

# UPLOAD-IT - 1 MARCH 2007

## COMPETITION LAW

- ***New record fines for lifts cartel...***

The European Commission has announced record fines for breach of EU competition law. It has imposed fines of €990m against Otis, KONE, Schindler and ThyssenKrupp for operating illegal cartels in Benelux and Germany between 1995 and 2004. The companies fixed prices, allocated projects so as not to compete with each other, rigged tenders for procurement contracts and shared sensitive market information. The companies all operated in the sector for sale, installation, maintenance and modernisation of lifts and escalators. ThyssenKrupp's own fine was uplifted because it was a repeat offender. The fine comes hot on the heels of the then record €750m fine recently dished out to 11 companies, including Siemens, who were involved in a cartel for the supply of electrical switchgears.

- ***Which? to take class action against JJB Sports for overpriced replica kits...***

*Which?*, the consumers' organisation, has vowed to take legal action against JJB Sports, the High Street retailer, on behalf of football fans who had been overcharged by a combined total of millions of pounds. It has asked the purchasers of one million England and Manchester United replica kits between April 2000 and August 2001 to come forward and help it with a class action for damages. *Which?* is bringing its action under powers given to it under the Enterprise Act 2002. In October, the Court of Appeal upheld the Office of Fair Trading's and then High Court's decisions that JJB Sports, Allsports, Umbro and Manchester United had come together to fix prices to keep prices artificially high for replica football kits, contrary to the Competition Act 1998. In that action, the parties were fined, but *Which?* is now also looking for compensation for the consumers, many of whom were charged £40 instead of £20.

- ***Wanadoo caught using predatory pricing and fined €10.35 million for abusing dominant position...***

The European Court of First Instance has confirmed that the European Commission was right to fine Wanadoo, the Internet services provider, for using its dominant position to distort competition. Wanadoo launched an Internet access service in 1999 but charged its customers prices well below the average variable costs. Under European competition law, any company with a dominant position in the market place charging its customers sums which are less than the total cost of supplying its services are automatically considered to be engaged in predatory pricing where it is part of a plan to remove competitors from the market. The Commission found that the company had incurred the losses deliberately due to under-charging while it held 100% of the Asymmetric Digital Subscriber Line (ADSL) market for high speed Internet service provision during a period of about one and a half years. Even though Wanadoo had stopped the predatory pricing by October 2002, the Commission decided to fine the company €10.35 million as its infringement was serious and had lasted for a long period of time.

- ***Court of Appeal reverses High Court's decision that British Horseracing Board had breached dominant position - Atheraces Limited v the British Horseracing Board, Court of Appeal...***

BHB compiled and maintained a database containing pre-race information on horse racing meetings. Attheraces (ATR) supplied websites and other audio-visual media in relation to horseracing in the UK. It had entered into an agreement for obtaining pre-race data from BHB. The original agreement terminated in 2004 and the parties then negotiated further arrangements. BHB threatened to withdraw its supply of data if the terms were not agreed. ATR commenced legal proceedings claiming that BHB had abused its dominant position contrary to Article 82 of the EC Treaty and the Chapter II prohibition of the Competition Act 1998 by threatening to refuse to supply pre-race data and charging excessive, unfair and discriminatory prices.

The High Court had agreed with ATR's claim. BHB was entitled to charge for its data, whether or not it had any intellectual property rights in them. (Another court decision (BHB v William Hill) had earlier ruled that BHB did not have database rights in its pre-race data as it had invested the money in compiling the data rather than verifying independent data. This had been a landmark ruling that narrowed the scope of database right protection.) However, the High Court believed the charges were excessive and discriminatory and BHB was dominant in the supply of pre-race data.

The Court of Appeal has now overturned the High Court's decision and agreed with BHB's arguments instead. The Court of Appeal said that the excessiveness and unfairness in the price had to be decided by reference to the relationship between the price charged and the value of the product. In this case, the High Court should have considered the economic value of the data to ATR and how much it could earn using that data. It was not just a case of working out the cost of producing that data plus a reasonable rate of return (the cost+ approach). The Court of Appeal stated that exceeding the cost+ approach was 'a necessary but in no way a sufficient test of abuse of a dominant position'. Since the High Court had just taken into account the cost+ of the data, it could not properly judge if the prices were excessive or unfair.

The Court of Appeal also found that ATR had failed to make its case that BHB had abused its dominant position by an unreasonable refusal to supply the data. Asking ATR to enter into a licence agreement for the data was a legitimate requirement and ATR had not raised reasonable issues in negotiations that had been flatly dismissed. Finally, as to ATR's claims of discriminatory pricing - that it was being charged by BHB more than BHB was charging other people - the Court of Appeal found that BHB was entitled to charge different suppliers different amounts according to how the negotiations went and that this did not prevent ATR from competing in the market place.

Read more here on the earlier case of BHB v William Hill: <http://www.upload-it.com/editArticle.aspx?ID=777>

## CONTRACTS

- ***Court comments on the meaning of 'reasonable endeavours' and 'best endeavours' again - Rhodia International Holdings v Huntsman International, High Court...***

Rhodia agreed to sell a chemical manufacturing business to a special purpose vehicle recently incorporated by Huntsman called 'HSS'. The contract stated that the parties would use 'reasonable endeavours' to obtain all consents and other requirements of the other party to enable the assignment or transfer of a number of supply contracts. The clause added that for the purpose of obtaining the consents, Huntsman would provide a parent company guarantee to perform a defined number of supply contracts if reasonably required by the other party in the supply contract. One of these contracts was with a supplier called NPL. Huntsman wanted this contract to be assigned to HSS since HSS had already started performing Rhodia's obligations under that contract without yet getting it assigned. Therefore, it asked NPL for a transfer. NPL in turn asked that Huntsman provide a parent company guarantee for HSS's performance. Huntsman refused to provide this and decided to stop paying the sums Rhodia was meant to be paying to NPL under that contract - which amounted to about £15m. NPL took legal action against Rhodia and Rhodia was forced to take action against Huntsman for breach of the sale contract.

Huntsman argued that it only had to use 'reasonable endeavours' to obtain the consents specified in the contract and so did not have to provide the guarantee. The High Court noted that although the contract contained a 'reasonable endeavours' provision, it was qualified by an absolute obligation to provide a parent guarantee if the other party to the supply contract reasonably required. Therefore, on the facts, the High Court decided that it did not matter if Huntsman had to use 'reasonable endeavours' to get the contracts assigned, since the contract contained an absolute obligation for Huntsman to do certain things including provide the parent guarantee. As it failed to do, this so it was in breach of contract.

As an aside, the High Court commented on the meaning of 'reasonable endeavours' and 'best endeavours'. Using 'reasonable endeavours' meant that a party had to take one reasonable course to achieve a particular objective and, once this was done, it had discharged its obligations. In general, 'reasonable endeavours' did not require a party to sacrifice its own commercial interests. However, in this case, where the contract required actually taking certain specified steps as part of exercising reasonable endeavours, those steps would have to be taken even if this meant compromising its own commercial interests.

The court said that a requirement to use 'best endeavours' required a party to take **all** reasonable courses of action it could in the circumstances. In this context, an obligation to use 'all reasonable endeavours' might equate with using 'best endeavours' and the High Court thought that that was what the Court of Appeal had meant in other cases.

- ***European Commission looks to update online consumer selling laws...***

The European Commission is consulting on updating online consumer laws to make them fairer, easier, more reliable and more efficient for consumers. The Commission emphasised that only 6% of European consumers are shopping online cross-border, so more needed to be done to make them more comfortable doing so. The Commission is going to review all consumer contract law, including the Unfair Contract Terms Directive, Directive on Sale of Consumer Goods and Guarantees, the Distance Selling Directive, the Doorstep Selling Directive, the Package Travel

Directive, the Timeshare Directive, the Directive on Injunctions and the Price Indication Directive. The most common problem consumers have is with late, partial or non delivery. The Commission also wants a uniform, clear basis for returns.

## **COPYRIGHT AND DATABASE RIGHTS**

- ***Disclosure of correspondence between group companies found to be copyright infringement and breach of confidence - Cembrit Blunn v Apex Roofing Services, High Court...***

Cembrit was a subsidiary of D and supplied slates to Apex for installation at two sites. Apex claimed the slates were defective and so it had had to replace a number of them. Apex obtained and circulated a crucial letter written by D to Cembrit about a possible settlement of Apex's claim that the slates were defective. Cembrit argued that the disclosure of the letter infringed D's copyright and was a breach of confidence.

The High Court first had to decide whether there was copyright in an internal business letter written between two group companies. The answer would depend on the facts of the case, but in this case the High Court decided that copyright did exist. The letter had the necessary requirement of sufficient skill and labour to attract literary copyright protection. That copyright had been infringed as the letter had been obtained and used without the copyright owner's permission.

The court also found that there had been a breach of confidence as the letter was a private internal communication not meant for publication outside Cembrit's group companies. Apex's disclosure was not justified as being in the public interest or made for the purposes of avoiding unnecessary or unjustified litigation. It was disclosed to force Cembrit to give up its fight against Apex.

- ***MySpace to use software to block unauthorised use of copyright material...***

MySpace, the popular social networking website that allows people to provide information about themselves and to share information and hobbies, has announced that it is going to start using software to block unauthorised use of copyright material. The technology will screen content that users try to upload. If it matches material identified as being owned by another person, the material may be pulled. Meanwhile, YouTube, the popular video-sharing website bought by Google for US\$1.6bn in 2006, has been asked by Viacom, the giant US screen entertainment producers, to remove over 100,000 clips of television and film material that it owns. Like MySpace, YouTube has also promised to introduce a content identification system, but it has set no firm timetable for doing so.

- ***CD WOW! breaks 2004 promise and parallel imports cheap CDs from Far East...***

CD WOW!, the e-tailer, has breached a 2004 High Court Order which had been awarded when it settled a claim brought by the British Phonographic Industry, the body representing major UK record labels. The BPI took legal action in 2004 when CD WOW! had sold CDs that CD WOW! had bought cheaply in the Far East and re-sold in the UK at more competitive prices than businesses with exclusive licences to sell in the UK. The BPI's members had exclusive licences to the UK copyright in music sold on CD WOW!'s site, and the CDs were imported from outside the European Union without their consent. Such parallel imports are prohibited by the Copyright Designs and Patents Act 1988. Under the 2004 settlement, CD WOW! had agreed to only re-sell music that originated inside the EU, which is permitted under EU laws.

However, the BPI recently found from test purchases that CDs were being obtained from the Far East again. CD WOW! has offered to pay £50,000 towards BPI's costs, but BPI is taking CD WOW! to court for substantial damages for 'flagrant and systematic breaches' of the 2004 Order.

- ***4,500 new copyright enforcement officers to target pirated material...***

There will be 4,500 new Trading Standards Officers from April whose remit will be the seizure of pirated or counterfeit CDs, DVDs and other material. The move follows the introduction of new powers under Section 107A of the Copyright Designs and Patents Act 1988 for local Trading Standards Officers to be involved with enforcing provisions protecting copyright. Previously, they could only exercise their rights in respect of material that infringed trade marks. The officers will now have the power to make test purchases, enter premises and seize pirated goods and documents. The change follows the recommendations of the government-commissioned Gowers Review, which reported back in December 2006. Malcolm Wicks, the government minister who announced the increase in intellectual property officers, cited the loss to the UK economy of £9bn a year caused by copyright infringement.

- ***Trial against Russian teacher for using unlicensed Microsoft software thrown out...***

A Russian court case, in which a teacher was accused of using unlicensed Microsoft software, has been thrown out on ground of being 'trivial'. The school obtained 12 new computers with Microsoft products already loaded on them - except the products were unlicensed copies. Seemingly under international pressure to show that Russia is trying to crack down on the massive amounts of pirated software in the country, the authorities took criminal proceedings against the teacher. Vladimir Putin and Mikhail Gorbachev, the current and former presidents, publicly voiced their support for the teacher.

- ***Harry Potter writer transfigures eBay into a 'loser' in Indian High Court copyright infringement case by using lawyers rather than any 'hocus pocus' or 'abracadabra'...***

J.K.Rowling, the billionaire creator of the fictional boy-wizard, Harry Potter, has successfully obtained an injunction in the Delhi High Court against eBay, preventing the online auction site from enabling unauthorised versions of the Harry Potter books to be sold via the Indian version of its site. The injunction means that eBay now has to monitor who sells what on its websites. If it fails to prevent the sale of the books, then eBay will be in contempt of court in India. Under Indian law, if the premises of a person are being used for an infringing activity, that person will be liable for that activity as well. eBay is also being sued by Christian Dior and Louis Vuitton in the Paris Commercial Courts for not doing enough to prevent the sale of counterfeit goods on the auction site.

- ***Sony BMG forced to pay out millions to consumers to settle US Federal Trade Commission case against it...***

Sony used digital rights management software in its CDs to stop people making unauthorised copies of them. However, the US Federal Trade Commission (FTC) took legal action against BMG for using the software to 1) restrict the devices music-lovers could play their CDs on without telling them, 2) restrict the number of copies they could make and 3) monitor their listening habits so that BMG could send them marketing messages. The FTC also found that the software exposed music-lovers to security risks and the software could not even be easily uninstalled. The case has settled and Sony has agreed to allow customers to return the CDs by June 2007 and

also be reimbursed for up to £79 to repair any damage caused to computers where these were damaged as a result of attempts to uninstall the software.

The settlement has also required Sony to make clear to customers the restrictions on their use of CDs, as well as telling consumers of the installation of digital rights management software and not install it without their consent. Further, the FTC has required Sony to provide a reasonable means of uninstalling such software if it decides to include it in its CDs.

- ***Copiepresse presses down on Google News and goes for maximum squeeze in Belgian Courts for copyright infringement when using snippets of news stories and thumbnail images...***

Google News uses headlines, short extracts and thumbnail images from other newspapers and online publications to provide its online news service. Even though readers have to go to the original source to read the whole story, Belgian newspapers took exception to Google News and sued it for copyright infringement in the Belgian courts. The courts have ruled that Google was infringing copyright in doing this and keeping other people's information in its search engine cache. However, the court agreed with Google's current procedure in which Google places the onus was on the copyright holder to contact Google and tell it to remove the material, which Google has to do within 24 hours of being notified. The fine of €1 million per day that Google was originally threatened with if it infringes the ruling has been reduced to €25,000. Google has vowed to appeal the decision.

- ***Ipod boss, Steve Jobs, urges music industry to sell songs online without copyright protection...***

Steve Jobs, the Chief Executive Officer of Apple, the company that makes the iPod portable music device and supplies music for download through iTunes, has urged the biggest record companies in the world – EMI, Universal Music, Sony and BMG Music - to ditch digital rights management software for their music. Mr Jobs claims that the software has not stopped piracy and it would be good for consumers. However, his own company, Apple, does not allow music downloaded from its iTunes services to be played on MP3 players other than iPods. Consumer groups in several European countries have complained that iTunes music is not compatible with other MP3 players. Mr Jobs argued that the abolition of the digital rights management software would allow all MP3 users to obtain music from any online music store, including iTunes.

## **CYBERCRIME/SECURITY**

- ***Internet survives attempted barrage of emails by denial of service attack...***

Cybercriminals have failed in a plot to bring down the Internet when three key root servers were subjected to a barrage of data requests by a distributed denial of service attack. The root servers act as a global address book so that requests to communicate with domain names (such as requests to visit websites) are told where to go. The three servers were operated by different bodies, in order to withstand such an attack. Most users did not notice the attempted attack, so the systems were hailed as a success. A denial of service attack is where a server is bombarded with repeated requests in order to bring it to collapse. A distributed denial of service attack is where the attack is conducted by compromised computers, which have previously been hijacked by viruses and used by cybercriminals without users' knowledge.

## **DATA PROTECTION/PRIVACY/CONFIDENTIALITY**

- ***Government department supplying technology for ID scheme unable to explain why details of 26,000 were sent to wrong people...***

The Department for Work and Pensions, the government department that will be supplying some of the key technology for the government's proposed new National Identity Register scheme, has been caught with egg on its face after details of 26,000 people ended up in the wrong people's hands. Worse still, it is unable to explain how or why the glitch occurred. The details included people's contact data, national insurance and bank details. The government has said that for its proposed ID scheme, data would be protected better, as it would hold biometric and other personal information on separate databases, making it harder to get unauthorised access to both sets of data.

- ***Children as young as 12 entitled to see data about themselves...***

Children as young as 12 years-old may be entitled to be told what data schools hold about them, according to the Information Commissioner, the Regulator in charge of enforcing the Data Protection Act 1998. Parents of younger children are also entitled to find out the data that schools hold about the children. The Information Commissioner believes that 12 year-olds are often mature enough to make their own requests for information, although schools should assess the correct age on a case-by-case basis depending on the individual's maturity. Some campaigners accuse schools of requiring children to use fingerprints to access libraries and halls, without having obtained the children's or their parents' consent. The law does not currently specifically require consent to the collection of fingerprint and iris, but the Information Commissioner and government are currently discussing whether or not to introduce such a requirement.

- ***Macpherson privacy invaded by press photos of her on secluded beach...***

Elle Macpherson, the former supermodel, had her privacy invaded by *Hello!* magazine when it published photographs of her at a private villa on the secluded island of Mustique. Those were the findings of the Press Complaints Commission, the press's self-regulatory body, which ruled that the magazine had breached its Code of Practice. The island has no public beaches and she deliberately chose it to protect her and her children's privacy. *Hello!* claimed the pictures had been taken on a public beach.

## **DEFAMATION**

- ***Golfer sues poster on Wikipedia for defamation...***

Fuzzy Zoeller, a US golfer, has sued Josef Silny & Associates, a Florida-based education consultancy, for allegedly posting defamatory comments about him on his biography on Wikipedia. 'Wiki' sites allow users interactively to add and alter existing content on the site - in contrast to a 'blog' (or web log) that only allows people to add content. The Wikipedia website is akin to an encyclopedia in that it covers a diverse range of subjects. No one person controls the postings, but the aim is that contributors will spot and amend any errors.

In this case, Zoeller managed to trace the Internet Protocol address (the computer's identification on the Internet) to Josef Silny & Associates. Josef Silny, the owner of

the consultancy, claims he knows nothing about the postings and is investigating. The offending words have now been removed.

Although the site is self-policing and errors are often corrected quickly, Wikipedia has a history of controversy. For example, in 2005, Brian Chase, a delivery firm manager from Tennessee, apologised for a 'joke' when he posted an entry linking John Seigenthaler, the founder of the newspaper USA Today, with the Kennedy assassination.

## **DESIGN RIGHTS**

- ***Air freshener Air Wick sent up in the air for infringing designs of rival as High Court gives guidance on interpreting EU registered design law - Proctor & Gamble v Reckitt Benckiser, High Court...***

P&G owned an EU registered design (the spray design) for a spray product. P&G claimed that Reckitt's Air Wick infringed the spray design. Reckitt denied this and claimed that the spray design was invalid. EU registered designs protect the appearance of a product resulting from the features of, in particular, its lines, contours, colours, shapes, textures or materials. The design also has to be new and have 'individual character' – that is 1) an assessment of the overall impression the design has on an 'informed user' and how this differs from the overall impression created from a design previously available to the public, and 2) an assessment of the degree of freedom available to the designer when designing the product.

The High Court found that Air Wick's design infringed the spray design as the differences between them were insignificant and both designs created the same overall impression. More importantly, the court gave guidance on the meaning of the relatively new EU laws in respect of designs. The court commented that an 'informed user' was someone who was a regular user of that sort of article in question and not just an average consumer. The court also commented that a designer's freedom depended on what constraints he took into account when designing the product, such as health and safety requirements, the nature of the product and regulatory issues.

## **DOMAIN NAMES**

- ***Most businesses with '.eu' domain name believe it is effective, while 50% of UK businesses do not even know what '.eu' is used for...***

There have been two conflicting surveys about the effectiveness of the '.eu' top-level domain, which was introduced in December 2005. In one survey, over two-thirds of UK businesses that have a '.eu' domain name found that it was effective and 43% said that it made them more accessible to European markets. Meanwhile, half of small and medium-sized companies in the UK did not know what '.eu' signified. The surveys were carried out by 1&1 Internet, the domain registration and hosting business.

## **FREEDOM OF INFORMATION**

- ***Information Commissioner rules that public authority could refuse to answer someone's information requests after it had made enough requests already...***

The Information Commissioner's Office has ruled that The West Midlands Passenger Transport Executive had received enough information requests under the Freedom of Information Act 2000 from a particular individual, so it could refuse to answer any more from him, as the requests were now becoming 'vexatious'. The Act gives people anywhere around the world the right to see information held by more than 100,000 UK public bodies about the way decisions are made and public money spent, even if the request relates to a competitor. In this particular case, the Executive had received 15 requests from the person in under a year. When it received the fifteenth request, it told the requester that it would not answer any more queries. The requester then complained to the ICO, the regulator in charge of enforcing the Act. However, the ICO backed up the Executive's refusal and said that the latest request would have imposed a significant and unreasonable burden, and the requests amounted to harassment of the body.

## **GENERAL IP**

- ***UK SMEs to be offered IP audits by the Patent Office...***

The Patent Office, together with four regional development agencies, will offer 40 businesses around the country 'IP audits' from March so that they can gauge the value of their intellectual property rights. This is part of a pilot initiative called Innovation Support Strategy designed by the Patent Office. The initiative also will provide web-based guidance for UK firms operating in foreign markets and help them with such things as how to register and enforce IP rights abroad.

## **INTERCEPTION OF COMMUNICATIONS**

- ***British security bodies make over 400,000 requests a year to see communications data from telcos and ISPs...***

British public bodies such as the police, MI5, MI6, GCHQ and others made 439,000 requests in just over a year in 2005-2006 to see communications data from telephone companies and Internet service providers. Communications data only relates to the details of the timing, dates, duration and parties to the communication, and not the contents themselves. Access to that communications data could have enabled millions of people to be tracked. The interception of the contents of the communications themselves requires a warrant and over 2,000 warrants were issued for the same period - and a single warrant could enable the interception of an entire office's communications. These are the findings of The Interceptions of Communications Commissioner's annual report. The Commissioner is in charge of overseeing the activities of the interception activities of the various public bodies.

## **MISLEADING ADVERTISING**

- ***Phone upgrade marketing message cut off as ASA states that opt-out to marketing messages must be clear...***

World Networks sent a misleading marketing message when it offered a mobile phone upgrade to customers on a paid-for list of telephone numbers. The message

said: 'Orange customer, you may now claim your FREE CAMERA PHONE upgrade for your loyalty. Call now on 0207 386 4925. Offer ends 4<sup>th</sup> Aug. T&C's apply. Opt-out available.' Amongst the complaints that were upheld by the Advertising Standards Authority were that it misleadingly appeared to have come from Orange (and not World Networks) and was rewarding its loyal customers, it misleadingly suggested that all customers were entitled to an upgrade, and the opt-out options were not sufficiently clear. In particular, the ASA commented that the advert did not give a clear or simple means to opt-out of future messages as it was not clear that recipients could call the sales number or access a website to opt-out. Marketers should provide a postal or email address or a short-code number to which recipients can send an opt-out message.

Consequently, the message breached the British Code of Advertising, Sales Promotion and Direct Marketing, which the ASA administers. World Networks has been asked by the ASA to seek its guidance before placing adverts in the future. The Code of Practice regulates the content of adverts and marketing communications. 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.

## **PATENTS**

- ***Sigh of relief for UK business as RIM remains able to supply Blackberries - Research in Motion v Inpro Licensing Sarl, Court of Appeal...***  
Research in Motion, the company behind the Blackberry wireless communication device, has won a patent case in the Court of Appeal against Inpro. RIM managed to show that Inpro's patents for mobile devices were invalid. The High Court originally agreed with RIM last year and now the Court of Appeal has upheld that decision. Inpro's patents relate back to 1996, three years before RIM brought its popular Blackberries to market. Inpro's patents were invalid due to the inventions having been obvious to those in the field based on the then existing technology and lacking in an inventive step. The threat to sales and use of the Blackberries has now been removed.
- ***Microsoft stopped dead in its tracks by Alcatel-Lucent for using infringing MP3 technology and must pay \$1.5bn in damages...***  
Alcatel-Lucent has won its claims for patent infringement against Microsoft. Alcatel-Lucent's Bell Labs subsidiary owns patents on encoding audio in MP3 format. Microsoft used this in its Windows operating system after it had obtained a licence for the technology from Fraunhofer-Gesellschaft, a German firm. In 2003, Lucent (before its merger) sued Gateway and Dell for patent infringement and Microsoft chose to join the action since the technology affected its systems. A San Diego court has now awarded Alcatel-Lucent \$1.52 billion dollars in damages. The case may affect other businesses like Apple, Sony, Nokia and others who have licensed MP3 technology from Fraunhofer. Microsoft has vowed to appeal the decision. Microsoft has said that the damages award was 'outrageous' as Microsoft had only paid Fraunhofer \$16m for its licence.

## TAX

- ***New legislation to hit businesses using contractors that escape IR35 through a loophole...***

The government has published draft legislation which may make third parties liable for unpaid PAYE of managed service companies from this April. An MSC is a company or partnership which provides workers through a managed service company scheme, which is a scheme that has all of these elements:

- The services of particular workers are provided to third parties.
- Most of the money earned for a worker's services is paid to the worker.
- A 'scheme provider' controls the finances or general management of the MSC.
- The workers themselves are not the 'scheme provider'.

The government is introducing the new law because it is concerned that the IR35 legislation is being flouted and is hard to enforce. The IR35 law was introduced in 2000 to stop people setting up as limited companies to avoid tax and national insurance, when they were really employees.

Under the new law, the MSC will need to operate PAYE and National Insurance on sums paid to workers. Unlike the IR35, all sums received by a worker will be subject to PAYE and NI. Another difference from the 2000 legislation is there will be no focus on whether an employment relationship would be deemed to exist between the individual worker and client (had there been no intermediary company).

Certain third parties may also be pursued for the PAYE and NI where the HM Revenue & Customs believes that the money cannot be recovered from the MSC. The third parties who could potentially be liable are firstly the scheme provider and directors or officers of the MSC or scheme provider. In addition, someone who has encouraged, facilitated or otherwise been involved in providing the worker's services ('a facilitator') or the facilitator's directors and officers may also be caught. This could potentially catch employment businesses, end clients and the worker himself, although they will only be pursued if HMRC cannot go after the MSC or scheme provider or their directors or officers.

Paul Gershlick, editor of Upload-IT, comments: 'This is crucial for any business involved with obtaining external contractors, which often happens in the IT sector. Those businesses could fall within the category of 'facilitators' and so could potentially be required to pay unpaid PAYE and NI. However, since this would only happen if the company supplying the workers (or the company behind that company) could not pay, adding in contractual indemnities is unlikely to help the client. It is advisable for anyone involved in these situations should take specialist tax advice urgently, as the laws are about to come into force in April.'

- ***HMRC launches new tax guide for e-traders...***

HM Revenue & Customs has launched a new guide for people who trade online to explain whether they are self-employed, and therefore may be subject to paying income tax and national insurance contributions and registering for VAT. The guide aims to differentiate between people who trade online for a profit and those who are just clearing low value items from their possession. Online traders are considered to be self-employed if they:

- Sell goods which had been bought with the intention of re-selling them; or
- Make items themselves and sell them with the intention of doing so at a profit; or
- Sell or buy goods on behalf of another for financial gain; or
- Provide a service and receive payment.

## **TELECOMS**

- ***Storm rages over premium rate phone lines for television phone-ins...***

The Independent Committee for the Supervision of Standards of the Telephone Information Services (ICSTIS), the body that regulates premium rate charged services in the telecommunications sector, is investigating various television phone-ins where people pay a premium number with a chance to participate in television programmes or votes on them. What triggered the investigation was Richard Madeley and Judy Finnegan's Channel 4 game 'You Say, We Pay', although other programmes are now also being investigated to consider whether viewers have been cheated in some way. The complaint against Richard & Judy's programme was that the game continued to accept £1 calls from people who thought they could enter the game even after the participants had been selected. In one week, apparently over 30,000 people who had no chance of becoming a contestant had paid for their £1 phone call. ICSTIS is investigating Eckoh Technologies (the premium rate service provider regulated by ICSTIS), Cactus TV (the television company) and Channel 4. ICSTIS is looking into whether the requirement in its Code of Practice for services and promotional material not to 'mislead or be likely to mislead' has been breached.

## **TRADE MARKS AND PASSING OFF**

- ***Apple Computer agrees coexistence with Cisco and Apple Corps...***

Apple, the company behind the iTunes service and iPod device, has obtained permission from Cisco, the network equipment maker, for use of the term 'iPhone' for Apple's new music-playing mobile phone. Cisco has owned the registered trade mark 'iPhone' since 2000, when it bought Infogear, the phone equipment maker. Despite that, Apple announced the launch of its new iPhone earlier this year. On hearing the announcement, Cisco started a legal action against Apple for trade mark infringement. That action has now been settled amicably with the two parties also agreeing to explore opportunities to work together on security issues.

Meanwhile, Apple has finally settled its long-running action with Apple Corps, the Beatles record label, over use of the 'Apple' name. Following the earlier disputes, the parties entered into a trade mark co-existence agreement in 1991. Apple Corps more recently argued that Apple Computer (the computer company) had used the name in an infringing field of use contrary to that agreement, by using 'Apple' in its iTunes music service. Last year, the High Court sided with Apple Computer and decided that the 1991 agreement had not been breached. Initially, Apple Corps had vowed to appeal, but the parties have now entered into a new coexistence agreement that replaces the 1991 one and so the dispute appears to be settled...at least for now. Under the new agreement, Apple Computer will own all trade mark rights for 'Apple' and license them back to Apple Corps for its continued use.

- ***European Courts see no confusion between 'NARS' and 'MARS' trade marks as visual dissimilarity outweighed phonetic similarity in this particular case -  
Quelle AG v OHIM, European Court of First Instance...***

Mr Nars applied to register the figurative mark 'NARS' in a number of classes including footwear. A German company, Quelle AG, opposed the application as it already had two marks in Germany for a figurative version of 'MARS' in relation to sports wear and footwear. OHIM, the Community Trade Marks Office, rejected the opposition.

The European Court of First Instance agreed with OHIM and found that the marks were not likely to cause confusion. The Court stated that it had to assess the likelihood of confusion globally and to consider the marks visually, conceptually and phonetically. Crucially, the visual, conceptual and phonetic elements did not carry the same weight. The weighting depended on the particular application of the marks. In this case, the Court decided that German consumers buying sports clothes would be much more likely to observe the visual marks rather than concentrate on any phonetic similarity. As the two words were so different visually (given the different figurative representations) and conceptually, the fact that there was a phonetic similarity did not mean that there would be confusion in the minds of German consumers in relation to the two marks even if the marks were for the same class of goods. The opposition therefore failed.

### **UNSOLICITED COMMUNICATIONS**

- ***Sending unsolicited photos of aborted foetus is indecent and grossly offensive contrary to Malicious Communications Act - Connolly v Director of Public Prosecutions, High Court...***

Veronica Connolly, a pro-life campaigner, sent photographs of aborted fetuses to pharmacies that stocked the morning-after pill. She was convicted under the Malicious Communications Act 1988 of the criminal offence of sending an article or electronic communication which is indecent or grossly offensive and intended to cause distress or anxiety to the recipient or anyone else to whom he intends for it to be communicated. The Magistrates Court found that the photographs were both indecent and grossly offensive and intended to cause distress to the recipients. The Crown Court and now the High Court have dismissed her appeals. They refused her argument that 'gross' offence had to be something significantly more than mere 'offence'. This law can catch electronic communications and (unlike a similar provision in the Communications Act 2003) applies whether or not the electronic communication is sent over a public network.