

# Legal Developments



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## Competition Law

### Over 100 building firms fined for cover pricing...

The Office of Fair Trading – the UK’s competition law regulator – has fined 103 businesses a total of £130m for having anti-competitive practices, contrary to the Chapter I Prohibition of the Competition Act 1998. Their activities involved cover pricing – which is where the bidding parties agree with each other who is going to be the successful bidder for a tender, and then the parties other than the winner put in bids which are clearly higher than the winner’s, but not ridiculously so. This gives the impression that there has been a fair bidding process, even though the parties colluded. 80% of the businesses fined had had their fines reduced under the OFT’s leniency regime as they had co-operated with the competition law investigation. However, on average, the businesses were fined over £1m each and they represented over 1% of their annual worldwide turnover. The OFT can fine offenders up to 10% of global turnover for a competition law breach.

### Recruitment agents in construction sector fined millions for competition law breaches...

The Office of Fair Trading – the UK’s competition law regulator – has fined recruitment agents in the building sector nearly £40m for having engaged in anti-competitive conduct, contrary to the Chapter I Prohibition of the Competition Act 1998. The fine came hot on the heels of fines for separate, unrelated cartel activity between over 100 construction firms, as reported this month at [www.upload-it.com](http://www.upload-it.com). The recruiters’ offending activity was directed at freezing out Parc UK Limited, a new entrant to the market, which wanted to be an intermediary between the recruiters and certain construction companies. The existing players in the recruitment market were concerned about their margins, so engaged in conduct designed to boycott Parc and fix their prices. The OFT would have fined the eight offending firms £173 million, but the whistleblower received 100% immunity, whilst other players received reductions of about 20-30% for their co-operation with the investigation. Hays was fined the highest at £30 million, even after the 30% leniency reduction.

## Contracts

### Suppliers can’t charge consumers for use made of goods that are returned under Distance Selling Regulations – Pia Messner v Firma Stefan Krueger, European Court of Justice...

Under the European Union’s Directive on distance selling, which has been implemented into English law through the Consumer Protection (Distance Selling) Regulations 2000, consumers have certain rights when entering into contracts at a distance, such as over the Internet, telephone or postal order. Those rights include a cooling off period to change their mind without reason. In the case of goods, this is usually seven working days from the day after delivery. The only charge that can be levied against the consumer for exercising the cooling off right is to charge for the cost of returning the goods. Any costs incurred in delivery to the consumer in the first place must be absorbed by the supplier.

This case involved the European Court of Justice making a ruling on a rule in Germany, under which the supplier sought to charge the consumer for use made of the goods before they were sent back. The ECJ said that any charge for use during the cancellation period was not permitted under the Distance Selling Directive, as the point of the Directive was to enable the consumer to have a right to decide without having to pay when he does not get a chance to see the actual goods before buying.

### Health club membership terms not fit enough as OFT requires changes to comply with consumer contract laws...

Total Fitness UK has agreed to revise its membership agreements for its customers, after the Office of Fair Trading had decided that its terms did not comply with the Unfair Terms in Consumer Contracts Regulations 1999. The 1999 Regulations require standard terms between businesses and consumers to be fair and balanced for the consumer and to be in plain English. The OFT has the remit to take action against anyone it considers does not to comply with those Regulations and has asked Total Fitness to:

- ◆ Make it clearer as to the circumstances in which it is excluding or limiting its liability.
- ◆ Clarify that it does not have absolute discretion to change opening times or reduce facility availability without considering the consumers’ rights.
- ◆ Provide clearer information for the circumstances in which the consumer may cancel the agreement.

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Total Fitness has promised to comply with these requirements. If it fails to do so and the OFT obtains a court order, the fitness club could end up in contempt of court.

## Copyright and Database Rights

Removals business agrees out-of-court settlement to pay £2,000 in damages, plus costs, for using single Getty Images photo from the web without authorisation...

JA Coles – a removal firm – has agreed to pay £2,000 in damages to Getty Images for using a single image of a mother and daughter smiling at each other. The firm also agreed to pay Getty's legal costs. The photographic agency had started High Court proceedings, but agreed to settle out of court. Getty has issued many frightening letters in the last few years against people who wrongly believe that they can download any images from the Internet without having to pay for them. Getty asks for high amounts in damages for loss of licence fee per image. Even if the offending business takes down the image from its site as soon as Getty contacts them, as was the case here, there is still a copyright infringement for use of the image before the take-down.

Paul Gershlick, editor of Upload-IT, comments: 'Until recently, Getty had a reputation for sending threatening warning letters but not following up. Now, the business is taking test cases to court to show it is willing to enforce its legal rights. It is very frightening for web site operators to receive threats of being sued for thousands of pounds when it was their web developer who had actually downloaded the images. Unfortunately, many people mistakenly think that anything on the web is free to copy and use, but this is not the case. Web site operators should protect themselves by passing the liability to their web developers with properly worded protection in their contracts.'

## Data Protection/Privacy/Confidentiality

Ex-BNP official fined just £200 for major Data Protection breach, but could be sued for much more...

The former British National Party official who had admitted to publishing on a web site details of the party's entire 12,000 members has been fined just £200. Matt Single was charged for offences under the Data Protection Act in the Magistrates' Court and so the maximum he could have been fined there was £5,000, but the actual amount was a lot less because he was living off jobseeker's benefits. Single was also ordered to pay £100 towards the prosecution costs which had run into tens of thousands of pounds. A BNP spokesperson was outraged by the verdict and said that some of its members were considering taking civil cases to sue Single after they had suffered a lot of damage. People had lost jobs and had their homes attacked, alleged the spokesperson. Upload-IT originally reported the story here: <http://www.upload-it.com/editArticle.aspx?ID=2966>. As Paul Gershlick, editor of [www.upload-it.com](http://www.upload-it.com), told Sky News at the time: 'Questions may be asked about the BNP itself and whether it should have allowed a single person access to so many people's details and also whether it took adequate security measures to prevent the data from getting out.'

Over 50% of most popular web sites use secret cookies that users can't opt out from...

Over 50% of the 100 most popular web sites use a type of surreptitious cookie without their knowledge. Cookies are tiny text files which identify a computer to a server as a unique user when the user visits certain pages. They are stored on the computer's hard drive. A recent survey shows that there is code in Adobe's popular Flash media player which can track users' online behaviour. That code is just like standard cookies, except that it is not stored on the user's browser and so it is very hard to stop, even for users who have deleted standard cookies. 54 of the 100 web sites researched used Flash cookies but only four of them mentioned this in their privacy policies. The Privacy and Electronic Communications Regulations 2003 prohibit the storing of information on a user's computer unless they are given clear and comprehensive information about the purposes of the storage of or access to that information and are given the opportunity to refuse the storage of or access to that information. Based on the research by the University of California, many web sites appear to be in breach of this law.

Publicity-seeking celebrities receive less privacy protection from PCC...

Celebrities who court publicity will now receive less protection from the Press Complaints Commission if their privacy is infringed. The PCC - a self-regulatory organisation for the press – has published its revised Code of Conduct. In other changes, the press now have wider rights to break the Code where this is in the public interest; previously, they had to show

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how the public interest was served by their action, whereas they now only have to say that they 'reasonably believed' that it would be served.

## Government appoints first Identity Commissioner...

The government has appointed the first Identity Commissioner. Sir Joseph Pilling took up his role on 1 October. His remit includes overseeing the government's National Identity Register – the database containing personal data of UK citizens and on which any future ID card scheme will be based. The Prime Minister recently announced at the Labour Party Conference that ID cards would no longer be compulsory. However, it is believed that they will still apply for anyone who wants to renew a passport or driving licence. Whether or not the scheme is actually introduced in 2011 depends on whether Labour is still in power after next year's general election. The Conservatives have announced that the ID card scheme is one of the projects that they would like to kill as part of their public spending cuts. It is therefore questionable whether Sir Joseph will have his job for very long.

## Defamation

### Government consults on new rule that would give online defamers immunity for ever if no one complains within the first year...

The government is looking at changing the law with regard to how long someone has to bring a defamation claim for material posted online. For decades, the rule has been that someone can only start an action within one year of publication. Online, publication is deemed to take place every time the page is downloaded by someone, thus meaning that the liability goes on for ever for material that is posted in their archive. The Government believes this causes a problem for publishers, so it is consulting on changing the law so that people would have one year from the date on which the article is first published on the web to start legal action

Paul Gershlick, editor of [www.Upload-IT.com](http://www.Upload-IT.com), believes there should be no change to the law. He says: 'We are living in the information age. There is so much data on the Internet. Someone being defamed may not be aware of a problem publication. A publisher could publish the offending item and hide it away online in a place that is not picked up by many people, wait a year, and then repeat it as much as they want with impunity. That can't be right. Why should someone defamed be denied their rights to protect their good name and reputation? What may be fairer is to limit causes of action to being brought within one year from when the defamed person discovered the defamatory article. There might be problems proving when the defamed person discovered it, but that seems to be the fair compromise.'

The consultation is open to comment until 16 December.

## E-Commerce Laws

### Web hosts in US ordered to pay US\$32m for web sites' sale of fake goods...

Two Internet service providers - Akanoc Solutions and Managed Solutions – together with the person running them (Steven Chen) have been ordered by a US jury to pay \$32m for trade mark and copyright infringement carried out by the people operating web sites which they were hosting. The sites were selling fake luxury goods, for example some appearing to be Louis Vuitton products. The US's Digital Millennium Copyright provides a 'safe harbor' for ISPs from having to check whether the web sites they are hosting infringe someone else's intellectual property rights. The safe harbor protection applies for ISPs and hosts that are ignorant of the infringing behaviour. However, once they become aware of that infringing behaviour, they are responsible if they continue to provide hosting facilities. The jury decided that Chen and his companies had not proved that they should be protected from the safe harbor provisions and that they were profiting from the sale of the fake goods.

### Ofcom announces proposal for regulating new EU online TV regulations...

Ofcom – the UK media and communications regulator – has announced plans for the enforcement of a new law which implements regulations concerning TV-type content online. The European Union's Audio Visual Media Services Directive is due to be brought into UK law by the end of this year. The new law aims to regulate TV-like services provided online. The Directive had originally been very controversial before it was passed, until it was eventually amended to be clear that it did not intend to cover short user-generated content. The Directive regulates audiovisual media services provided by a media service provider for viewing programmes at the time chosen by the user at their individual request based on a catalogue of programmes selected by the media service provider. It is not clear where the dividing line should be as to what qualifies, but Ofcom has indicated that it would like as few services as possible to be caught by the new regulations, and only those creating the content – rather than intermediaries relaying it – should be held responsible. By way of example, Ofcom has said that the sort of services that would be caught include Sky's television channels, BBC's iPlayer, ITV Player, Channel 4's 4OD, and certain other particular interest services such as online television services of football clubs.

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Ofcom has said that the Association for Television on Demand would regulate the editorial side of the services, while the Advertising Standards Authority would deal with regulating adverts. The Directive requires all content to adhere to basic standards such as: not inciting hatred on grounds of race, religion, nationality or sex; protecting children from certain content; and certain sponsorship and product placement rules.

## Employees

### Different description of scope of services in outsourcing contract can avoid TUPE impact – OCS v Jones, Employment Appeal Tribunal...

Under the Transfer of Undertakings (Protection of Employment) Regulations 2006 (more commonly known as TUPE), employees are automatically transferred when there is a relevant transfer. This applies not just to traditional business transfers but also to outsourcing situations, when a customer outsources its business function or the business function comes back in-house or to a replacement outsourcing service provider. For TUPE to apply to those situations, though, the activities carried out need to be 'fundamentally or essentially the same as carried out by the alleged transferor'.

In this case, OCS provided catering services to a BMW car plant. This involved a restaurant and four cafés providing hot food. OCS staff spent a lot of time preparing the hot meals. MIS then took over the catering, but the new catering contract provided for much less of a meals service and having pre-prepared sandwiches instead. Staff under the MIS contract did not really get involved with hot food preparation, but had to clean and staff the sandwich bar. Mrs Jones was one of a number of OCS catering staff who claimed that her employment had been transferred to MIS under TUPE. However, the Employment Tribunal and then the Employment Appeal Tribunal disagreed. In effect, there had been no service provision change as there were fundamental, rather than minor, differences in the ways in which the tasks were to be performed. MIS carried out a 'wholly different operation' to OCS. The contract differences went further than just a change in menu or style of food, but extended to the type of service being provided.

Paul Gershlick, editor of [www.Upload-IT.com](http://www.Upload-IT.com), comments: 'The TUPE effect can be costly for anyone considering taking an outsourcing contract or for the business bringing the service back in-house. However, this case shows that there are ways around it with clever drafting. The tribunals were influenced by the change in service specifications in the contract and change in job functions for the staff. The new service provider can avoid the effects of TUPE by defining the services and employment requirements in a way that is significantly different from previously. The outgoing provider of the services will want to try to avoid this.'

## IT and Internet Use

### Google's plan to put all books online hits the buffers...

Google's plan to create a database of all books online has hit problems. It had previously appeared to reach an out-of-court settlement after many authors and publishers had sued the Internet search giant over its plans. The settlement would have enabled Google in the US to deal with books that were either out of print or orphaned (which is where the copyright owner cannot be traced). However, the US Department of Justice has opposed the proposed settlement. It said that dealing with millions of copyrighted works in this way should not be done through a settlement between parties but legislation should be passed. The proposed settlement had been controversial as some authors and publishers had opposed it. The Open Book Alliance, one of the opponents of the proposed deal, has pronounced it dead.

Meanwhile, the European Commission is consulting on how to operate a digital library of scanned-in books in Europe. However, unlike Google's controversial scheme, the Commission's project, Europeana, does not scan in any works which are still protected by copyright. The Commission is looking for views from industry and the public as to operating its €3m per year project. The Europeana project has been inhibited by its non-use of out of print works, which represent a significant proportion of publications. The consultation is open until 15 November 2009. For more, click here: [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/communications/next\\_steps\\_2009/questions\\_en.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/communications/next_steps_2009/questions_en.pdf).

### More money now spent on online advertising than television ads...

The decline in advertising revenues for television stations and its replacement with online advertising spend has continued apace, with online advertising overtaking the television medium for the first time. Online spend grew by 5% to £1.75 billion in the first six months of 2009 compared with the corresponding period in 2008, in contrast to a fall of 16% to £1.64 billion for TV ad revenues. Online advertising bucked the trend in general advertising spending, which fell by 16%. These figures were provided by the Internet Advertising Bureau – the trade association for Internet marketing in the UK - and PwC. The scope of online advertising covers email campaigns, classified adverts, display ads and search marketing.

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## UK OK but not great for broadband capability...

The UK is 25<sup>th</sup> out of 66 countries measured for the quality of their broadband networks, according to a survey by Cisco, the networking equipment supplier. The survey looked at download speeds, upload speeds and the delay when information is routed around the Internet (latency). There were four categories of results and the UK appeared in 'Meeting needs for today'. Countries like South Korea and Japan and some northern and eastern European countries led the way by being in 'Ready for tomorrow'. Many other leading European economies and the US were in 'Comfortable for Today'. The final category, below the UK's, was 'Below needs for today'. South Korea and Japan have made commitments to superfast speeds of up to 1Gbps (gigabit per second) by 2012. Cisco expects the UK to be okay for the future because of upgrades in networks following the Digital Britain report. For more on the Digital Britain report, click here: <http://www.upload-it.com/editArticle.aspx?ID=3352>.

## Skype founders and new owners in IP licence spat...

The two founders of Skype - the Internet telephone service - and their company, Joltid, are suing eBay, which bought the Skype service for US\$3 billion in 2005. They are also suing people who have more recently invested in the Skype service. When the eBay deal was done, Joltid kept ownership of certain technology and licensed it to Skype. The claimants are now alleging that Skype is infringing Joltid's copyright. They are claiming damages of US\$75m per day. The action is taking place in the Californian courts. This tit-for-tat measure follows legal action started by eBay against Joltid in the UK courts for alleged licence breaches.

## US telecoms regulator insists on net neutrality...

The Federal Communications Commission – the influential US telecoms regulator – has insisted on net neutrality. This means that Internet traffic must be treated in the same way by Internet service providers. Ideas had been floated by ISPs that they would need to prioritise or restrict certain types of Internet traffic because the Internet was getting too congested and their costs were rising to deal with online video. The FCC also discussed charging certain content providers – in addition to its business model of charging subscribers - for allowing their material to be accessed. The FCC said: 'It is vital that we safeguard the free and open internet.' It has insisted in its rules that ISPs do not discriminate against particular Internet content or applications, and that they are also transparent as to their network management practices.

## Miscellaneous Laws

### 600 years of history wiped out with creation of Supreme Court...

After more than 600 years, there is no more House of Lords as the highest court in the land, and there are no more Law Lords. At a stroke, on 1 October, they were replaced by a Supreme Court and Supreme Court Justices. The Court will be entirely independent of Parliament and the new court even has a new building near to Parliament in Westminster. 11 of the final 12 Law Lords have become Supreme Court Justices.

## Misleading Advertising

### ASA rules that leaflets distributed by business about its own offering constitute advertising and should be regulated as ads...

The Advertising Standards Authority – the advertising watchdog – has ruled that a leaflet concerning a proposed new Tesco shop that was distributed by Tesco itself constituted advertising and should be regulated under the CAP Code. The CAP Code is a code of practice governing the content of adverts and marketing communications, and it is administered by the ASA. Although the Code does not have legal force, it is best practice to comply with it, as failure to do so can result in bad publicity and ultimately an inability to obtain advertising space.

In this case, the ASA ruled that Tesco's leaflet was misleading and broke the CAP Code. The leaflet had claimed that there was a need and demand for a new food shop in the Manningtree area. The ASA said that this suggested that a majority were in favour, when in fact only 8.6% of respondents to a telephone survey believed that a new supermarket would be useful.

### Tesco not wrong for using Boots' higher online prices when research showed this was a reasonable action to take...

Tesco did not breach the CAP Code when it used the prices on a competitor's web site for price comparison purposes, rather than the cheaper in-store prices. That is according to the Advertising Standards Authority, which administers the CAP Code. The CAP Code is a code of practice governing the content of adverts and marketing communications. Although the Code does

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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.

In this case, Tesco compared the price of its £9.76 razor blades with those at Boots, which Tesco said were priced at £11.24. Boots complained that this was misleading as the price in its shop was £9.60. The ASA rejected the complaint because it said that Tesco had conducted sufficient research to show that Boots' Internet prices were generally the same if not lower than its in-store prices. Although Boots said that its online prices were sometimes more expensive than their in-store ones, it could not give any indication for how often that happened. Tesco said that it could have put a disclaimer in all of its adverts but it thought that would be too cumbersome a way to fix a small problem. The ASA agreed that what Tesco did was fair.

## Advertisers need to tread carefully when using ex-employees in their material without their consent...

J&S Security had a leaflet promoting its security guards with an image of a man in a fluorescent jacket, with text saying: 'Fully uniformed guards, all guards are SIA Licensed.' The person appearing in the photo was an ex-employee of J&S and objected that he had not consented. He also questioned whether J&S was SIA licensed. The Advertising Standards Authority asked J&S for their comments. J&S did not respond in writing, but over the telephone claimed that it had obtained verbal consent of the employee. The ASA said that was not good enough and breached the CAP Code. The ex-employee said he had only ever consented to his photo being used for ID purposes. The ASA also ruled that the company breached the CAP Code because it had failed to prove that it was SIA Licensed.

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

## Sky rebuked for advertising high definition for sports events which could not be installed in time...

The Advertising Standards Authority has rebuked Sky for advertising its high definition service for coverage of crucial sports matches at a time when it would not have been possible to provide the service in time for people who ordered it. Sky sought to encourage viewers to buy its high definition package so that they could watch the Ashes cricket matches and the British and Irish Lions rugby tour to South Africa. Unfortunately, due to the fact that the waiting time for installation was then 12 weeks, it would not have been possible for viewers to watch all of the matches if they responded to the adverts. The ASA – the advertising watchdog – therefore ruled that the adverts were misleading. The ASA decided that the adverts had breached the broadcast and non-broadcast codes of practice that it administers and ordered Sky not to repeat the offending ads.

## OFT and US counterpart work to stop US retailer from misleading UK buyers...

The Federal Trade Commission has obtained an injunction to stop a US retailer from misleading UK consumers. The FTC worked with the Office of Fair Trading, the UK consumer protection body, to stop the problem. Balls of Kryptonite claimed that it had signed up to the 'safe harbor' data protection programme, which protects data about EU individuals when it is transferred to and processed in the US. However, the Californian company had not done so. Its behaviour was therefore misleading. It had also wrongfully misled consumers into believing that they were dealing with a UK-based company and therefore benefited from UK consumer protections, such as for cancellation rights and manufacturer warranties. The OFT and FTC had worked together after they had received a number of complaints from UK consumers through a centralised complaints web site at <http://www.econsumer.gov>.

## Misleading Selling

### EU investigating hundreds of web sites after they fail to comply with consumer laws...

The European Commission is investigating hundreds of web sites after 55% of the sites which it initially reviewed were failing to comply with consumer laws, such as the Distance Selling Directive, E-Commerce Directive and Unfair Commercial Practices Directive. Many buyers were not properly informed about their cooling off rights under the Distance Selling Directive, in which consumers usually have at least seven working days to change their mind without giving a reason. For example, many sites that they would not accept the products back once delivered, or that they would only receive a credit rather than full refund. In other cases, consumers were misled over how long they had to send back faulty goods. In some other occasions, the Commission found that sites added unclear charges further down the order process – for example, they advertised free delivery but then

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added delivery charges at the end. The Commission is now carrying out further investigation and plans to take enforcement action where necessary, which could eventually see web sites closed and/or their operators fined.

## Telecoms

### Mobile phone networks face fines of 10% of turnover for mis-selling consumer contracts...

Mobile phone networks and retailers could be fined up to 10% of turnover if they fail to stop mis-selling. These are additional rules which have been imposed on the industry by Ofcom, the UK telecoms regulator. Ofcom tried to sort the problems a couple of years ago with a voluntary code of practice, but it had to introduce a mandatory condition after the problems continued to occur. Under the new rules, providers must ensure: they do not mis-sell mobile phone services; customers intend and are authorised to enter into a contract; consumers get the information they need at the point of sale; the terms and conditions for cash back deals offered by their retailers are not unduly restrictive; and they carry out certain due diligence checks in respect of their retailers.

Ofcom cited three examples of bad behaviour. The first involved someone who complained about the poor signal for his phone, and he had been persuaded to buy a new phone, but that did not work; the customer wanted then to cancel the contract, only to be told that buying the phone had involved entering into a new extended 18-month contract, so the customer was tied in despite not getting a good service. The second was where a mobile phone contract had cost twice as much as the consumer had been led to believe and the debt ended up with a debt collection agency, with the customer now having a black mark on his credit history. The third involved a 16-year-old having been given a new contract which upgraded the original contract, but the customer could not persuade the network provider to cancel the new contract.

## Trade Marks and Passing Off

### Founder gets new business off to worst possible start with all sorts of intellectual property infringements against his former employer – First Conference Services v Bracchi, High Court...

Richard Bracchi tried to get his new business up and running as quickly as possible when he copied various data from his old employer and then gave the impression that he was somehow connected to them – but he ended up feeling the full force of the law for his actions. Bracchi had worked for First Conferences and, before he left them, he copied large parts of their database so as to set up a rival conferencing business. He used that information to poach First Conferences' speakers by inferring that he was continuing First Conferences' work. Before he left, he also transferred a domain name for his new business without his employer's permission. Not surprisingly, his old employer took issue with this and Bracchi ended up in court.

The High Court sided with First Conferences. It ruled that he had infringed First Conferences' database rights, had unlawfully taken their confidential information and had been passing himself off as First Conferences. The Court said it would be hard to see a more blatant example of someone passing themselves off as First Conferences.

### Exclamation mark not distinctive enough to be registrable – Joop v OHIM, European Court of First Instance...

Joop! has lost its legal battle to get a solitary exclamation mark registered as a European Community Trade Mark. OHIM – the European Community Trade Mark Office – had denied Joop!'s trade mark application on the basis of the mark lacking distinctive character. The clothing and perfume supplier appealed, but the European Court of First Instance has upheld OHIM's decision. It ruled that consumers would not associate exclamation marks with the German company's products. It was only an eye-catching gimmick and not an indication of origin of the goods. It was possible for marks to acquire distinctiveness through use, but the CFI ruled that this had not happened here across the European Union.

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