

UPLOAD-IT - 1 JULY 2008

COMPETITION LAW

- ***OFT shows executives who's boss when it comes to price fixing with prison sentences and tougher use of director disqualifications...***

Last month, the first ever criminal prosecutions in Britain under the Enterprise Act 2002 for price fixing resulted in three men receiving jail sentences totalling 8½ years and disqualification as directors. Two of them face further court proceedings to seize their assets obtained illegally through the conspiracy. The men had been involved in a price fixing cartel of marine hoses in the oil industry. The three men had originally been arrested and charged in the US last year but under a plea bargain with the US anti-trust authorities they were allowed back to the UK to face the charges here.

The Office of Fair Trading has warned that this is only the beginning and it will be bringing more criminal prosecutions for 'hard core' manipulation and promised tougher use of director disqualifications for less severe cases. The head of cartels at the Office of Fair Trading, Simon Williams, spoke out about 'pockets of resistance in the business community to the mindset that cartel activity is just inherently wrong' but said that the combination of jail time, disqualification and asset confiscation used in the case should show executives it was 'not just the company that pays the price' for cartel activity.

- ***European Commission demands disclosure of proprietary technologies and maximum licence fees in standards-setting process...***

Software suppliers which are involved in developing technical standards should be required to disclose if they own any relevant intellectual property up-front in the process and fix maximum royalty rates for use of their intellectual property, so says the EU's Competition Commissioner, Neelie Kroes. 'Standards' are agreed specifications to achieve interoperability between the technology of different manufacturers. Ms Kroes hopes that this will lead to more choice for customers while limiting the risk of technology suppliers behaving anti-competitively.

In addition to the setting of official technical standards, Kroes highlighted the competition problems that can arise where one company is dominant in the market, resulting in a *de facto* standard, such as Microsoft in the operating system market.

The Commissioner has warned that action will be taken against anti-competitive behaviour adopted by businesses seeking to abuse their dominant position when setting technology standards or abusing their dominance in their technology market.

- ***EU to take action against discriminatory pricing between users based in different EU countries...***

Meglana Kuneva, the EU Commissioner for consumer affairs, has vowed to take action against retailers who vary their prices to consumers in the EU depending on which country they are from. This war on discriminatory pricing follows complaints from Members of the European Parliament concerning Amazon, Nintendo and Eurostar, which sell products in different EU countries at different prices and restrict consumers to purchase goods only on their own national website. Ms Kuneva said, 'We are not obliged to shop in the supermarket and stores of our postal code. Yet we cannot buy computers, train tickets or PlayStations freely across the EU'.

Gemma Adie, assistant editor of Upload-IT, comments: 'A single market for online consumers would create an equal playing field for EU consumers creating access to fairer and more competitive pricing.'

CONTRACTS

- ***No compensation payable to commercial agents who commit a repudiatory breach of agency agreement - Nigel Fryer v Ian Firth Hardware, High Court...***

Nigel Fryer worked for IFH as a self-employed sales agent. Mr Fryer's role was to promote interest in IFH's products and identify the products which a customer may be interested in purchasing. IFH had provided Mr Fryer with price lists and Mr Fryer would indicate to customers what the price was likely to be for the customers requirements. However Mr Fryer had no authority to conclude a sale without reference to IFH's head office.

The agreement between IFH and Mr Fryer required Mr Fryer to provide weekly written reports of his activities and prohibited him from working for other companies. When Mr Fryer breached those terms, IFH terminated the agreement by giving one month's notice in accordance with the agreement terms. Mr Fryer claimed that he was a commercial agent for the purposes of the Commercial Agents (Council Directive) Regulations 1993. Those Regulations give protection for self employed intermediaries who have continuing authority to negotiate the sale or purchase of goods on behalf of another person (the principal). Accordingly, Mr Fryer claimed that he was entitled to three months' notice of termination and compensation for his loss of agency in accordance with his rights under the Regulations.

The High Court ruled that, despite IFH's assertion that Mr Fryer was a commercial agent (on the basis that he did not have authority to negotiate the contracts), Mr Fryer was still a commercial agent. That was in line with other cases that have given a wide interpretation to the scope of the Regulations. The High Court said the definition of a commercial agent included an agent whose role was to attract interest in the product, suggest possible prices subject to confirmation and to encourage the customer to place an order at those prices. However, the court went on to rule that Mr Fryer's breaches of the agreement amounted to 'repudiatory' (or fundamental) breaches which entitled IFH to terminate the agreement by one month's notice. Therefore, no compensation was payable here.

- ***Expert's decision binding unless fraud or actual bias - Owen Pell v Bindi, High Court...***

Parties to a contract often choose to settle technical or accounting issues by reference to an expert rather than a court. An expert's jurisdiction and the extent of matters to be considered depend on the contractual provisions. The process is intended to be a speedier way of resolving a dispute with a final and binding conclusion. In this case, the High Court has once again confirmed that the principle of natural justice does not apply in determining whether an expert's decision is binding. If the expert has answered the question put before him, the expert's decision is final and binding on the parties unless there is evidence of fraud or actual bias. 'Apparent bias' is not sufficient to challenge the expert's decision.

In the case itself, Owen Pell had agreed to build an extension for Bindi. Owen Pell left before the work was completed and a dispute had arisen between the parties over whether or not Owen Pell should be paid. In accordance with the written agreement between the parties, an independent expert was appointed. The expert

found that Owen Pell was entitled to be paid £53,487.62 and Bindi should pay 80% of Owen Pell's costs. Bindi refused to accept the expert's decision and withheld payment. Owen Pell applied to Court for the decision to be enforced.

Bindi argued that the expert had failed consider the matter properly and that the expert's decision should be declared unenforceable. Alternatively, Bindi claimed that the expert appeared to be biased or the decision was a result of gross error, because (Bindi argued):

- ◆ The expert appeared to dismiss Bindi's complaints about Owen Pell.
- ◆ He made a wrong conclusion without giving Bindi the opportunity to comment.
- ◆ He reached other 'perverse' conclusions.

Bindi's arguments were rejected by the High Court. The expert's decision was final except if there was actual bias or fraud, even if the decision was made in error.

- ***Parties end up in High Court over yoghurt pot mess after relationship went sour and unclear contract documents were never clearly agreed -***

RTS Flexible Systems v Molkerei Alois Muller, High Court...

In this case, the parties had agreed in principle for the supply of an automated packaging system for yoghurt pots – it was just unclear on what terms that had been agreed!

RTS issued a detailed quotation, including price, to Molkerei for the packaging system and attached its standard terms and conditions. Molkerei responded with a letter of intent agreeing the price quoted, but stating that an agreement would be based on a negotiated form of the terms of the Institute of Electrical Engineers to be finalised within four weeks and if the letter of intent was terminated in the meantime, Molkerei would only be required to reimburse RTS for reasonable out-of-pocket expenses. RTS replied by saying it had already started work but Molkerei would also need to reimburse RTS for placing the orders if Molkerei terminated. RTS then delivered the system, but acceptance testing was not concluded. Molkerei paid in part.

The parties had actually agreed a final form agreement based on the Institute of Electrical Engineers' terms, including project and acceptance plans, but the document was never executed. Final versions of the project and testing plan had been agreed and they were annexed to the draft contract.

The High Court was given the unenviable task of unravelling all of this mess and deciding what was in the contract and on what terms. It decided that RTS's initial quotation was an offer followed by a counter-offer of Molkerei's letter of intent. RTS's qualifications were a further counter-offer which had been accepted by Molkerei. That sorted things out – at least until the expiry of the four week period.

After that four week period expired, the position was more complicated. Molkerei's right to terminate and pay expenses and cancellation costs was no longer reasonable – it had been reasonable for the four week period, but the parties had not envisaged that applying for the entire project. However, since the parties had carried on working after the four week period had ended, there must have been a contract of sorts. The High Court decided that while a final form agreement and project and testing plans were agreed, the Institute of Electrical Engineers terms would only be incorporated once a final agreement was negotiated and executed as that had been the original intention of the parties. The terms of the agreement were therefore that RTS would provide the goods and services specified in the final form of project and

testing plan that had been agreed. Molkerei was bound to pay the balance of the contract price subject to site acceptance tests being concluded.

Paul Gershlick, editor of Upload-IT, comments: 'What a mess! And all because the parties kept sending to each other various documents that did not set out clearly what were the agreed terms. When the yoghurt project went sour, the parties involved ended up spending time and money going to court to try to sort out the mess. All this could have been avoided if they had had properly drafted contracts in the first place.'

COPYRIGHT AND DATABASE RIGHTS

- ***'Screen scraping' sparks threats of legal action by easyJet against websites...***

easyJet – the low-cost airline – has reportedly written to several websites advising them to cease 'screen scraping' information from easyJet's website or face legal action. Screen scraping is a technique whereby a website extracts data from other sites before using that data for its own use. easyJet has confirmed that it has contacted a number of websites to warn them to stop screen scraping flight data from its website in breach of easyJet's terms and conditions. easyJet's legal action is likely to be based on an infringement of its copyright or database rights.

- ***High Court was right to refuse to imply copyright assignment into software contract –***

 - ***Meridian International Services v Richardson, Court of Appeal...***

GSK commissioned Meridian to develop software for it. Mr Richardson and Mr Aldersley worked for Meridian. Before the software could be written, however, Meridian got into financial difficulties and was not able to pay its employees. Mr Richardson and Mr Aldersley refused to carry out any further work for Meridian. The parties had a meeting and it was agreed that Mr Richardson and Mr Aldersley would develop the software for GSK and get paid for it via Mr Richardson's company (IPE). Meridian would get a finder's fee. This was set out in an email but there was no mention of who would own intellectual property rights. Meridian signed a software development contract with GSK which purported to state that Meridian owned the IP rights in the software.

Meridian claimed that a term had to be implied into its agreement with Mr Richardson and Mr Aldersley that the software would be assigned to it. This was necessary in view of the provisions of the contract it had signed with GSK; it also needed to prevent GSK from using the software outside the healthcare sector and it needed to ensure that no one else except for Meridian could re-sell the software. Meridian also claimed that the software incorporated its confidential information.

The High Court found that Meridian did not own the intellectual property rights in the software. These were owned by Mr Richardson and Mr Aldersley. The contract between the parties did not have a term that the rights would be assigned to Meridian and the draft contract that Meridian signed with GSK was an insufficient basis for the implication of a term into the agreement. Meridian's argument that it could prevent GSK from using the software outside the healthcare sector presupposed that it owned the copyright. There was no reason to stop IPE from re-selling the software. Just because Meridian's confidential information was incorporated into the software did not mean that it would also own the copyright in the software. Previous case law involving the right for commissioners of copyright materials to use materials commissioned for them established that a court would only imply a term into the

contract if it would make the arrangement between the parties commercially workable and no more.

The Court of Appeal has now re-affirmed the High Court's decision. The High Court had been entitled to conclude that Meridian's contract with GSK did not justify implying a term into Meridian's contract with IPE. The ownership desired by Meridian was not so obvious that it needed to be implied.

Paul Gershlick, editor of Upload-IT, comments: 'As the software writers in this case had not properly documented their agreement, they ended up going to court to have a seven-day trial and then they had to fight an appeal - spending a small fortune, wasting their time and having a lot of aggravation in the process. This could have been easily avoided if they had made a clear written agreement about ownership of the software in the first place.'

CYBERCRIME/SECURITY

- ***Cotton Trader credit card data stolen by web hacker...***

A hacker has breached the security of Cotton Trader's website and stolen credit card details of thousands of its customers, it has emerged. Reports had suggested that 38,000 customers' credit card details were stolen, but this has been refuted as 'widely inaccurate' by the clothing company, although it would not confirm exactly how many customers were affected by the attack, which took place in January of this year. The specialist clothing outfit actually holds details of over two million customers on its database. The company said: 'We can confirm our customer credit card data is encrypted on our website but if any of our customers have been a victim of fraud, they should contact their card issuer.'

DATA PROTECTION/PRIVACY/CONFIDENTIALITY

- ***Government responds to data security blunders with four reports and introduction of new data handling procedures but the Information Commissioner is hot on its tail...***

After a string of high profile data losses by Government bodies, the Government has published a final report on the Government's data handling procedures in conjunction with three related independent reviews in a bid to prevent the types of blunders that have occurred recently. The Government commissioned Sir Gus O'Donnell to prepare the report following the revelation that HM Revenue and Customs ('HMRC') had lost details of 25 million child benefit recipients in November 2007.

In his report, Sir Gus O'Donnell acknowledged that work has been carried out across all Government departments to improve the handling of personal data. 90,000 employees at HMRC have been given additional security training and 20,000 laptops at the Ministry of Defence ('MOD') have been encrypted. However, Sir Gus O'Donnell has called for improvements to civil service data handling performance including:

- ◆ Core minimum standards for the protection of information, which should be consistent and transparent. This includes identifying which data needs better protection, and transferring data securely (including using encryption).
- ◆ Testing of the resilience of systems.

- ◆ A recognition of the value of data and importance of protecting data, along with mandatory annual training.
- ◆ Stronger accountability mechanisms.
- ◆ Improved scrutiny of performance including spot checks by the Information Commissioner – the UK regulator in charge of enforcing data protection law.

The Government suggests a new category of 'protected personal information' which should be kept within secure premises and systems by the Government where possible. That would cover any material that linked an identifiable individual with information that, if released, would put them at significant risk of harm or distress; alternatively, it could be any source of information not in the public domain relating to at least 1,000 people.

Meanwhile, another report commissioned by the Government specifically to look into the HMRC blunder has been scathing. Kieran Poynter called the data loss 'entirely avoidable' and said the incident demonstrated 'serious deficiencies' at HMRC. He has supported the Government's plans and made his own recommendations for systematic, organisational and management structures to improve data handling performance.

At the same time, the Independent Police Complaints Commission investigated the incident of its own initiative and found that failure to provide adequate support, training and guidance as to how to handle sensitive data was rife but that individual staff members were not to blame – despite the fact that one junior member of staff had been initially blamed at the time of the incident. The IPCC criticised the 'muddle through' ethos and the complete lack of any meaningful systems.

A fourth report scrutinised the MOD following the theft from a car in January 2008 of an unencrypted laptop containing personal details of 600,000 people who had expressed an interest in joining the Armed Forces. Sir Edmund Burton - who was invited to conduct a full investigation into the incident - made 51 recommendations and prepared an action plan to implement them, all of which have been accepted by the MOD.

But whilst the Government and MOD appear to be positive regarding plans to avoid future security blunders, the Information Commissioner has confirmed that he will be taking formal enforcement action against them under the Data Protection Act following the series of breaches that have occurred. The Information Commissioner says the reports show 'deplorable failures at both HMRC and MOD'. HMRC and the MOD will need to implement the recommendations set out in the reports to comply with the terms of the enforcement notices that the Information Commissioner is issuing.

- ***New public sector security breaches come to light as 20,000 patients' personal data is stolen from a London hospital...***

The personal information of approximately 20,000 patients - including brief medical notes, names, dates of birth and postcodes - has been put at risk following the theft of six laptops from St George's hospital in London. Although the theft was from a locked cabinet in a secure room, the hospital admitted that the data should not have been stored on a portable device. The data had been temporarily stored there (with password protection) because of computer network problems, but the hospital had failed to anticipate such a determined thief. The hospital has since written to the patients concerned to apologise for the blunder. A police investigation has been launched and the St George's Healthcare NHS Trust has commenced an internal inquiry into the theft.

Meanwhile, although not involving personal data, a further concerning major public sector security breach has come to light. Top secret reports relating to al-Qaeda and Iraq were left on a train seat by a senior employee of the Cabinet Office and handed to the BBC. Cabinet Minister Ed Miliband told MPs that this was a 'clear' breach of security rules prohibiting the removal of documents of this nature outside of secure Government premises. Gordon Brown described the incident as 'very serious'. Mr Miliband contended that he did not believe there had been any threat to national security based on the data within those documents.

DATA RETENTION

- ***Data minimisation encouraged by Parliamentary Committee...***

The House of Commons Home Affairs Committee has urged the Government to stop creating unnecessary large databases on its citizens and to adopt 'a principle of data minimisation'. It advocates the Government avoiding 'the tendency to collect more personal information and establish larger databases.' This follows growing distrust and concerns of the UK becoming a surveillance society and revelations of the Government's plans to create a giant database of records of everyone's telephone and email records.

Paul Gershlick, editor of Upload-IT, recently spoke live on BBC Radio about this issue. He commented: 'No one doubts the need to preserve data to try to stop really serious crimes such as terrorism. However, the Government's plans for one super-database begs the following questions: Given the current existing laws, why the need for one database? Given its recent track record with data handling, is the Government the best person to look after that data? How much is this going to cost the tax payer to look after so much data?'

Meanwhile, Mark Weston, head of Commercial/IP/IT at Matthew Arnold & Baldwin, also criticised the further move towards a 'big brother' State when he was interviewed live on Sky News about the issue, and he wrote recently on the Society for Computers and Law website: 'The Information Commissioner, Richard Thomas, has previously warned that we are 'sleepwalking into a surveillance society'. His office has again reiterated these concerns in light of these most recent proposals.'

DOMAIN NAMES

- ***Domain name expansion backed by ICANN but likely to be a headache for businesses seeking to protect their brands...***

The Internet Corporation for Assigned Names and Numbers ('ICANN') - the body responsible for managing technical matters relating to the Internet's domain name system - has given its support to a relaxation in the strict rules on creating new top-level domain names ('TLDs'). The launch of new TLDs must be authorised by ICANN and currently there are just 21 TLDs - of which '.com' is the most popular. Under the proposal, businesses could apply for new TLDs using their brand for their domain name while individuals could use their names. They could then use the names as they see fit including offering them for sale to third parties by acting as a registry.

Whilst some industry members champion the proposal for paving the way for many new addresses, others have expressed concerns over the cost of the new system to brand owners in protecting their trade marks. There are plans for an objection-based mechanism for trade mark owners. However, trade marks will not automatically be reserved, which is likely to result in businesses having to embark on even more

expensive defensive registrations (to stop others registering domain names similar to their brands) than currently as each new TLD is introduced. The new names are expected to be available for registration from 2009.

A second proposal approved by ICANN was to allow internationalisation of TLDs to enable domain name registrations in Chinese, Arabic, Hebrew and other scripts. This is expected to lift a barrier for users in China, the Far East and Middle East who often find that they need to switch their keyboard settings to Roman in order to type in part of the web address.

- ***Innovative birthday present turns into legal battle with Narnia author, CS Lewis's estate...***

A Richard Saville-Smith from Scotland purchased the 'narnia.mobi' domain name as a birthday gift for his son, thinking that he would appreciate an email address ending in '@narnia.mobi'. He claims that he did not then expect to receive a 128-page letter from the New York office of Baker & McKenzie acting for the estate of C.S. Lewis, the creator of the '*Chronicles of Narnia*'. The heavyweight international law firm alleged that Mr Saville-Smith had acted in 'bad faith' when purchasing a 'domain name identical or confusingly similar to a trademark or service mark in which the complainant had rights'. Baker & McKenzie warned that if he did not give up the name, its client would take proceedings to obtain the domain name through the Uniform Domain Name Dispute Resolution Policy. The Policy provides a quick arbitration procedure for disputes over top level domain names such as '.com'.

It appears to be a classic 'David Versus Goliath' battle. However, it is possible there is more to his story than meets the eye. Mr Saville-Smith has a history of buying up lots of domain names and it is being held on a site which generates advertising revenue. Despite that, Mr Saville-Smith claims the family has not 'made a bean out of it'. Mr Saville-Smith has vowed to defend the action and said he would not be bullied into giving up his son's innovative birthday present by threats from one of the world's largest law firms seeking to satisfy the wants of its wealthy client. The domain name is currently inactive pending future use.

E-COMMERCE REGULATIONS

- ***Revised EU e-commerce laws on horizon as only 7% of consumers purchase online from foreign suppliers...***

The European Commission is planning to revamp the online trading laws in the EU. This follows concerns that a mere 7% of the EU's 490 million consumers have made purchases online from foreign suppliers, compared to a third who have bought anything online. These were the results of EU surveys among 26,000 consumers and 7,200 businesses announced by the European Consumer Commissioner, Meglena Kuneva. Whilst the Commissioner reported that e-commerce is succeeding at a national level, cross border e-commerce is failing to keep pace.

The European Commission is to bring forward proposals for a single framework consumer contract law for Europe's Internal Market in its bid to remove regulatory barriers to cross-border trade and to make it easier for consumers and business to buy and sell across Europe. Flexibility given to Member States in implementing the E-Commerce Directive and the Distance Selling Directive has resulted in inconsistency in national laws – for example some countries require different periods of time for their cooling off periods - and additional national consumer laws applicable to sales vary widely. The Commissioner hopes that a single set of core rights and obligations will increase consumer confidence and cut compliance costs for businesses.

The Commissioner has advocated the development of 'price comparison sites that compare prices of retailers in different European countries' as a means of promoting online commerce between countries. Also on the agenda are new common guidelines on how to implement the Unfair Commercial Practices Directive and the development of principles to deliver a more consistent approach to dealing with tracking and profiling activities that may affect consumers' privacy and data protection rights online.

EMPLOYEES

- ***Use of social networking profile after leaving employment breached employer's rights in confidential information – Hays v Ions, High Court...***

The High Court has ordered a former employee of Hays Recruitment to disclose his business contacts made through LinkedIn, a social networking site designed to promote and extend business contacts.

Hays alleged Mr Ions had breached the terms of his employment contract by uploading its contacts onto his LinkedIn profile which were then used to develop his own rival recruitment agency. Mr Ions had claimed - although denied by Hays - that the contacts had been uploaded with Hays' consent and that, once uploaded and the invitation to join his network was accepted, the information ceased to be confidential because it was accessible to a wider audience through his network.

The High Court ruled that there had been a breach of Hays' confidential information. Even if it had consented to Mr Ions developing his profile on LinkedIn by using its database, this would surely have only been implied for the purposes of developing its own business and not for creating a rival one. The Court granted Hays' request to require Mr Ions to disclose his business contacts and all emails sent and received via his LinkedIn profile.

- ***New guidance on data to be provided on transfer of employees...***

The Information Commissioner's Office – the regulator in charge of enforcing data protection law in the UK – has provided new guidance to assist employers with complying with the Data Protection Act 1998 when their employees are transferred to another business. Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (also known as 'TUPE'), employers must provide details about their employees to anyone deemed to be taking over their employees when the business transfers - and that information must be provided before the employees are transferred. Although that requirement appears to conflict with the Data Protection Act, that Act does not prohibit the information being provided to the new employer on the basis that it is required by law. The Act does still apply to protect that data in all other respects, though – such as with the requirement for the data to be accurate and up-to-date.

Whilst the Act does not prevent disclosure of the information under TUPE, Phil Jones - Assistant Commissioner of the ICO - said that, under the guidance, businesses should limit the information disclosed and 'consider their data protection obligations early in the transfer process and only transfer the information required by the new employer. Additionally, if not prevented by insider trading restrictions, employees should be told that their information is going to be passed on.'

IT AND INTERNET USE

- ***Government IT projects running up to 21 years late and at a wasted cost of at least half a billion pounds...***

The Liberal Democrat shadow chancellor, Vince Cable, has claimed that IT projects at the Department for Work and Pensions are running a total of 21 years late and £315m over budget and that the Pensions Transformation Project - which aims to improve customer service and efficiency - is running £169m over budget. These are just two examples of the findings from figures collected by Mr Cable from Government departments annually for five years, which show that overruns on IT projects have resulted in at least £500m being wasted. Total losses are expected to be much higher as two of the biggest Government departments - the Home Office and the Department of Health - have either not answered questions at all or have refused to supply the information requested because it was 'commercially sensitive'. The NHS Programme for IT - which aims to put everyone's medical records on one centrally accessible database - is running late and the costs are currently £12.4 billion.

- ***Record breaking downloads for Mozilla as it releases Firefox 3.0...***

Mozilla, the developer of the web browser Firefox, released Firefox 3.0 on 17 June and in the process probably created a record for the greatest amount of software downloaded in one day. Firefox was downloaded 8.3 million times over the 24 hours beginning with its release, far exceeding the 1.6 million downloads registered on the day Firefox 2.0 was made available in October 2006 and the 5 million predicted by Mozilla prior to the release of Firefox 3.0. Data from the download servers are being scrutinised to ensure duplicate and unfinished downloads are not counted and to produce an official figure to pass to the Guinness World Records organisation.

The release of Firefox 3.0 was not, however, without its hitches. At the start of the record attempt, the download servers collapsed under the volume of visitors checking to see if the new version was available. Then, a mere five hours later, DV Labs/Tipping Point reported a flaw which potentially lets an attacker take over a PC if a user clicks on a booby-trapped link.

Firefox was first launched in 2004 and since then it has gradually eroded Microsoft's near total monopoly in the Internet browser market. Firefox's market share currently stands in excess of 15%, and rising.

- ***Internet meltdown in less than three years predicted unless the world moves to IPv6...***

The Internet is heading for meltdown in just two and a half years unless users and machines across the globe switch to Internet Protocol Version 6 ('IPv6'). Those are the claims of Geoff Huston, chief scientist at the Asia Pacific Network Information Centre. IPv6 is designed to replace Internet Protocol Version 4 ('IPv4'), the current Internet Protocol used by most of today's Internet. IPv4 is now nearly 20 years' old and Mr Huston has claimed that by 9 January 2011, the underlying machinery of the Internet that generates IP addresses will run out. IP addresses are unique addresses that allow people to use the Internet and be found on the Internet.

One problem is that IPv6 machines do not talk to the IPv4 machines. IPv6 is expected to gradually replace IPv4 but Mr Huston warned that unless businesses, end users and computing devices are upgraded to IPv6 there will not be any more IPv4 addresses to give out, which will prevent the growth of the Internet and prevent new users from connecting. Mr Huston called for significant acceleration of investment

into the essential infrastructure to effectively adopt IPv6 and allow IPv6 machines to talk to the rest of the world's Internet computers.

MISLEADING ADVERTISING

- ***Unclear Virgin Media mailing envelopes shot down by ASA ruling...***

The Advertising Standards Authority ('ASA') has ruled that a mailing for Virgin Media contained in a plain, white envelope with no markings, except for a small hole through the envelope that was designed to look like a bullet hole surrounded by burn marks, breached the requirements of the Committee of Advertising Practice Code ('CAP Code') on recognising marketing communications and identifying marketers. Enclosed in the envelope was a letter headed with Virgin Media's logo, which was addressed either to 'The Recipient' or 'The Occupier' and a leaflet advertising fibre optic broadband containing the gimmick 'Faster than a speeding' next to a bullet hole similar to that shown on the envelope.

The ASA rejected challenges made by recipients who had considered the use of an envelope which appeared to have sustained a gun shot inappropriate in the current climate of rising gun crime. The ASA concluded that the mailing was unlikely to cause serious or widespread offence or distress. However, despite the stylised bullet hole, the ASA concluded that the envelope should have stated clearly that it contained marketing material to avoid ambiguity about the status of the envelope.

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

- ***Domain name using the word 'gov' in advertisement renders advertisement misleading...***

Inter-Markets Ltd has been prohibited by the Advertising Standards Authority ('ASA') from repeating an advertisement for a service supplying copies of birth certificates headlined 'Birth Certificates UK' which made use of the domain name www.gov-certificates.co.uk. The use of the word 'gov' in the domain name was considered to imply that the advertiser was an official Government agency when it was not. The ASA concluded that the advertisement was misleading and breached the Committee of Advertising Practice Code ('CAP Code'), which requires advertisements to be truthful.

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

- ***Tailor gets hot around the collar but does not breach the CAP Code says ASA...***

The Advertising Standards Authority ('ASA') received a complaint in respect of an advertisement made in the local and national press for a tailor which stated 'LIMITED INTRODUCTORY OFFER To celebrate the opening of our showroom in Old Bond Street. 1 Bespoke Suit Uniquely made according to your personal measurements & specifications from our extensive range of finest Italian Super 120s quality fabric £495 (Regular Price £995)'.

The complainant claimed that bespoke suits were made entirely by hand from a new pattern, whereas the suit advertised was machine-cut abroad after initial measurements were taken and adjusted at the end of the process – and therefore the use of 'Bespoke Suit' within the advertisement was misleading.

The ASA considered the evidence produced by the tailor (Sartoriani) that a multitude of modern definitions of 'bespoke' referred to clothes or other things being made to order or custom made. It acknowledged that many tailors and high-end fashion designers described their made-to-measure suits as bespoke - as a result of which the traditional Savile Row tailors had registered the term 'Savile Row bespoke' as a trade mark and set out a strict code of practice for its use including that suits should be made completely by hand. However, the public simply understood the term to mean something other than 'off-the-peg'. The ASA found that the tailor had not breached the provisions of the Committee of Advertising Practice Code ('CAP Code') relating to substantiation and truthfulness as the majority of people would not expect that suit to be fully hand-made, but instead simply to be tailored to their measurements and specifications.

MISLEADING SELLING

- ***New guidance on comparative pricing practices published in wake of new Consumer Protection from Unfair Trading Regulations 2008...***

The Department for Business Enterprise and Regulatory Reform ('BERR') has published non-mandatory guidance for traders on good practices when providing information on prices. The 'Pricing Practices Guide' ('Guide') takes into account certain legal obligations including provisions of the Consumer Protection from Unfair Trading Regulations 2008 relating to prices and the general prohibition on the use of unfair commercial practices.

Price comparisons are required to be justifiable, accurate and valid and in particular:

- ◆ Any price advantage claimed must be real.
- ◆ Traders should compare like with like or very similar products in terms of quality, composition and description.
- ◆ The basis of the comparison should be made explicit, reasonable in terms of time and include the previous price as well as the new lower price.
- ◆ Where the basis of the comparison is not set out explicitly, the price used should be the most recent price available for 28 consecutive days or more, the new lower price should not be described as such for so long that the comparison becomes misleading, and comparisons should not be made with prices last offered more than six months previously.
- ◆ A previous price used for the comparison should be a genuine retail price - for example, a price at which a significant quantity of goods were placed on sale for 28 days.
- ◆ Traders should not call something an 'introductory offer' if they do not intend to sell at a higher price at the same place soon.

- ◆ Traders should not use a recommended retail price as a basis of comparison which is not genuine or differs significantly from the price at which the product is usually sold.
- ◆ Descriptions of products as 'free' are banned if the consumer has to pay anything other than the unavoidable cost of responding to the commercial practice and collecting or paying for the delivery of the item.

Other guidance contained in the Guide includes advice on indicating two difference prices and the omission of information and non-optional extras. Prices to consumers should always include VAT. In addition, the Guide states that 'free call outs' should only be stated as such if there is no charge to the consumer unless remedial work is done with the consumer's agreement.

For more on the introduction on the Consumer Protection from Unfair Trading Regulations 2008, please click here: <http://www.upload-it.com/editArticle.aspx?id=2613>.

PATENTS

- ***High Court grants damages to innocent party following unjustifiable threats of legal action for patent infringement - LB Europe v Smurfit, High Court...***

The High Court has ruled that a company which unjustifiably threatened to institute legal proceedings against its competitor's main customer for infringing its patent must pay damages for lost sales as a result of the threatened legal action.

Smurfit patented a form of tap for use with boxed wine. When a competitor, LB, secured the custom of Constellation to use its brand of tap known as the Liqui-Sure tap, Smurfit threatened to commence legal action against Constellation on the grounds that the tap it was using allegedly infringed its patent. As a result of the threat, LB and Constellation made development of the Liqui-Sure tap a low priority until the dispute was resolved. Smurfit's patent was found by the court to be valid but it was not infringed by the Liqui-Sure tap. The case then proceeded to consider the effects of Smurfit's threats for patent infringement.

The High Court ruled that it was likely that the Liqui-Sure tap would have been developed at a higher priority and been available for commercial use earlier if the threat had not been made by Smurfit. As a result, LB was entitled to damages for lost sales arising due to LB's groundless threats between the earlier date on which the Liqui-Sure tap would have been available and the actual date of sale.

Samantha Lloyd, assistant editor of Upload-IT, comments: 'Businesses must ensure that any action taken against suspected patent infringement is done so on the basis of sound legal advice and they must refrain from groundless threats of patent infringement. The stakes are high. If the patent owner gets it wrong, they could instead be on the receiving end of a damages claim, as happened here.'

TRADE MARKS AND PASSING OFF

- ***O2's bubbles burst as ECJ indicates comparative advert by Hutchison is acceptable if no likelihood of confusion – O2 Holdings v Hutchison 3G, European Court of Justice...***

In what has become known as the 'bubbles case', the European Court of Justice has delivered a crucial judgment over when comparative adverts that use someone else's trade marks are permitted. Essentially, comparative advertising is allowed if it complies with the requirements of the Comparative Advertising Directive; and if someone else's trade marks are used for the comparative ad they can take action for trade mark infringement only if there is a likelihood of confusion. The ECJ stated that trade mark infringement would only occur for comparative adverts where:

- ◆ Use is in course of trade;
- ◆ Without the trade mark proprietor's consent;
- ◆ It relates to the same goods and services to those of the registered trade mark; and
- ◆ It is likely to cause confusion as to the commercial origin of the trade mark.

In this case, O2 - the telecoms service provider - had 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 the following year, Hutchison ran a series of adverts 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 had ruled that Hutchison's adverts appeared to infringe O2's registered trade marks. There was a question over whether Hutchison had a defence to trade mark infringement based on use of the other's mark merely to identify and refer to it. The High Court broke new ground and decided that in order to avoid registered trade mark infringement in a comparative advertisement, the advertisement must comply with the criteria in the EU's Comparative Advertising Directive, which had been brought into English law by the Control of Misleading Advertisements (Amendment) Regulations 2000. The Comparative Advertising Directive (which has now been replaced by another Directive) permitted comparative adverts where:

- ◆ It was not misleading;
- ◆ It compared goods or services that satisfied the same needs;
- ◆ It objectively compared material, relevant and verifiable features;
- ◆ It did not discredit or denigrate the other's marks, names or activities;
- ◆ It did not take unfair advantage of the other's reputation;
- ◆ It did not present the goods or services as an imitation or replica; and
- ◆ It did not create confusion between the advertiser and the competitor.

The High Court took a lenient approach to comparative advertising and decided that Hutchison had made out the defence. It said that the Regulations should be interpreted in the sense most favourable to the comparative advert, and courts should not be quick to stop use of trade marks that give additional impact to its message.

After O2 appealed to the Court of Appeal, the Court of Appeal referred the case to the European Court of Justice for a ruling, as it needed to interpret the relevant EU Directives. The ECJ's ruling described above effectively makes the position very simple when someone wants to stop a competitor from using a trade mark in a comparative ad.

Paul Gershlick, editor of Upload-IT, comments, as follows: 'Until this case, there had arisen uncertainty as to whether businesses could refer to a competitor's trade marks, for example in price comparisons. This case sets out a definitive ruling and gives more certainty. The advertisers must still comply with all of the factors set out in the misleading advertisements laws (which have recently been updated), or they could be on the receiving end of action from the Office of Fair Trading or other regulatory bodies. For trade mark owners to be able to sue, though, they must be able to show that there was a likelihood of confusion. In that event, the competitor would have no defence under the misleading advertisement laws. However, this will surely be a rare occurrence – the whole point of comparative adverts is to distinguish and contrast someone's products or services from those of someone else.'

- ***ECJ asked to rule on Google's AdWords policy of allowing trade marks to be sponsored by third parties after Louis Vuitton objects...***

AdWords, Google's lucrative keyword advertising auction engine, will be challenged for trade mark infringement in the European Court of Justice. 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. This has come about after the luxury fashion retailer Louis Vuitton sued Google in the French courts for trade mark infringement following the auctioning by AdWords of terms such as 'Louis Vuitton fakes'. The fashion house initially won its claim that making money from those terms violate its trade mark, but after Google appealed against the decision, the French appeal court has referred the matter to the ECJ to decide. Google will lose a significant revenue stream if a decision - which will apply to all 27 countries within the EU - is made against it.

- ***No defence to infringement of trade marks to inadvertently infringe another's mark - ALM Manufacturing v ALM Imp Exp Limited, High Court...***

ALM Manufacturing (A) had a registered trade mark 'ALM' in respect of household products. A became aware that the defendant (D) and its director advertised household and garden products under the name 'ALM imports and exports'. A claimed that D was infringing A's trade mark and passing off. A claimed that D had no reasonable prospect of defending the claim and therefore its defence should be struck out and judgment should be made in A's favour. D's defence was that D was not aware of the trade mark when the advertisement was published and any trade mark infringement was entirely innocent. In addition, it claimed that none of its goods were sold under the 'ALM' name and so there was no trade mark infringement at all.

The High Court ruled that it did not matter whether there was any subjective intention to infringe the trade mark or pass off its goods as those of A's; it was simply a matter of fact that it had done so. In addition, although it had not used the 'ALM' name on the goods themselves, A's case succeeded because D had displayed the ALM name prominently on its business literature. D's defence was therefore struck out and A was awarded summary judgment.