had a case decided in their favour, after the Foxtons and Estafnous cases went against them in the last year. Looking at all of these three cases together, it is vital that estate agents get their terms and conditions professionally looked at to make sure that they are fully protected from the situations in those cases and do not lose their commissions.'

In dealing with battle of the forms, a traditional contract analysis should apply unless clear evidence to the contrary – Tekdata v Amphenol, Court of Appeal...

G was a long-term supplier to Rolls Royce. G bought items from B, which in turn bought components from S. The relationships had been in place for many years. Over the years, G had required B to obtain items from S to G's specification and to a price required by G. S and G also had a long-term contract under which S agreed to supply to B at a price required by G. During the relationship, B sent purchase orders to S containing B's standard terms and conditions, and S responded with its order acknowledgements, which in turn contained S's standard terms and conditions. It came to be determined which terms and conditions applied. The High Court ruled that although a purchaser's terms and conditions would normally be superseded by the supplier's in this sort of 'battle of the forms' scenario, B's terms applied here because it was never intended that S's terms should apply and the parties had always intended for B's terms to apply.

The Court of Appeal disagreed with the High Court's analysis. The traditional analysis of offer and acceptance applied unless it was clear that their common intention was for some other terms to apply. The parties had opportunities to agree to a single set of terms and conditions but had never done so. It could not be inferred from the facts that the parties never intended for S's

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terms and conditions to apply. Although a long-term relationship and parties' conduct may displace traditional offer and acceptance analysis, that was not strong enough here.

Paul Gershlick, editor of www.Upload-IT.com and a Partner at Matthew Arnold & Baldwin LLP, comments: 'This case shows the importance of having clear contracts so everyone knows the terms on which they are dealing. This is especially so if the contract goods or services are complex or worth significant sums of money as they are more likely to end up in dispute. Sometimes people refer in their quotations, order forms and order acknowledgements to their own terms and conditions applying, without ever getting to the bottom of which set of terms really do apply. The parties in this case have ended up incurring significant time and legal expense in going to court – time and money that could have been better used elsewhere. Far better if they would have had clear contracts instead.'

Where important terms are still under negotiation there was no contract – Whittle Movers v Hollywood Express, Court of Appeal…

The Court of Appeal has ruled that where important terms were still under negotiation no contract had been concluded. Whittle Movers had been successful in its tender for the supply of distribution and warehousing services to Hollywood Express. The tender process had been 'subject to contract' but before a formal long-term contract had been finalised Whittle Movers began performing the services and invoicing on the basis of prices negotiated for a five and a half year contract. After 15 months, Hollywood Express decided to terminate what it called an 'interim agreement' based on its previous sub-contract with a third party which provided for termination by either side on six months' notice. Whittle Movers argued that the parties had entered into the long-term contract or in the alternative it suggested that no contract had been concluded. The High Court found in favour of Hollywood Express but the Court of Appeal disagreed.

The Court of Appeal found that there had not been a complete agreement on important terms. In addition, neither party had indicated that their negotiations were no longer subject to contract or that they no longer required a formal written document to be signed by the parties before the agreement became binding between them. The Court of Appeal took the view that it was highly unlikely that, by conduct, the parties would conclude in the interim a binding contract contained terms that were still the subject of negotiation. Instead, the Court of Appeal ruled that the parties would most likely have entered into a contract under which if one party supplied the other agreed to pay a reasonable remuneration. Where important terms were still under negotiation the Court of Appeal said that no contract had been concluded and the court should not strain to imply one unless it was necessary to do so. In this case, the Court of Appeal found it was not necessary as the restitutionary remedy of 'unjust enrichment' could resolve the issue between the parties. If Whittle Movers had provided the services at a lower price (on the basis of a five and a half year contract) which was less than reasonable in the circumstances then arguably Hollywood Express had been unjustly enriched. The Court of Appeal concluded by ordering an enquiry into whether Hollywood Express had been unjustly enriched.

Samantha Lloyd, assistant editor of www.Upload-IT.com, comments: 'This case is a clear example of the dangers of providing goods or services before a contract for the supply has been concluded. It leads to uncertainty and, in a small number of unfortunate cases, protracted litigation when a party finally wants to rely on a terms which they did not take the time to fully negotiate.'

Court of Appeal clarifies that contracts dealing with termination in insolvency situations will usually be upheld – Butters v BBC Worldwide, Court of Appeal…

BBCW and W jointly owned a joint venture company, 2e. 2e had a wholly-owned subsidiary, V. BBCW granted V an exclusive licence to produce BBCW's videos and DVDs. That licence would terminate automatically if W became insolvent. Under the joint venture agreement between BBCW, W and 2e, if W became insolvent, BBCW could require W to transfer its shares in 2e to BBCW and pay at the prevailing market price. W did actually become insolvent, the licence terminated and BBCW argued that the market price should reflect the fact that the licence had terminated. The High Court had argued that although each of the two provisions were not a problem, the combined effect of the termination of the licence and transfer of shares at market value once the licence had been terminated would be to deprive W's creditors of the value of the licence. Accordingly, this would breach the anti-deprivation rule and not be permitted under insolvency laws.

The Court of Appeal has now reversed that decision. The purpose of the rule was to invalidate contractual provisions which expressly or had the effect of disapplying a provision of the Insolvency Act 1986 – it did not have any wider application. The High Court had been wrong to look behind the wording of the contract and assess the overall commercial effect of the joint venture agreement and licence in combination. There was nothing in either the joint venture agreement or the licence which offended against the 1986 Act. The Act did not stop one party from providing that contracts or licences were terminable upon the other's insolvency event. Similarly, the 1986 Act did not prevent someone from purchasing (for value) the other's assets if that other went insolvent.

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Commercial agent still had authority to negotiate even after he was no longer taking orders and his compensation claim was not time-barred – Claramoda v Zoomphase, High Court…

In this case, the agent represented a clothing supplier for sales to shops. From 1998, the agent was the supplier's exclusive UK and Ireland agent. The agency terminated between October 2006 and January 2007 but the exact time was in dispute. The timing was crucial, because the agent was looking for compensation under the Commercial Agents Regulations, an EU-derived law which gives agents certain rights on termination of their agency. The agent put in a claim for compensation in November 2007, but depending on the exact date of termination of the agency the claim may or may not have been valid as a written claim needs to be made within one year of the termination date in order to be able to claim compensation.

The High Court ruled that the effective termination date was January 2007, so the agent was in time to make a claim. There was little in the way of initial written contract or clear termination notice. Everything had been dealt with in an informal way. The termination date had been left vague because although the supplier had wanted to bring the sales function in-house, it wanted to leave open the possibility of the agent continuing to act for one more season until the right staff were recruited. The main selling for the Spring/Summer 2007 season had concluded in October 2006, but there was continuing commercial activity beyond that date. In November, the supplier sent an email to the agent about a particular customer's request for some dresses. In addition, customer queries regarding the Spring/Summer 2007 season were passed to the agent to deal with, up until January 2007. Both of those things showed that the agent had continuing authority to negotiate beyond January 2007. The Court said that although the Regulations defines the agent's role by reference to a continuing authority to negotiate, an agency contract does not terminate when an agent stops negotiating sales, if they are still carrying out agency duties, as here.

Paul Gershlick, editor of www.Upload-IT.com and a Partner at Matthew Arnold & Baldwin LLP, comments: 'This case highlights the importance of agreeing everything clearly in writing. Even if parties to a contract start off intending only to have good relations, this does not always turn out to be the case further down the line. That's when the value of a good contract is noticed. There is a further reason for principals to have contracts with their agents: under the Commercial Agents Regulations, they may be worse off if they don't stipulate in writing that the indemnity alternative applies rather than compensation – agents could be able to claim for more money on termination.'

No prize for second place as Formula One sponsor loses US$4m contract battle due to acquiescing in breach – Force India v Etihad, High Court…

Etihad Airways – the Abu Dhabi airline - was a sponsor of the Force India Formula One racing team when the team had been called Stryker. The team had a further investor which owned the Kingfisher beer and airline business. The team changed its name to Force India in November 2007. At the end of January 2008, Etihad objected and terminated the contract without notice because it claimed that the name change was a blatant breach of its rights under that contract.

The High Court, however, ruled that Etihad was too late to object and its behaviour following the name change suggested that it had accepted the change. Accordingly, it was deemed to have acquiesced in the change and so lost a right to terminate. Therefore, its attempt to terminate was a wrongful repudiation of the contract and meant that it had acted in breach of contract, rather than the other way round. The court awarded the team US$4.6 million in damages for the breach.

Paul Gershlick, editor of www.Upload-IT.com and a Partner at Matthew Arnold & Baldwin LLP, comments: 'This case shows the importance of not delaying when exercising rights under a contract. Otherwise, you could end up in breach rather than the other party who committed the initial transgression.'

Apple agrees to change Terms and Conditions to comply with consumer contracts laws…

Apple Inc has agreed to the Office of Fair Trading's request to change its terms and conditions in order to comply with the Unfair Terms in Consumer Contracts Regulations 1999. The 1999 Regulations require contract terms with consumers to be in plain English and not create a significant imbalance between the consumer's position and the supplier's. Apple agreed to change the terms that applied to people purchases on its iTunes stores and software downloads. It agreed to ensure its terms:

- did not exclude liability for faulty or mis-described goods;
- were consistent with consumer rights under the Distance Selling Regulations;
- were drafted in plain and intelligible language;
- did not allow changes to be made after agreements had been made.

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Copyright and Database Rights

Government goes for illegal P2P file-sharers with Digital Economy Bill…

The Government has introduced its Digital Economy Bill in the Queen's Speech. Amongst the changes to the law to be introduced by the Bill are provisions that could see illegal peer-to-peer file-sharers cut off from the Internet. The BPI – a body that represents the record industry – thinks that it is a good thing to protect the creative sector. However, The Open Rights Group is concerned that people could be stopped from engaging in everyday activities like shopping and social networking. In addition, the Government plans to introduce age ratings on all video games aimed at children aged 12 years or older.

Government proposes abolition of copyright exemptions for charities and not-for-profit organisations that want to play music…

The Government has proposed the abolition of the current exemptions for charities and not-for-profit organisations that want to play music. Currently, the Copyright, Designs and Patents Act 1988 have certain exemptions, provided that certain criteria are met. Last year, the Intellectual Property Office consulted on what to do with those exemptions. The Government has now announced that its preferred option is their repeal. This was on the basis that the current position is very complex and has not worked well. It wants to move towards a simplified procedure for licensing, which in turn could mean that licence costs would be kept to a low, flat fee. There is also a proposal that PPL (a collecting society for performers and record companies in the sound recordings) and PRS (a collecting society for owners of the music and lyrics) join forces when collecting royalties from charities and not-for-profit organisations. PPL and PRS have agreed to the single fee and collection point.

Sale of devices enabling pirated video games to be played on game consoles is copyright offence, says Court of Appeal – R v Gilham, Court of Appeal…

The Court of Appeal has ruled that the sale of mod chips – so called because they modify a games console – which enabled pirated video games to be played did constitute an infringement of copyright. It is an offence to sell or distribute 'any device, product or component which is primarily designed, produced or adapted for the purpose of enabling or facilitating the circumvention of effective technological measures'. However, to find that the mod chips enabled purchasers to commit a copyright infringement, it had to be shown that the playing of the pirated games copied 'a substantial part' of the work. Mr Gilham, the seller of the devices, claimed that only a small portion of the pirated game was copied from a disc into a games console's memory at any one time and therefore the amount copied was much less than the required substantial part. The Court of Appeal disagreed.

The Court of Appeal reasoned that it was not necessary that a substantial part of the whole game was copied. Where constituent parts of the game were copyrighted, infringement occurred when substantial parts of those constituent parts were displayed. The Court ruled that the various drawings that resulted in the images shown on the screen were themselves artistic works protected by copyright. The Court of Appeal used the example of the popular Tomb Raider game and the display of Lara Croft in screen, who is a recognisable character created by the labour and skill of the original artist. The Court said it was clear that the appearance of Lara Croft on screen is a substantial copy of an original even if the contents of the RAM of a game console at any one time is not a substantial copy. It was common sense that a person who plays counterfeit DVDs on his games console, and sees and hears the visions and sounds that are the subject of copyright, does in fact make a copy of at least a substantial part of the game, notwithstanding that at any one time there is in the RAM, on screen and audible only a small part of that work.

Cybercrime/Security

Law firm criticised for tactics in sending thousands of letters to alleged copyright infringers…

A law firm which is sending letters to thousands of alleged illegal peer-to-peer file-sharers has been accused of scattergun tactics which affect many innocent Internet users. *Which?,* the consumer group, claims that many people wrongfully accused of sharing pornographic material have settled the cases for hundreds of pounds rather than risk losing for thousands in court and face the humiliation of their good names being affected. AC: Law, the law firm behind the legal actions, denies being aware of any innocent people who are involved. The letters from the law firm were sent on behalf of its clients, DigiProtect and MediaCat, which are licensees acting on behalf of computer games and porn film companies to collect royalties for them. According to the lawyer who represents some of the accused, many of them have never even heard of peer-to-peer file-sharing, and some of the people accused of downloading computer games say they have never played a video game in their life. One possible explanation for people's computer connections being targeted is that many computers running on wi-fi connections do not password protect their connections.

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Virtual world thief arrested in real life…

Someone who obtained details of other people's accounts to access a web-based role play game to steal their virtual world possessions has been arrested on suspicion of computer misuse offences. The Central Police e-Crime Unit arrested the man and gave him a caution after discovering that people's possessions and virtual characters in the RuneScape game had been stolen. The man is believed to have obtained password and other account details through a phishing scam. Phishing is the fraudulent practice of sending emails purporting to be from reputable businesses in order to induce individuals to reveal personal information, such as passwords and credit card numbers, online. Possessions in games worlds can be bought and sold for real money.

This was believed to be the first case in Britain of someone being arrested for committing a crime during an online game. However, in 2008, a Dutch court convicted teenage boys of assaulting another RuneScape participant when they threatened him with a knife to force him to hand over an amulet and mask in the game. The Dutch court had ruled that a theft had taken place.

Data Protection/Privacy/Confidentiality

Mandatory notification of data breaches introduced by the European Commission…

The European Commission has passed a new privacy regulation which requires communications providers and Internet service providers to notify individuals whose personal details have been exposed to a data breach. The provisions of the ePrivacy Directive are aimed at improving the protection of privacy and personal data in the online community. Rules relating to security breaches, spyware, cookies, spam and enforcement are all covered by the Directive. Focus is also given to the protection of privacy threatened by targeted advertising. However, notably, for the first time in the EU, notification of personal data breaches will be mandatory. A communications provider or ISP which finds itself involved in a data breach will now have to notify an individual affected by the blunder if the breach is likely to cause that individual harm. The potential for identity theft, fraud, humiliation or damage to reputation are likely to give rise to the requirement to notify. The Directive must be implemented by all Member States within 18 months.

Information Commissioner gets broader enforcement powers as Coroners and Justice Bill receives Royal Assent…

The Information Commissioner's Office – the body in charge of enforcing UK data protection laws – has been given greater enforcement powers, as the Corners and Justice Bill has been passed. The new law gives the ICO a right to serve public authorities with assessment notices to enable them to establish whether they are complying with data protection laws. The law also gives the ICO broader powers to require people on premises to provide explanations of material found on those premises. One controversial provision in the original Bill – to allow the Government much wider data-sharing powers – was withdrawn before the Bill became law. The ICO would like to see the greater powers extended to its role in enforcing data protection laws against private sector organisations.

Information Commissioner discloses details of police officers breaching data protection laws to snoop…

The Information Commissioner - the regulator in charge of enforcing data protection law in the UK - has revealed details of police officers who have wrongfully accessed people's personal data without the consent of the data controller in breach of the Data Protection Act. One instance had tragic consequences, when a police officer disclosed the details of a pensioner who had been involved in an argument over a supermarket car parking space and the other person's family then threw a brick threw the pensioner's window, which resulted in him dying of shock. The officer had used the Police National Computer to match the pensioner's car to his address. In another case, an officer accessed the police systems on at least 800 occasions and passed on telephone records and checked out his housemate's family. Each officer was fined about £1,000. The Commissioner used the cases as examples to further his argument that there should be prison sentences for illegal access and use of data under the Data Protection Act.

Personal data of customers at leading UK mobile phone company sold by staff for substantial sums to brokers and used by other mobile phone firms…

Staff at a leading mobile phone company in the UK sold data about their employer's customers to brokers in flagrant breach of the Data Protection Act. Customers had wondered why they were being contacted by rival companies asking if they wanted to switch to them when their contracts were nearly expired. The Information Commissioner – the Regulator in charge of enforcing

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data protection laws in the UK – said that the data was sold for substantial sums of money. Christopher Graham said that it was cases like that which justified the Commissioner's calls for tougher penalties for data protection breaches. The Government plans to introduce much higher fines and even prison sentences soon to deal with cases like this and to act as a real deterrent to the unlawful trade in people's personal details.

Patient records turn up as gift wrapping paper at shop…

Whatever next? NHS patients' paper records have turned up as packaging to wrap gifts up in at a jewellery shop! The records had originally come from Papworth Hospital NHS Foundation Trust, although the lack of care was not their fault. The records had apparently been sent by the hospital to a solicitor who acted for patients and the records were inadequately shredded. A recipient of a gift from the shop got more than she bargained for and phoned the hospital immediately to report the data compromise. The hospital was horrified when it found out.

Unsafe deletion of personal data is a breach of the Data Protection Act. In this case, though, the solicitor may face additional consequences. If his clients were already in a litigious frame of mind when they were looking for legal action in respect of the hospital, they may next decide to vent their spleens, so to speak, at their legal advisers!

Government launches consultation on new powers for ICO to issue a maximum £500,000 fine for data protection breaches…

The Government has launched a consultation which would provide the Information Commissioner's Office powers to fine organisations up to a maximum of £500,000 for serious breaches of data protection principles. The aim of the Ministry of Justice is to provide the ICO will the ability to impose robust penalties on those who commit such breaches. The consultation asks whether the proposed maximum fine of £500,000 will provide the ICO with a proportionate sanction. New powers for the ICO to issue civil monetary penalties were created by the Criminal Justice and Immigration Act 2008 and are expected to come into force next April. The powers will permit fines to be levied by the ICO where:

- A data controller has breached of one of the eight data protection principles;
- The breach was deliberate or the data controller knew, or ought to have known, of the contravention risk;
- The contravention would be likely to cause substantial damage or substantial distress; and
- The data controller failed to take action to stop it.

The consultation closes on 21 December 2009.

Defamation

Libel claim 'totally without merit' when online article only received about four visits – LonZim v Sprague, High Court…

The High Court has described a libel claim as being 'totally without merit' after the complainants had failed to establish 'substantial publication' within England and Wales. The article at the subject of the complaint was published on the web site of a South African weekly magazine called Financial Mail. The claim was made by an investment firm listing on the Alternative Investment Market, LonZim, and two senior executives of the firm. They complained about what Andrew Sprague, a non-executive director of a company that held LonZim shares, had accused them of doing.

The High Court ruled that the complainants had failed to prove publication – which requires evidence of readership and not just availability - within England and Wales. Sprague had produced evidence which showed that since publication there had been a total of a mere 65 visits to the contentious article. The High Court also noted that it was not possible to ascertain whether or not those visits included more than one visit by the same person or the jurisdiction in which the visitors where located. The publishers of the web site had stated than on average approximately 6.79% of visits to their site were made by Internet users based in the UK. In applying that percentage to the 65 visits, the Court estimated that four visits may have been made by one or more visitors based in the UK. The Court concluded that, taken at its highest, the evidence showed at best minimal publication of the words complained of. It did not show that a substantial tort had been committed in England and Wales.

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Design Rights

Reservation of rights can constitute an unjustified threat of unregistered design right infringement, rules High Court – Grimme Landmashinenfabrik v Scott (t/a Scotts Potato Machinery), High Court…

The High Court has ruled that a reservation of rights to commence proceedings can constitute an unjustified threat of infringement even where the letter expressly stated that there was no intention of proceedings. Grimme sued Scott for unregistered design right infringement in relation to rollers in 'Evolution' potato separators sold by Scott. Scott counter-claimed that Grimme had made unjustified threats of design right infringement proceedings arising from letters sent to Scott's resellers. Where threats of proceedings for infringement of design right are made, a person affected by those threats may seek a declaration that the threats are unjustifiable, an injunction against further threats and damages in respect of any loss suffered as a result of those threats. It is then up to the party accused of making the threats to show that there was in fact an infringement of the design right constituted by the acts in respect of which the proceedings were threatened.

The High Court found that one of Scott's roller designs infringed Grimme's design right but that a second version of the roller did not infringe that right. However, the High Court went on to find that unjustifiable threats of design right infringement proceedings had been made notwithstanding that the letter expressly stated that Grimme did not intend to commence proceedings. The High Court ruled that a threat could be implied and that the test to be considered was the effect that the letter would have on an ordinary recipient. In applying that test, the High Court found that an ordinary recipient would read the following sentences as indicating that Grimme did not intend to commence proceedings at that time but would likely to do so if it was successful in its action against Scott: '…Please note that our client does not intend to commence proceedings against you as its action is against Mr Scott, but of course our client reserves all its rights in this matter. We will contact you again after judgement [sic] has been handed down.' As such, the High Court found that the letters constituted a veiled threat of infringement proceedings.

The allegations contained in the letter were not specific about which particular roller designs were alleged to have been infringed. In order for Grimme to show that the threats were justified it needed to show that all of Scott's roller designs infringed at least one aspect of its unregistered design right as an ordinary recipient would assume that the allegation was made against all of Scott's rollers. However, Grimme had shown that only one of Scott's roller designs infringed its design right. The High Court concluded, therefore, that the threats were unjustified.

Samantha Lloyd, assistant editor of www.Upload-IT.com, comments: 'Letters which include allegations of intellectual property infringement must be drafted very carefully. As this case shows, even an express statement that no proceedings are intended may not be enough to ensure correspondence does not amount to a veiled threat of proceedings.'

E-Commerce Laws

Government publishes new Regulations to bring into force Audiovisual Media Services Directive …

The Government has published the Audiovisual Media Services Regulations 2009 to bring into force the EU's Audiovisual Media Services Directive. The Directive replaced the Television Without Frontiers Directive and extended regulation that had previously only applied to television services to all audiovisual media visual services, including on-demand services. The legislation will affect online services that have television programmes, such as BBC iPlayer, ITV Player and Sky Player. The new law will take effect on 19 December 2009. Amongst other things, the law will have minimum standards for programmes and advertising, including rules on advertising and sponsorship. It will also define product placement and when it can take place.

In addition, the Government is looking into implementing "short extract" provisions, which would enable broadcasters to show extracts from "events of high interest to the public" even where another broadcaster has exclusive rights. Meanwhile, the Department for Culture, Media and Sport has published a consultation on introducing product placement to UK television for the first time. The DCMS is keen to find out what safeguards there should be.

Miscellaneous Laws

Draft Bribery Bill re-introduced to Parliament…

The Bribery Bill has been re-introduced to Parliament following the examination of the initial Bribery Bill, which had been originally put before Parliament in March. The Bribery Bill aims to modernise and consolidate the UK's bribery and corruption laws. There would be offences of bribing and being bribed and also bribing a foreign public official. Of significant interest is a corporate offence of failing to prevent bribery. The corporate offence had initially required the need to prove negligence on the

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part of the company, but that has been changed to a strict liability offence. The Government has decided that requiring the prosecution to prove negligence would be too complex. Therefore, if the Bill is passed in its current form, a commercial organisation would now be guilty of failing to prevent bribery where a person associated with it bribes someone, intending to obtain or retain business, or to obtain or retain an advantage in the conduct of business, for the organisation. However, the organisation would still have a defence to the strict liability offence if it is able to prove that it had adequate procedures in place to prevent the offending conduct. The Bill currently leaves it unclear what those procedures are.

The bribery seeks to encourage self-reporting. However, one of the consequences of a corruption conviction would be that the convicted organisation would be automatically and perpetually prohibited from competing for public contracts under the Public Contracts Regulations 2006. Other consequences of breaching the new law would be large fines for individuals and the business concerned.

One grey area remains corporate hospitality. The Government does not intend that the new law should penalise legitimate and proportionate use of corporate hospitality to establish or maintain good corporate relations. But where should the line be drawn?

Misleading Advertising

Proposals to extend the CAP Code will give the ASA power to adjudicate on web site content...

The Advertising Standards Board of Finance has been working on plans to extend the current CAP Code to cover web site content which would bring statements made on web sites within the remit of the Advertising Standards Authority, the advertising watchdog. The CAP Code is a code of practice governing the content of adverts and marketing communications, and it is administered by the ASA. 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. Currently, the CAP Code specifically excludes web site content except sales promotions and advertisements in paid-for space. This loophole means that whilst banner ads appearing on a web site are within the ASA's jurisdiction any promotions made by that advertiser on its own web site are not. The ASA already receives more than 2,000 complaints each year about web site content which it has to reject in the absence of the proposed new powers.

Trade Marks and Passing Off

Numbers not registrable as trade marks – Agencja v OHIM, European Court of First Instance...

The European Court of First Instance has ruled that OHIM - the body in charge of deciding whether to accept or reject European Community trade mark applications – was right when it rejected a couple of trade mark applications for numbers. They were rejected on the grounds of descriptiveness and non-distinctiveness. The company applied to register '1000' as a trade mark in respect of puzzles and brochures, and '100' and '300' for posters, magazines, newspapers and puzzles. There was a direct link between the numbers and the characteristic of the products – such as the number of pieces in the puzzle or the amount of pages. The average consumer who was reasonably well-informed and reasonably observant and circumspect might think that the number described the characteristic of the goods.

If you would like further information on any of the items in this month's newsletter or anything else related to Commercial/IP/IT issues, please contact:

Paul Gershlick
Partner
Commercial/IP/IT Team
Direct tel: +44 (0)1923 208816
Commercial/IP/IT fax: +44 (0)1923 215004
E-mail: paul.gershlick@mablaw.co.uk

For Matthew Arnold & Baldwin LLP
85 Fleet Street, London EC4Y 1AE
401 Grafton Gate, Milton Keynes MK9 1AQ
21 Station Road, Watford WD17 1HT
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