

# UPLOAD-IT - 1 September 2007

## COMPETITION LAW

- ***European Commission spoils for a fight with Rambus over competition law breach...***

The European Commission has alleged that Rambus – the chip manufacturer – has been abusing its dominant position. This is because Rambus created and patented the technology for dynamic random access memory (DRAM). This is now included in industry standards that Rambus was instrumental in setting, so every time a person wants to manufacture chips with DRAM he or she needs to get a licence from Rambus or challenge its patent in court. This means that Rambus is 'quids in' every time its technology is used as an industry standard! The Commission has complained that Rambus deliberately deceived people by not disclosing that it had patents in what became a part of the adopted standard. This is known as 'patent ambushing'. Rambus has nine weeks to reply to the accusation. So watch this space...

## CONTRACTS

- ***High Court finds that a party to a contract has to unequivocally accept a repudiatory breach to end contract - Banham Marshalls Services Unltd v Lincoln City Council, High Court...***

Banham ran a residential special needs college and had contracts with Lincoln City Council for admission for certain pupils who could not be accommodated in mainstream schools. The Council sent pupils to the college. The college was closed down but, before it was, the college was subject to child protection investigations and found to have breached its duties under the Children Act as the principal was accused of child cruelty and sexual assault. The Council withdrew four pupils without giving notice or paying the term fees in lieu of notice. The contracts between the parties were not in writing so terms had to be implied into the contract. The Council claimed that Banham was in repudiatory breach of contract because of the child cruelty allegation and that the Council had accepted the breach. Banham argued that the child cruelty allegation did not amount to repudiatory breach of contract and the Council had not accepted the breach. It further argued that the Council was bound to pay the fees and that this survived termination of the contracts. A repudiatory breach occurs where the innocent party is deprived substantially of the whole benefit to which it was entitled under the contract.

The High Court thought that there was an implied term in the contract that Banham would not appoint someone who had acted cruelly towards a child in a managerial role. This went to the root of the contract and so Banham's appointment of a child abuser as a principal was a repudiatory breach. However, the Council had failed to unequivocally accept the breach because the Council had not made clear whether the withdrawal of the pupils from the college was temporary or permanent. In that situation, a reasonable observer could have justifiably thought that the contract might be re-affirmed after a temporary suspension. Therefore, the Council lost and was liable to pay the college fees.

- ***Chilli powder contaminated by industrial dye was not 'free from foreign and extraneous matter' and therefore breached contract of supply –***

***Hazlewood Grocery Ltd v Lion Foods Ltd, High Court...***

Hazlewood sued Lion as it discovered that Lion had provided chilli powder that was contaminated with a minute quantity of an industrial dye that was not a permitted additive in food. That powder was subsequently incorporated by Hazelwood into food manufactured by it. Under the raw material specification in the written contract between the parties, the powder was to be 'free from foreign and extraneous matter'. The Food Standards Agency (FSA) had rules about the dye and Hazlewood's food was quarantined and recalled. Together with adverse publicity as a result of a notice on the FSA website, this caused Hazlewood substantial losses. Hazelwood claimed that the presence of the illegal dye constituted a breach of contract as the powder was not 'free from foreign and extraneous matter'.

The High Court agreed with Hazlewood's claim. All the experts agreed that the chilli powder was not injurious to health, but interpreting the words 'foreign and extraneous matter' according to their ordinary English meaning meant that there had been a breach of contract. The dye was foreign and extraneous because it was not there naturally and was not supposed to be there. In addition, the powder that was contaminated with measurable quantities of dye was not reasonably fit for its purpose or of satisfactory quality, contrary to the Sale of Goods Act 1979 because products manufactured from it were liable to be posted on the FSA website and subject to recall as a result of advice or instruction from the FSA.

### **COPYRIGHT AND DATABASE RIGHTS**

- ***A phoenix rises from the ashes as company behind AllofMP3.com relaunches cut-price download service from another website...***

MediaServices, the company behind AllofMP3.com – the second most popular site for selling music downloads in the UK after iTunes - has decided to re-launch its download service from a new website, mp3sparks.com. Mp3sparks.com says that it is accepting credits from the allofMP3 site. AllofMP3.com was recently shut down by the Kremlin following diplomatic pressure from the British government. MediaServices has been the subject of many copyright infringement actions as record labels claimed it was not paying the artists or record companies to use the music and so was infringing their copyright.

In another recent development, the director of the company was prosecuted in Russia but the Russian court found that he had not infringed copyright law after he had shown that the company had paid 15% of its profits to a local organisation – the Russian Multimedia and Internet Society (Roms). For this reason, the prosecution failed. The prosecutors plan to appeal. Despite this setback, the International Federation of Phonographic Industries - the international body representing many recording companies - has commented that MediaServices is still infringing copyright by supplying music that it has no right to supply to punters.

- ***Minimal use of software held to be copyright infringement by High Court –***

***Cantor Gaming v Gameaccount, High Court...***

Cantor Gaming claimed that Gameaccount had infringed its copyright in two suites of gaming software which Cantor Gaming owned. The employees who developed the software for Cantor Gaming left Cantor Gaming and set up Gameaccount. Cantor

Gaming granted Gameaccount a limited licence to use the suites of software. A clause in that licence stated that it would be a breach of the licence terms if Gameaccount allowed any betting company to invest in it or if it entered into any agreement relating to the use of Cantor Gaming's intellectual property rights with a third party betting company.

Gameaccount began to provide Internet services to UKBetting, a third party betting company. Cantor Gaming alleged that this breached the licence for its software and that it was an infringement of its copyright in the software. The High Court had to look at the licence terms and work out what 'use of Cantor Gaming's intellectual property rights' meant. It decided that the licence term meant 'use' in terms of infringement. Cantor Gaming's software was on Gameaccount's servers while it was providing services to UKBetting even if its use was limited and was of little importance to the system that Gameaccount was providing for UKBetting. Therefore, the use of Cantor Gaming's software was a breach of the licence and so an infringement of copyright. The High Court granted an injunction against Gameaccount to stop it using the software.

- ***SCO comes out with more than a bloody nose in its fight over IP rights in UNIX...***

In 2003, SCO challenged Novell's ownership rights of the UNIX operating system in a high-profile court action. AT&T had originally owned the copyright in UNIX and then AT&T sold UNIX to Novell. The Santa Cruz Operation bought the system from Novell soon after but the sale contract specifically excluded the copyright in the UNIX system. Despite that, SCO, as the successor company of The Santa Cruz Operation, claimed ownership in the UNIX system. The US District Court in Utah has now ruled that Novell owns the copyright in UNIX. SCO is left owing millions of dollars in licence fees to Novell. The sale contract had allowed SCO's predecessor a right to sell UNIX licences with 5% of fees going to SCO's predecessor and 95% of the fees going to Novell. The share value of SCO went down by 70% because of the decision.

This case also has an impact on a related case between IBM and SCO. IBM was given a licence of UNIX in the 1980s. SCO claimed that IBM had leaked some of UNIX's code into the Linux open source operating system. SCO had threatened IBM and Linux end users with a multi-billion dollar claim. The verdict in the IBM case was put on hold until the decision in the Novell case. If SCO does not own UNIX then it cannot take action against IBM or Linux end users for infringement.

- ***Copyright Tribunal sets interim royalty rates payable to rights owners for downloads and streaming...***

The Copyright Tribunal has settled a dispute between businesses using digital music and the collecting societies that collect royalties for performers and composers. The parties were not able to agree on the royalty rates for music used or transferred online. These services included permanent downloads, limited downloads and on-demand streaming/webcasting. The British Phonographic Industry (BPI) (which represents major UK recording companies) and various Internet and phone companies applied to the Copyright Tribunal (an independent body established under the Copyright Designs and Patents Act 1988) to settle their collective copyright licensing dispute. In September 2006, a settlement agreement was made between BPI and the collection societies. In this decision, the Copyright Tribunal settled outstanding issues and endorsed a lot of the contents of that settlement agreement and made various rulings based on it.

The Tribunal endorsed the royalty rates set out in the settlement agreement and other parts of the online licence contained in the agreement. These are as follows:

- Permanent download - 8%; limited download or on demand service - 8%; webcasting where more than half is by a single artist or band - 8%; premium or interactive webcasting - 6.5%; pure webcasting - 6.5%. Downloads to mobile phones were agreed at those rates but with a small discount.
- The concept of minimum royalties for the full range of services - this means that royalties have to be paid to rights holders even when music is provided for free or at a discount.
- Setting out when royalty sharing in advertising revenue is due and when a royalty is payable for music used in advertising.
- ***Advocate-General believes that ISPs cannot be required to disclose personal details in civil cases if national law prevents disclosure...***

Promusicae, the Spanish copyright licensing group for music producers, wanted to prosecute Spanish unauthorised peer-to-peer file-sharers. It had identified them using IP addresses but did not have their names and addresses. It asked Telefonica, Spain's largest Internet Service Provider (ISP), to reveal the identity of the file-sharers - to provide the names and addresses of the culprits. Telefonica refused and Promusicae started court proceedings against the ISP. Telefonica argued that Spanish implementation of EU data protection laws did not allow it to share personal data with third parties unless it was a criminal law matter. The Spanish Court felt that it had to ask the European Court of Justice (ECJ) questions about the validity of Spanish laws on data protection and whether it was compatible with various EU Directives such as the E-commerce Directive. The decision of the ECJ is yet to be issued but the Advocate-General, whose opinion the ECJ tends to follow most of the time, has stated that European laws allow member states to prevent personal data relating to IP addresses from being disclosed where this relates to copyright infringement claims in civil law, as opposed to criminal law.

Once the ECJ decides on this matter, the Spanish court will have to decide if the file-sharers' details could be disclosed under Spanish data protection law. The fact that the Spanish court had to ask the question in the first place means that it did not think that it could force the ISP to disclose personal data belonging to the file-sharers. In the UK, the British Phonographic Industry (BPI) (which represents major UK recording companies) has already obtained court orders against ISPs so as to get disclosure of illegal music file-sharers' details. However, in those cases, the ISPs did not claim that data protection laws prevented them from disclosing the information.

- ***German Court refuses to order ISP to hand over music file sharers' data...***

A court in Offenburg, Germany has refused to order Internet service providers to identify illegal file-sharers. This comes hot on the heels of the opinion of the Advocate-General in the European Court of Justice in a similar case involving a Spanish Internet service provider, Telefonica. Decisions of the ECJ tend to follow the opinions of the Advocate-General, but the Advocate-General's opinion is not legally binding. The German court found that it would be disproportionate to order disclosure as the members of the music industry that had asked for disclosure had not stated how the illegal file-sharers' actions had amounted to criminally relevant damage, which was needed to force the ISPs to identify the users in Germany. The Advocate-General recently said that countries' laws that restricted the requirement to hand over user names to criminal cases were compliant with European law. In most European countries, including the UK, copyright infringement is only a criminal offence where it is done on a commercial scale. Most file-sharers share files as

individuals and not for commercial gain - so their actions are unlikely to be a criminal offence. If European courts refuse to force ISPs to identify unauthorised file-sharers, this will make it very difficult for the music industry to take legal action to stop its unauthorised loss of revenues.

## **CYBERCRIME/SECURITY**

- ***Man arrested for stealing Wi-Fi connection...***

Residents of Chiswick beware! A man in Chiswick, London was recently arrested for using someone else's wireless Internet connection without permission to connect to the Internet. Two community support officers became suspicious when they saw him with a laptop outside a house on Prebend Gardens. When questioned, he admitted to using someone else's unsecured Wi-Fi connection. The case is now in the hands of the Metropolitan Police's computer crime unit. It is an offence under the Communications Act 2003 to dishonestly obtain an electronic communications service with intent to avoid paying for it. In 2005, a certain Gregory Staszkiwicz was convicted of using wireless networks without permission. He was fined £500 and given a conditional discharge of 12 months.

- ***Public Wi-Fi not as secure as previously believed...***

Rob Graham, CEO of Errata Security, has managed to frighten Internet users at a conference by gaining unlimited access to people's accounts when they access them on a public Wi-Fi network. Mr Graham used a device to read cookies after a user had entered his or her log in details. Cookies are files which identify a user's computer as a unique user and they are stored by the browser on the hard drive of the computer being stored. The websites recognise the cookie as a session ID to identify the browser as being associated with the person who logged in. By copying the cookie and attaching it to a different browser, Errata was able to access and use someone else's account.

Mr Graham showed how easy it was to do this by opening the email accounts of unsuspecting attendees at a conference just after they had used one of the public Wi-Fi access points to check emails. It had been previously thought that if the wireless log in was done through secure sockets layer protocol (SSL) then wireless access was safe. Now it seems that any session that is not protected from start to finish by using SSL is vulnerable to hacking. The only way to avoid the problem is to have SSL protection throughout the entire session.

- ***Personal info stolen from job website monster.com...***

Sophisticated software has been used to collect hundreds of user names from the monster.com website, according to Symantec, the software security business. The software was used to log on to the employer's part of the website. The candidates' data was then reportedly used in order to send them phishing emails. The emails were used to encourage candidates to download a Monster Job Seeker Tool which encrypted all their files and left a ransom note demanding money in return for decrypting them. '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 or by directing them to a spoof website where the fraudsters collect users' passwords and financial data on the site.

Monster has stated that its security was not breached but that certain people had used legitimate customer details to log on to its website and use the information on

its database. Symantec has advised job seekers to give minimum contact information on job websites and to use a disposable email address.

- ***Report calls the Internet a 'Wild West' for criminals...***

The Internet is a haven for criminals who use it to steal millions of pounds every year, according to a report issued by the House of Lords Science and Technology Committee. The report claims that many millions are lost by banks around the world thanks to online banking fraud. It also recommends that banks, Internet Service Providers, police and hardware suppliers should promote greater security. It commented that software providers should be forced to pay where customers are victims of e-crime because of their failure to deal with security problems in their products. Laws should also be introduced to make banks liable for losses suffered by customers and it should be mandatory for businesses to report security breaches.

The report also found that US banks lost \$2 billion through 'phishing' in 2006. In the UK, the loss from 'phishing' was a mere £33.5 million. '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 or by directing them to a spoof website where the fraudsters collect users' passwords and financial data on the site. One of the report's findings was that people could buy another person's card details for as little as \$2.

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

- ***Information Commissioner's Office gives guidance on definition of 'personal data'...***

Following the Court of Appeal's narrow definition of 'personal data' in the Durant v Financial Services Authority case (see <http://www.upload-it.com/editArticle.aspx?ID=1304>), the European Commission had issued a notice to the UK government stating its concern about the UK's implementation of the Data Protection Directive. This year, the EC Article 29 Data Protection Working Party - which provides influential opinions on complex issues surrounding EU data protection law - issued an opinion on the definition of 'personal data' which gave it a wide meaning, in contrast to the Durant decision. For this reason, the Information Commissioner's Office, the regulator in charge of enforcing data protection laws in the UK, has issued a guidance note on what 'personal data' means. The guide is in the form of a flow chart of questions so that people can answer the questions and decide whether their data is 'personal data' as defined in the Data Protection Directive.

The guidance lists examples of where a person can be identified from a description even if not named - such as 'the tall, elderly man with a dachshund who lives at number 15' - so in that situation the information might be considered to be 'personal data'. If the data is used to provide information about a person, then it might be 'personal data' as well. For example, if a satellite location system is used by a taxi company to reduce waiting times and fuel efficiency, then it will not be personal data. But if it is used to monitor a taxi driver's performance, then it will be personal data. The ICO has tried to follow the Working Party's guidance as opposed to the restricted meaning given to 'personal data' by the Court of Appeal. The advice will help people to decide more easily as to what may be considered 'personal data' by the regulator. However, until Parliament changes the Data Protection Act 1998 or the Durant case is overruled by a House of Lords decision, the Court of Appeal's interpretation of 'personal data' in the UK remains legally binding.

For more information on the ICO's guidance note, please see:

[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/personal\\_data\\_flowchart\\_v1\\_with\\_preface001.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/personal_data_flowchart_v1_with_preface001.pdf).

- ***Taking photo of JK Rowling's child walking down the street not an infringement of a person's right to privacy – David Murray v Express Newspapers PLC, High Court...***

JK Rowling and her husband, Mr Murray, were walking down a road in Edinburgh with their son, David in 2004. A photographer took a photo of the child with a long-lens camera. The picture appeared in an article about JK Rowling's views on motherhood in 2005. The child and parents were unaware of the photo being taken and had not consented to the photo being taken or used. A claim was made on behalf of the child that there had been a breach of his right to privacy under Article 8 of the Convention on Human Rights (which has been given legal force in the UK by the Human Rights Act 1998). The claim asked for an injunction and damages. The newspaper applied for summary judgment to have the action thrown out.

The High Court had to consider whether the child had a reasonable expectation of privacy in the circumstances and whether the parents had the same in respect of their child in a public place. As none of them were aware of the photo being taken, there was no question that the child had been harassed or distressed by the photo being taken or used. The photo did not expose the child to any danger. Therefore, the injunction was being requested not to protect a vulnerable child but to give him a private space in relation to public appearances. There was a question to what extent the people involved had an expectation of privacy in a public place. The High Court had to reconcile the House of Lords decision in the Naomi Campbell v Mirror case in 2004 and the European Court of Human Rights' wider protection of privacy in the subsequent Von Hannover case (which involved photos of Princess Caroline of Monaco).

The High Court followed Campbell and other English cases. A distinction had to be drawn between a photo of the child at a family event or sporting event and walking down the street for a pint of milk – the former was a person's private recreation time while the latter was not and so did not qualify for protection. The court had to decide if a reasonable person of ordinary sensibilities would feel seriously aggrieved if placed in the same position and exposed to the same publicity as the claimant. In a case such as this that involves a child, the court had to take an objective view of what this meant. Here, this was a case similar to the walking down the street for a pint of milk scenario and so there should be no protection. To do otherwise would unduly restrict the freedom of the press and create image rights in English law.

The High Court also threw out a claim for breach of the Data Protection Act 1998. Interestingly, the judge decided that the photo constituted sensitive personal data, as it revealed his racial or ethnic origin. However, use of the photo was permitted as the family had decided to appear in public and so the information in the photo had been made public as a result of steps deliberately taken by the data subject.

The claimants also asked for damages for breach of the Data Protection Act on the basis that the photographer was not notified (or 'registered') with the Information Commissioner's Office as a 'data controller', as it was required to do under the Act. The Court said that the failure to notify had not caused any damage to the family. In addition, even if the family had a right to claim damages, the claimant would not have been entitled to claim a level of damages that reflected the data controller's profit or the market value of the data (ie the photograph), but only compensation for damage and distress suffered by the data subject.

- ***PCC makes newspaper stand in the corner for showing videos on website of schoolchildren without obscuring their faces...***

The *Hamilton Advertiser*, the *Sun* and the *Daily Mirror* published video footage on their websites of pupils misbehaving in class. They had obtained the footage from another pupil who had recorded the video on her mobile phone. The president of the school's parent teacher association brought complaints against the newspapers under the Press Complaints Commission's (PCC) procedure, which had been extended to cover audio-visual materials on newspapers' and magazines' websites earlier this year. The PCC has its own voluntary code of practice which states that children should be free to complete their schooling without press intrusion and the press must not interview or photograph children without their parent's or guardian's consent. An exception to this is where a matter is in the public interest.

The *Hamilton Advertiser* published the video of the pupils where the pupils and the teacher could be identified. The *Sun* and *Daily Mirror's* version did not identify the pupils. The *Hamilton Advertiser* argued that it was in the public interest to show the lack of supervision in schools and the obscuring of the faces of the pupils would have undermined the impact of the story. The PCC accepted that it was in the public interest to report on the story but also stated that the *Hamilton Advertiser* had a responsibility to ensure that it did not infringe the rights of the pupils. The newspaper should have obtained consent for the publication or obscured the faces as the *Sun* and the *Daily Mirror* had done. Therefore, the complaint against the *Hamilton Advertiser* was upheld but not against the *Sun* and the *Daily Mirror*.

Mahbuba Chowdhury, assistant editor of Upload-IT, comments: 'This case is interesting as it is the first complaint against audio-visual material on a newspaper's website which is subject to the PCC's code and not Ofcom's Broadcasting Code - which regulates television and radio. The Broadcasting Code currently does not apply to audio-visual materials on a television or radio station's website. Once the Audio-Visual Media Services Directive (AVMS Directive) comes into force, this will govern the audio-visual materials issued by broadcasters on their websites, but there is a specific exception in the Directive excluding newspapers' websites so the AVMS Directive does not apply to these.'

For more information on the AVMS Directive, please go to <http://www.upload-it.com/editArticle.aspx?ID=2015>.

## **DOMAIN NAMES**

- ***(Alleged) con artist unable to stop third party having right to use domain name incorporating his name to criticise him and his business ventures...***

The Australian consumer body, Consumer Protection, had a website that contained Stephen Cleeve's name in its domain name in order to criticise him. The site contained articles about his business ventures from the *News of the World* and the BBC. It called him a con artist. Mr Cleeve applied to WIPO complaining that the website was being used to tarnish his reputation and disrupt his businesses. 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 '.com'.

To win the name, Mr Cleeve needed to show that he had rights in a trade mark confusingly similar to the domain name, that Consumer Protection had no legitimate rights in the domain name and that the name had been registered and used in bad faith. The WIPO Panel found that Consumer Protection had a legitimate right to use the domain name to criticise and comment on Mr Cleeve's business activities, which

constitutes fair use within the terms of the UDRP. Also, Mr Cleeve had registered his trade mark after the domain name registration, so the registration of the domain name could not have been made in bad faith. For these reasons, the complaint failed. Consumer Protection was therefore able to continue holding the domain name and running the site. However, the Panel also commented that it was still open to Mr Cleeve to take court action if he did not like its decision.

## **GAMBLING**

- ***Government to ban non-EEA gambling operators from advertising in the UK...***

The Department of Culture, Media and Sports (DCMS) has laid proposals before Parliament to ban operators from advertising in the UK if they are based outside the European Economic Area. This means that operators like William Hill Casino and Littlewoodscasino.com will not be able to advertise in the UK, because of where those websites are based. The DCMS has said that countries who host gambling sites need to be on a 'white list' of countries whose regimes to regulate gambling meet the DCMS's requirements so that the DCMS can permit operators from those countries to advertise in the UK. At present, only the Isle of Man and Alderney meet these requirements.

## **IT AND INTERNET USE**

- ***More and more UK homes ride on the information super highway and connect to the 'Net...***

In May 2007, 61% of UK homes had Internet access, according to research from the Omnibus Survey of the National Statistics (a monthly survey of 1,200 people in Britain aged over 16 and 400 people over 16 in Northern Ireland). The figure went up from 54% a year earlier. 84% of Internet connections used broadband, compared to only 65% of homes in May 2006. The research also found that there was an age discrepancy between users of the Internet. 71% of those over 65 had never used the Internet - while for the 16-24 age-group the figure was 4%.

- ***Sony BMG's memory stick is not a 'stickler' for security as security firm alleges that it poses security risk for users...***

Sony BMG has been accused by F-Secure - a security company - of having software in its USB memory sticks with fingerprint readers which embeds itself in a user's computer and offers viruses a place to hide so that anti-virus software cannot detect it. The claim has been backed by McAfee, another software security business. In 2005, Sony BMG used digital rights management technology in its CDs which installed a special type of software - a 'rootkit' - onto users' computers, also creating a security vulnerability for the computer. That software was also difficult to remove. Security experts have commented that people have developed a method of hiding malicious files especially to exploit the kind of security flaw created by Sony BMG's first rootkit problem.

- ***Amazon is 'top of the trees' when it comes to the list of most used online retailers in the UK...***

Amazon has been found to be the most used online retailer in the UK by an Interactive Media in Retail Group (IMRG) survey. IMRG is a trade body for online retailers and produces a quarterly 'Hitwise Hot Shops List of the 50' most used online shops in the UK. Argos came second and tesco.com came third. Various holiday companies were also in the top ten.

- ***Wet July causes online sales to reach record levels...***

Interactive Media in Retail Group (IMRG), the trade body for online retailers, has reported that online sales rose to £4.2 billion in July - up from £2.34 billion in the corresponding month a year ago. Sales also improved because of faster Internet connections, commented IMRG. Electrical goods performed the best as sales of such goods doubled in a year. Sales of clothing and accessories also increased by 60%.

### **MISLEADING SELLING**

- ***ICSTIS says there is no deal for Channel 4's 'Deal or No Deal' game show and fines it £30,000 for misleading punters...***

The Independent Committee for the Supervision of Standards of the Telephone Information Services (ISCTIS) - the regulator of providers of premium rate phone lines - has fined the phone company (iTouch) behind a phone-in competition on Channel 4's 'Deal or No Deal' game show £30,000. The game show included a viewer competition which did not provide every entrant with an equal chance of winning, according to the ruling. In the competition, viewers were shown three sealed boxes containing three different amounts of money. They could win one of the three cash amounts if they entered and were successful. This was a live phone-in competition. However, the show was pre-recorded so the cash amount that would be won was by necessity pre-determined and already known to the programme makers.

ICSTIS found that this was misleading as the winning amount had already been selected at the time the viewers were telephoning in. In addition, ICSTIS ruled that callers near the beginning of the show were more likely to win the competition than callers at the end, which was also unfair. Channel 4 expressed surprise at the decision, saying that it had received earlier advice with ICSTIS before it ran the competition and ICSTIS had apparently assured Channel 4 that it was comfortable with the competition.

- ***OFT takes action to force airlines to come clean over prices...***

The Office of Fair Trading (OFT) has warned 13 airlines to come clean when advertising ticket prices, so that they clearly display all non-optional additional fees and taxes payable as part of the price. Airlines in the firing line have included Ryanair, bmibaby and easyJet. Ryanair and Aer Lingus have stated that they cannot change their online booking systems immediately but will do so as soon as they can. If they fail, the OFT can get court orders to enforce their decision.

- ***Which? says advertised broadband speeds are misleading ...***

The actual broadband speeds on offer are often substantially less than the speeds advertised by Internet service providers, according to *Which?*, the consumer group. It found that broadband speeds advertised at 8Mbps (megabits per second) were receiving speeds at 2.7Mbps on average. The slowest speed was an incredibly slow 0.09Mbps. *Which?* has asked Trading Standards and Ofcom to investigate. This follows pressure by the Advertising Standards Authority on Internet service providers to make clear to consumers that exact speeds depend on how far away from the exchange their properties were. The ASA suggested broadband providers advertise their speeds as being 'up to' 8Mbps. BT has admitted that 8Mbps was a virtual rarity for users. To find out what is your current Internet connection speed, you can go to <http://www.speedtest.net>.

### **PATENTS**

- ***US\$1.5bn patent infringement award against Microsoft reversed...***

Microsoft has successfully seen a US\$1.5bn patent infringement award from a US jury reversed by a judge. The damages, awarded to Alcatel-Lucent in a dispute over MP3 software, had been the largest ever award for a patent infringement. The judge, though, has ruled that the patent infringement did not occur. Microsoft had paid licence fees for its Windows Media Player to a consortium including Germany's Fraunhofer Institute, but Alcatel-Lucent claimed that Microsoft had violated its own patents for the technology. The Californian judge ruled that one of the two Alcatel-Lucent patents had not been violated by Microsoft and there would need to be a further trial to see if Alcatel-Lucent really owned the patent rights in the other one.

## **TELECOMS**

- ***Lawyers representing AT&T use mafia tactics by making threatening midnight calls to company who makes iPhones interoperable with all networks...***

UniquePhones - a Northern Ireland company - claimed that it had software that could make an Apple iPhone work on any mobile network in the world. Normally the company spends its time unlocking mobile phones so that any SIM card will operate on any mobile phone. AT&T - a US telecom company - made an agreement with Apple that it would act as the exclusive network for the iPhone. Needless to say that the UniquePhones launch would have scuppered such an arrangement and so AT&T's Californian lawyers were instructed to call the company at 3am on the morning of UniquePhones' proposed launch and warn it that the company was infringing copyright and illegally disseminating software. AT&T may seek to justify its claim under the Digital Millennium Copyright Act, which prohibits circumvention of technological measures that effectively control access to a work. However, the position is far from straightforward and Apple would have to show that UniquePhones did not come within an exception.

AT&T's tactics seem to have worked on UniquePhones, which has delayed its launch while it 'takes legal advice'. Meanwhile, other people - such as a 17 year-old US hacker called George Hotz - have also claimed they have cracked the iPhone code. Apple still has time to change the iPhone to make it harder to crack before its European launch.

## **TRADE MARKS AND PASSING OFF**

- ***It's a case of 'sour lemons' as ECJ decides that the CFI needs to make a better global assessment of the likelihood of confusion between trade marks -***

### ***OHIM v Shaker di Laudato, European Court of Justice...***

Shaker applied to register 'LIMONCELLO' and a blue and white dish decorated with lemons as a European Community trade mark (CTM) for lemon liqueurs. Limiñana opposed it, citing its earlier Spanish registration of the word mark LIMONCHELO for alcoholic drinks and that the mark applied for was the same as or similar to its own registered mark so as to be likely to cause confusion. The Office for the Harmonisation in the Internal Market (OHIM) upheld the opposition, concluding that there was a likelihood of confusion. Shaker appealed to the European Court of First Instance (CFI). The CFI dismissed the claim because it said there was insufficient similarity between the two signs to create any likelihood of confusion. In coming to its decision, the CFI focused on the visual element of Shaker's mark which it

distinguished from the earlier LIMONCHELO word mark. OHIM then appealed the decision of the CFI and took the matter to the European Court of Justice (ECJ).

The ECJ found that the CFI has applied the law incorrectly and sent the matter back to the CFI to decide again. The CFI had to assess the likelihood of confusion in relation to the reasonably well-informed and reasonably observant and circumspect consumer. Then, it had to assess the degree of visual, phonetic and conceptual similarity between the marks taking into account the relevant goods or services, and the circumstances in which they were marketed. The ECJ commented that the CFI had failed to carry out an appropriate global assessment of the likelihood of confusion of the marks taking all the factors into account. The ECJ stressed that this did not mean that the CFI had to determine all of the factors equally as the overall impression conveyed to the relevant public in a specific case may be affected by one factor over another. If the composite mark was dominated by one or more of its component parts of the mark - as was the case here with the dish decorated with lemons - then the dominant part should be considered most, but it was still necessary to consider the mark as a whole, unless the effect of all other components of the mark was only negligible. The CFI had decided that dominant element of Shaker's mark was the dish with the lemons and it therefore had no phonetic or conceptual similarity. However, the CFI should have considered the other components of the mark as part of making its assessment - which it had failed to do the first time round.