

UPLOAD-IT - 1 JANUARY 2009

COMPETITION LAW

- ***European Commission switches its spotlight on alleged cartel between some of the world's largest engineering groups...***

The European Commission has sent statements of objections to an unspecified number of manufacturers of power transformers regarding an allegedly illegal price-fixing agreement in Europe's multi-billion euro power transformer market. Four of the world's largest engineering groups have confirmed that they have received copies of the charges – Germany's Siemens, Zurich-based ABB, Japan's Toshiba and French energy and nuclear power generation specialist Areva. The products subject to the alleged cartel are major electrical components used to reduce or increase the voltage in a power grid.

This is not the first time engineering companies have been investigated for uncompetitive behaviour. In 2007, the European Commission found that 11 companies, including Siemens, ABB, Toshiba and Areva, had used secret codes and encryption to hide the fact that they were rigging tender prices, fixing prices, sharing confidential information, and carving up the market for electrical switchgears. For more on that case, please click here: <http://www.upload-it.com/editArticle.aspx?ID=1779>. The Commission has shown itself to be tough on repeat offenders and the companies could face fines of up to 10 percent of their global turnover if the charges against them are made out.

- ***Loss of rivalry between broadcasters of video on-demand services could restrict competition says Competition Commission...***

The Competition Commission has raised concerns regarding a proposed joint venture between the UK's biggest broadcasters ('UKVOD') to supply video on-demand ('VOD') services in the UK. BBC Worldwide (the BBC's commercial arm), Channel 4 and ITV have joined forces to offer a 'one-stop-shop' for online access to recently-aired programmes as well as archive content. The broadcasters anticipate that most content will be funded by advertising and free to view although customers will have to pay for some programmes. UKVOD is also proposing to license its VOD service, or a large part of it to other VOD service providers on a wholesale basis.

However, the chairman of the Commission, Peter Freeman, has voiced concerns that a loss of rivalry between the broadcasters could restrict competition for VOD. Mr Freeman said: 'UKVOD would have the ability and incentive to impose unfavourable terms when licensing domestic content to rival VOD providers...At the extreme, UKVOD might withhold content from its rivals altogether.' The Commission is consulting on possible remedies, but if these suggestions do not eliminate the potential for restriction on competition the Commission may prohibit the joint venture from going ahead altogether.

CONTRACTS

- ***Terms 'overleaf' not properly incorporated into contract - J Murphy & Sons v Johnston Precast, High Court...***

J Murphy & Sons ('Murphy') faxed an order for a length of glass reinforced plastic pipe for the supply of portable water to Johnston Precast ('Johnston'). The order referred to the conditions 'overleaf' which had not been included in the fax. Two days

after the order was made Johnston sent an acknowledgment of the order containing its own terms and conditions and then proceeded to make the pipe. Four years after Murphy had laid the pipe in a tunnel surrounded by foam concrete the pipe burst. The High Court had to consider, amongst other issues, whether a concluded contract had been made and on what terms.

The High Court found that the contract had been made when Murphy faxed the order to Johnston at which point all important matters such as the identification of the parties, price, the work scope and the specification had been agreed. From this time the parties had treated each other as contracting parties and Johnston had commenced production. However, the High Court said that the reference to the terms 'overleaf' in Murphy's order had to be ignored because there was no evidence that anyone had paid attention to whether Murphy's terms had actually been attached (which they were not) and the words used did not amount to an effective incorporation of Murphy's terms into the contract. The High Court ruled that even if it was wrong to ignore Murphy's terms Johnston's acknowledgement of the order had been a counter-offer that Murphy had accepted so that Johnston's terms and conditions had been incorporated.

The High Court also added a couple of other interesting comments. It reinforced the recent Court of Appeal approach in *Regus v Epcot* (as reported here: <http://www.upload-it.com/editArticle.aspx?ID=2588>) as to dealing with limitation of liability clauses, which are amongst the key provisions in any contract. The High Court encouraged the severability of different parts of a liability clause so that different parts of it could stay enforceable even where other bits of the clause were ruled to be unreasonable and therefore unenforceable. The High Court here also stated that there should be an implied term in supply contracts that require a supplier to warn its customer if the supplier knows or should know that a certain material might create problems when used in conjunction with the supplier's product, even if the supplier finds out about the proposed use after the contract has been entered into.

Samantha Lloyd, assistant editor of Upload-IT comments: 'This case is an important reminder to businesses to ensure that their standard terms and conditions are effectively incorporated into the order forms that they use. Suppliers should also be wary if a customer seeks to introduce or refer to its own terms and conditions of purchase (which are likely contain diametrically opposed provisions to a suppliers' terms) with its own written order. In such circumstances a supplier should make it clear that it does not accept those terms and ask the customer to confirm again that it agrees to its terms and conditions to win the so-called 'battle of the forms'.'

- ***High Court rules that pre-signed signature pages substituted in a later version of an agreement is not effective execution - R v HMRC and others, High Court...***

HMRC applied for and was granted search warrants for its investigation of possible fraud in the operation of a tax avoidance scheme. The promoter of the tax avoidance scheme applied for judicial review of the application for and grant of the warrants. One of the grounds HMRC relied upon in making the warrant application was it suspected that the promoter had transferred signature pages from draft versions of the three key deeds essential to the scheme to the final versions.

The High Court found that the drafts from which the signature pages were later transferred contained a number of blanks, which had been completed in the final version. There were also significant differences between certain provisions contained within the draft and final versions. There was little evidence that any of the promoter's clients had implicitly authorised (or ratified) the changes and the draft

deeds were substantially different to the final document. As the final versions of the documents were not executed in accordance with the statutory requirement for the execution of a deed – which requires an individual to sign a document that includes the other clauses of the deed in the presence of a witness who attests his signature – the deeds were formally invalid.

The Court added that the ruling would probably have been the same even if the documents had not been deeds. It said that a party should sign an actual existing version of the contractual document in order to guard against fraud or mistake.

Paul Gershlick, editor of Upload-IT, comments: 'Parties to a contract are often tempted to take short-cuts when it comes to finalising an agreement, particularly where the parties are in different places or it is hard to get busy directors to sign something. However, this case shows the importance of entering into an agreement properly, because it may not be enforceable if this is not done.'

- ***Spurs' no refund policy likely to constitute unfair term says OFT...***

The Office of Fair Trading ('OFT') has informed Tottenham Hotspur FC that the condition on its website that 'tickets cannot be refunded or exchanged under any circumstances' is likely to be an unfair term in breach of the Unfair Terms in Consumer Contracts Regulation 1999 ('Regulations'). The OFT considered that the term would disadvantage fans who purchase a ticket for a match that is subsequently postponed and who are unable to attend the rearranged date. Tottenham Hotspur FC has agreed to amend its terms and conditions to ensure that they provide for full refunds in the case of rearranged fixtures. The Director of Consumer Protection at the OFT, Mike Haley, said: 'When a consumer enters into a contract to buy a ticket to a performance or match there is a clear date, location and time, and there may be any number of valid reasons why ticket-holders cannot attend on a rescheduled date. We are asking all football clubs in the UK to ensure their terms are compliant with this aspect of the law.'

COPYRIGHT AND DATABASE RIGHTS

- ***IPO launches consultation on copyright reform...***

The Intellectual Property Office ('IPO') has launched a consultation on reforming the copyright regime. The paper does not make any recommendations but instead highlights and raises questions relating to four fundamental areas to stimulate debate and input from key players in the creative industries and the public. The areas in question are: access to works; incentivising investment and creativity; recognising creative input; and authenticating works. Alongside the consultation, the IPO is arranging a series of meetings and events with interested parties to debate the key issues and possible solutions. The IPO has stated that its objective in encouraging debate and setting a copyright objective for the future is to ensure that the UK's copyright system properly supports creativity, promotes investment and jobs while also inspiring the confidence of businesses and of users.

- ***That's all folks - Popeye creator's estate loses strength for copyright enforcement battles as copyright protection expires...***

Just like the spinach whose effects wear off in the famous cartoons, Popeye's creator and his estate have now lost copyright protection in the UK. Copyright protection in the UK lasts for the life of the creator plus 70 years (unlike in the US, where copyright lasts for 95 years from the year of creation). Elzie Segar - the Illinois artist who created Popeye, Olive Oyl and Bluto - died in 1938, meaning that his estate's rights to copyright expired in the UK on 31 December 2008. From 1 January, anyone

can now use drawings of Popeye without having to pay for a copyright licence, although people should still take care with how they use the Popeye images because the Hearst Corporation group owns trade mark rights in Popeye and protects them vigorously.

CYBERCRIME/SECURITY

- ***Koobface worms its way into Facebook...***

Users of the social networking site Facebook have been targeted by the Koobface worm – a virus which obtains sensitive information such as credit card details by remembering details as they are inputted or extracting them from cookies stored on infected computers. The virus has spread by sending messages such as 'you look funny in this new video' to users' inboxes which appear to come from a friend. Once the user clicks on the link to the video, they are invited to watch a 'secret video by Tom' and then asked to download the latest version of Adobe Flash Player. Once downloaded, the virus worms its way into the computer and attacks. However, Guy Bunker from Symantec, the makers of Norton AntiVirus, says that the virus is easy to get rid of. He advises those who think they may be infected to download some anti-virus software from the web or search the Windows directory for the files 'tmark2.dat' and 'mstre6.exe'. If either of the files are located, they should be deleted.

- ***Cybercriminals cash in on the recession...***

The number of cyber attacks have tripled in volume as cybercriminals exploit the impact of the recession. Cybercrime appears to be slipping down the government's agenda as the credit crunch bites. Even the promise of £7million to fund a specialist e-crime police unit looks pitiful against the US budgeted \$155million for the same purpose. The annual Virtual Criminology Report produced by McAfee found that cybercriminals were using the existing attacks plus new ones to steal information they can sell during the credit crunch. Some have been cashing in on consumer anxiety with old fashioned get-rich-quick scams and others have been setting up fake job sites to harvest CV data from desperate job seekers.

DATA PROTECTION/PRIVACY/CONFIDENTIALITY

- ***Government to consult on a more proportionate, fair and common sense approach to Big Brother laws...***

The Government is to consult on its use of the Regulation of Investigatory Powers Act ('RIPA') and the retention of DNA profiles on the national DNA database. The decision to reassess the Big Brother laws comes after the European Court of Human Rights found that the UK's existing DNA data retention policy breached human rights. It also follows the controversial use of RIPA – which had supposedly been intended to tackle terrorism and serious organised crime - by local authorities to target minor offenders such as people dropping litter, putting their bins out on the wrong day or committing dog fouling offences. The Home Secretary, Jacqui Smith, reported that the consultation on RIPA will seek views as to how the powers contained in RIPA can be brought in line with tests of safeguards, openness, proportionality and common sense. In addition, the Government will consult on retention of DNA samples to increase public confidence in the DNA database. Jacqui Smith said that the changes that the government will set out in the white paper 'will deliver a more proportionate, fair and common sense approach.'

- **Police arrest pair in connection with leaked BNP members list...**
Police have arrested two people in connection with alleged offences under the Data Protection Act following a joint investigation by the police and the Information Commissioner's Office into the leaking of the BNP party membership list. The membership list, which appeared on the Internet, exposed the identities of some 13,000 or so members of the far right party, revealing their names, contact details, and in some cases ages and occupations. Some of those members have since been sacked or suspended from their jobs. The BNP has claimed that the leak was carried out by an ex-employee.

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

- **ICO encourages parents to capture the magic of Christmas...**
The Information Commissioner's Office ('ICO') – the regulator in charge of enforcing data protection law - issued a press release in the run up to Christmas encouraging a common sense approach to photographs taken at school concerts and plays. It wanted to remind parents and schools that the Data Protection Act does not prevent parents from capturing those magic moments. The Deputy Commissioner at the ICO, David Smith, said: 'All too often we hear of cases where parents have been prevented by schools from taking pictures of their children and friends because of data protection. We recognise that parents want to capture significant moments on camera and would advise a common sense approach.'

The ICO is keen to prevent data protection duck-outs by schools and other organisations. It has produced guidance to assist parents and local authorities in understanding how the Act applies to the taking of photographs in schools and explains that the Act is unlikely to apply in most situations. To view a full copy of the guidance, please click here: http://www.ico.gov.uk/upload/documents/library/data_protection/practical_application/taking_photos_v3.0_final.pdf.

DEFAMATION

- **Elton John loses libel claim after High Court backs newspapers' 'right to poke the occasional bit of fun' – Sir Elton John v Guardian, High Court...**

Elton John has lost his libel claim against *The Guardian* after the High Court backed the right of newspapers to use humour and irony to lampoon or criticise public figures. The composer/singer brought the libel claim in respect of a spoof diary published in *The Guardian's Weekend* magazine which was supposedly written by Elton John but was bylined 'as seen by Marina Hyde', a journalist for the newspaper. The diary entries described the organising of the famous White Tie and Tiara Ball thrown by Elton John every year in aid of the Elton John Aids Foundation. In particular, it highlighted the small fortunes spent by the sponsors staging the lavish event and the fact that only a small proportion of the money raised by the Ball went to the foundation once the costs of the evening have been covered.

Elton John claimed that the article suggested that he had misled party attendees and others about where the raised money goes. However, *The Guardian* argued that the words used did not mean that Elton John had spent money on the party that he

claimed was going to charity, rather they meant that all the money involved in staging the event should go to charity, which was fair comment on a matter of public interest.

The High Court found that it was relevant to how the words would be read that the article appeared in the *Weekend* section of the paper. It ruled that if the serious allegation that Elton John had used funds raised to pay party costs and not cure Aids was correct 'a reasonable reader would expect so serious an allegation to be made without humour, and explicitly, in a part of the newspaper devoted to news'. The decision was welcomed by *The Guardian* who sees it as 'an important recognition of the right to poke the occasional bit of fun.'

- ***Celebrities seek restraining orders against search engines in Argentina for pornography links...***

A number of celebrities have sought restraining orders against Google and Yahoo in Argentina after the search engines had listed results for the stars which included links to pornographic websites. The question raised by these cases is whether in Argentina the search engines should be held responsible for defamatory web content. In the UK, the position is much clearer. There is no positive obligation on search engines to police web content transmitted. Service providers that merely transmit the provision of access to a communication network, such as with provision of search results, will not be held liable for such content provided they comply with The Electronic Commerce (EC Directive) Regulations 2002.

As Paul Gershlick, editor of Upload-IT, recently said in the Financial Times: 'European law has exemptions from liability for intermediaries like Yahoo and Google so it couldn't happen in the UK. But in Argentina they don't have such laws to fill that gap.'

DISABILITY DISCRIMINATION

- ***International standards for web accessibility revamped...***

W3C – also known as the World Wide Web Consortium - has published version two of the Web Content Accessibility Guidelines ('WCAG 2.0') - revamping the international standards for web accessibility the first time since 1999. The guidelines seek to explain to website operators how to remove the barriers faced by those with visual, auditory, physical, cognitive and neurological disabilities and older web users when they access websites. They are a key resource for web designers and developers.

Aside from excluding potentially ten million UK customers, failure by a website to include all customers with impairments could leave them in breach of the Disability Discrimination Act 1995. The Act requires websites not to unreasonably discriminate against the disabled and, although there is no definitive test under the Act as to what websites actually need to do, complying with the standards set by the W3C coupled with user testing is widely believed to be the absolute minimum standard required. Complying with the revised guidelines could therefore help website operators avoid legal challenges.

GAMBLING

- ***Calvert's gamble doesn't pay off - the compulsive gambler loses his appeal for compensation - Calvert v William Hill, Court of Appeal...***

Calvert, a compulsive gambler who lost £2m on gambling in just six months, has lost again, this time in the Court of Appeal. Calvert appealed against a decision of the High Court which dismissed his claim in negligence for damages against the bookmaker, William Hill. William Hill had allowed Calvert to carry on betting over the telephone after he had asked it to close his account and despite William Hill informing Calvert that he had been placed on its internal self-exclusion scheme. Calvert alleged that William Hill had failed in a duty of care to stop him from wasting money on his addiction.

The Court of Appeal found that although William Hill had assumed a limited responsibility not to allow Calvert to place telephone bets with it, the scope of William Hill's duty did not extend to preventing Calvert from gambling in other ways, which he had done. The quantification of Calvert's losses flowing from William Hill's breach of a limited duty could not ignore the fact that Calvert would probably have continued to gamble elsewhere and sustain the losses regardless of the breach. Calvert's appeal was dismissed.

IT AND INTERNET USE

- ***Microsoft Office to appear online in 2009...***

Microsoft is preparing to launch web versions of its Microsoft Office suite, together with Exchange and Sharepoint, online in 2009. This will allow users access to the programs via their web browser as opposed to users being required to install them on a PC. It is expected that some versions of the programs will be free to users who agree to view adverts alongside the software. Unlike others such as Google and Adobe, Microsoft had previously been reluctant to push web-based versions of its applications. The move reflects Microsoft's bid to be seen as a player in the progress towards 'cloud computing' where applications live only online.

- ***Court permits judgment to be served via Facebook...***

A judge in Australia's supreme court permitted lawyers to serve a default judgment via Facebook after being satisfied that the profiles located belonged to the defendants. The claimant's lawyers had made numerous attempts to locate the Australian couple who had defaulted on their \$150,000 mortgage but had failed to find them. However, using information from the couple's mortgage application, lawyers from the Canberra-based firm Meyer Vandenburg were able to track them down. In a statement, the firm said: 'The Facebook profiles showed the defendants dates of birth, email addresses and friend lists and the co-defendants were friends with one another. This information was enough to satisfy the court that Facebook was a sufficient method of communicating with the defendants.' It is thought to be the first time a court has allowed a judgment to be served via Facebook. Courts have previously permitted judgments to be served via email and text.

- ***30% of companies delay infrastructure upgrades and software refreshes as the recession gets its claws into IT budgets...***

30% of UK companies are delaying upgrades to their IT infrastructure as the recession hits IT budgets. The latest survey of IT infrastructure plans, conducted by the National Computing Centre ('NCC'), also shows that 23% of the large and multinational businesses surveyed are postponing hardware upgrades and an equal

number are holding off refreshing their software. The survey shows that software as a service ('SaaS'), which involves the delivery of applications from a hosted environment, is growing in popularity with 30% of businesses seeing it as important or very important technology. 'Cloud computing', being the provision of infrastructure services over the Internet, is comparatively new and was less acknowledged in the poll with 39% of businesses yet to make up their mind about it. Steve Fox, the managing director of the NCC's Evaluation Centre, said: '[The survey] confirms a trend that IT budgets are coming under severe pressure. Any projects that are non-essential or affect only the back office are coming under increased scrutiny...This will force companies to look more seriously at alternative delivery infrastructure such as SaaS and cloud computing.'

- ***Most ISPs agree to code of practice regulating clarity over broadband speeds...***

Internet service providers covering 95% of broadband users in the UK have signed up to a voluntary code of practice designed to bring clarity to their users over what broadband speeds they can expect. This follows much criticism over advertised speeds not matching what customers actually receive. The code requires the ISPs to:

- ◆ Give new customers accurate estimates of maximum speeds their line can have.
- ◆ Explain to customers how technical issues could slow down Internet access and how to overcome those issues.
- ◆ Downgrade the customer's deal to a lower price if the speeds are a lot lower than the original estimate.
- ◆ Give timely warnings to customers who breach any data download caps placed on them.

Ofcom – the communications regulator – will monitor ISPs' compliance with the code of practice. More information, including a list of the ISPs who have signed up to the code of practice, can be found by clicking here: <http://www.ofcom.org.uk/broadbandcode/>.

JURISDICTION

- ***New EU non-contract jurisdiction rules come into force...***

The Law Applicable to Non-Contractual Obligations (Rome II) Regulation comes into force on 11 January 2009. It creates uniform choice of law rules in cross-border non-contractual civil and commercial situations. Certain non-contractual matters are excluded from its application, such as revenue, customs and administrative, bills of exchange and cheques, company law, trusts, privacy and defamation. Member states must apply the new EU Regulation to determine which laws for non-contractual obligations apply, even where this results in the laws of a non-member state (such as New York law) applying.

The starting point is that the relevant law is the law of the country in which the damage occurs. This changes the prior position under English law, which said the relevant law was where the events leading to the damage occurred. The general rule may not apply or may be limited in its application where:

- ◆ Both the parties causing and suffering the damage have their habitual residence in the same country.

- ◆ The issue is manifestly more closely connected with another country.
- ◆ There are mandatory rules as to the forum or there are inconsistencies with public policy.
- ◆ The non-contractual obligation arises out of dealings before conclusion of a contract, in which event the contract conclusion rules apply.
- ◆ The parties have agreed on a particular law to apply.

Paul Gershlick, editor of Upload-IT, comments: 'It is common in contracts for there to be both contractual and non-contractual liabilities, for example negligence or breach of duties of skill and care. In that situation, the parties should clearly show that they have chosen a particular country's laws for their non-contractual obligations as well as for any contractual obligations. In most cases, this will involve a change to the standard clauses on which a business contracts to include the relevant agreement to non-contractual obligations there.'

MISLEADING SELLING

- ***Court opens way for recent misleading selling laws to be used between competitors rather than just by regulators – Tiscali v BT, High Court...***

Tiscali has been suing BT in the High Court for claims made by BT in letters to Tiscali's customers questioning whether its rival Internet service provider's broadband service would be able to continue. Tiscali initially claimed that BT's letter was defamatory, but those claims were thrown out. Tiscali has now been given permission by the High Court to claim that it could have a right of action for BT committing the tort of unlawful interference with trade based on its letters not complying with the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008.

The High Court's decision at this stage is not whether or not BT did actually breach those Regulations, but Tiscali has simply won the right at all to argue in the trial that BT had breached them. The Regulations themselves had not given businesses a direct cause of action for damage caused by statements made by third parties in breach of those Regulations. Instead, they simply gave regulators a right to take action against people who infringe. However, this High Court ruling suggests that the Regulations can in fact be used as a basis for a claim in damages by someone against competitors that cause it harm due to a misleading statement.

For more on the 2008 Regulations, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2613>.

- ***Collective redress for consumers explored by European Commission...***

The European Commission has launched a consultation to explore the options to improve access to collective consumer redress. Concerns have been raised by the EU that consumers do not have sufficient remedies against rogue traders because procedures are too complex, lengthy and expensive. The Green Paper does not propose introducing US-style class actions nor does it address competition law issues. Instead it considers four options: take no immediate action and continue to monitor the situation; set up a co-operation scheme between member states; put in place a policy mix of tools which can be binding or non-binding; or propose a non-binding or binding EU measure to ensure that a judicial collective redress procedure

exists in all member states. The Commission believes that measures to deal with activities such as unfair advertising or unfair terms will benefit both consumers and businesses. For a copy of the Green Paper, click here: http://ec.europa.eu/consumers/redress_cons/greenpaper_en.pdf. The consultation closes on 1 March 2009.

- ***Ofcom fines BBC after it 'knowingly misled' audiences...***

Ofcom, the media watchdog, has fined the BBC a total of £95,000 for broadcasting 13 pre-recorded programmes 'as live' which included competitions. As the competitions were pre-recorded there was no way that the listeners could take part in them. Instead, the stations invited listeners who had previously contacted the show to be the competition entrants and winners. Eight of the competitions ran on Dermot O'Leary's Radio 2 show in 2006 and five on Tony Blackburn programmes on BBC London 94.9 in 2005 and 2006. Ofcom stated that it 'was very concerned by the repeated, pre-meditated and deliberate decisions to include competitions in pre-recorded programmes that were broadcast as live'. It also added that because the decisions had been made for logistical reasons, rather than because of a problem, the production teams had 'knowingly misled' BBC audiences. Radio 2 was fined £70,000 and BBC London 94.9 was fined £25,000. Both radio stations have also been told that they must broadcast Ofcom's findings on-air.

Ofcom also ruled that Blue Peter's rigged online poll which saw a cat awarded the name 'Socks' - despite the winning entry being 'Cookie' - was another 'serious' deception, 'especially given that the programme is primarily aimed at children'. Blue Peter, however, escaped a financial penalty. Other BBC shows which have come under criticism are the BBC Asian Network's Film Café programme and the Tom Robinson Shaw for breaching Ofcom's broadcasting codes.

- ***European Commission cracks down on airlines failing to comply with new rules on pricing transparency...***

The European Commission is cracking down on airlines which are failing to comply with new European laws that demand pricing transparency. It has written to airline representatives requesting that members of the airline associations amend all websites to ensure they fully comply with the 26 consumer rights in respect of the sale of air tickets. The Consumer Commissioner, Meglena Kuneva, said: 'Full compliance with EU law is an obligation, not an option...there are still too many consumer complaints about hidden charges and fees, and too many cases where pricing is not clear.' In particular, some airlines are still providing optional price supplements pre-ticked thereby requiring customers to 'opt-out' rather than 'opt-in' as required by the new Air Services Regulation which came into force on 1 November 2008.

TRADE MARKS AND PASSING OFF

- ***M&S and Flowers Direct face legal action from Interflora over Google keywords...***

Interflora is suing Marks & Spencer and Flowers Direct in the High Court for sponsoring the word 'Interflora' and its common misspellings as a search engine keyword in Google's AdWords programme. AdWords is an auction operated by Google whereby advertisers bid for placing of links to their websites in connection with keywords so that when a user searches for a term they may also click on sponsored links next to the unsponsored search results. A search on Google for 'Interflora' and its misspellings reveals (at the time of writing) adverts for M&S and Flowers Direct as 'sponsored links' alongside Interflora itself. Interflora claims that M&S and Flowers

Direct have taken unfair advantage of Interflora's brand in breach of trade mark law by:

- making use of a sign which is identical to its trade mark, in the course of trade, in relation to goods or services identical to those for which the trade mark is registered; and
- making use of a sign which is identical or similar to its trade mark, and where the use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the reputes of the trade mark.

Google previously assisted brand owners in preventing their trade marks being used as keywords but controversially changed this policy in May 2008. Google's change in policy came after the High Court had dismissed a claim against Yahoo! by the owner of the 'Mr Spicy' mark in March 2008. Yahoo! won due to the particular set of facts in that case, but the High Court also commented that the search engine would not have been deemed to have 'used' the term in a trade mark infringement sense anyway even if the facts had been different.

Google's AdWords scheme is also currently being challenged for trade mark infringement in the European Court of Justice. The EU case came about after Louis Vuitton, the luxury fashion retailer, sued Google in the French courts following the auction of terms such as 'Louis Vuitton fakes'.

Those more current cases involve a search engine's use rather than another advertiser's use of the trade mark. Following comments made by the Court of Appeal in Reed v Reed in 2004, it should be expected that where one advertiser uses another business's trade marked term for generating Internet results but does not include it in the text of the advert, that would not be a problem, especially if the advert generated comes below the search result for the trade marked products or services.

There is still a great deal of uncertainty in this whole area as to what is permitted or not permitted when using or allowing use of another's trade mark for sponsored ads. The decision in this latest case will be an important part in the jigsaw in establishing how UK trade mark laws apply to keyword advertising.

- ***Coke Cola loses its fizz as new Company Names Tribunal orders it to change its name...***

Coke Cola Limited has been ordered to change its name and pay £700 to Coca-Cola by the newly-formed Company Names Tribunal. Coca-Cola had objected to the company name Coke Cola on the basis that it was misleading and opportunistic, taking advantage of Coca-Cola's famous trade mark. The ruling, by Company Names Adjudicator Judi Pike, was the first issued under new provisions introduced by the Companies Act 2006 which came into force on 1 October 2008. The new procedure allows brand owners to challenge company names if they can show that the company name is either:

- the same as a name associated with the brand owner in which it has goodwill; or
- sufficiently similar to such a name that its use within the UK would be likely to mislead by suggesting a connection between the company and the brand.

For more on the new provisions, please click here: <http://www.upload-it.com/editArticle.aspx?ID=2875>.

- ***Cipriani London's rights to use its name off the menu as its own name and bad faith trade mark arguments fail - Hotel Cipriani v Cipriani (Grosvenor Street) London Ltd, High Court...***

HC – which owned hotels under the name 'Cipriani' in Italy, Portugal and Madeira - has won in its trade mark infringement action against the owners of a restaurant that called itself 'Cipriani London'. The High Court said that the defendant's operation of a restaurant in London since 2004 infringed HC's EU and UK trade marks, which had been registered since 1996. The London restaurant was ordered to change its name.

The High Court threw out the defendant's argument that it was simply using its 'own name'. Although there was an 'own name' defence that could apply to companies as well as to individuals, the defendant did not use its full company name (apart from the 'Ltd' bit) as it was required to do to take advantage of this defence but it instead used a much shorter version of its name. In any event, its use had not been 'in accordance with honest practices in industrial and commercial matters' as it should have known of the existing registered trade mark when starting up.

The Court was similarly disparaging about the defendant's claims that HC's registration of the name when knowing of other users of the name had been in 'bad faith' and should therefore be revoked. The Court said that HC had a legitimate interest in protecting its rights. Bad faith did not apply to situations where one person registered a mark in situations where there may be another person with rights to the same mark. Trade mark registrations worked on a first-to-file principle. Bad faith generally involved some breach of a legal or moral obligation on the applicant's part towards a third party.

- ***High Court infers that confusion is likely where the names and products are similar despite no evidence of actual confusion in trade mark infringement and passing off claim - Kitfix Swallow Group v Great Gizmos, High Court...***

The High Court, in allowing a trade mark infringement and passing off claim, has inferred that there was a likelihood of confusion despite there being no hard evidence of confusion between the products and the High Court finding that confusion might not occur very often. The judge's ruling was based on the background and similarities between the products, the nature of the market and the fact that both products were called 'Sequin Art'.

Kitfix Swallow Group ('Kitfix') owned a European Community trade mark for the word mark SEQUIN ART ('Mark') for 'artistic materials, namely craft and hobby kits for making picture'. Kitfix brought a claim for infringement of the Community trade mark and passing off in the UK against Great Gizmos which sold craft kits in the UK also under the name 'Sequin Art'. Great Gizmos argued that it had a defence and counterclaimed for a declaration that the mark was invalid on the basis that it was devoid of distinctive character and descriptive.

The judge found that although the mark used by Great Gizmos was in different script, it was otherwise identical to the mark. Also, the mark was a word mark protecting any graphical representation of those words and, subject a defence, its use by Great Gizmos constituted trade mark infringement. The judge went on to consider the likelihood of confusion given the claims in passing off brought by Kitfix and the defence and the counterclaim raised by Great Gizmos.

The judge found that Kitfix had used the mark for some years building up significant sales in the corner of the craft market but doubted that purchasers would be aware that the two 'Sequin Art' products came from different manufacturers. In addition, both products were sold by the name of the product with the manufacturers logos appearing in only small print. Given these facts, the judge concluded that despite there being no evidence of actual confusion it was certainly likely that confusion would occur. In considering the defence and counterclaim the judge found that while the term 'Sequin Art' did indicate the nature of the product it was not descriptive and its use over the years had made it distinctive.