

# UPLOAD-IT - 1 May 2007

## COMPETITION LAW

- ***It may be a case of the 'pot calling the kettle black' as Virgin Media sues Sky for charging too much and abusing its dominant position...***

Virgin Media – which recently had the largest number of broadband customers in the UK – has sued Sky for allegedly abusing its dominant position in the pay TV market in breach of competition laws. Some of Sky's channels had been carried on Virgin Media's cable service. When re-negotiating the deal, Sky asked for more money and Virgin refused to pay it. Sky then withdrew the channels. Virgin took the matter to court claiming that Sky was charging excessive prices. However, the Office of Fair Trading, the regulator in charge of enforcing UK competition law, has to investigate the matter first, which is likely to delay the case. Proving that a party is charging excessive prices is difficult to do. In a recent case involving the British Horseracing Board, the Court of Appeal commented 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. The courts would only interfere in a business's freedom to contract for excessive prices issues where the excessive pricing was a serious detriment to consumers. For more on this case see <http://www.upload-it.com/editArticle.aspx?ID=1848>.

- ***Sun Microsystems reveals dark side with alleged anti-competitive actions in second-hand reseller market for Sun machines in Europe...***

The Association of Service and Computer Dealers International (ASCDI), a body which represents computer resellers, has alleged that Sun's UK subsidiary has been acting anti-competitively by banning resellers from selling any Sun machines not originally made available by Sun for sale in Europe while refusing to give resellers the lists of machines that were or were not originally available in Europe. The ASCDI has accepted that it would be legitimate, on trade mark law grounds, to stop the resale in Europe of machines not originally sold there, but it has taken issue with Sun's refusal to disclose information about its machine lists, which means in practice that resellers cannot safely resell ANY Sun machinery in Europe without being accused of trade mark infringement. The ASCDI has filed a complaint with the Office of Fair Trading, the body in charge of enforcing competition law in the UK, that Sun's actions constitute an unlawful abuse of a dominant position. Not surprisingly, Sun has disagreed that it has acted anti-competitively.

- ***Apple's new deal with EMI is not music to European Commission's ears as it still sends Apple and record labels statement of objections for alleged breach of competition law...***

In December 2004, the Office of Fair Trading (OFT) received a complaint from *Which?*, the consumer association, that Apple's iTunes service discriminated on price according to the user's country of residence. It complained that UK users were being charged more than iTunes websites in other EU states, as those sites were barred to UK users. The OFT escalated the matter to the European Commission, which has now stated that it considers that the distribution agreements between Apple and the record companies breach EU competition law contrary to Article 81 of the EC Treaty. Those agreements prohibit users in one country from downloading music from the iTunes website in another country. The Commission has therefore sent Apple and the record companies a statement of objections setting out why it believes that those

agreements may be breaching competition law. The parties have two months to give their answers.

Interestingly, the statement does not allege that Apple is abusing its dominant position or using digital rights management (DRM) software anti-competitively. Apple has come in for some criticism that its Fairplay DRM software prevents users from copying legitimate downloads from iTunes onto devices other than Apple's iPod. Apple has already been found to break competition law in Scandinavia for its 'tying' tactics. In an interesting development on that front, as reported elsewhere in this edition of Upload-IT, Apple and EMI have agreed that Apple will sell most of its music as a two-tier service – a basic price with DRM software preventing copying and a supplement which involves higher quality versions with no DRM restrictions so that copying for personal use can take place. Although that deal may help to placate complaints on one front, the complaint remains of carving up the market to stop UK consumers benefiting from cheaper prices in other EU countries.

- ***OFT recommends that consumers and businesses who suffer as a result of cartels should be given help to sue...***

The Office of Fair Trading (OFT) has issued a consultation document on changing competition laws so that both consumers and businesses affected by cartels are given more help to sue and claim damages from the perpetrators of anti-competitive behaviour. The OFT is advocating giving consumers access to evidence gathered by the OFT in its investigations. In addition, its proposal document suggests that bodies representing businesses should also be allowed to bring representative actions against anti-competitive businesses; this right currently exists for consumers - whose representative bodies can bring a claim in the Competition Appeal Tribunal under the Competition Act 1998. Finally, the OFT is proposing that consumers and businesses are able to bring representative actions for damages not just in the CAT but also in the courts. Responses are invited for submission by 13 June 2007. For more information, please see [http://www.oft.gov.uk/advice\\_and\\_resources/resource\\_base/consultations/private](http://www.oft.gov.uk/advice_and_resources/resource_base/consultations/private)

## **CONTRACTS**

- ***High Court enforces third party rights in relation to a licence to assign -***

- ***Prudential Assurance Co Ltd v Ayres, High Court...***

Prudential (P) was a tenant for some City of London offices. It granted an underlease to Mr Ayres (A). The American law firm, Altheimer & Gray (A&G), agreed to take over the underlease. All the parties involved signed a licence to assign. The licence contained an obligation for A&G to pay all rents due on the underlease from a certain date. There was also an authorised guarantee agreement so A (the previous tenant) guaranteed payment of the rent to P. A further document called a 'supplemental deed' was agreed between P and A&G. It contained a limitation clause as follows: 'The liability of the Tenant under the [underlease]...shall be limited to the Partnership...and such liability shall not extend to the personal assets of individual partners (present, past or future) therein. Consequently any recovery by the Landlord against the Tenant or any previous tenant under the [underlease] for any such default shall be limited to assets of the Partnership and shall not extend to the personal assets of any individual partners therein other than the capital and current accounts of such partners in the Partnership.'

Therefore, P could not recover rent from the personal assets of any partners of A&G. Soon afterwards, A&G became insolvent. P claimed the rent from A (the earlier undertenant). A relied on the limitation contained in the supplemental deed under

section 1 of the Contracts (Rights of Third Parties) Act 1999. This Act allows a third party in certain cases to enforce rights in contracts to which it is not a party where the contract purports to confer a benefit on an identifiable third party or class of parties.

The High Court agreed that the supplemental deed conferred a benefit on A as it fell within the particular description set out in the supplemental deed (i.e. 'any previous tenant'), so A's liability to P was limited under the 1999 Act.

- ***OFT issues consultation on its guidance as to fairness of terms in consumer contracts...***

The Office of Fair Trading has issued a consultation as to its guidance on consumer contract terms which it considers to be unfair. The consultation should result in the first revision to its guidance as to the Unfair Terms in Consumer Contracts Regulations 1999. Those Regulations state that standard business-to-consumer terms will be unfair - and therefore unenforceable - if they are not in plain English, not individually negotiated and cause a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

The guidance sets out what the OFT considers to be right and wrong in relation to certain terms. The OFT guidance contains useful examples of terms that it considered were likely to fail the fairness test and were replaced or deleted with the OFT's agreement, including:

'I have read the Conditions of sale overleaf and agree to be bound by them.', which was replaced by 'before signing this order, the customer should carefully read the terms and conditions set out on the other side of this agreement.'

'Any dispute arising out of this agreement shall be subject to the jurisdiction of the High Court of Justice or the County Court local to [the supplier] or the Central Office of the High Court of Justice at the option of [the supplier]'

'I hereby waive my rights under the Data Protection Act'

'The company reserves the right to vary design and/or specification of any installation and/or product used without prior notice to the customer', which was replaced by a term reserving the right to make changes but not make any significant variations without the consumer's agreement.

'This Contract is not subject to cancellation by the Customer...The Company reserves the right to cancel or refuse acceptance of any order at any time by refunding all monies paid less an administrative charge.', which was replaced by 'either party shall have the right to terminate this Contract without penalty within seven days.'

- ***Court of Appeal states that a contract has to be governed by the law of a country and not some other basis such as Jewish law - Halpern v Halpern, Court of Appeal...***

The siblings of the Halpern family got into a dispute about the entitlement of the estate of their parents. The claimants commenced arbitration before a Beth Din (a Jewish arbitral tribunal) in Zurich. The arbitration was settled and the defendants agreed to pay £2.4 million to the claimants. Clause 4 of the settlement agreement stated that the parties had to destroy all the documents. The claimants began proceedings to enforce the agreement in England. The defendants claimed that the agreement was not valid as they had been forced to sign it under duress. They also stated that the agreement was subject to Halakha law (Jewish law) and was not valid under Jewish law. The agreement did not specify a choice of law but the claim was

based on the fact that the Zurich Beth Din applied Jewish law. The claimants applied for summary judgment and the case has now reached the Court of Appeal.

On the duress point, the High Court had made a landmark legal ruling, but the Court of Appeal has now decided that the facts of the case need to be investigated further and dealt with at a full trial and were therefore not appropriate for a summary judgment decision. Therefore, although the Court of Appeal was inclined to agree with the High Court on the matter of duress, the issue could not yet be finally resolved. (In brief, the High Court had ruled that a party could not rescind a contract for duress or undue influence - ie avoid the contract and be put back in their original positions before signing the contract - where the other party could not be substantially put back in its original position. It was irrelevant that a party who was unable to be put back into the original position was the one guilty of the wrongdoing. That decision had seemed to resolve a grey area where there has been duress, although the question is now unresolved again following the Court of Appeal's decision.)

Of more interest in the Court of Appeal's decision is the ruling on which laws apply to the contract. The Court considered the Rome Convention, which sets out rules as to which laws apply to contracts where a contract does not specify the law of a country. The Court of Appeal found that Jewish law was not the law of any country, so could not apply to the way the contract as a whole was governed. The law of the country with which the contract was most closely connected applied. In this case, this was likely to be Swiss law or English law, although on the facts of the case it did not matter which of those countries' laws applied. However, Jewish law could still be relevant as it was possible for a contract to incorporate the provisions of a foreign law including a law that was not of any country and certain provisions could be interpreted in line with that other law. However matters affecting the contract as a whole (such as mistake or duress) would be governed by the overall governing law of the contract. If the parties wanted to apply a law other than a particular country's law to the contract overall, they could do this by having an arbitration clause, as the Arbitration Act 1996 enables arbitration tribunals to determine a case under principles which are not the law of a country.

## **COPYRIGHT AND DATABASE RIGHTS**

- ***EMI bows to pressure of the online piracy racket and agrees with Apple to remove DRM software from (most) downloads...***

EMI, the record label giant, has announced that it is agreeing with Apple, the company behind iTunes (the online music distribution service), to sell most of its music downloads without digital rights management (DRM) software so that punters are no longer restricted in how they can play them. The cost that Apple will charge will be 99 pence per download, which is 20p more than the price of downloads that include DRM software. At the moment, music downloaded from Apple's iTunes website can only be played on Apple's iPod devices. This is becoming increasingly irritating to consumers who want to be able to download a single and play it anywhere and not be restricted because of anti-piracy software. The move has been seen as a response to commercial pressure to make it as easy as possible for people to obtain and use their music legitimately in the face of the continuing onslaught of illegal online music-sharing.

In addition, Apple has been under some legal pressure. Apple is already under the cosh in Norway where the Consumer Council has objected on competition law grounds to the fact that downloads cannot be played on devices other than iPods.

Apple has been given until September to comply with Norwegian law. Similar actions have been brought against Apple in Denmark and Sweden.

- ***Google and Agence France-Presse sign the equivalent of an 'entente cordiale' over copyright in newspapers...***

Google and Agence France-Press (AFP) - the French news agency - have ended their long-running battle over the use of French newspaper stories on Google News Service without AFP's consent. AFP took exception to Google using its news stories without paying any licence fee as other people - such as newspapers - did. Google has now agreed to pay fees to use AFP's materials on its websites, so 'all's well that ends well'...

- ***New powers for Trading Standards Officers to seize pirated goods come into force...***

A new law has come in giving trading standards authorities the power to make test purchases, enter premises and seize pirated goods and documents where it suspects that copyright infringement has taken place. Previously, they could only exercise their rights in respect of material that infringed trade marks. There are now going to be 4,500 new Trading Standards Officers whose remit will be the seizure of pirated or counterfeit CDs, DVDs and other material, due to the coming into force of Section 107A of the Copyright Designs and Patents Act 1988. The change follows the recommendations of the government-commissioned Gowers Review, which had reported back in December 2006.

- ***GPL licence Version 3 gets a third draft...***

The Free Software Foundation has published a third discussion draft of version 3 of the General Public Licence and a second discussion draft of version 3 of the Lesser General Public Licence. The Free Software Foundation is a US not-for-profit organisation aimed at promoting free use of software. The GPL is used in the distribution of most open source software, including the Linux operating system. Although open software is free to use, the GPL requires all users to provide the full source code to the rest of the open source community.

The latest draft takes into account the agreement made recently between Microsoft and Novell whereby Microsoft agreed not to assert its patent rights against Novell customers where Microsoft patents are identified within Novell software. This preferential treatment in favour of Novell is seen by some as contrary to the fundamental principles of open source software. The new draft states that if a GPL licensee agrees to give a patent licence then the licence will automatically extend to all recipients of the software and any other software derived from it, whether or not they are direct customers of that licensee. People have 60 days to comment on the latest draft.

## **CYBERCRIME/SECURITY**

- ***Indiscreet employees ready to hand over passwords for a chocolate and 'a smile'...***

64% of people disclosed their password to researchers carrying out a survey for the security exhibition, Infosecurity Europe 2007. Half of those surveyed were general office commuters, while the other half were IT professionals at an IT conference. 40% of commuters and 22% of IT staff gave up their password when asked outright what their password was. Then a further 22% of commuters and 42% of IT workers answered questions that led the interviewer to discover the password, in a process known as 'social engineering'. The interviewees were asked if their password was

their child's name, football team or family pet, then the researcher tried guessing the password based on their answers, and eventually the interviewees succumbed. The outcome was even more concerning because IT professionals had name badges showing their names and organisations so it would be easy for a hacker to impersonate them on business networks. One factor in the successful coaxing of passwords was the fact that the interviewer had a friendly, smiling face and was offering a bar of chocolate to the interviewee.

Meanwhile, another Infosecurity Europe survey has found that a third of businesses did not report e-crime as they did not want the negative publicity of the hacking to affect them.

- ***MessageLabs reveals the latest hacker invention to cause mayhem – virus links within spam...***

MessageLabs – the email security business – has found that certain spam emails now also contain links to websites hosting viruses. Cyber-criminals have long used email viruses to set computers to automatically send spam but this is the first time it has found emails that also contain links to malware. The link looks like it is a screen saver but when the user clicks on it, the malware drops the Zhelatin MeSpam engine onto the compromised computers.

MessageLabs has also found that 83.6% of email traffic in April was spam. It commented that infected PowerPoint files were almost as common as infected Word files.

- ***Sharp increase in malware threat reported...***

Malware threats have increased by over 50% in the first quarter of 2007 compared with the same period in 2006, according to Sophos, the Internet security business. However, Sophos also found that the percentage of emails that were infected dropped from 1.3% to 0.4% in 2007. As people have become more aware of email security, hackers have had to resort to websites to spread their form of mayhem. Over two-thirds of the infected websites were genuine websites that had been attacked and hacked due to poor maintenance of security patches by their operators. A high profile attack recently was the Miami Dolphins website which contained the malicious script identified as Mal/Packer. The American football team was due to host the Super Bowl and so was a very popular website at the time. The hackers therefore succeeded in causing as much trouble as possible.

- ***Bulldog in the dog-house as breach of security causes disclosure of 100,000 customers' details...***

The private information of 100,000 Bulldog customers was stolen by a third party in December 2005. At the time, Bulldog was owned by Cable & Wireless, although it is now owned by Pipex, the broadband provider. Cable & Wireless has stated that it can identify the person who was responsible for the theft of the data. As a result of the theft, a small number of customers received unsolicited calls but it is not clear if their financial details had been taken. Cable & Wireless has stated that it will start legal action against the person believed to be the source of the leak.

- ***People found illegally using other people's wi-fi networks to access the Internet...***

Two people have been arrested in Redditch, Worcestershire for accessing other people's wi-fi networks to access the Internet. The Communication Act 2003 makes it an offence to dishonestly obtain communications services with the intent to avoid paying a charge for that service. One culprit was seen to be sitting in front of a house in a car with the windows blocked up by cardboard. The neighbours called the police and the culprit was caught. People who have their networks hacked in this way risk

not only suffering slower connections but also being falsely accused of visiting child porn sites or committing other offences as the hacker may be doing anything once he has connected to the victim's network. Police have warned that people should follow their Internet service provider's instructions as to securing their home networks.

- ***Sharp phishing technique helps hackers to steal money from ABN Amro bank accounts...***

Hackers have used an innovative malware phishing technique to steal money from the accounts of four customers of ABN Amro, the large bank. Phishing is the fraudulent practice of sending emails purporting to be from reputable businesses in order to induce individuals to reveal personal information, such as passwords and credit card numbers, online. The fraudsters usually trick people into disclosing their financial security details by sending recipients spoof emails appearing to come from a legitimate source. In this case, the hackers sent the account-holders an email with an attachment. The customers opened the email and the attachment, which installed malware into the computer by changing their browser settings so that when they tried to log onto the ABN site next time, they were taken instead to a spoof site. When the customers logged on and inserted their security details, the hackers logged on simultaneously onto the ABN website and accessed the accounts to withdraw the money. ABN has compensated the victims but has not disclosed how much was stolen in this fraud.

- ***Government to create new offence for having child porn images in computer-generated form or drawing form...***

The Government has begun a consultation on creating a new offence for possessing or circulating generated images of child sex abuse. Currently, there is a gap in the law, as it is only a criminal offence to possess real photos or photos that look like real photos, and not other images that do not look like photos, unless those photos are classified as an 'obscene article for publication for gain'; mere possession of an obscene drawing is not caught. If implemented, the new offence would carry a three year jail term and an unlimited fine. The consultation asks whether to amend existing law, create a new specific law or do nothing. The Government proposes having defences if the person in possession of the material had a legitimate reason for possessing it or had no reason to suspect what it was.

Internet service providers (ISPs) need to be especially aware of the consultation as some may unwittingly generate or circulate generated images. The expectation is that the Electronic Commerce (EC Directive) Regulations 2002 will be extended to deal with the liability of ISPs for the new offence so ISPs should make clear to the Government that that is what they expect. Those Regulations limit the liability of ISPs which act as mere conduits, hosts or caches of unlawful information which they unwittingly carry or store.

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

- ***Private 'eye' told to watch out for the law more carefully by Information Commissioner for illegally obtaining personal information from government department...***

Infocind Ltd and its managing director have been fined £3,200 and ordered to pay a further £5,000 in costs for illegally obtaining personal data from the Department for Work and Pensions without the Department's consent (as 'data controller') contrary to the Data Protection Act 1998. Infocind had been working as a private investigator for On:Line Finance, a finance company which was looking for contact information to collect debts. Infocind's breaches occurred even though it had signed an agreement

with On:Line promising not to breach the Act. The data had been obtained by people pretending to be staff in the government department, a tactic known as 'pretexting'. In order to try to prevent any unauthorised disclosures happening again, the Department for Work and Pensions has agreed to work with the Information Commissioner's Office, the regulator in charge of enforcing UK data protection laws.

## **DOMAIN NAMES**

- ***Stock photography company unable to prove 'corbis.net' domain name should be transferred to it...***

Corbis, the digital media business which licenses the use of digital images and often takes legal action against people who have refused to pay large amounts for using its images, has lost a legal battle to obtain ownership of the domain name 'corbis.net'. Corbis had claimed that Corbis Internet, the web design business that owns that domain name, was holding it in bad faith. It had taken its complaint to WIPO. WIPO deals with top-level domain name disputes and is one of the accredited arbitration bodies that can hear domain name disputes under the UDRP procedure. The UDRP is the Uniform Domain Name Dispute Resolution Policy and it provides a quick arbitration procedure for disputes over top level domain names such as '.net'. To win the name, Corbis needed to show that it had rights in a trade mark confusingly similar to the domain name, that the web design business had no legitimate rights in the domain name and that the name had been registered in bad faith.

Corbis failed to prove bad faith and so did not obtain transfer of the domain name. The reason appears to have turned on the facts that the web designer appeared to have legitimate claims and in order to win the onus was on Corbis proving its claim rather than Corbis Internet having to justify its own position. The web design business claimed that it did not offer any products or services on the site which would compete with Corbis' products, so there was no likelihood of confusion. In addition, its links on the site were to its apparent customers and not to an affiliate scheme and so had not sought to profit from Corbis' goodwill. The person behind the Malaysian web design company, a Mr Pickworth from England, also submitted evidence that his nickname had been 'Corbis' since his school days. WIPO further found that Corbis Internet was not passively holding on to the domain name or cybersquatting, as being offline intermittently for short periods for technical reasons did not amount to passive holding.

## **E-COMMERCE REGULATIONS**

- ***Internet ticket touting offence becomes law...***

As of 6 April, a new law has come into force making it an offence for unauthorised persons to sell tickets for designated matches over the Internet. The Ticket Touting (Designation of Football Matches) Order 2007 has brought into force the Violent Crime Reduction Act 2006. The Act introduced a new offence to ban ticket touting done by any means. Previously, the touting law had only prohibited face-to-face operations. The new law aims to stop unauthorised sale of tickets on venues such as eBay. The Act makes it an offence to offer for sale tickets to a statutorily designated football match without authority. People do not commit an offence if they are only buying tickets for friends and all transactions are at face value.

Website operators established in the UK who offer tickets caught by the touting law from anywhere in the European Economic Area are guilty of an offence. In line with other laws, the Act gives a limited exemption to Internet service providers - provided

they did not know they were receiving and storing information that contravenes the touting law.

## **EMPLOYEES**

- ***English secretary wins case against accountant employers in anonymous blogging incident...***

A British woman accused of bringing her employers into disrepute has won an action against her employers. Dixon Wilson – the accountants - dismissed Catherine Sanderson as a secretary for allegedly bringing the firm into disrepute in her web diary (or 'blog'). This was despite the fact that the firm had never been named in the diary and that the woman had used a pseudonym - 'Petite Anglaise'. The woman was identified on the blog via a photo that she had posted there. Some employers may consider any staff member in the public eye as being representative of their business. However, this case suggests otherwise (although it is not legally binding on English courts as it had been brought under French employment law). The upside for Ms Sanderson was that she was awarded a year's salary plus costs and has won a lucrative book deal to tell her story. The firm has a month to appeal the decision.

## **GENERAL IP**

- ***European Parliament approves Directive making IP infringements a crime but patent infringement not criminalised...***

The European Parliament has approved the Second Intellectual Property Rights Directive, which would criminalise certain intellectual property infringements but not patent infringement. The inclusion of patent infringement in an earlier draft had been controversial as critics claimed that it could damage competition because a lot of genuine businesses may have become criminals. Breach of patent rights will remain actionable through civil litigation only. The Directive is aimed at curbing organised crime and not personal use. The Directive is applicable to commercial-scale intellectual property infringement only, for example in the fields of copyright or trade mark, which are already criminal offences in the UK.

## **HARDWARE**

- ***Computers more popular than ever as worldwide shipments go up by 8.9%...***

Computer shipments worldwide have gone up by 8.9% in the first quarter of 2007 compared to the same period in 2006, according to Gartner, the analyst. HP's worldwide shipment growth surpassed the industry average and increased by 28.7%. Meanwhile, Dell, which is second in the market only to HP, had another slow quarter. After HP and Dell is Acer in terms of computer sales worldwide. The launch of Microsoft Vista did not have a major impact on computer sales.

## **IT AND INTERNET USE**

- ***ESRI survey shows that 70% of UK companies use geographic information systems-based technology...***

Geographic information systems (GIS) are increasingly becoming popular with mainstream businesses with over 70% of businesses now using geographic information-based technology, according to a YouGov survey of 300 IT directors and managers commissioned by ESRI (UK), the leading GIS provider. The survey also found that 37% expected GIS to become a critical business application. For example, geographic data is used by insurers to underwrite their risks.

Bernard Mageean, Commercial Underwriting Director for Royal & SunAlliance, explains, 'R&SA uses GIS to more effectively manage and underwrite insurance risk. GIS technology is fully integrated into our underwriting system to enable us to carry out risk assessments and most importantly to manage risk accumulation at the point of underwriting new business. We realise that geography is at the heart of our business and that the quality and accuracy of data we capture is absolutely fundamental.'

Richard Waite, managing director of ESRI (UK), said: 'We are increasingly seeing GIS being adopted by businesses, for example within mobile services, as online maps and in route planners. But more importantly, we are seeing GIS solutions starting to be adopted as an integral part of the overall corporate IT infrastructure. Increasingly, we are being approached by businesses that are starting to understand the value GIS can add to the large volumes of data already held within their organisations and the power of GIS to unlock this new value.'

- ***Teachers threaten to sue websites for allowing unruly pupils to post obscenities and false information against teachers ...***

Teachers at the annual conference of the Association of Teachers and Lecturers (ATL) have complained about websites that show fake images and abusive messages about teachers. The US-based website 'RateMyTeachers', which specifically encourages children to post comments about teachers, and YouTube, the popular video-sharing site, make life very difficult for teachers by allowing pupils to make untrue comments about them and post pictures (some of which may be superimposed) showing them in compromising positions. Both the sites have clear guidelines on what can be posted but teachers have complained that the operators do not police the sites properly. The general secretary of the ATL has vowed to sue operators if they do not stop the showing of false images and statements about teachers.

- ***Broadband uptake so high that over 50% of UK households have it...***

More than 50% of UK homes – and a total of 13 million UK homes and SMEs (small and medium-sized enterprises) in all – now have broadband, says a report by Ofcom, the communications regulator. The numbers have increased by over a quarter since last year and seven-fold over four years. The report also shows that broadband prices are falling. Providers have started providing broadband at no extra cost when customers take up a bundle of their services. Bundling is an important factor for consumers when choosing broadband, according to Ofcom.

- ***Web pioneer drafts blogging code of conduct and suggests content warnings to counter anti-social comments on blogs...***

A draft code of conduct for bloggers has been created by Tim O'Reilly, a web pioneer, following the complaints of US blog writer Kathy Sierra that she had been harassed and a victim of death threats causing her to go into hiding. The code states that

users should be warned that the content of the blog (or web log) may contain 'crude language' and they participate at their own risk. It also says that certain blogs should contain disclaimers of responsibility for the conduct of posters, and requirements for people not to post unacceptable posts, including anything which may abuse, harass, stalk or threaten others or which may involve posting material that is libellous, violates privacy or infringes intellectual property rights. The draft code further recommends that people should not be allowed to leave anonymous posts. It is hard to see how the non-legally binding code would be enforced but that is another story - perhaps the subject for another blog...

## **MISLEADING ADVERTISING**

- ***ECJ clarifies when advert becomes a comparative advert and infringes EU rules on comparative advertising – De Landtsheer Emmanuel v Comité Interprofessionnel du Vin de Champagne, European Court of Justice...***

De Landtsheer Emmanuel SA (a Belgian company) sold beer. It launched a beer under the name 'Malheur Brut Réserve' which was brewed based on a method used to make sparkling wine. The bottle and packaging referred to the phrase 'à la méthode traditionnelle', the name 'Reims-France' and the word 'Champagnebier'.

The Comité Interprofessionnel du Vin de Champagne (CIVC) and the champagne producer Veuve Clicquot Ponsardin sued De Landtsheer, alleging that its advertising was misleading and constituted unlawful comparative advertising. The Belgian appeal court referred various questions of interpretation of the EU Comparative Advertising Directive to the European Court of Justice.

The ECJ has ruled that even mere implicit - rather than express - references to a competitor or his product or services in an advert could constitute comparative advertising for the purposes of the Directive. This was the case even if several competitors could claim to have been identified in this way. Reference to a type of product or service could be caught.

The ECJ also stated that it was possible to make comparisons by someone with a product that did not have 'designation of origin' status against a product that did have it. 'Designation of origin' status is given to special places - such as the French region of Champagne - that has particular food derived from there and has a particular geographical environment that involves the food being prepared or produced in a certain way. The ECJ said the Directive should be interpreted in the way most favourable to comparative advertising, and the Directive already prohibited people from using a trade mark or a designation of origin mark for comparative advertising where it would take unfair advantage of or be detrimental to the reputation of such mark.

This was therefore a mixed result for both sides. Adverts which referred to other products without naming them could be caught within the rules of the Directive. Meanwhile, it was not prohibited to have adverts referring to designation of origin products by other products (as long as this comparison was still done in a fair way).

## **TELECOMS**

- ***New VoIP code to come into force from June 2007...***

Ofcom, the telecoms regulator, has issued a new code of practice for VoIP service providers. VoIP is the ability to make telephone calls over a broadband Internet

connection, and occurs by speech being broken down into digital data, transmitted digitally across the Internet and reconstituted as speech for the recipient. Many VoIP service providers offer cheap or even free calls. The code states that the service provider must make clear if the service includes emergency services, whether directory services are available, whether the customer can receive itemised bills and whether the consumer can keep his telephone number if he switches to another provider. If consumers take up a service not providing emergency services, the service provider will have to prove that the consumer has positively acknowledged this before joining the service. For more details on this code please go to [www.ofcom.org.uk](http://www.ofcom.org.uk).

## **TRADE MARKS AND PASSING OFF**

- ***ECJ finds that relevant public includes consumers as well as healthcare professionals in relation to prescription only pharmaceuticals –***

### ***Alcon v OHIM, European Court of Justice...***

Alcon Inc applied to register 'Travatan' as a European Community trade mark for various pharmaceutical goods. Biofarma SA opposed the application as it had a mark for 'Trivastan' for the same goods in Italy. OHIM, the body which accepts or rejects European Community trade marks, agreed with the opposition as the mark was confusingly similar to another trade mark in relation to similar goods. Alcon argued that OHIM should have restricted its analysis of the similarity between the goods solely to the viewpoint of healthcare professionals and should not have taken consumer end users into account since the end users were not making a choice to buy the product as the products were issued on prescription only.

The dispute ended up with the European Court of Justice. The ECJ rejected the argument as it stated that members of the public may see both products at different times even if not at the same time. The ECJ could infer likelihood of confusion even if the end user's choice would be influenced by a healthcare professional. It was quite possible for a member of the public to get the two names mixed up and ask the health professional for a particular product because he assumed that he had taken it before.