

# Legal Developments



## Commercial/IP/IT – May 2009

### Competition Law

#### More IT heavyweights gang up on Microsoft...

IBM, Sun, Oracle, Nokia and other technology companies that form the European Committee for Interoperable Systems have sided with the European Commission in the Commission's current competition law case against Microsoft. The software giant is accused of abusing its dominant position by unfairly tying its Internet Explorer web browser to its Windows operating system. The Commission has made preliminary findings of abuse, in response to a complaint by Opera Software, the Norway-based browser firm. For more on this case, please click here: <http://www.upload-it.com/editArticle.aspx?ID=3080>. ECIS's complaint is that by tying Internet Explorer to Windows and making its applications dependent on its other proprietary technologies, Microsoft is seeking to become the gatekeeper to the Internet. This case follows a previous action by the Commission in 2004 in which Microsoft was fined €497m for tying its Media Player software to Windows.

#### Airline alliances suffer turbulence as European Commission investigates whether there is anti-competitive behaviour...

The European Commission has announced that it is formally investigating whether two separate airline alliances constitute agreements in breach of Article 81 of the EC Treaty by having as their object or effect the distortion of trade between Member States of the EU. One was the Oneworld Alliance between American Airlines, British Airways and Iberia; the other was the Star Alliance between Air Canada, Continental, Lufthansa and United Airlines. The Commission is concerned that the co-operation agreements may have resulted in restrictions on competition on certain transatlantic routes. The agreements had provided for the participants to co-ordinate their commercial, marketing and operational activities on the transatlantic routes, and in particular by jointly managing schedules, capacity, pricing and revenue management. The Commission will consider whether the agreements provide sufficient consumer benefits so that the agreements can be found to be exempt, under Article 81(3), from infringement.

#### Nintendo discovers price-fixing and prevention of parallel imports are not within the rules, but its fine is reduced for good behaviour – Nintendo v European Commission, European Court of First Instance...

The European Court of First Instance has said that, although Nintendo and its distributors were rightly found to be in breach of EU competition law by the European Commission, their fines could be reduced for good behaviour. The games console maker and its distributors had been parties to agreements which had as their object or effect the distortion of trade between Member States of the EU, contrary to Article 81 of the EC Treaty. The parties had agreed to keep re-sale prices of Nintendo's consoles artificially high and thereby also prevent parallel importing within the EU. Parallel importing is where products are imported from a cheaper territory and re-sold at a profit, but still below market price, in another territory. Anyone who did not comply with the agreements were punished by Nintendo's refusal or reduction in supplies. Despite the infringements, most of the fines were reduced by 40% because of the parties' co-operation with the Commission's investigation. Nintendo's fine was therefore reduced to a mere €120m.

## Contracts

### International supply contract exclusion from UCTA is given wide interpretation to cover misrepresentation – Trident v First Flight, Court of Appeal...

The Court of Appeal has given a wide interpretation to Section 26 of the Unfair Contract Terms Act 1977. UCTA places restrictions on the ways in which people may exclude or limit their liability. For international supply contracts, Section 26 of UCTA carves out the limits that the rest of UCTA imposes on the ability of someone to exclude or limit their liability by reference to a contract term. An international supply contract is one where all of the following applies: it relates to the supply of goods, it is made by parties who are based in different countries, and the goods will be carried from one country to another (or the contract is actually entered into in different countries).

In this case, Trident leased two aircrafts to First Flight, an Indian courier company. First Flight stopped paying rent for alleged defects in the planes. Trident then terminated the contract. First Flight claimed that it had been induced to enter into the contract based on a misrepresentation. In response, Trident alleged that the contractual terms prevented First Flight from relying on alleged misrepresentations. This amounted to an exclusion clause, but the question was whether or not a clause excluding liability for misrepresentations fell within the Section 26 exemption so that the other UCTA rules did not apply.

The Court of Appeal stated that although Section 26 specifically refers to limits imposed by UCTA on contract terms, the wording of Section 26 as a whole deals with excluding or limiting liability through contract terms in general and not just for breach of contract. Therefore, Section 26 was capable of applying to wording that excluded or limited liability for misrepresentation. Accordingly, it was permissible in this case for Trident to exclude or limit liability for misrepresentations in international supply contracts without the constraints of the rules of UCTA applying.

The Court of Appeal took a further wide interpretation of what qualifies to be an international supply contract. It applied not just to situations where the contract provided for goods to be transported across borders, but where the contract envisaged that the goods would in the future be transported across borders. Here, the aeroplanes were being transferred between the parties within the UK, but the parties knew that First Flight intended to use them in India.

Paul Gershlick, editor of Upload-IT, comments: 'This is an important case, as it interprets the scope of UCTA's application to an international supply contract. It shows that courts are prepared to give a wide meaning to what is an international supply contract, and therefore a narrow meaning to what is caught by UCTA's tight restrictions on the parties' freedom to contract and set their own limits and exclusions on liability. This case does not answer every question, though. Although this particular court gave a wide interpretation to Section 26, it is still not clear what happens when the international agreement involves the supply of services or software, which are not specifically mentioned in Section 26. It remains to be seen whether a court would take a wide interpretation of those sorts of supplies.'

### Misbehaving party to contract can't deliberately breach the agreement and then claim not to have liability by reference to limitation on liability clause – NETTV v MAR, High Court...

N made interactive Internet television platforms. M provided information and services to hedge funds. They entered into a joint venture for N to broadcast material provided by M. The agreement was to last for three years except where there was a material breach. Soon after the agreement had been made, M sought to terminate the agreement without justification. M admitted that its termination was wrongful, but said it was protected from incurring liability by reference to an exclusion clause in the agreement, under which neither party would be liable to the other for (amongst other things) loss of profit or loss of opportunity. M argued that, as it would still be liable for N's direct set-up costs, this interpretation did not mean that it could just act in breach of the agreement and avoid having any liability.

The High Court disagreed with M. It said the starting point for any liability clause must be a strong presumption that it is not intended to cover a deliberate repudiatory (or fundamental) breach of contract. That presumption could be refuted, but there needed to be very strong, clear language used that any deliberate wrongdoing done by the party or its controlling mind (such as a managing director) was intended to be covered (such as: 'including without limitation deliberate repudiatory acts by the parties to the contract themselves'). There was no such strong, clear language used here, let alone for deliberate fundamental wrongdoing. M's argument that N could still claim for its set-up costs were inadequate. Lost profit was likely to be the most serious consequence of the fundamental breach, so there would be little deterrent not to deliberately breach if M's interpretation was correct. Therefore, the exclusion clause did not cover the deliberate repudiatory breach here and M lost.

Paul Gershlick, editor of Upload-IT, comments: 'This still does not mean that parties should use those express words to exclude or limit liability for deliberate breach of contract. On a commercial basis, the other side may of course be put off by those words

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and wonder about the commitment to fulfilling the contract. And legally, any attempt to exclude or limit liability for deliberate breach may also be unenforceable if a court considers that attempt to be unreasonable under the Unfair Contract Terms Act.'

## Guidance provided on indemnity payment rules to commercial agents, but rules still not clarified much – Turgay v Deutsche Tamoil, European Court of Justice...

Under the EU's Commercial Agents Directive, agents are entitled to certain rights. In particular, on termination of the relationship, they are entitled either to compensation or indemnity from their principals. An agent is entitled to an indemnity payment if: he has brought new customers to the principal or has significantly increased the volume of business and the principal continues to derive substantial benefits from that business; and payment of the indemnity is equitable in the circumstances, in particular with regard to the commission lost by the agent on the business transacted with the customers.

In this particular case, Turgay (the agent) sold fuel on a commission basis at a petrol station owned by Deutsche Tamoil (the principal) and leased by Turgay. Deutsche Tamoil was a member of a much larger corporate group. The German court was asked to rule on the indemnity due to the agent, and the court referred the matter to the European Court of Justice. The ECJ said that lost commission to the agent was only one of several elements relevant to determining whether an indemnity payment was equitable. It was for the courts of the particular Member State of the EU to decide whether an indemnity was equitable in the circumstances, although the relevant court's interpretation must not be to the agent's detriment. The ECJ also stated that benefits to the principal's other group companies are not deemed benefits to the principal and they do not have to be taken into account when calculating the agent's indemnity.

Paul Gershlick, editor of Upload-IT, comments: 'Although any ruling by the ECJ on any aspect of the Commercial Agents Directive is welcome, this one does not help much. Effectively saying that it all comes down to the Member State to exercise their own discretion without giving very clear guidelines leaves principals and agents unclear as to their respective positions. In the UK, previous decisions on indemnity payments have included factors other than just lost commission (like expenses), so this latest case does not really take the position forward much.'

## Unfair consumer contract terms not enforceable against consumers in existing as well as future contracts – OFT v Foxtons, Court of Appeal...

The Office of Fair Trading has sought an injunction against Foxtons to stop the estate agency from having offending terms in any contracts. Foxtons argued that the injunction should only apply in respect of future contracts, rather than for existing contracts. The High Court had agreed with Foxtons, but the Court of Appeal has now overturned that decision and sided with the OFT. The contract terms at the centre of the dispute stated that Foxtons could charge commission to landlords in respect of tenants introduced by Foxtons even where Foxtons has not been involved with negotiating or securing the lease renewal or extension, or sale. The Court of Appeal has not ruled on whether those terms are unfair – that will be the subject of a further hearing. The Court of Appeal decision relates purely to which contracts would be affected if there is a finding of unfairness.

The Unfair Terms in Consumer Contracts Regulations 1999 apply to terms in contracts involving a consumer where the offending term is either not in plain English, or has not been significantly negotiated and is contrary to the requirements of good faith and causes a significant imbalance in the parties' rights and obligations to the consumer's detriment. The OFT said many of the landlords in this case were non-professional and so should be regarded as 'consumers' and benefit from protection under the Regulations.

## Manchester United agrees to play ball and change season ticket terms to make them fair...

The Office of Fair Trading has persuaded Manchester United to change its terms relating to season tickets. Manchester United did not agree with the refereeing decision, but it has chosen the sensible route to avoid conflict by agreeing with the OFT's recommendations. This followed a complaint from the Manchester United Supporters Trust that the club's season ticket terms were unfair, contrary to the Unfair Terms in Consumer Contracts Regulations 1999. Those Regulations apply to terms in contracts involving a consumer where the offending term is either not in plain English, or has not been significantly negotiated and is contrary to the requirements of good faith and causes a significant imbalance in the parties' rights and obligations to the consumer's detriment.

If fans bought a season ticket, they were entitled to see every home league game. However, they had no right to see all the home cup games. The Trust said that was not fair on the fans. It also said that terms which required season ticket holders to be obliged to buy a ticket for every home cup game over and above the league games was also unfair. The terms were changed so that season ticket holders now have the right to watch every home game, but if they choose not to exercise that right and not to pay for the cup games and their ticket is cancelled as a result, they would be given a pro rata refund of league match payments. There still remains the possibility, though, that if some fans cannot afford to pay for all the extra tickets, they

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could well end up supporting Manchester United's opponents in cup competitions, just so they can keep hold of their season ticket! Now that doesn't seem like a fair result! That said, at least if the team continues to win the Premier League every year, the fans won't have to fork out even more money to watch the team play in the qualifiers for the Champions League competition...unlike the Arsenal fans!

## New name for national procurement partner for UK public services...

Anyone doing business with the public sector needs to get used to a change in lingo. OGCbuying.solutions – the national procurement partner for UK public services – has announced that it has changed its name to Buying Solutions. It has also withdrawn the Catalist and Managed Services brands to develop the single Buying Solutions brand. The name change is intended to reflect the difference between Buying Solutions and the Office of Government Commerce. Buying Solutions is an agency of the OGC. OGC is responsible for policy, best practice, assurance and co-ordination of cross-governmental delivery, whilst Buying Solutions is the delivery agent.

## Copyright and Database Rights

### No excuse for peer-to-peer service to say it did not host infringing material as The Pirate Bay operators are jailed by Swedish court...

A Swedish court has sent four operators of The Pirate Bay peer-to-peer file-sharing service to jail for one year and fined them about £3m in damages for infringing copyright. The damages were awarded to key entertainment businesses, including Warner, Sony, EMI and Columbia. The Swedish court refused to agree with the service operators' arguments that since they were not actually hosting any infringing files they did nothing wrong. The court said that the mere fact that they hosted 'torrent' links to peer-to-peer suppliers of infringing television, film and music files was sufficient. Unlike previous victories for rights owners against Napster, Grokster, Morpheus and Kazaa, this latest battle took place in the criminal (rather than civil) courts.

There has been concern that other Internet search listing service providers such as Google may suffer as a result of this ruling. However, as Paul Gershlick, Upload-IT's editor, comments: 'There is a clear difference which courts have so far reinforced time and again. Anyone whose business model depended on deliberately seeking to make money (through advertising revenues) out of services where the vast majority of users infringed copyright would be deemed themselves to have infringed copyright laws. However, that was totally different from innocent Internet services such as Google which do not encourage intellectual property infringement, and where most use is legal. But there will be interesting legal cases to decide where the line is to be drawn. Is eBay safe despite there being a number of counterfeit items sold there? And what about YouTube, where so much user-generated content uploaded infringes copyright? We should expect a flurry of legal cases in the next couple of years, so watch this space.'

Meanwhile, The Pirate Bay case itself has come in for some controversy. The judge has been accused of having a conflict of interest, since he was a member of the Swedish Copyright Association and was on the board of Swedish Association for the Protection of Industrial Property. The jailed men have asked for a retrial, so the music might not have stopped playing in this particular case.

### French Parliament passes, and then rejects, three strikes law against file-sharers...

The French Parliament has rejected a proposed law that the lower house of its parliament had passed days earlier which could have led to users having their Internet use disconnected for engaging in unauthorised peer-to-peer file-sharing of copyright content. The proposed law was dubbed the 'three strikes law' because it would have entailed two initial warning letters being sent to infringers, followed by a third letter telling them that their Internet connection was going to be suspended. There is speculation that the French Parliament may yet re-introduce a watered-down version of the proposed law.

### European Parliament votes to extend copyright in sound recordings to 70 years...

The European Parliament has voted to extend the copyright protection in sound recordings from the current 50 years from the year of release of the recording, up to 70 years. That is less than the 95 years that the European Commission had called for. Meanwhile, the UK government had recently been following the 2006 Gowers Review recommendations, which had called for copyright protection to remain unchanged at 50 years. The Commission's 95 years proposal was in response to pressure from rock musicians such as Cliff Richard, who had been concerned that royalties on music released at the end of the 1950s were going to dry up. The EU's compromise position of 70 years needs the approval of EU Member States to become law. The copyright in sound recordings is different from royalties payable to writers of music or lyrics, which last for 70 years from the death of the writer.

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## Disgruntled redundant staff are whistleblowing ex-employers for under-licensing software...

Staff who have been made redundant are increasingly shopping their ex-employers for failure to have paid for all software licences. Those are the claims of The Business Software Alliance, a group of leading software licensors, which collects underpaid licence fees on its members' behalves. The BSA says that the number of reported incidents are up by about 10% compared to last year. Unlicensed software often arises as a result of businesses neglecting their licensing obligations and how much they should pay for permitted use, particularly after a period of growth in the business.

## Copyright could automatically revert to composers under music publishing contract where publisher was in material breach – Crosstown v Rive Droite Music, High Court...

W had assigned their copyright in their compositions to R under a music publishing agreement so that W could benefit from royalties as a result of R licensing their music. The agreement provided that if R was in 'material breach' and failed to remedy the breach within a specified time, all rights assigned to the publisher would 'revert forthwith' to W. W had served a few notices of breach of accounting provisions. R then purported to assign the copyright to another person, C. W argued that copyright had been re-assigned as the breaches had not been corrected within the appropriate time.

The High Court agreed with W. The agreements led to an automatic reversion of copyright back to W in this situation. Under English copyright law, the agreement was capable of providing for this to happen. There was no principle under English law that copyright could not be owned by different people at different times. In any event, the Copyright Designs and Patents Act 1988 provided that copyright ownership could revert on a specific date, and there was no reason why that could not be extended to apply to a clause such as the one in this agreement which provided for an earlier reversion of ownership.

## Data Protection/Privacy/Confidentiality

### Information Commissioner gives practical examples of how to use Data Protection Act and exposes common myths...

The Information Commissioner's Office – the regulator in charge of enforcing data protection law – has published some guidance giving practical examples of applying the Data Protection Act in practice and exposing some common myths. The Act is there to ensure organisations keep data relating to living individuals in a sensible way. It must be kept fairly, securely, accurately and only for as long as they need it. Some organisations err on the side of caution while others use the Act as an excuse not to do things. Some particular examples highlighted by the ICO include:

- ◆ Myth 1 – “The Data Protection Act stops parents from taking photos in schools.” Not true. Photographs taken for personal use are exempt from the Act. Parents can take photos and film school events and keep them for their own albums.
- ◆ Myth 2 – “The Data Protection Act means a company is never allowed to give a customer's details to a third party.” Not true. Data can be given to a third party if the discloser and recipient are entitled to do so under the Act. There are several ways in which this is permitted. Organisations should be cautious about sending data about a particular person to third parties including to someone who claims to be connected with that person (such as a relative or spouse), particularly as there are unscrupulous people or estranged relations. However, once satisfied that a particular person is entitled to receive information on behalf of another, there is nothing wrong with disclosing it to that person.
- ◆ Myth 3 – “The Data Protection Act stops parents from finding out their children's exam results”. Not true. The *Daily Telegraph* had reported on a case where an 11-year-old girl and her mother were prevented from finding out about the girl's flute exam results as it was the flute teacher who had made the application. There should have been nothing to stop the Exam Board from having given the results to the student or her mother.

Paul Gershlick, editor of Upload-IT, comments: 'Organisations often go to one extreme or the other with data protection law: they either use people's data wantonly or they are too careful with it. Data protection law doesn't mean that businesses have to stop working properly. There are often very workable common sense solutions as long as the principles set out in the Data Protection Act have been complied with.'

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## Despite lots of letters of complaint, Information Commissioner's Office writes open letter to Privacy International explaining why Street View is legitimate...

The Information Commissioner's Office – the regulator in charge of enforcing data protection law – has received over 70 complaints about Google's recent UK launch of its Street View service. One complainant was Privacy International, which asserted that the safeguards promised by Google did not actually give adequate notice or deal with photographed people's data fairly as required by data protection laws. Google's service allows users to browse pictures taken at street level. The picture view can be rotated a full 360 degrees and users can effectively wander along roads and through the cities at street level. In the UK, it currently applies in 25 cities from Aberdeen to Southampton, and growing.

Google says it has taken significant steps to ensure that it protects the privacy of individuals. It uses technology to blur out faces and licence plates that appear in the images and provides tools for flagging and reporting inappropriate images for removal. In an open letter back to Privacy International, the ICO sides with Street View. It says that the service has many benefits and there are adequate safeguards to protect against privacy breaches. It would be impractical to inform everyone in each photograph that they are captured in that picture. Despite good efforts by Google to blur out some data, it may still be possible for some people to be recognised by those who know them well. However, the photographs are historic and not date or time stamped. The ICO added that it had not received complaints from anyone who had asked for an image showing them to be removed where Google had not carried out their request.

The ICO stated that any people caught in an image were entirely incidental – to ban people from showing general scenes that captured people's images would render television programmes such as Match of the Day unworkable. There was a huge difference between showing pictures intended to show people doing a particular thing at a particular time, and publishing general street images that were not timed and from which a few people who know them well may be able to identify them. It would be disproportionate to force the service to be suspended or changed because of a relatively low privacy risk.

Mark Weston, head of the Commercial, IP and IT team at Matthew Arnold & Baldwin LLP, told Sky News recently: 'The technology ratchet has turned another notch. This is yet another new technological tool which although useful raises legal issues. It is important that there are adequate safeguards to protect privacy, so as to ensure the tool is both trusted and useful.'

## British Council rebuked by Information Commissioner's Office for loss of sensitive personal data surrounding 2,000 staff...

The Information Commissioner's Office – the regulator in charge of enforcing data protection law – has rebuked the British Council for the loss of an unencrypted disk by a courier. The disc contained sensitive personal data (trade union membership) as well as banking details of 2,000 staff. Although the disc was lost by a courier, it was the fact that it was unencrypted which was the problem. The UK's international organisation for cultural relations and educational opportunities has signed a formal statement to the ICO promising to improve its data handling in the future, including making its data more secure.

## European Commission takes action against UK for inadequate implementation of privacy laws after Phorm trials had been conducted without BT customers' knowledge...

The European Commission has initiated legal proceedings against the UK because of its concerns that the UK failed to adequately implement the Data Protection Directive and Privacy and Communications Directive into UK law. The Commission is concerned that BT trialled the use of Phorm's technology with BT's Internet users without the users' knowledge. That first trial was before a subsequent trial involving BT, Virgin and Talk Talk, in which users were given clearer information. Phorm's technology provides users with more targeted advertising by monitoring their surfing habits. There are benefits from Phorm for advertisers (for better targeting their advertising message), Internet service providers (if advertisers are willing to contribute a fee for having the information) and also the users themselves (for receiving fewer adverts about things they not interested in), but privacy campaigners say that users should not be monitored unless they are comfortable with this.

The Commission is concerned that, despite the fact that there had been complaints about BT's initial trial of Phorm to the police and the Information Commissioner's Office (the UK's privacy regulator), no action could be taken. The Commission believes this was because the UK's implementation of the two Directives was inadequate and there was a hole in the UK laws. The UK has two months to respond to the Commission's complaint. The matter could ultimately be resolved by the European Court of Justice.

Meanwhile, in a separate development, Amazon and Wikipedia have blocked Phorm's technology from monitoring use of their websites. This followed a campaign by Open Rights Group – the pressure group – which had asked several big Internet sites to block Phorm. Any website can block users' behaviour on its site from being tracked. Websites may wish to opt out if they are concerned that users may be worried that they are being monitored whilst on their sites. Website operators may also be

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concerned about suffering loss of business if competitors can serve more targeted adverts based on information gleaned by Phorm about users' surfing habits from their own websites.

## European Commission promises to take action against countries that do not protect people against RFID chips...

The European Commission has promised to take legal action against any EU Member State which does not adequately protect its citizens from new intrusive technologies such as RFID chips or social networking. A Radio Frequency Identification Chip sends radio signals when it is near to a receiver, in order to detect the object on which the RFID chip resides. RFID technology can be used to help retailers manage stock, and also to allow people into secure buildings. However, they can potentially cause privacy concerns if they also monitor movements of people carrying the object which has the RFID chip on it. The Commission is concerned to see that EU citizens' movements are not monitored - at least not without their clear knowledge or with the option to switch the device off at any time. This promise comes at a time when the Commission has started separate legal action against the UK for the UK's inadequate protection of people's privacy, following trials of the Phorm monitoring technology that was done without Internet users' knowledge.

## Data Retention

### Government decides against plans for single database of everyone's phone, email and web habits...

The government has dropped controversial plans for its creation and storage of a single database containing details of everyone's telephone, email and website usage in the UK. Instead, it will rely on accessing the records of communications services providers as and when necessary. The government said that the reason for its change of mind was because it had taken on board privacy concerns. However, the scheme was also expected to cost billions of pounds. The government has recently introduced legislation implementing an EU Directive which requires telephone companies and Internet service providers to store data for 12 months relating to the source, destination, time, date, duration and type of communication, as well as the users' communication equipment and, in respect of mobile phones, the location.

## Discrimination

### Equality Bill published...

The government has published the Equality Bill. If passed, it will replace existing discrimination laws, including the Disability Discrimination Act. It would consolidate into one place and also extend in certain respects all relevant legislation relating to discrimination, harassment or victimisation of people in relation to providing goods, services or facilities. For example, the new law would extend age discrimination laws from applying in the workplace to making it unlawful to discriminate based on age when providing goods, services or facilities. The sort of discrimination that would be covered would be sex, race, disability, sexual orientation, gender reassignment, pregnancy/maternity, religion or belief, and age. The new law would apply to public, private and voluntary organisations.

Discrimination outlawed could be either direct or indirect. Indirect discrimination applies where someone has a policy that appears to apply equally but in fact its effects are particularly felt by people in a certain category. The rules include not discriminating by refusing to provide the service, and not discriminating in relation to the terms on which the service is provided. The Bill would not prohibit justifiably different treatment based on age, such as free bus passes or properly calculated different insurance premiums to reflect the actual risks represented by the different age group.

The Bill still needs to make its way through Parliament before it would become law.

## Interception of Communications

### Government consults on reining in snooping powers under RIPA...

The government is consulting over whether to reduce the powers of public bodies to snoop on citizens. The consultation follows some bad press over councils using powers under the Regulation of Investigatory Powers Act 2000 to snoop on people suspected of putting their bins out on the wrong day or people who allow their dogs to foul the pavement. RIPA allows covert surveillance of targeted individuals and the obtaining of communications data (the timings, duration and location, etc rather than the actual content of emails and telephone calls). The data can be collected and used by a variety of public bodies and for a variety of purposes, such as national security, preventing or detecting crime, public health, public safety or national emergency.

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The consultation asks whether any public authorities should be removed from having RIPA rights, whether the rank of authorising covert investigations should be raised, and whether elected councillors should oversee the way the powers are used. Whilst the government has stated that the intrusive powers under RIPA should not be abused, it believes the authorities should be given the widest possible tools to do their jobs. For example, snooping may be necessary to see whether someone who had claimed benefits had been doing so fraudulently. Whilst acknowledging concerns of misuse, the government has argued for a common sense approach. Anyone interested in responding to the consultation must do so by 10 July. Here's a link to the consultation: <http://www.homeoffice.gov.uk/documents/cons-2009-ripa>.

## IT and Internet Use

### 3D data discs storing 500GB of data unveiled by GE...

General Electric has unveiled data discs that can store 500 gigabytes of data. That is about 100 times as much as is stored on a DVD, but the physical discs are about the same size. The new disc can hold much more data because it is stored in three dimensions rather than just pits on the surface of the disc. GE would like to supply the micro-holographic discs to the consumer market. Blu-ray discs, which are currently used to store high definition films and games, can hold up to 50GB, so the new discs would be a significant advance.

### Iron Mountain launches secure software escrow service to encourage early dispute resolution in IT disputes...

Iron Mountain, the legal archiving business, has launched a new service that is aimed at encouraging earlier settlement of IT disputes, through secure access to the confidential software in dispute. The software could be examinable on a laptop in a secure, monitored room where printing and networking would be disabled. The aim would be to encourage both sides to examine the disputed material without risk of theft or copying or modification. Iron Mountain would act as a neutral third party in providing this service.

## Jurisdiction

### Beware: non-exclusive English jurisdiction clause does not mean it is easy to take legal action outside of England – Deutsche Bank v Highland Crusader, High Court...

Deutsche Bank and Highland entered into a contract, but ended up locked in a legal battle. The big question surrounded where that battle should take place. Highland started proceedings in Texas. Deutsche Bank then commenced proceedings in the English courts. Deutsche Bank applied for an anti-suit injunction – ie an application for an order prohibiting Highland from continuing proceedings in another court. The relevant jurisdiction clause in the contract provided as follows: 'Buyer and Seller hereby irrevocably submit for all purposes of or in connection with this Agreement...to the jurisdiction of the Courts of England...Nothing in this paragraph shall limit the right of any party to take proceedings in the courts of any country of competent jurisdiction.'

The parties agreed that the clause was a non-exclusive jurisdiction clause. The question was: what was its impact? The High Court confirmed that it was important that there was only one set of proceedings in play, and full regard should be given to reflecting the contracted jurisdiction that the parties had selected. It did not matter (as in this case) which set of proceedings started first. The test for where the case should be heard was not the balance of convenience nor whether there had been oppressive or vexatious conduct generally. It was that, unless there was some exceptional unforeseeable change in circumstances since the contract, it was vexatious or oppressive to continue proceedings in a non-contractually agreed forum as well as in the contractually agreed forum. There was no unforeseeable change in circumstances here. Highland had therefore acted vexatiously and oppressively by bringing Texas proceedings and it was in the interests of justice that those proceedings be restrained.

Paul Gershlick, editor of Upload-IT, comments: 'Despite common perception, the existence of a non-exclusive jurisdiction clause does not mean that the court can decide which is the most appropriate forum.'

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## Misleading Selling

### eBay rebuked by ASA for claiming to be 25% cheaper than High Street stores on brand new items...

eBay has been rebuked by the advertising watchdog for running misleading advertisements. The adverts said: 'Guess What? 25% cheaper than the High Street on Brand new items.' The small print for the advert said: 'Source: Frontier Economics, Spring 2008. Figure obtained by comparing the average sold price (including P&P) of 288 new products on eBay.co.uk with the price in mainstream retail stores. In respect of each product, prices were obtained in 6 different retail stores and the average price was taken.' The Advertising Standards Authority agreed with a complainant that readers were likely to infer from the headline that they could expect a new item purchased on eBay to be 25% cheaper than one purchased in the High Street on every occasion. Although it may be that eBay was cheaper than some High Street stores for some new products, there was no evidence provided by eBay that showed that it was cheaper than all High Street stores for all new products. Although the small print clarified the position, it was not big enough, particularly as it contradicted the main headline.

The advert was therefore likely to mislead and breached the CAP Code, which is administered by the ASA. The ASA ordered eBay to stop the advert from running again in its current form, and also to have robust evidence in the future supporting any comparative advertising claim. The CAP Code is a code of practice governing 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.

## Trade Marks and Passing Off

### European Court says luxury brands can use trade mark law where goods are not sold in a luxurious way – Copad v Christian Dior, European Court of Justice...

Dior entered into a trade mark licence agreement with SIL for manufacturing and distributing luxury goods bearing the 'Christian Dior' trade mark. The licence agreement contained a provision requiring SIL not to sell to particular places such as discount stores, mail order businesses or door-to-door sales people without Dior's prior written agreement, in order to maintain the repute and prestige of the trade mark. SIL was also obliged to ensure that this rule was complied with by its distributors and retailers. Dior refused SIL's request for consent to supply outside of Dior's selective distribution network. Despite that, SIL went ahead anyway and sold to Copad, a discount store. Dior sued SIL and Copad for trade mark infringement. The French courts ruled that any action by Dior was only for breach of contract and not trade mark infringement. The case ended up going to the European Court of Justice to adjudicate.

The ECJ agreed with Dior's arguments. It said that if a licensee breached a term of the licence relating to quality of goods, the trade mark owner could invoke its trade mark rights. The quality of luxury goods as in this case was not just about material characteristics, but also their high-class image, which created an aura of luxury. A reduction in the aura would impair that sense of luxury. The ECJ said that it was for the relevant national court to decide whether the licensee's breach damaged the luxurious aura of the goods and therefore affected their quality. For good measure, though, the ECJ added its view that the object of the selective distribution agreement was to ensure Dior's goods were displayed in a manner reflecting the luxurious reputation.

The ECJ went on to say that although trade mark owners had usually 'exhausted' their trade mark rights to prohibit use of the mark in goods when those goods have been put on the market in the European Economic Area with their consent, there are exceptions to this. A trade mark licence did not amount to an absolute and unconditional consent of the trade mark owner. Where the trade mark licensee supply was contrary to terms of the licence contract relating to its duration, the scope of goods and services, territory and quality – as in here – the trade mark owner's rights were not exhausted. Therefore, Dior could assert its trade mark rights against anyone who had infringed its trade marks – and not just SIL for breach of contract – provided that Dior would be able to convince the French court that SIL's breach of the licence contract damaged the luxurious aura and was therefore detrimental to the quality of the goods.

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