

UPLOAD-IT - 1 JANUARY 2007

COMPETITION LAW

- ***OFT savages Ordnance Survey and other government bodies for charging too much to license public data...***

The Office of Fair Trading (OFT) has been investigating the licensing of public data by a number of government bodies via its Commercial Use of Public Information market study. This has revealed that bodies such as The National Archives, the Met Office and Ordnance Survey (OS) provide the information they hold to the public on restrictive licence terms and charge too much. These practices cost half a billion pounds a year to the UK economy. This is because this raw data is vital to many UK businesses and helps many develop new products and services, for example anyone wishing to use mapping data in their own products. The report also noted that the data was not easily available from those public bodies or from other sources and the price to obtain it from the public bodies was not necessarily linked to the cost. Public sector information holders charge higher prices to some competitors for the same information than they charge to their own value-added business. The OFT recommended that such bodies should make public sector information easily available for re-use as much as possible at a price that was proportionate to the cost.

- ***Microsoft appeals European Commission's July 2006 decision to impose fines for failure to comply with its 2004 ruling...***

Microsoft has asked the Court of First Instance to cancel the European Commission's decision of 12 July 2006 - that it had still not complied fully with the 2004 EU ruling ordering it to reveal complete and accurate application programming interface information that would allow non-Microsoft work group servers to fully interoperate with Windows computers and servers. Microsoft claimed that the Commission had failed to provide clear details of what it required or to tell it of the standard of compliance the Commission required under the 2004 ruling. It also argued that the fine of €280.5 (£194 million), representing €1.5m per day for failure to provide the information, was excessive and disproportionate. Further, Microsoft claimed that it was not given access to the Commission's files nor was it allowed to make representations before the issuing of the decision. No doubt the spat will continue to drag on and on, so it's just a case of waiting to see what happens next...

- ***European Commission issues revised Leniency Notice relating to immunity from fines for whistleblowers...***

The European Commission, which is in charge of enforcing EU competition law, has recently adopted a revised Leniency Notice for businesses and other undertakings which get immunity or a reduction in fines for committing cartel offences if they blow the whistle on the cartel or provide assistance in the investigation. The Notice states that the first undertaking to provide information to the Commission to enable it to carry out a cartel investigation will often get full immunity. Also, reductions in fines of 50% will be given to other undertakings which add to the information the Commission already has. The 2006 Leniency Notice replaces the earlier ones from 1996 and 2002.

CONTRACTS

- ***High Court says Currys' refusal to honour its price promise did not leave bad taste in mouth - DSG Retail Ltd v Stockton-on-Tees Borough Council, High Court...***

The High Court has found in favour of electrical goods shop Currys in a recent case that was brought against it by Stockton-On-Tees Borough Council. A consumer had been shopping for a tumble dryer, which was priced at £119.99 in one store. The identical dryer was priced at £159.99 in Currys. Currys advertised a promise that it would not be beaten on price, but when the consumer asked it to honour its price promise, Currys refused. The consumer was in fact a Trading Standards enforcement officer for Stockton-On-Tees Borough Council, which took the matter to court. Trading Standards prosecuted Currys' owner, DSG Retail Ltd, under the Consumer Protection Act 1987 for giving misleading price indications. Currys argued that the two dryers were not identical as its dryer had a vent kit, which was why it cost more. However, Currys had allegedly not made this clear early enough.

The criminal trial ended up in the High Court on a point of law. Although the High Court was critical of DSG for 'ambushing' the prosecution by only making clear the differences between the products during the case itself, it accepted that the two products were not identical. Therefore, it decided that the claim would fail as the criminal standard of prosecution had not been reached. Trading Standards had to bear the cost of the High Court case.

Mahbuba Chowdhury, assistant-editor of Upload-IT, comments on this case: 'This case is an unfair and unjust outcome for consumers. Most consumers are just members of the public who are not familiar with the law - unlike the Trading Standards enforcement officer in this case. If she thought she had a case because the pricing deal wasn't fair, then what chance does Joe Public have to bring retailers to account for pricing promises? This case shows hard it can be for consumers to bring actions against 'rogue traders' and for Trading Standards to enforce the law - especially if they are going to be penalised with costs orders each time they try to bring a big retailer to book.'

- ***Internet user gets hotel rooms for bargain £1.50 due to online pricing error on opodo.co.uk...***

A pricing error on www.opodo.co.uk has allowed a lucky individual to book a hotel room in Marrakech for £1.50. The surprised man received an email from Opodo, which is owned by a group of European airline companies, confirming that his booking was confirmed. He returned to the site, booking five rooms for a month at just £250. It should have cost him £8,000. The individual called Opodo to find out if they would honour the booking and surprisingly Opodo agreed as did the hotel with which the room was booked.

Opodo's acts as agent for the hotel when someone books just a hotel room on the website, so the contract is between the website visitor and the hotel. The hotel is responsible for uploading its price information, so the mistake was the hotel's. In this case, Opodo's conditions made it clear that it acted as agent, and the particular hotel's separate hotel room conditions did not protect it from pricing errors such as this one. So the user got away with it this time...

Paul Gershlick, editor of Upload-IT, comments: 'This is one in a long line of cases which shows that website errors can be extremely costly, especially if the online contractual processes are not carefully designed to enable the online business to

cancel for errors. The hotel can count itself fortunate that it did not suffer even bigger losses.'

- ***Unruly online 'pirates' raid the 'mother' of all toy shops after discount error...***

A defect in Hamleys' voucher scheme has allowed many Christmas shoppers to get away with getting a 60% discount in Hamleys' online store. In the penultimate Saturday before Christmas Day, shoppers noticed the discount mistake and proceeded to raid the e-shelves of Hamleys' store - so much so that by Sunday morning, Hamleys had run out of stock and was left high and dry! Hamleys has commented that it took action as soon as possible and also apologised for people being unable to access its website because of the raiders while the issue was being resolved. It has also said that it would honour the orders placed with it during the raid. Hamleys put the error down to 'one of the downsides of ecommerce.'

- ***Comma in wrong place in contract could cost claimant one million Canadian dollars...***

Aliant Telecom had an automatically renewable five-year contract with Rogers to give Rogers access to poles that carried its cables to Canadian homes. Aliant was a middleman, so when the power company which owned the poles decided to raise the price, Aliant wanted to end its agreement with Rogers. It served 12 months' notice on Rogers to terminate. Early termination would have forced Rogers to pay the power company at its (higher) rates for the poles, so it would have had to pay an extra one million Canadian dollars. The case revolved around one comma in the following clause in the agreement:

'[This Agreement] shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.'

Aliant argued that this meant that it could end the agreement by giving 12 months' notice at any time, but Rogers thought that the agreement could only end at the end of the five-year term or a successive five-year term. A dispute resolution body in Canada had to decide whether Aliant was right in that the placing of the second comma closed the middle phrase so the final phrase applied to both previous phrases - in which case the right to terminate could be exercised at any time. If the right to terminate was to be limited to the end of the five year periods, surely there would be clear words stating this, argued Aliant. However, Rogers argued that if Aliant could end the agreement at any time, what was the point of having the successive five-year terms in the first place? The adjudicator agreed with Aliant's arguments and so it was allowed to terminate the agreement. Rogers is appealing the decision by relying on Canada's second official language, as apparently the French version of the document is different.

In the UK, the courts will interpret contracts by trying to find what the parties intended the words to mean by looking at the phrase used in the context of the contract as a whole. The meaning is not just interpreted through looking at dictionaries and grammar, but how the words used in the document would have reasonably been understood by a reasonable man with the relevant background.

Paul Gershlick, editor of Upload-IT, comments: 'This case shows the importance of having a properly drafted contract by a professional and how one small thing missing could have massive financial consequences.'

COPYRIGHT AND DATABASE RIGHTS

- ***ECJ rules that showing TV programmes in hotel rooms amounted to communicating broadcasts to the 'public' - SGAE v Rafael Hoteles SA, European Court of Justice...***

SGAE, which managed various intellectual property rights in Spain, asked for compensation (for unpaid licence fees) from Rafael Hotels on the basis that the showing of TV programmes in the hotel's bedrooms amounted to communicating copyright works to the public under the Spanish legislation that implemented the EU's Copyright Directive. The Spanish courts accepted that broadcasts on televisions in the communal areas of the hotel were communications to the public but asked the European Court of Justice to rule on whether this applied to televisions in each hotel bedroom, which could be considered to be 'private' places.

Although each case turns on its own facts as to what is meant by 'public', the ECJ found here that 'communication to the public' should be interpreted widely and that the communications in private places could also be communication to the public, as long as the retransmission was accessible to the public and was not just limited to a small circle of friends and family. Therefore, it followed Advocate General Sharpston's conclusions that mere installation of a television in a hotel bedroom was not 'communication to the public', but transmission of the signal was. The only real test was whether the communication was to the public. The public or private nature of the place in which it was received was immaterial.

- ***Modern day brats ignore copyright laws and swap music using their phones...***

A third of children interviewed admitted that they shared music using the Bluetooth wireless technology contained in their mobile phones, according to a survey conducted by Intuitive Media. Intuitive Media provides online communities where children can learn, be creative, communicate and collaborate with other children. The survey consisted of interviews with 1,500 children. More worryingly, almost half of children who currently do not swap music said that they would like to use Bluetooth to do so. Many children do not know that they are infringing copyright by doing this. Mr Hart, co-founder of Intuitive Media, commented that music sharing was identified by the music industry as one of their biggest threats. This view was shared by the BPI, the UK record music trade body. However, mobile Bluetooth only allows one-to-one sharing and the BPL does not see it as worrying as P2P (peer-to-peer) file sharing over the Internet, which often involves sharing music with hundreds if not thousands of music lovers.

CYBERCRIME/SECURITY

- ***Watch out for spim and VoIP phishing to rise...***

Spim, VoIP phishing and viruses spread over peer-to-peer networks are set to be major emerging security threats in 2007 according to MessageLabs, the security firm. Spim is spam (or unsolicited communications) over Instant Messaging. Phishing is the fraudulent practice of sending emails purporting to be from reputable businesses (such as financial institutions) in order to induce individuals to reveal personal information, such as passwords and credit card numbers, online. VoIP is voice over Internet Protocol, commonly known as Internet telephony.

Further concerns are 'disaster squatting', whereby criminals will register domain names linked to a disaster event and use emails and websites to try to persuade people to 'donate' money to them.

Ransomware will also continue to rise. This is where criminals spread malicious software to pay a ransom or have their data erased.

- ***Phishing attacks increase by 8,000% in the UK in last two years...***

Phishing has risen by a massive 8,000% in the UK in the last two years, according to the Financial Services Authority (FSA), which has aired its concerns about the huge increase. '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. The fraudsters usually trick people into disclosing their financial security details by sending recipients spoof emails appearing to come from a legitimate source. APACs, the banking trade body, has revealed that the number of recorded attacks for the period January to June 2006 was 5,059 - whereas for the same period in 2005, it was 312.

Meanwhile, McAfee, the security business, has warned of a 'staggering' rise in cybercrime. It says it had detected more than 200,000 online threats by July 2006. It had taken 18 years to reach the first 100,000 but just 22 more months to get to the second 100,000.

- ***Three major pieces of malware can be run on Microsoft Vista...***

Stratio-Zip, Netsky-D and MyDoom-O, three of the ten most virulent pieces of malware, or malicious software, have been found to bypass Vista anti-virus software when accessed via a third party web email client by Sophos, the software security firm. This is a serious matter as many businesses allow employees to access private email accounts at work. Prior to the launch of Vista in December 2006, it was thought that Vista's launch may result in the extinction of then current malware, but clearly this is not the case. Vista has a number of security features but experts recommend that people should still use additional security software with it to minimise the risk of viruses and other malware attacks on their systems.

- ***MySpace to remove sex offenders' pages from its website...***

MySpace has decided to search US sex offenders registers and databases to remove their profiles from the MySpace website. MySpace will use a new device, called Sentinel Safe, to search US state and federal databases to find sex offenders and delete their profiles from the MySpace website. MySpace has no such plans to do the same in other countries as yet. MySpace is a website which people use to add their profiles and post blogs, network for social purposes and exchange music and ideas.

DATA PROTECTION/PRIVACY/CONFIDENTIALITY

- ***Prince wins right to privacy for diaries in Court of Appeal – HRH Prince of Wales v Associated Newspapers, Court of Appeal...***

Prince Charles kept a journal with his personal thoughts and impressions on a visit to the Far East on the occasion of the handover of Hong Kong to China in 1997. Prince Charles had regarded the journals as private and confidential and copies were marked as such, with restricted access. However, his diaries were disclosed by one of his ex-employees and extracts were published and commented on in the Mail on Sunday. Prince Charles claimed that they infringed his copyright and were in breach of confidence.

The High Court and the Court of Appeal agreed with Prince Charles on both counts. The Court of Appeal commented that the journal was both private and confidential. In addition to the diaries being his private thoughts, the person who disclosed it to the newspaper owed Prince Charles a duty of confidentiality, which had been breached. The Court of Appeal had to decide whether in all the circumstances, it was in the public interest to allow the duty of confidence to be breached. It was not just a case of considering whether the information should be disclosed on public interest grounds but whether the courts should restrict freedom of expression to prevent disclosure of information given in confidence. In this case, it was an important public interest that employees respected their confidentiality obligations to employers. In this case, the public interest in the disclosure of the journal did not outweigh the confidential nature of the information and the relationship of confidence between employer and employee. In giving its judgment, the Court of Appeal made clear that private information was potentially protectable, but it would stand an even better chance of protection if a relationship of confidentiality was involved.

The Court of Appeal also supported the High Court's findings in respect of the copyright side of the claim and so there was no defence for criticism or review - as this only applied to material already in the public domain - or for reporting current news events.

- ***Liverpool City Council 'nicked' over offence of failing to comply with Information Commissioner's information notices...***

The Information Commissioner, the regulator in charge of enforcing data protection law in the UK, has successfully prosecuted Liverpool City Council in the Magistrates' Court for failing to comply with an information notice. This was the first time the Commissioner has brought a prosecution for failure to comply with an information notice. An information notice is a formal requirement under the Data Protection Act 1998 to provide the Information Commissioner with certain information when the Information Commissioner is conducting an investigation. The Commissioner usually uses it as a last resort.

The reason for this sad state of affairs is that a former employee of the Council made a subject access request under the Act for the Council to disclose the personal information it held about her. The Council did not satisfy her request fully so she complained to the Information Commissioner. The Information Commissioner tried to contact the Council several times but it did not respond. The Information Commissioner had already issued a preliminary information notice against the Council for another matter to which it had not responded either. After the Council had failed to respond adequately to the information notice, the Commissioner decided that he had had enough from the Council and commenced criminal proceedings against it. The Council pleaded guilty and was fined £300. The District Judge rebuked the Council for showing an 'appalling breakdown of communication' and 'a clear lack of compliance' with the Act.

- ***Information Commissioner obtains conviction and first community penalty in illegal sale of personal information case...***

The Information Commissioner, the regulator in charge of enforcing data protection law in the UK, has obtained his first community penalty - against data thief, Anthony Clifford. Mr Clifford pleaded guilty to 16 counts of illegally obtaining and selling personal information, contrary to the Data Protection Act 1998. Under the Act, it is illegal for anyone knowingly or recklessly to obtain or disclose personal data without consent of the data controller (meaning someone who is authorised to hold data about a living person). There are defences to the offence, for example if someone acted in the reasonable belief that they had the data controller's consent to do what they were doing. Clifford had impersonated individuals to 'blag' information (ie

obtain personal data by deception) from banks and utility companies. This was then sold to third parties. Mr Clifford was sentenced to a community penalty of 18 months which includes 150 hours of community service. He was also ordered to pay £2,000 towards prosecution costs.

- ***UK courts confirm celebrity's right to privacy in Niema Ash v Loreena McKennitt, Court of Appeal...***

Loreena McKennitt, the Canadian folk singer, took legal action against Niema Ash for a book that Ash had written. The two had formerly been friends for 20 years until they had had a dispute. The book was about Ash's friendship with McKennitt. McKennitt sued for breach of her privacy rights, contrary to the Human Rights Act 1998. The book contained details of McKennitt's personal feelings, her relationships, her recording contracts and her personal life such as shopping trips, holiday visits and trivial details about her home.

The High Court found that there had been a pre-existing relationship of confidence between the parties. Although Ash had a right to free speech and tell her own story, she should not infringe someone else's privacy when doing so. The Court also drew a contrast between what interests the public and what was in the public interest to know about. In order for the writer to have a public interest defence in support of free speech when privacy is affected, there needed to be a very high degree of misbehaviour on behalf of the claimant. The Court also commented on the importance of protecting information that related to someone's home, including apparently trivial details, such as layout, how bunk beds were put up and state of cleanliness.

The Court of Appeal agreed with the High Court decision. It further commented that just because Mr Ash had participated in the story did not give her the right to tell all as it was not her story - it was Ms McKennitt's story and Ms Ash was just a confidante. It also confirmed the findings of the European Court of Human Rights that newspapers could only publish private information if it was in the public interest and such information would only be in the public interest if the information contributed to a debate of general interest (such as reporting on politicians' lives in the context of how they exercise their functions). There was no legitimate public interest in Ms McKennitt's affairs just because she was a public figure. The information about her was private and she had not done anything which caused an attitude of hypocrisy to be uncovered. In reaching its conclusions in this case, the Court of Appeal rejected the ruling in the 2003 case of *A v B*, in which the Court had said that public figures had to expect more comment than private individuals and where it had described details about public figures' lives as being in the public interest.

- ***Information Commissioner does an exposé on the exposers...***

The Information Commissioner has decided to reveal the identities of newspapers which shamelessly use illegally obtained personal information for their stories. The Commissioner, who is pressing for jail sentences for anyone buying or selling illegally obtained information without the consent of the data controller, said: 'Individuals may choose to divulge information to others, but information about them held confidentially by others should not be available to anyone prepared to pay the right price.' The Commissioner has stated that he will get tough on people who are involved in the illegal trade of personal information - and this includes high profile newspapers...so watch this space...

- **High Court gags husband from disclosing wife's affair with a public figure – CC v AB, High Court...**

AB, the husband of a woman with whom CC (a public figure) had been having an affair, wanted to disclose the details of that affair to the media. CC applied to the High Court to get an injunction to prevent the husband from making any disclosure on the basis that he had a legitimate expectation of privacy under Article 8 of the European Convention of Human Rights (which has been given legal force in the UK by the Human Rights Act 1998). In particular, when it came to making his arguments in the case, CC also argued that he was concerned that the disclosure would cause his wife and children to suffer. He gave evidence that his wife was suffering from stress and anxiety, she had self-harmed and threatened to commit suicide. CC also argued that the High Court should take into account his family's rights to privacy.

The High Court decided that it had to balance AB's right to express himself with CC's right to privacy. Sexual relationships have a reasonable expectation of privacy. In this case, the judge said that these rights came from a secular code and, as there were no commonly accepted moral standards in society regarding sexual morality, a judge could not use religious principles against adultery to interpret the European Convention of Human Rights. AB claimed that his disclosure would be in the public interest but there was no genuine public interest defence for 'vapid tittle-tattle' especially as it was apparent that the husband wanted to make the disclosure for spite and financial gain. The disclosure would also affect the claimant's wife and children so under those circumstances, the judge granted the injunction.

In weighing up the competing interests of free speech and rights in confidentiality, the judge also noted that CC was entitled to a personal life and had not misled the public or moralised publicly on family life, so publication could not be justified in the public interest on these grounds. The judge further commented that the fact that CC and AB's wife had been seen together in public places such as in hotels and streets did not stop them having a right to privacy, which could extend to public places too. Further, as part of taking an objective moral view, the judge decided that AB did not have any extra rights purely by virtue that he was the wronged party and wanted revenge.

Mahbuba Chowdhury, assistant-editor of Upload-IT, comments: 'This case was unusual in that the judge sought to protect the rights of the claimant's wife and children even though they were not party to the action, but at the same time it was also surprising because of the court's comments about the lack of any commonly accepted moral standards in society regarding sexual morality. Further, it is a long-held legal tradition in England that those who come to 'the court of equity' must 'come with clean hands' and yet this claimant asked the court for an injunction - an equitable remedy - and obtained it, although he certainly did not come to the court with 'clean hands'!

DISABILITY DISCRIMINATION

- **97% of websites fail to pass UN test of acceptable level of accessibility...**

97% of websites tested on behalf of the UN have failed to meet minimum accessibility requirements. The research was conducted for the UN by Nomensa, the website designers and researchers of website accessibility issues. The company reviewed the leading websites in five different sectors - Heads of State, airlines, banks, newspapers and retailers - in 20 countries around the world to see how far they complied with generally accepted minimum standards. They used a

combination of manual and automatic tests to see compliance against the Web Content Accessibility Guidelines (WCAG) (developed by the World Wide Web Consortium). Only the German Chancellor's, Spanish Government's and British Prime Minister's websites met WCAG Level A, the most basic level. No site reached Level AA or Level AAA. The research comes at a time when the UN is considering the adoption of the Convention on the Rights of Persons with Disabilities.

E-COMMERCE REGULATIONS

- ***Government's introduction of new laws requiring all companies to provide company information on emails and websites blasted by Upload-IT...***

The Government has passed a new law making it compulsory for every company and limited liability partnership to provide certain information on their emails and websites. In effect, the 'rule of thumb' is that any information which companies or LLPs must provide on their physical business letters must now also be included on their emails and websites. Otherwise, companies, directors, company secretaries and insolvency practitioners could be fined.

Paul Gershlick, Upload-IT's editor, has been quoted in several publications and written several articles on the issue, including the following:

<http://www.telegraph.co.uk/money/main.jhtml?xml=/money/2007/01/08/cbcomms09.xml>

<http://www.computing.co.uk/itweek/news/2171778/rules-force-web-site-changes>

<http://www.scl.org/editorial.asp?i=1470>

Paul Gershlick comments for Upload-IT: 'It is not the law that is disappointing but the way the Government has implemented it. The law was actually brought into force as a result of an EU Directive in 2003 and the Government had known that it had to do so for three and a half years. However, it only introduced the law to Parliament on the penultimate working day before Christmas and it came into force just a few days later on New Years' Day. As many business people up and down the country were enjoying the seasonal festivities, they could have been blissfully unaware that the law was suddenly changing and that they could be fined just for firing off an email that did not have their company number on it on the day they returned to work.'

FREEDOM OF INFORMATION

- ***Information Tribunal upholds Information Commissioner's order for Derry City Council to disclose 'confidential' financial information under Freedom of Information Act...***

A member of the public asked Derry City Council under the Freedom of Information Act 2000 (the FOIA) to disclose a fax sent to it by Ryanair about Derry City Airport. The FOIA came into force on 1 January 2005 and 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, even if it relates to their competitors. The fax included information about airport charges and ground handling charges. The fax was marked as 'private and confidential' as Ryanair did not want anyone to find out about the transaction until it had made a public announcement. The Council refused to disclose the fax. Eventually, it disclosed a version of the fax with certain information 'redacted' (ie removed). It claimed it was entitled to hold back certain financial information under certain exemptions allowing a public body to refuse disclosure as contained in FOIA – they claimed that the disclosure would harm

the economic interests of the UK, prejudice its own commercial interests and the disclosure would also breach the confidence of Ryanair.

The member of the public took the matter to the Information Commissioner who has power to look into FOIA matters and make orders against public bodies. The Information Commissioner found that the financial information in the fax had come from the Council itself and not from a third party, so the disclosure would not be a breach of the Council's obligations of confidentiality to any third party. If it had come from someone else, then its disclosure might have been a breach of confidence. As to the other two potential exemptions, the information itself related to the subject of the airport receiving state subsidies and how this affected the value of state aids to public bodies and whether there was a breach of EU competition law. The public interest in this subject and the expected public debate outweighed the Council's interest in not having the information disclosed. As a result, the Information Commissioner ordered the Council to disclose the information it had left out when it had given a copy of the fax to the member of the public.

- ***Government consults on new restrictions on ability to make requests under so-called freedom of information laws...***

The Government is consulting on various measures to save money and hinder the ability of people to make requests of public bodies under the Freedom of Information Act 2000. The Act came into force on 1 January 2005 and 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, even if it relates to their competitors. One proposal involves cutting the numbers of requests to one every three months per organisation - even media bodies such as the BBC or a newspaper. Another change would see the public body being able to factor in reading and consultation time when working out whether the request is able to be processed within the limit of £600 per request to central government and £450 per local authority request - this will have the effect of taking many more requests above the limit.

GENERAL IP

- ***Government-commissioned Gowers Review on future of intellectual property issued...***

Andrew Gowers, the former editor of the Financial Times, was commissioned by the Chancellor, Gordon Brown, to conduct an independent review of the state of intellectual property in the UK and give his recommendations for changes. His 180-page report has recently been published. Overall, Mr Gowers found that IP in the UK was working well. However, he made a few useful suggestions and comments which allay fears that the whole exercise was just a waste of taxpayers' money. Here are some of the key recommendations and comments Mr Gowers made:

Copyright

- Allow a limited private-copying exemption to copyright, which will enable consumers to format shift legitimately purchased content, for example from a CD to an MP3 player (following the US with its 'fair use' provisions). Currently, it can be an infringement of copyright for someone to make a copy of music or other copyright material, which they have legitimately paid for, for their own purpose.
- No need to change copyright law to combat peer-to-peer music file sharing.
- Allow transformative works and derivative works to be created from copyright protected works without infringement, provided that the new derivative works do not impact on success of the original works and ensure that the moral rights of the original authors are respected.

- Require CDs to have clear warnings on their packaging if they contain digital rights management which could interfere with use.
- Have copyright works whose authors cannot be traced (known as 'orphan-works') more easily available to allow artists to re-use those copyright protected works.
- Keep the copyright term for music recordings at 50 years. Artists such as Cliff Richard had been lobbying for an increase so they could continue to receive royalties when the term from records from the late 1950s onwards are due to expire soon. In the US, the term is 95 years.
- Allow an exemption to copyright infringement for caricature, parody and pastiche.
- Allow libraries to copy and format-shift master copies of archival works so as to prevent cultural works kept only on outdated formats from deteriorating.
- Reform the research exemption to copyright infringement to allow universities and businesses to use all forms of copyrighted material for research - and not just literary, dramatic, musical or artistic works as is currently the case.
- Give Trading Standards wider powers to enforce copyright, including the right to audit and inspect business premises for software misuse.

Database rights

- No clear recommendations - merely an acknowledgment that the system is currently in confusion following recent case law.

Designs

- There is a confusing mix of rights. The complexity does not help users of the system, but no recommendations are made.

Trade marks and passing off

- Offer a more expensive fast-track system to enable trade marks to be examined and accepted within just 10 days of filing, although the 3-month opposition period would remain.
- Consider further whether to have a more general, wider unfair competition law in order to go further than passing off. With passing off, the claimant must already show it has a reputation. However, that does not stop businesses which copy-cat a new product that has just been launched without a reputation yet. Having a more general law of unfair competition would also get round the need to show customer confusion, which can be expensive, particularly for small businesses.

Patents

- Support the establishment of a unitary Community patent.
- NOT extend patent rights more widely for software, business methods and genes.

IP Enforcement

- Consult on having a better system of damages awards in civil IP cases. This may include having punitive damages for software licence infringement.
- Match penalties for IP infringement for both physical and digital copies. For example, the maximum penalty for selling unauthorised downloads should be raised to ten years' imprisonment to reflect the penalty for sale of pirate CDs and DVDs.
- Make IP litigation cheaper and quicker. This includes encouraging more use of alternative dispute resolution procedures.

- ***European Parliament approves updated Television Without Frontiers Directive...***

The European Parliament has approved the 'Audio-Visual Media Services Directive' (AVMS Directive) to update the 1989 Television Without Frontiers Directive. 'Audio-visual media service' means any service whose main purpose is to provide moving images in order to educate or entertain using electronic communication networks. The Directive will extend regulation to all audio-visual media services regardless of

how these are transmitted. The AVMS Directive regulates not just regular TV but also IPTV (internet protocol television), mobile TV (television delivered via mobile phone), webcasting and near video-on-demand.

Although all services covered by the AVMS Directive would be covered by at least the basic level of regulation, 'linear services' (scheduled services) would have additional regulation than would be the case for 'non-linear services' (on-demand services where users decide when the programme is transmitted to them).

The AVMS Directive will relax the rules so as to allow product placements (advertising certain products by placing them in television programmes as a part of the props).

Concerns have been raised by some leading businesses that the regulation of non-linear services as if they were linear services would stifle growth in digital content. They are also concerned that additional regulation might force service providers to move their operations outside the EU. However, the Directive does expressly make clear that it does not catch online gambling, gaming, blogging, and user-generated videos and personal websites with no economic or mass media impact.

HARDWARE

- ***It's 'wee' all the way as the WEEE directive finally comes into force (on 2 January 2007)...***

The Waste Electrical and Electronic Equipment ('WEEE') Regulations 2006 were made on 11 December 2006 and much of it will come into force on 2 January 2007. The rest will come into force on April Fool's Day 2007 and on 1 July 2007. The Regulations implement the WEEE Directive. The Regulations set out criteria for the collection, treatment, recycling and recovery of WEEE such as computer hardware, TVs, videos, telecoms, hi-fis and electronic tools and toys.

Businesses that are subject to the Regulations include manufacturers, resellers that buy equipment from outside of Europe, and retailers. The Directive was meant to be implemented in the UK in August 2004, but after several delays and Government's claims that it has needed time to work out the logistics of introducing the law the Regulations have now been drafted, approved and are set to be implemented.

The Regulations state that 'producers' need to finance the collection, treatment, recycling, recovery and safe disposal of WEEE. The cost to each producer is calculated based on the relevant producer's market share. A 'producer' is anyone who manufactures and sells or resells equipment under its own brand, or imports or exports equipment. Producers must also join approved producer compliance schemes ('PCSs') by 15 March 2007. PCSs register their members with the Environment Agency. PCSs must ensure that WEEE is sent to and treated at an authorised treatment facility ('ATF'). In every compliance period (which may initially be between seven and 12 months), each PCS and 'producer' must show it has treated and recycled the appropriate amount of WEEE and it can 'trade' or 'sell' any excess amounts with producers which have underperformed.

Non-households which want to dispose of WEEE that had been initially put on the market before 13 August 2005 without buying replacement equipment must finance the WEEE themselves and ensure it is treated at an ATF.

Households will be able to take their WEEE for free to designated collection facilities.

Distributors (ie retailers) must, by 1 July 2007, either offer free designated collection facilities or join a collective distributor take-back scheme. 'Producers' will be the ones responsible for transporting the waste from the designated collection facility to the ATF.

'Producers' will also be required to insert marks on all their new equipment to identify it as having been put on the market after 13 August 2005 and to identify the producer's identity. They will also have to mark all new equipment with a crossed out wheelie bin. These particular changes will take effect from April Fool's Day 2007. And, no, this isn't a joke.

IT AND INTERNET USE

- ***Only 20% of business would survive for more than a week if hit by disaster...***

Only 20% of companies could survive more than a week if hit by disaster, a survey of FTSE 250 companies has revealed. The survey was carried out by the BSI British Standards. Only 45% questioned were ready for a supply chain failure and just 1 in 5 companies required all their suppliers to have business continuity plans. On the plus side, the survey showed that had been major improvements over the last 12 months for companies dealing with disaster recovery – 40% of companies were fully prepared to relocate their businesses in the event of an emergency, a figure which was just 15% the previous year.

MISLEADING ADVERTISING

- ***ASA slaps TalkSPORT radio station on the wrist for a (possible) breach of the CAP code...***

The Advertising Standards Authority (ASA) has censured TalkSPORT for posting messages that looked like a genuine comment to blog sites and message boards, but which were done to advertise their station (known as comment spam, or 'flogging' (ie fake blogging)). The blog had been posted by a member of staff at TalkSPORT. A complaint against this was upheld by the ASA as it was unclear if the message was an advert or not and the CAP Code states that an ad has to be clearly labelled as such. The CAP Code is a code of practice which governs the content of adverts and marketing communications. 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.

- ***Wal-mart 'dissed' by blogging community for submitting false blog entries describing how great Wal-mart stores were...***

Recently a blog appeared in the US about an American couple travelling across America in their RV staying overnight in Wal-mart car parks. The blog described their experiences, particularly the pleasures of living in US towns where Wal-mart stores were located. However, this was not the true state of affairs, as the couple turned out to be a reporter and a photographer paid by Wal-mart's PR people to advertise a 'cosy' image of 'America's favourite supermarket'. The issue has caused a stir in the blogging community. The US has a trade association called the Word of Mouth Marketing Association (WOMMA), which has its own ethics code for bloggers. A whole list of companies such as Dell, Sony and Coca-Cola have signed up to it and there are plans to have a European equivalent to counter the increasing misuse of blogs.

PATENTS

- ***Amazon takes action in patent suit against it from IBM...***

Amazon has claimed that IBM used its patents in IBM's Websphere application server and in its information management products and services. Amazon's patents relate to the technology which allows a website to recommend products to its customers based on what they were buying or looking at on the website. Earlier in 2006, IBM sued Amazon for infringing its patents, so who knows when and how this 'tit-for-tat' battle will end....

TRADE MARKS AND PASSING OFF

- ***High Court allows Sky to stop others 'taking off' with extended warranties service by free riding on its reputation – British Sky Broadcasting Group v Sky Home Services Ltd, High Court...***

The defendants were companies that had the word 'Sky' in their corporate names. One such company had also previously been an authorised sales agent for Sky. When this arrangement ended, the companies proceeded to sell extended warranties and repair services for satellite television equipment, although none of them had ever been appointed agents of Sky for this purpose. Sky sued the companies for passing off on the basis that the companies used the name 'Sky' in their corporate names and because of the misleading nature of their contracts and their sales scripts. For a passing off action, the claimant must show that it has goodwill, the defendant has made a misrepresentation based with the claimant's goodwill, and this has caused loss to the claimant (for example from customers being confused).

The High Court agreed that the defendants were passing off their extended warranties as if Sky approved of them. The judge said that where a company had a de facto monopoly and a new product was introduced, there was an increased risk that the competitor's marketing methods would lead to confusion by an implied misrepresentation. Although the competitor did not have a duty to distinguish between his product and the monopolist's product, he still had to ensure that there was no misrepresentation that his product was connected with the monopolist's. If the competitor found that a customer was in fact under a self-induced misapprehension that the competitor or his product was connected to the monopolist and he did nothing to correct the customer's mistaken belief, then this could be misrepresentation by conduct.

- ***Court of Appeal refers questions about comparative advertising in bubbles case to ECJ – O2 Holdings v Hutchison 3G, Court of Appeal...***

O2, the telecoms service provider, launched a new brand in 2002 centring around bubbles and names as registered trade marks. In 2003, Hutchison 3G launched 3, a rival telecoms network. In 2004, Hutchison ran a series of advertising comparing 3 to competitors' services. One advert began with a series of bubbles, similar to O2's, and a voice-over and captions that expressly referred to O2's services. O2 sued Hutchison for trade mark infringement.

The High Court ruled that Hutchison's adverts did appear to infringe O2's registered trade marks. Hutchison's adverts used a sign which was identical to the trade mark registered by O2 for similar services, and there would be a likelihood of confusion or association with the registered marks. This was contrary to Section 11(2) of the Trade Marks Act 1994. However, was able to show that it had a valid defence under

Section 10(6) of the Act. Section 10(6) allows use of another's trade mark for the purpose of identifying goods or services as those of the trade mark owner, but that use must be in accordance with honest commercial practice. The High Court decided that in order to avoid trade mark infringement by a comparative advertisement, the advertisement must comply with the EU's Comparative Advertising Directive, which has been brought into English law by the Control of Misleading Advertisements (Amendment) Regulations 2000.

The Comparative Advertising Directive says that, in order to make a comparative advertising effective, it may be 'indispensable' to identify a competitor's goods or services or trade marks. The High Court thought that 'indispensable' did not involve a high standard - it was not whether it was indispensable to making the comparison but to making it effective. This should be interpreted in the sense most favourable to the comparative advert. It said that courts should not be quick to stop use of trade marks that give additional impact to its message.

O2 then appealed to the Court of Appeal, saying that the defence to the infringement decision should not have applied, while Hutchison meanwhile argued that the advert had not been an infringement in the first place (and that it therefore did not even need to rely on the defence). The Court of Appeal could not decide on this issue as it was required to interpret the EU Directive, which was not totally clear and had been interpreted differently across the EU, so it referred three questions to the European Court of Justice (ECJ) in order to help it reach its decision. The questions can be summarised as follows:

1. Where someone uses another's trade mark purely to compare the merits (including price) of his goods or services with those of the trade mark owner and in such a way that it cannot be suggested that the trade mark's indication of origin is in any way jeopardised, can the use even be an infringement in the first place?
2. Where a defendant uses in a comparative advert the registered trade mark of another, in order to comply with the Comparative Advertising Directive, must that use be 'indispensable' and, if so, what are the criteria by which indispensability is to be judged?
3. If the answer to 2 above is 'yes', does the requirement for indispensability preclude any use of a sign so similar to the registered trade mark as to be confusingly similar to it?

We now have to wait a few months with baited breath for the answers...

- ***Mere placing of CE mark on goods does not constitute consent for trade marked goods to be imported into EEA - Roche v Kent Pharmaceuticals, Court of Appeal...***

R made and supplied a product for self-checking glucose levels. R supplied the products to a company in the Dominican Republic for use in trials there but not for re-sale. K found some of the products in France and bought them for re-sale into the UK. The Davidoff case in 2002 established that a trade mark owner could not stop the parallel importing of products containing its trade marks once it had put them on the market anywhere in the European Economic Area, but could stop their sale in the EEA if the goods had only been on the market outside the EEA. The trade mark owner lost its rights to object to the resale if it had unequivocally demonstrated that it had renounced its rights to object to the resale. The trade mark owner's rights would not have been unequivocally demonstrated simply by failing to communicate

its opposition to marketing the goods in the EEA, by failing to have a relevant warning on the goods or by not including sufficient clauses in its contracts.

R successfully obtained summary judgment against K in the High Court, and now the Court of Appeal has re-affirmed that decision. In order to allow re-sale into the EEA, the court was looking for some actual consent (whether express or implied) and not merely deemed consent. R had not consented to supply within the EEA even though the products had a 'CE' mark on them, which indicated that the products were designed to comply with a European standard. The 'CE' mark only showed that the product had been formally approved for sale, the regulations had been complied with and they were of a certain quality, and did not represent consent to sale of the products within the EEA. R had expressly prohibited re-sale into the EEA and the presence of the 'CE' mark did nothing to revoke that prohibition.

The Court of Appeal added that in the context of commercial contracts the English courts were prepared to recognise that a particular expression could have a wider meaning within a particular trade. If the 'CE' mark conveyed the message that the relevant trade mark proprietor had consented to the placing of the product on the market within the EEA, the result would have been different. However, it was not shown that the use of 'CE' mark gave that message. In order to satisfy that test, the parallel importer would have had to show that the term had such a wider meaning amongst trade mark owners generally or in the market in which the case concerned.

UNSOLICITED COMMUNICATIONS

- ***Microsoft obtains High Court support under spam regulations to stop anti-social person selling email addresses to spammers - Microsoft v McDonald, High Court...***

Microsoft was concerned with the amount of spam (or unsolicited) emails being received by subscribers of its free web-based email service, 'MSN Hotmail', so it investigated. It found that a Mr McDonald was selling email lists to people who then used them for spamming for marketing purposes under a trade name BIZADS. A high proportion of those who were emailed were receiving unsolicited emails, contrary to the Privacy and Electronic Communications (EC Directive) Regulations 2003. Microsoft claimed it was suffering loss as a result, as it lost goodwill from subscribers who were less willing to continue subscribing, fighting spam was expensive and it incurred costs in buying additional servers to cope with the increased volume of emails.

The High Court awarded summary judgment as the defendant had no real prospect of defending the claim. Interestingly, the Court clarified that Microsoft had a cause of action under the Regulations as it fell within a class of people intended to be covered by the 2003 Regulations. Microsoft was awarded damages and an injunction to stop further transmission of unsolicited emails to Hotmail accounts.