

C/M/S/ Cameron McKenna

Technology Annual Review

A month by month review of selected technology
legal news from 2009





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Foreword

Welcome to CMS Cameron McKenna's Technology Annual Review. The Review contains short, easy to read articles on topics of interest over the year. Topics in this year's Review include: Search Engine Keywords, Digital Britain, Unclear Contract Terms, Al Fayed's Domain Name, Bloggers' Defences, Phorm, Pirates, eBay's Liability, Excluding Liability, AdWords, Online Defamation, Skype, Lily Allen, Service by Twitter, Product Placement and more.

At the back of the Review, we have included four detailed articles on Green ICT Strategies, Google Books, Optimising Outsourced Services, and the Digital Economy Bill.

If you would like to discuss any of the articles in this year's Review or any technology, media or telecoms law issue you or your business is facing, or you would like to talk to us about the services we can provide both in the UK and across Europe, please do not hesitate to contact us. Our contact details are below:



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Thanks to Phillip Carnell for organising the production of this guide.

Keywords: Germany joins those waiting for answers

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In January, Germany became the latest EU Member State, along with the Netherlands, Austria and France, to have its senior court refer a question to the European Court of Justice ("ECJ") about the link between sponsored search engine keywords and trade mark infringement. Keywords are words that are sold by search engines which, when typed by internet users into search engines, trigger a 'sponsored link' advertisement. The problem for many brand owners is that some search engines allow advertisers to bid on their competitors' trade marks – or even suggest trade marked terms they might want to bid on. This can lead to competitors' sponsored links appearing on the same search results page as the brand's official website. If this happens the brand owner can either outbid its rivals to obtain its own trade mark as a keyword or, as some have done, opt to test the legitimacy of the practice in the courts.

Following a similar line to the questions referred by the Dutch courts in December 2008 and the French courts in May 2008, the German court asked "Does the use of a third party's trade mark as a keyword/adword on identical goods/services constitute trade mark infringement under the [Trade Marks] Directive?" The German court's question arose from the *Bananabay* case, in which the Claimant took action for trade mark infringement against its competitor's use of its mark as a keyword. The German court will not be able to rule on this case until it has received the ECJ's guidance.

The questions of the German and Dutch courts were directed to the issue of the use of trade mark terms as keywords by advertisers rather than by the search engines. They should therefore be seen as distinct from (although complementary to) the questions asked by the French courts earlier in 2008, as they addressed a slightly different issue. The French court asked the ECJ whether a search engine (Google) could be liable for allowing advertisers to register another company's trade mark as a keyword. The logic of taking on the search engine rather than a competitor is that success for the trade mark owner could put a stop to its trade marks being registered as keywords by any advertiser.

In 2008, in the *Mr Spicy Case (Wilson v Yahoo!)*, the Claimant lost his case for trade mark infringement against Yahoo!, which had sold his trade mark as a keyword. The judge commented that the use of a trade mark as a keyword by a search engine would not infringe a registered trade mark and did not feel the need to ask the ECJ for guidance on the issue. However, given that this was only a summary judgment by a lower court, that the term used was generic and not used as a trade mark (it was the term 'spicy'), and that the Claimant represented himself, this judgment may not stand up to heavy scrutiny.

Also in 2008, Interflora commenced proceedings against Marks & Spencer plc and another online flowers retailer for bidding on the word 'Interflora' as a Google keyword. Similarly, L'Oreal commenced proceedings against eBay and part of its claim related to the use of search engine keywords by eBay to promote listings for counterfeit products. Both of these cases resulted in the UK courts asking further questions of the ECJ (see articles in the May and June sections).

The law on trade marks should be harmonised within the EU. It is clear from the questions being asked of the ECJ that guidance is required as soon as possible. Following the Advocate General's opinion in October on the French questions, clarification from the ECJ is eagerly awaited...

A good month for... Rick-rolling your customers....

This month, gadget retailer Boffer.co.uk claimed to be offering a free USB stick which could assist customers in the bedroom (which is as polite as we could make it). Users who clicked on the link in the advert were sent to a video of Rick Astley singing 'Never Gonna Give You Up'. Some users failed to see the joke and complained to the ASA that the promotion was misleading because it did not make it clear that it was not a genuine offer. Fortunately for Boffer, the ASA did have a sense of humour: "*The ASA considered that the references in the ad to kidnapping people and forcing them to buy stuff, cloning being a grey area and the invitation for readers to help Boffer manufacture new customers made clear that the offer of a USB Fornication Optimizer was a spoof.*"

A bad month for... the President (well, kind of)

The modern day morning ritual is usually a double vente macchiato combined with a quick check of your Facebook newsfeed to see who is doing what, where. So picture the scene, when the most powerful man in the world starts his first day in the (oval) office and cannot access his Facebook account. This is tantamount to social suicide!! President Obama, who used modern social media throughout his campaign, including Facebook and Twitter, was not able to access any of these sites on his first day in the White House because the IT department had barred access to these sites for security reasons. Unconfirmed reports quoted the President's Facebook status as later changing to "*Barack is currently outsourcing the White House IT department.*"

Dutch search engine takes a stand on IP address privacy

Ixquick, a Dutch internet search engine, took advantage of Data Protection Day to announce that it would no longer be keeping a record of the IP address used to carry out a search on its website. An IP address coupled with information from the user's Internet Service Provider (ISP) could lead to the identification of the individual using the search engine. It is not guaranteed, however, due to the use of IP spoofing and other methods of hiding an IP address (including methods as simple as using an internet café).

The retention of IP addresses by search engines has become something of a hot topic. In 2007, Google announced that it would stop keeping logs indefinitely and only for 18-24 months. It then reduced this to 18 months, and then again in September 2008 to 9 months. Yahoo! announced in December 2008 that it would only keep the addresses for 3 months.

Search engines have argued they need the information to improve the usefulness, functionality and security of their sites. However, the EC's Article 29 Working Party, which is a committee made up of the privacy watchdogs of the EU's 27 member states, said in a report on the issue that any company that kept logs for longer than six months risked falling foul of data protection laws.

In April 2009 (see April's articles) the privacy issues relating to the retention of IP addresses by search engines died down when the Data Retention (EC Directive) Regulations 2009 came into force. These required all ISPs to retain data about their users' browsing activities for at least 12 months, which sidelined many people's concerns with the retention of IP address information by search engines.

A successful Britain must be a "Digital Britain"

The Department for Business, Enterprise and Regulatory Reform (BERR) and the Department for Culture, Media and Sport (DCMS) published an interim 'Digital Britain' report (the "Report") this month, which reminded us that our economy's future success will be defined increasingly by our ability to use and develop digital technologies. The UK is presently twelfth in the European Commission's global league table of digital adoption, skills and use, which shows that there is significant work to be done.

The Report outlines 5 Objectives and 22 Actions, with providing broadband to everyone in the UK a top priority, as well as ensuring that public services are accessible online and that everyone has the skills to access them. The Report commits the Government to working with businesses to develop the necessary infrastructure for universal broadband access. The Report also recommends the creation of a Digital Rights Agency to

coordinate attempts to prevent illicit file sharing on the Internet.

Despite the obvious steps forward, the Report is not without its critics, particularly in relation to the lack of commitment to rolling out fibre optic broadband. Jeremy Hunt, the Shadow Culture Minister, was reported by the BBC as saying: "*We're very disappointed... We thought the report was going to contain a strategy... In France and Germany they are laying fibre [optics], in Japan they already have it.*"

The Report also states the Government's intention to corral ISPs, through the use of legislation if necessary, to require them to notify alleged infringers (subject to reasonable levels of proof) that their conduct is unlawful. ISPs will also be expected to collect information on serious repeat infringers and to make it available to rights holders (together with personal details) on receipt of a Court Order.

Data direct wins maintenance from Marks and Spencer

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This month, the Court reminded us why it is important to have clear and consistent contracts with suppliers and, in particular, in respect of software.

On 30 June 1997, Data Direct Technologies entered into a software licence agreement with Marks & Spencer. Under the agreement, software was licensed to M&S for use in its business. Data Direct claimed to be entitled to the sum of £135,844 plus VAT for the annual maintenance of the software for the period from October 2007 to October 2008. M&S denied that it was required to pay this amount under the terms of the agreement and Data Direct therefore commenced proceedings.

The Court focused on the construction of the agreement, specifically the schedules. The wording of the agreement specifically stated that certain schedules were part of the agreement. This included the Maintenance Schedule, concerned with software maintenance, and the Product Schedule, a summary of the orders for the licensed software.

The disagreement arose because of the wording in Clause 7 of the Product Schedule, which provided that: *“Maintenance shall be provided in accordance with the Agreement and the Maintenance Schedule appended to the Agreement. At the Customer’s option, annual maintenance for the licence extension (including upgrade) contained herein for the period 26 October 2007 to 25 October 2008 shall be 17.5% of £750,000 i.e. of the licence fee paid and will be subject to an annual RPI increase.”*

The question was whether because of the wording *“At the Customers option”* M&S had positively to choose to have maintenance and so pay the maintenance fee or, if M&S did not choose to have maintenance, whether it had to pay at all. Data Direct claimed that because maintenance was required and payable under the Maintenance Schedule, M&S was obliged to pay unless it gave 30 days written notice of its intention to cancel the maintenance. M&S disagreed, believing that it only had to pay the maintenance fee if it exercised the option to do so.

The Court held that the combined effect of the relevant clauses in the Maintenance Schedule was that, if M&S had given notice 30 days before the fee was due, it would not have been payable. In addition, the court held that Clause 7 of the Product Schedule related only to the licence extension to which the wording referred and not to maintenance generally. However, the nature of the software was such that the obligation to maintain it had to apply to all the licensed software or none of it. This all-or-nothing nature of the maintenance obligation strongly supported Data Direct’s interpretation. A reasonable reader of the wording in the relevant clause would understand that it could not sensibly be read as creating a special option to elect for maintenance in respect of the licence extension. This being so, the maintenance fee was payable by M&S.

Whilst the interpretation of the contract is interesting, the extent to which this decision may have a knock-on effect is not clear. The decision relates to the specific language of the Data Direct and M&S agreement. However, the lesson for all suppliers of software and new customers is clear; contract wording should be consistent and should reflect the intentions of the parties. If there is any doubt, then expensive and unnecessary litigation can result.

A good month for... criminals making a hash of it on YouTube

Avon and Somerset police arrested a man after viewing his footage on YouTube, which documented the stages of growth of the cannabis plant. The desperately intelligent man used his real name as his YouTube username, which probably made this the easiest arrest Avon & Somerset police will have made all year. PC Peck, winner of the 2009 award for stating the obvious, said: "*The cultivation of cannabis is illegal. If you break the law and are foolish enough to then advertise your criminal activities on the Internet, it makes it very easy for the police to catch you.*"

A bad month for... Boring the Court

Mr and Mrs Boring have lost their legal battle against Google, which had placed pictures of their home on Google Street view. The Borings said that Street View had "*caused them mental suffering and diminished the value of their property.*" But a US District Court judge summarily dismissed the case, rejecting six separate claims from the now famous couple. The judge noted that the suit itself did far more to intrude into their lives than Google's cameras. The Court said that the couple could have simply asked Google to remove their house from the net using Google's opt out procedure. However, they drew public attention to themselves by suing and not redacting or suppressing their contact details.

EU Committee approves proposals to extend copyright term for music

This month a proposal was put forward to the European Commission to increase the term for copyright protection of sound recordings from 50 to 95 years under a proposed EC Directive.

Under the proposed legislation, music producers and performers would be entitled to royalties for 95 years after the first publication or performance of their sound recording, and performers would get the full benefit of extra royalties as pre-contractual agreements would not be able to be used to deduct money from the additional royalties they would receive.

The European Commission approved the proposal in March 2009. When enacted, the new legislation will provide an extended term to copyright in sound recordings, which will enable performers to earn

money throughout their lifetime, rather than for 50 years only.

In addition to extending the copyright term for music, the new legislation includes measures aimed specifically at helping performers. A "use it or lose it" clause will be implied into contracts between performers and record companies. This will allow performers to get their rights back if the record company does not market the sound recording during the extended period. This will enable the performer to find another record company willing to publish their music or to do it themselves.

The European Commission will submit an assessment of whether this has benefited performers in three years time and every four years after that.

Volvo fails in its bid to obtain Volvospare.com

Volvo, the Swedish car maker, failed in its attempt to get the domain name Volvospare.com transferred to it from the registered owners. It had commenced UDRP proceedings against the registrant of the domain name, who had apparently been using the domain name to supply Volvo car spares.

The panel noted that you do not always have to be a trade mark holder or have the holder's permission in order legally to operate a domain name relating to a trade mark. The domain name registrant would have to offer the goods and services at issue, use the site to sell only trade mark goods and accurately describe the registrant's relationship with the owner. Volvo argued that Volvospare.com had not fulfilled these criteria.

Volvo's complaint indicated that it had made three secret test purchases from the website. In each case the goods were not delivered. However, the panel did not

accept this as proof that the goods were not offered for sale on the website in good faith. Volvo also claimed that the website sold spare parts made by other manufacturers. However, the response stated that only spare parts for use with Volvo cars were sold, and Volvo cars had parts made by other manufacturers.

Finally, Volvo argued that the site did not make it clear that it was not affiliated to Volvo. At the time of the complaint, the website displayed a disclaimer, but there was a dispute about whether it was added before or after the complaint. The panel found that a disclaimer was not necessary in any event, as the website did not misrepresent any association with Volvo and the information it displayed was true. As a result it could not be mistaken for an official or authorised site of the Volvo group.

Volvo's complaint was therefore rejected and the panel did not order a transfer of the domain name.

Al Fayed wins domain name from fake Fayed

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This month, in an Expert Determination under the Dispute Resolution Service (DRS), operated by Nominet, the Internet registry for .uk domain names, the Expert decided that the domain name “fayed.co.uk” should be transferred to Harrods Limited.

Acting on behalf of its owner, Mohamed Al Fayed, Harrods submitted a complaint against the registrant, “Ahmed Fayed”, to the Nominet DRS requesting that the domain name be transferred to them. In its complaint, Harrods provided evidence of the trade marks owned by Mr Al Fayed (e.g. for MOHAMED AL FAYED) and also referred to a letter they had sent to the previous registrant of the domain name asking for it to be transferred. At the time of the letter, the website www.fayed.co.uk displayed sponsored links relating to Harrods, Mohamed Al Fayed, Dodi Fayed and various stories concerning Princess Diana. Only after the letter was sent was the domain name transferred to “Ahmed Fayed”.

In its complaint, Harrods alleged that “Ahmed Fayed” was a made up name and a false identity. The website was also changed to feature defamatory and inappropriate sponsored links under such headings as “Egyptian Child Molesters” and “Egyptian fraudsters”.

In deciding against “Ahmed Fayed” and awarding a transfer of the domain name to Harrods, the Expert acknowledged that the invention of an alter ego was a common tactic used in the domain name community. He found on the balance of probabilities that “Ahmed Fayed” was not a real person and therefore had no legitimate claim to the domain name. However, the Expert stressed that it was possible that the domain name could have been owned and operated legitimately by a party independent of Harrods/Mr Mohamed Al Fayed (e.g. in a non-commercial manner or by someone who truly had the name “Fayed”).

The Expert concluded that knowingly taking advantage of the rights of another party, without their permission, and using their reputation to obtain financial gain was always going to be viewed as unfair and that on the balance of probabilities that was the situation in this case. The Expert also noted that the headings of the tabs put up were clearly “abusive” in the ordinary meaning of the word as well as the meaning given to it by Nominet’s DRS policy.

This decision illustrates that Nominet DRS experts are wise to the tactics used by domainers (i.e. those persons selling domain names on the secondary market) to claim legitimate rights to use domain names. In this case the Expert was able to cut through all of the tactics of the original registrant and the abusive communications to focus on the key issue, namely whether the registration of the domain name in the hands of the original registrant (or “Ahmed Fayed”) was an abusive registration.

It is standard to write a letter of claim to a domain name registrant before commencing Nominet DRS or UDRP domain name proceedings. However, until such proceedings are commenced (and a restriction is placed on transfers), there is always a risk that the domain name will be transferred to a third party. If there is a significant concern that this will happen and the domain name is valuable, or if it will be more difficult to proceed against a third party rather than the existing registrant, it is always worth considering commencing proceedings before contact is made with the registrant of the domain name.

A good month for... divorce lawyers and snooping spouses.

Google's Street View was introduced in the UK this month with many claiming it invaded their privacy. It has since emerged that Google Street View could seriously damage relationships after the mapping service was cited in divorce cases. A London woman launched legal proceedings after spotting her husband's distinct Range Rover parked outside a female friend's house. She dated the image to a time when he claimed he was on a business trip. Another incident involved a wife finding a picture of her partner talking into a colleague's ear in a way which "created the appearance of intimacy". So, philanderers, if you see a car with a camera on its roof, come up with an alibi fast!

A bad month for... music lovers.

Google Inc's online video site YouTube blocked all (official) music videos to British users this month after it was unable to reach a rights deal with the main songwriters' collection society. YouTube is attempting to generate meaningful profits for Google, which bought it in 2006 for \$1.65bn. YouTube said that PRS for Music, a British collection society that collects royalties on behalf of nearly 50,000 composers, was asking it to pay "many many times" more than its previous licensing agreement. The proposed terms of the new agreement were deemed to be prohibitive by YouTube but PRS said it was "outraged" on behalf of the consumers. The dispute was not resolved until September (see September's articles).

ECJ adds to the database of database decisions

This month, the ECJ gave judgment in a further case on database rights in *Apis-Hristovich EOOD v Lakorda AD*. Unusually, there was no Advocate General's Opinion preceding the judgment.

The case concerns the extraction of parts of an online legal information and resources database, much of which comprised official public domain material, but which also contained editorial content, translations, links between documents and other information not generally accessible to the public.

The ECJ confirmed that a wide view of extraction must be taken, in particular stating that the concept of extraction is independent of the Defendant's objectives, of any modifications he makes to the material extracted and of any differences in the structural organisation of the

parties' respective databases. Further, the ECJ made clear that the nature of an underlying computer program used to manage two electronic databases was not a factor in assessing whether extraction from the database had taken place.

The ECJ also confirmed its previous case law regarding the need to analyse the degree of investment in obtaining, verifying and presenting the contents of a database when assessing whether a substantial part had been extracted. Therefore, where materials are accessible to the public, such as official legislation, there still needs to be an assessment as to whether extraction or re-utilisation of a substantial part has occurred, measured quantitatively and/or qualitatively, depending on whether the original obtaining, verifying or presenting of the material represented a substantial human, technical or financial investment.

Blogger loses defamation claim because he left the comment for the world to see

The High Court threw out a blogger's defamation claim this month after he left the comment on his blog for the world to see.

Christopher Carrie set up a blog in February 2007 which, under a pseudonym, he used to publicise his book in which he claims he was sexually abused by the son of the writer JRR Tolkien, Father John Tolkien. JRR Tolkien's great-grandson posted a comment on the blog claiming that Christopher Carrie was a fraudster who had tried to defraud the Catholic Church and the Tolkien Family. He also alleged that Carrie had admitted to lying about the sexual abuse to extract money from the Church.

Carrie became aware of the remarks four and a half hours after they were posted. However, rather than remove the remarks, which he was fully capable of doing as it was his blog, he denied the claims on the blog and sued Tolkien for defamation.

The High Court held that, as Carrie had failed to remove the allegedly defamatory remarks, he had consented to their publication. The judge said that Carrie's conduct was not compatible with his claim that he had suffered "substantial upset and distress" and therefore decided that a jury would come to the conclusion that Carrie had consented to the remarks by failing to delete them.

The court was, however, willing to allow Carrie a potential defamation claim for the four-and-a-half hours when the comments were on the site and he was unaware of them. In agreement with previous internet defamation cases, the judge ruled that an article would have to be read before it could damage someone's reputation. However, the mere assertion that a posting had been accessed "by a large but unquantifiable number of readers" was not sufficient for the court to decide on this point.

EC to take action against UK over Phorm Failures

January

This month, the European Commission revealed that it intended to proceed against the UK government over its failure to take any action against BT and Phorm for their broadband interception and profiling trials.

February

Phorm, a US based company known for its advertising software, and BT conducted trials of Phorm's Webwise software on tens of thousands of broadband lines between 2006 and 2007 to profile web use on behalf of their advertisers. Webwise is a behavioural targeting service that uses deep packet inspection to examine pages that users have visited. Users are then sent targeted advertising based on the web pages that they have visited.

March

April

Where Phorm is used, a unique Phorm tracking identifier (UID) is assigned to a user (or is collected from the user if it already exists), and a cookie is added to the user's computer that appears to come from the requested website. The system then stores a tracking cookie for each website visited on the user's PC and each cookie contains an identical copy of the user's UID. Where possible, Phorm's system strips its tracking cookies from http requests forwarded across the Internet to a website's server, but it cannot prevent the UID from being sent to websites using https. This would allow websites to associate the UID to any details the website collects about the visitor.

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BT confirmed that they had run a small trial in 2006 and a trial in 2007 in which it profiled the web browsing of 18,000 of its broadband customers. A technical report concerning the trial stated that the customers who participated in the trial were not made aware of the profiling as one of the aims of the validation was not to affect their experience.

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The EU Telecoms Commissioner said that the Phorm case shows that UK laws needed to be tightened to protect consumers and to comply with the ePrivacy Directive which came in to force in the UK in 2003. The Information Commissioner's Office (ICO), responsible for enforcing the ePrivacy Directive, has voiced concerns over the Webwise software as it is currently implemented, saying it should be an "opt-in" rather than an "opt-out" service.

September

The ICO held talks with Phorm and BT and despite its concerns, declined to take any action. The ICO accepted BT's argument that it would have been hard to explain Phorm's interception and profiling system to internet users whose communications it was being tested on.

October

The European Commission announced in October that they would progress to the second stage of proceedings against the UK Government for failing to implement EC law. This stage of the process will result in a "reasoned opinion", which is a document setting out the case against the UK Government for failing to implement European law. The Government has already had two attempts at addressing the concerns of the European Commission, and appears to have failed on both occasions. The first response was written by BERR (now BIS) in September 2008. The second response was led by the Home Office, and submitted to the European Commission in May 2009.

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High Court rules in favour of eBay

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The High Court ruled this month that eBay was not liable for the sale of counterfeit L'Oréal products on its UK website. L'Oréal commenced legal action against three European subsidiaries of eBay Inc, the First to Third Defendants, and seven eBay sellers, the Fourth to Tenth Defendants, whom it was alleged had sold infringing products through eBay.

L'Oréal's three principal claims were as follows:

- 1 that eBay was jointly liable for the infringements allegedly committed by the Fourth to Tenth Defendants;
- 2 that eBay was liable on its own for the use of L'Oréal's trade marks: (a) in sponsored links on third party search engines; and (b) on www.eBay.co.uk, and
- 3 if the court found that the Fourth to Tenth Defendants were liable, that L'Oréal should be entitled to an injunction against eBay to restrain future infringements.

(1) Joint Liability

L'Oréal did not claim that eBay should be liable on its own for the advertisement, offer for sale, exposure for sale or sale of the infringing goods, but argued that such acts (committed by eBay sellers) were subject to the control of eBay, which profited from the infringing sales, and that eBay should therefore be found jointly liable for the infringements. Trade mark law is largely harmonised within Europe as a result of the Trade Marks Directive but the law relating to accessory (e.g. joint) liability is not dealt with in the Directive and is therefore a matter for national law. The judge found that eBay had a complete answer to L'Oréal's case: the evidence did not establish that eBay had procured the particular acts of infringement by the Fourth to Tenth Defendants, nor was there any participation in a "common design" which is a requirement to establish joint liability in the UK.

(2) Sponsored Links

The court considered it necessary to refer questions on this issue to the European Court of Justice (ECJ). eBay contended that even if they were liable for the use of L'Oréal's trade marks in the sponsored links, then they had a defence under the E-Commerce Directive because they were merely 'hosting' the advertisements.

The questions put to the ECJ can be summarised as follows:

- Whether eBay infringed L'Oréal's trade marks by using them in sponsored links which related to infringing goods
- If eBay has infringed L'Oréal's trade marks by using them in sponsored links, whether eBay has a defence under Article 14 of the E-Commerce Directive 2002.

(3) An injunction

The third claim concerned the grant of an injunction under the IP enforcement directive, which allows an injunction to be granted where an infringement of an intellectual property right has been found and is continuing. The judge stated that the obligation Article 11 placed on Member States to provide for injunctions against intermediaries was unclear. The court therefore also sought guidance from the ECJ on this issue.

Although the court felt it necessary to refer some questions to the ECJ, it was still able to make its key decision that eBay is not jointly liable for infringements committed by sellers using its platform. The present position is therefore that websites such as eBay do not have to police their users or monitor every posting, nor will they be held jointly liable for trade mark or other intellectual property infringements.

A good month for... streaming music on your PC, PDA or other gizmo...

The Performing Rights Society (PRS) for Music announced that it is reducing the amount it will charge companies such as Spotify, Last.fm, and YouTube to stream songs. The PRS charges companies for using music and passes a proportion of the cost to the music writers. The PRS is reducing the amount it charges per song from 0.22p to 0.085p but will increase its share in any revenue taken from the service, for example from advertising, from 8.5% to 10.5%. This will please online broadcasters as advertising revenue is typically low for such services and so the cost overall should be reduced for them. Similarly, music lovers will welcome this move, as it should allow them greater access to streamed music.

A bad month for... Pirates (again)...

Bad news for the second month in a row for pirates. The government has announced that the fine for IP infringements which result in criminal liability will increase tenfold to £50,000. The Intellectual Property Office consulted with the public and industry on possible changes to sentencing and received support for the increase in penalties for copyright and other IP law infringement.

Intel receives largest ever fine

Computer chipmaker Intel was fined a record €1.06bn (Euros) by the EC Commission for anti-competitive practices this month. This is the largest ever fine imposed for a breach of competition law.

Between 2002 and 2007, the Commission found that Intel had paid manufacturers and retailers to favour its chips over those of Advanced Micro Devices (AMD), which had lodged complaints with the Commission in 2000, 2003 and 2006. Last year, Intel made 80.5% of all the microprocessors in personal computers, while AMD made just 12%.

The Commission found that personal computer makers Acer, Dell, HP, Lenovo and NEC had all been given hidden rebates if they used Intel chips exclusively. It also found that Media Saturn Holding, which owns Europe's biggest consumer electronics retailer Media Markt, had

been given money so that it would only sell computers containing Intel chips.

Intel, which intends to appeal against the verdict, announced that it "categorically" denied that it had paid manufacturers to favour its products over those of its rivals. Intel also stated that although they had provided incentives to customers to buy their products, no harm had been done to customers as prices in the microprocessor market had fallen sharply in recent years.

However, the Commission believed that consumers had been harmed, stating "*Intel has harmed millions of European consumers by deliberately acting to keep competitors out of the market for computer chips for many years.*" The Commission said that no action would be taken against the firms who received payments.

Nine months held to be "reasonable notice"

A High Court judge found that a reasonable notice period for termination was nine months.

In the case, the Claimant was a distribution company and the Defendant was a fashion and skate show brand. The parties first met at a trade show where they discussed whether the Claimant should become a distributor for the Defendant. After negotiations via email a year later, the Claimant was confirmed as the sole distributor. However, no formal agreement was signed and they operated their business arrangement without a signed agreement for more than two years, when the Defendant purported to terminate the arrangement between the parties giving 6 months' notice.

The Claimant issued proceedings for wrongful termination and claimed damages. To determine what was reasonable notice, the judge reviewed the degree of formality in the relationship; the

length of the relationship and the extent of early investment by the Claimant; the percentage of the Claimant's turnover made up by the Defendant's products; and how quickly the Claimant would be able to replace the business lost.

Several other factors also influenced the judge's decision, such as the fact that the business was seasonal in nature, the Claimant had taken on new employees and vehicles, a new warehouse had been brought into operation in the autumn of 2005 and further business premises had been planned. All of these factors led the judge to determine that nine months was a reasonable notice period for termination.

While this judgment does not create any new law, it does show the various factors that a court will take into consideration when determining what a reasonable notice period is where there are no express terms agreed relating to termination.

You can't exclude that!

January

This month, the High Court decided that an exclusion clause in a contract could not extend to excluding liability for a personal repudiatory breach of a contract, or in other words, for wilful abandonment.

February

The Claimant, NETTV, designed and created interactive television platforms. The Defendant, MARHedge, provided information to hedge funds and organised conferences for the hedge fund industry. In 2005, the parties entered into a joint business venture under which NETTV was to provide an internet television platform featuring content provided by MARHedge. The agreement for the joint venture provided that it could not be terminated for three years unless there was a material breach.

March

In 2006, MARHedge gave notice purporting to terminate the agreement with immediate effect and stopped providing content for the channel. NETTV sued for loss of profits, claiming a wrongful repudiatory termination of contract. MARHedge accepted that it had wrongfully terminated the agreement but argued that an exclusion clause in the agreement protected it from a claim for loss of profits.

April

May

The relevant part of the exclusion clause stated that:

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"... neither party will be liable to the other for loss of profit, anticipated profit, revenues, anticipated savings, goodwill or business opportunity, or for any indirect or consequential loss or damage."

July

The court identified that the repudiation was deliberate and personal, carried out by the President of MARHedge. The court described the President of MARHedge as MARHedge's "controlling mind". The judge found that the case law showed that there was a strong presumption against exclusion clauses covering deliberate, personal repudiatory breaches. The exclusion clause would need to have strong and clear language which showed that the clause was intended to cover a deliberate, personal repudiatory breaches by the parties.

August

September

In this instance, the court did not believe that the exclusion clause contained any strong language or clear statement that any deliberate wrongdoing was intended to be covered, especially a deliberate and personal repudiatory breach. The court felt that no businessman would have ever intended the clause to cover such a breach and would never have accepted the clause if that is what had been intended. The court also made a note that the exclusion clause should not be read literally as it would defeat the main object of the contract.

October

November

As a result, the Court found that the exclusion clause did not apply to exclude loss of profits where there was a deliberate and personal repudiatory breach. This decision highlights the limited scope of exclusion clauses that do not have specific wording relating to a deliberate breach of contract. To be effective, an exclusion clause needs explicitly to refer to such a breach, although it is highly unlikely that anyone would agree to such a clause. Similarly, if such a clause was included in a standard contract, it would have to satisfy the "reasonableness" test set out in the Unfair Contract Terms Act 1977, which would in most cases be extremely difficult.

December

A good month for... forgetful phone users

No longer will mobile phone users have to worry about having left their phone charger at home as new plans were unveiled for a “one size fits all” charger. A deal done between the European Commission and companies including Nokia, Sony Ericsson, Apple, Motorola, Research in Motion and Samsung will see a universal charger developed. This should help cut waste and also mean that mobile phone users will always be able to borrow a phone charger no matter where they are. While the agreement is not legally binding at present, companies representing over 90% of the market have signed it and it means that a universal charger should be available this time next year.

A bad month for... Swedish rights owners

The Swedish Pirate Party has won one of Sweden's 18 seats in the European Parliament, with 7.1% of the popular vote. The Pirate Party is not officially linked with the Pirate Bay file-sharing website, which was fined over \$3m in April this year for making copyright content available. However, it seems as if the Pirate Bay trial has captured the minds of Swedish voters as Pirate Party membership figures have tripled within a week of the controversial Pirate Bay ruling. The Pirate Party is campaigning for free internet access for all “and to fundamentally reform copyright law, get rid of the patent system, and ensure that citizens' rights to privacy are respected”.

Online bloggers cannot expect privacy

A police officer who wrote an anonymous blog lost the battle to keep his identity secret this month. DC Richard Horton wrote the blog using the pseudonym “NightJack”. The blog discussed his experiences whilst policing and his blog won this year's Orwell blogging prize for political writing.

The Times uncovered Mr Horton as the blog's author and Mr Horton sought an injunction from the High Court to prohibit the newspaper from publishing the information. Justice Eady granted “temporary cover” to restrain publication of the information until he had made his judgment.

Mr Horton argued that his name should remain secret as he was at risk of disciplinary action for breaching police regulations. Certain cases reported on the NightJack blog, although anonymised, could be traced back to genuine prosecutions. Justice Eady rejected this argument as “unattractive”, as he did not want to protect police officers who were

breaching police regulations. Mr Horton also argued that there was a public interest in allowing bloggers to share their opinions but not their names.

The Times responded that there was a public interest in exposing a police officer's breach of his obligations under the statutory police code and under his general public law duty to protect information obtained during the course of a police investigation.

Justice Eady removed the interim injunction, ruling that Mr Horton could have no reasonable expectation of privacy “because blogging is essentially a public rather than private activity”. Mr Horton's identity did not have the requisite “quality of confidence” and its publication would not, therefore, contravene the right to privacy afforded by Article 8 of the European Convention on Human Rights. In any event, the court added that the public interest inherent in revealing Mr Horton's identity as a police officer would outweigh any right to privacy claimed.

Google AdWords – the UK adds to pressure on ECJ to provide guidance

This month, the Court referred a question about Google AdWords and registered trade marks to the European Court of Justice (ECJ), adding to the six pending referrals from other European courts on the same subject.

In May 2008 Google changed its policy in the UK and Ireland to allow third parties to bid for keywords registered as trade marks. Marks and Spencer (M&S), which operates a flower delivery service, purchased “Interflora” and other variants as keywords. Interflora sought to prevent M&S from bidding on “Interflora” keyword search terms and commenced trade mark infringement proceedings against M&S in December 2008.

In response, M&S claimed that its use of the “Interflora” trade mark in the Google AdWords was not “use in the course of trade” for the purposes of trade mark infringement. However, it said that the law was unclear on this point and that the

Court should not make any decision until clarification was received from the ECJ.

Interflora agreed that the Court should wait for the ECJ to respond to the questions raised in respect of this issue, but asked the court to grant an injunction in the meantime to prevent M&S from registering keywords featuring the “Interflora” trade mark. The Court refused on the basis that Interflora had delayed in issuing proceedings for up to seven months and had not asked for an interim injunction when it commenced proceedings.

The French courts referred their questions in May 2008, the Dutch courts referred their own questions in December 2008 and the German courts in January 2009. The ECJ is due to answer the French questions in early 2010, although those questions relate to the liability of the search engine (e.g. Google) rather than the advertiser (in this case M&S).

Consultation on P2P proposals

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With the UK music industry claiming to lose an estimated £180 million a year through peer-to-peer file sharing (P2P), it should come as no surprise that the Government remains under significant pressure to address this ever-increasing problem. Having taken into consideration the issues raised in previous consultations, the final Digital Britain Report was published in June 2009, outlining the Government's intended plans to deal with P2P file sharing. This month, a year after its previous consultation, the Department for Business, Innovation and Skills launched a consultation on the Government's new proposals.

The new proposals, which are intended to change the behaviour of file-sharers, include placing Ofcom under a duty to reduce online copyright infringement by requiring ISPs:

- to notify account holders who are allegedly infringing rights that their account appears to have been used to carry out such unlawful activity (subject to the provision of reasonable levels of proof from the rights-holders); and
- to collect, maintain and make available personal information and data on serious repeat infringers to rights-holders upon the provision of a court order.

Various so called "safe harbour" provisions contained within the Copyright, Designs and Patents Act and the E-Commerce Directive (2000/31/EC) make it very challenging for rights owners to take action against ISPs. The new proposals therefore attempt to redraw the line in the battle to hold file-sharers accountable. If ISPs are forced to retain personal and other information about file-sharers, it will become easier for rights-holders to obtain "good" information about a file-sharer's activities by obtaining a court order. Furthermore, if the above measures fail significantly to reduce illegal file sharing, Ofcom are able to require ISPs to impose specified technical measures against alleged infringers, which may include blocking, bandwidth capping, bandwidth shaping and the filtering of content.

The consultation is seeking to obtain views on a variety of issues including: (i) who should have the right to require ISPs to send out notifications; (ii) whether there should be any limits on the volume of notification requests; (iii) who should bear the additional costs to the ISP; (iv) the role of the rights agency; and (v) the content of the Code of Practice which Ofcom will be required to develop and implement. While ISPs and content owners are likely to be concerned with the costs of implementing these measures and the level of proof required, consumers will be more troubled with the protection of their privacy and the potential lack of a judicial hearing.

A recent European Court ruling affirmed that although Member States are able to impose obligations for the disclosure of personal data of illegal file-sharers, these obligations would need to be reconciled with the requirement to protect certain fundamental rights.

The consultation closed in September 2009, but it remains to be seen what the results of the consultation are or what they will lead to. With such an array of conflicting views, it is likely that those concerned will need to recognise the need for compromise before any plans can be put into action.

A good month for... rubbish tracking devices

Thousands of pieces of rubbish will soon be tagged electronically to track their movements. The idea behind this being that illustrating the journey trash undertakes will help reduce what the public throws away as waste. 3,000 pieces of trash from London, Seattle and New York will initially be tagged. A small mobile sensor will be attached to the piece of waste and it will act like a "miniature cell phone with limited functionality". The tags will then be tracked and their movements shown on a map in real time.

A bad month for... file-sharers in the US

Joel Tenenbaum, a US student who was found liable for sharing just 30 songs online, has refused to accept help in paying his \$675,000 fine, \$22,000 for each infringement. Supporters started donating money to help Mr Tenenbaum pay the fine but he has refused it, stressing that it is his fine and that he does not want the Recording Industry Association of America to get any money which he cannot afford to pay. However, the money has not gone entirely to waste as Mr Tenenbaum donated the money collected to his legal team who had worked for free up until that point.

Google not liable for Defamatory Statements

This month, Google was found not to be liable for publishing words alleged to be defamatory in its search results.

Metropolitan International Schools Ltd ("MIS") provided adult distance learning courses under the name "Train2Game". MIS brought defamation proceedings against Design Technica for the words "Train2Game new SCAM" which were posted on their bulletin board. Google were joined to the proceedings because certain search terms produced the quote from the bulletin board as part of a search result.

The court considered the Electronic Commerce (EC Directive) Regulations 2002 which limit the liability of an information society service provider (essentially a company that provides online services) where they act as mere conduits, caches or hosts of information.

However, it was held that these were not relevant because Google, in relation to section 1 of the Defamation Act, was not hosting a website so it could not take down the offending words. With regard to the Regulations, the court pointed out that the Government had not extended the protection granted by them to search engines and it would be inappropriate for the court to do so.

However, it was held that as the search results were generated automatically, and Google had blocked specific URLs as requested by MIS, it was unrealistic to attribute publication to Google. In particular, because Google had no control over formulating search terms, it was unreasonable to attribute responsibility for publication of the material to Google whether as an author or through acquiescence.

Consumers "tricked" by .co.uk sites

Trading Standards warned this month that some foreign companies with a ".co.uk" website address are "tricking" UK consumers into purchasing fake goods. The warning appears to have been triggered by someone who purchased "genuine" Nike trainers on a .co.uk website for £10 and was then shocked when the trainers that arrived were fake.

Nominet, the UK domain name registry, expressed that consumers need to be vigilant (which is a polite way of saying "show some common sense!"). Nominet provides a WHOIS service, free of charge, which internet users can access allowing them to determine who has registered a

particular ".co.uk" domain name. As a condition of registering a domain name, Nominet requires the owner of the website to give their address, which can be an address anywhere in the world.

The domain name registries of some other countries require that a domain name registrant have an address in that country. However, in reality, unscrupulous registrants use false addresses and consumers are not better protected. The best advice for consumers therefore appears to remain: *"if it looks too good to be true, it is too good to be true...and, while we're dishing out advice, use a credit card and not your debit card."*

Do websites owe a duty of care?

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This month, the Court of Appeal held that a swimming pool trade association did not owe a duty of care to users of its website in relation to false statements it had made that suggested all of its members were vetted and that their work was guaranteed. The Court confirmed that a website can owe a duty of care to its visitors, but that warning notices on the website can operate to remove that duty.

The Claimants had used the Swimming Pool Allied Trade Association's website to choose a contractor to install a new swimming pool. Unfortunately, the contractor chosen by the Claimants became insolvent before completing the work. When the Claimants approached the Trade Association, they were informed that because the contractor was not a full member of the trade association and only an affiliate member, the trade association had not vetted the contractor, nor did it offer a guarantee for the contractor's work.

The Claimants commenced legal proceedings against the trade association, claiming that the association was liable for making negligent misstatements because the website did not clarify that affiliate members of the trade association were not vetted or guaranteed. The High Court dismissed the claim and the Claimants appealed to the Court of Appeal.

The Court of Appeal held that the issues in determining whether the trade association owed the Claimants a duty of care, more specifically a duty to take reasonable care to provide accurate information on its website, were: (i) whether there was sufficient proximity between the parties; and (ii) whether it would be fair, just and reasonable to impose a duty of care on the trade association.

The Court of Appeal decided that there was not sufficient proximity between the parties to establish a duty of care. The website's "About Us" section clearly stated that its users should ask for the trade association's information pack before engaging a contractor. A duty of care does not exist unless it is known or can be inferred that a statement is likely to be acted upon by the advisee "without independent inquiry". As the trade association had recommended that users consult the information pack, no duty of care was established.

If the Claimants had obtained an information pack as recommended by the website, they would have realised that the contractor did not have full membership of the trade association. The Court of Appeal therefore held that the situation was not one in which an assumption of responsibility or liability should be found to exist.

The relationship between the trade association and the Claimants was such that the trade association produced its website for people like the Claimants. However, there was not a relationship of advisor and advisee. The fact that visitors to the website were advised to obtain an information pack (through which it is possible to determine whether contractors are full members of the trade association) meant that there was not sufficient proximity between the trade association and the Claimants to give rise to a duty of care.

The case represented the first UK decision on potential liability for incorrect information provided on a website. Although in this case the website operators were found not to be liable, the Court reached this conclusion only because the website suggested that users should apply for an information pack.

A good month for... sacking your employees on Facebook

An employee has been sacked after posting on Facebook how much she hated her job and her boss. Apparently forgetting that she had previously accepted her boss as a “friend”, the employee posted “OMG I hate my job!!! my boss is a total pervy w*****r”. That same day the employee’s boss commented on her post to say, in no uncertain terms, that she should not bother coming in the next day and that her P45 would be sent to her in the post.

A bad month for... for domain tasting

ICANN continued its crack down on abuse of the “grace period” provided to registrars registering some gTLD domain names. Under the previous ICANN rules, a registrar was able to cancel the registration of a domain name within five days and receive a full refund. Registrars often used this as a loophole and registered millions of domain names, placing ads on them and keeping the income from the ads. The practice was massively reduced last year after ICANN started to charge 20 cents per domain name to companies that cancelled large numbers of domain names. Now the 20-cent penalty has been raised to the full cost of a domain name for a year, which should eradicate domain tasting entirely.

Consumer protection watchdog to investigate online pricing tactics and internet advertising techniques

This month, the Office of Fair Trading (OFT) announced plans to investigate online pricing tactics and internet advertising techniques that mislead consumers. The OFT also announced that it intends to look into price comparison sites and behavioural advertising. In order to do so, the OFT has launched the following two studies:

1. Advertising of Prices, which will focus on several different ways in which prices are often advertised and which may give rise to concerns; and
2. Online Targeting of Advertising and Prices, which will cover online behavioural advertising and customised pricing.

According to the OFT, it is going to evaluate which advertising and pricing practices are most detrimental to consumers, “taking into account the growth and the use of the Internet for online shopping, information provision

and advertising.” Should the OFT find enough evidence of unfair behaviour by online retailers, it may propose an industry code of practice on advertising and pricing and may also take enforcement action against retailers it believes are treating consumers unfairly.

In particular the OFT is going to target tactics prevalent online, such as “drip pricing” (where consumers only see an element of the total price upfront, but price increments “drip” through during the buying process); “baiting sales” (which entice consumers with promises of discounts but then have very few items on offer at the stated sale price); “reference prices” which are price promotions that create a relatively high reference price compared to sale price; and “time limited offers” which include sales that finish at the end of the month or special prices which are available for one day only.

OFT and FSA’s guidance on online sponsored links

In a busy month for the Office of Fair Trading (OFT), it also joined up with the Financial Services Authority (FSA) to publish a guide called “Online Sponsored Links” which was directed at advertisers of financial products and services. The guide reminds advertisers of their responsibilities and tells them to raise standards of practice in the advertisement of financial products and services. Specifically, advertisers are warned that their choice of keywords to trigger search ads for financial products and services is regulated in the same way as the content of the ads, meaning that the rules on advertising control not just the words in the ads, but the words used to trigger them. The UK regulators also cautioned financial services companies against sponsoring rivals’ names as keywords.

Examples provided include phrases such as “independent financial services”, which

when searched produced firms that were not independent. A search of “guaranteed returns” produced firms whose investment products are linked to the performance of stocks and shares where returns were not actually guaranteed. A search for “free advice” yielded results for firms whose advice was not free.

The OFT and FSA have therefore suggested that advertisers should make use of the facility offered by search engines to exclude certain terms in the search terms they purchase. The guidance also warns that firms should be mindful when purchasing – or instructing media agencies to purchase on their behalf – search terms from search engine providers. Advertisers of financial products and services should also have adequate systems and controls in place to ensure they do not buy keywords or terms which result in misleading return results.

Reproduction of newspaper articles and copyright

January

In September, the European Court of Justice decided that, in addition to copying entire scanned copies of articles, the reproduction of the first 11 words from newspaper articles by a news aggregation service could also infringe copyright.

February

Infopaq operated a media monitoring business which created summaries of selected articles from the Danish daily newspapers and other periodicals. The articles were selected on the basis of certain subject criteria agreed with customers and the selection was made by means of a "data capture process". The resulting summaries were sent to customers by email.

March

In 2005, Danske Dagblades Forening (DDF, an association of Danish daily newspaper publishers, became aware that Infopaq was scanning newspaper articles for commercial purposes without authorisation. DDF claimed that the following four activities carried out by Infopaq infringed its members' copyright: (i) creation of TIFF files by scanning the articles; (ii) creation of text files using the TIFF files; (iii) storing and publishing 11-word text extracts from the articles; and (iv) printing out the extracts.

April

May

Infopaq denied that it needed to obtain DDFs consent and brought an action against DDF before the Danish Regional Court, asking the court to declare that Infopaq was entitled in Denmark to carry out its activities without DDFs consent. The Regional Court dismissed the action and Infopaq appealed to the Danish Supreme Court. The Supreme Court referred the following questions to the ECJ for a preliminary ruling:

June

- Whether the storing and subsequent printing out of a text extract from an article in a daily newspaper, consisting of a search word and the five preceding and five subsequent words, could be regarded as acts of reproduction which were protected under Article 2 of the Copyright Directive (i.e. did such activity infringe copyright); and
- Several further questions surrounding the issue of whether acts of reproduction occurring during a data capture process such as that at issue satisfied the conditions laid down in Article 5(1) of the Copyright Directive (e.g. whether the reproduction was lawful, by an intermediary, and a transient or incidental part of a technological process) and whether, therefore, that process may be carried out without consent of the relevant right-holders.

July

August

September

The ECJ found that Infopaq's activities infringed copyright. The act of copying an extract of 11 words during the data capture process was not transient in nature and therefore not exempt under Article 5(1) of the Directive. The ECJ therefore held that the process could not be carried out without the consent of the relevant right-holders.

October

The overall result of this case is not extraordinary or unexpected. In particular, it confirms that it is a clear infringement of copyright to scan and reproduce newspaper articles. However, the ECJs position that taking an 11-word extract from a newspaper article can constitute copyright infringement reopened the debate about the legality of search engines and news aggregator websites. These services often provide text previews of more than 11 words without the site owners' specific content. However, a distinguishing factor is that operators of websites are able to prevent search engines (at least those which stick to the protocol) from including their website in results by including the "Spiders off" command in the website code.

November

December

A good month for... watching your favourite pop stars on YouTube

After falling out recently (see March's article), Google and PRS for Music (PRS) have signed a new licensing agreement to cover the use of music on YouTube, which is Google's online video website. The previous licence expired at the beginning of 2009 in a dispute over royalties. The new agreement has been backdated to January 2009 and expires in June 2012. Under the new agreement, Google has paid PRS an undisclosed one-off fee to cover premium music videos, user-generated content and music from TV programmes uploaded to YouTube. The significance of the agreement is that it specifies a lump-sum fee rather than a pay-per-use royalty arrangement as is standard.

A bad month for... Lily Allen

Lily Allen has closed her music business blog after only four days, citing abuse from "freetards". She also signed up to a pledge not to persecute individuals that share music. Lily posted that she had shut down the blog because "the abuse was getting too much". Lily was also under fire from the online magazine, TechDirt, which accused her of being a hypocrite for reproducing a TechDirt article on her blog without permission.

A course of dealing does not constitute a binding contract

The Court of Appeal has held that a previous course of dealing by email did not create a binding contract. The two parties to the case had collaborated for several years and agreed a new contract each summer. An email sent in May 2005 stated that the University of Plymouth would be able to offer ELC, a language school, 200 places for students in 2006. When the university later retracted its offer, ELC commenced legal action against the university for breach of contract.

The initial ruling of the High Court was in favour of ELC. It was held that the email sent by the appellant, offering 200 places did constitute an offer, the acceptance of which would give rise to a binding contract. ELC maintained that it had accepted the offer orally or by conduct. The university appealed on the grounds that the offer was not accepted and, in any event, the email was too uncertain to be capable of giving rise to a contract.

The appeal was allowed. It was held that no contract had come into existence between the parties. Previous conduct between the parties suggested that both parties intended for a binding contract only to come into existence on the conclusion of a detailed written contract, which was consistent with the parties' previous dealings. According to the Court of Appeal, the fact that both sides assume that their discussions will eventually lead to a contract is no substitute for an unequivocal acceptance of offered terms.

The case is a further example of the danger of relying on informal exchanges, such as email and telephone calls to form a binding contract. Important informal telephone exchanges should always be confirmed in writing if they are to be relied on and contractual terms should be recorded in a document signed by both parties no matter how long the parties have been doing business together.

Skype founders commence legal action against eBay over technology licensing

Niklas Zennstrom and Janus Friis, the two founders of internet telephone software company, Skype, this month launched a suit in the US against eBay, the current owners of Skype, and the investment consortium which has agreed to purchase a majority share in Skype from eBay. The action is for copyright infringement. The suit could complicate eBay's sale of 65 percent of Skype to the consortium, which is thought to be worth around \$1.9 billion.

In 2005, when the two founders of Skype sold the company to eBay for \$3.1 billion, they retained ownership of the software at the core of the Skype service, which was then licensed to Skype by the founder's company, Joltid. As a result, Joltid claims to control key peer-to-peer technology required by Skype to operate its VoIP service.

The issue has already given rise to a legal dispute. Earlier in 2009, Skype had filed a claim against Joltid in the English Courts because Joltid was seeking to terminate the licence agreement. Joltid brought a counterclaim, claiming that Skype was in violation of the original licence agreement. The case is expected to reach court next year.

According to Joltid, eBay owes Joltid \$75 million per day in damages for what it calls eBay's ongoing infringement of Joltid's rights. In addition, Joltid maintains that "each day that the Skype Companies continue to make available its Internet telephone software for download, Skype users download Joltid's copyright works approximately 6 times per second."

Online newspapers are required to review archives to retain defamation defence

January

This month, the High Court held that, although The Times was able to rely on the defence of qualified privilege in relation to a defamatory article when it was first published, it was not entitled to rely on the defence in respect of its online archive of the article. The article in question made allegations about the Claimant, who was under investigation for corruption.

February

Qualified privilege is one of the defences to a claim for defamation. It arises “*where the person who makes a communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made*” and such communication is made without malice. The defence is often relied on by news sources when defamatory allegations are made about persons under investigation.

March

April

The Claimant was a detective sergeant in the extradition unit of the Metropolitan Police Service. In 2006, The Times published an article in hard copy and on its website, alleging that the Claimant was under investigation for corruption over the alleged sale of confidential information in relation to extradition warrants from Russia. An investigation eventually found that the evidence required to proceed with a criminal prosecution or further disciplinary proceedings against the Claimant was insufficient. The Times was informed of the results of that investigation.

May

June

In May 2007, the Claimant issued libel proceedings against The Times in relation to both the print and website publications. Although The Times admitted that the article was defamatory, it pleaded the defences of justification and qualified privilege. In June 2009, Eady J ordered a trial of the defence of qualified privilege by judge alone as a preliminary issue. It was held that the defence of qualified privilege applied to the print publication of the article but not to the continued website publication from the point at which The Times was informed of the results of the investigation.

July

August

The judge applied the case of *Reynolds v Times Newspaper Limited* and subsequent cases on qualified privilege. The important development since Reynolds was the recognition that, in some cases, maintaining a reputation was a right under Article 8 of the European Convention on Human Rights (respect for private and family life). The issue was whether the publication of the article at the time it was published was fair to the Claimant, meaning whether it was a proportionate interference with the Claimant’s reputation right given the legitimate aim in pursuit of which the publication was made. As the story was of public interest, it was held that the original publication of it was a proportionate interference with the Claimant’s reputation.

September

October

However, the judge found that The Times’ failure to remove the article from its website archive or to attach an appropriate qualification to it could not be described as responsible journalism. The continued existence of the article on the Internet questioning the Claimant’s honesty was not in the public interest and not fair to the Claimant. Therefore, The Times could not rely on the defence of qualified privilege after it had been informed of the results of the investigation.

November

December

The case demonstrates the importance of regularly reviewing the material on newspapers’ websites to check that it is up to date. In the event that the key facts of a report change, the relevant article should be removed or amended to ensure that it reflects that change.

A good month for... [www.facebook.com/ <yournamehere>](http://www.facebook.com/yournamehere)

In June this year, Facebook announced that existing users of the site and trade mark owners could register their user names as facebook URLs. This month, the free-for-all commenced, and URLs were awarded on a first come first served basis. Facebook has reserved IP owners the right to reclaim any username that is an abuse of IP rights and has put in place procedures to do so. The social networking site has also implemented a strict no-transfer policy preventing the URLs from acquiring any resale value and avoiding ransom demands for the return of a trade mark.

A bad month for... maintaining reporting bans when its all over the Internet

The attempts to ban the Guardian Newspaper from reporting on the details of a question tabled by an MP in Parliament caused widespread shock in media and civil liberties circles because it was seen as unusual to block reporting from the place where the public's representatives conduct the business of Government. The Guardian had wanted to report on a question relating to the Minton report on the alleged dumping of toxic waste in the Ivory Coast. However, after the question had been published in full online and the name of the oil-trading company in question were circulated countless times on Twitter, the injunction application was withdrawn.

Parties to a software development agreement refused injunctions

The judgment in *Ericsson AB v EADS Defence & Security Systems Ltd* was handed down this month. The court had considered applications by both parties for injunctions, one to prevent the termination of a contract pending contractual adjudication and the other to prevent adjudication on the basis that the parties had commenced mediation.

The parties had agreed to engage in mediation to attempt to resolve a dispute. Shortly afterwards, the Defendant purported to give notice of material default, a ground for termination under the software development agreement between the parties. The Claimant gave notice of adjudication shortly after. The Claimant disputed the notice of material default and the Defendant disputed the notice of adjudication.

The court refused both parties' applications. The judge decided that the "balance of convenience" did not require the court to prevent the Defendant from exercising its right to terminate. Therefore, the injunction to prevent termination was refused.

It was held that the dispute resolution provisions in the contract did not suspend any party's rights to take steps it was entitled to take under the contract. It would not be a breach of contract for a termination to take place, even though a dispute as to whether termination could take place had been referred to contractual adjudication. This was because the contract did not specify that adjudication should freeze a right to terminate. Such a provision would need to be expressly included if the parties wished to rely on it.

High Court allows court order to be served by Twitter

A blogger who was being impersonated on the social networking site, Twitter, has sought injunctive relief against an unknown Defendant who was impersonating him on the site, requiring him to cease posting, to preserve the account and passwords and to identify himself to the Claimant's solicitors. In a legal first, the court allowed service of the court order via Twitter, because the Defendant was anonymous and not easily identifiable.

The Claimant, Donal Blaney, operates a blog called Blaney's Blarney and posts updates on Twitter under the name Donal_Blaney. The Claimant was impersonated on Twitter by someone using the Twitter username "BlaneysBlarney" together with a photograph of the Defendant and

a link to the Defendant's blog.

To obtain the personal details required to serve a court order against someone operating online, Norwich Pharmaceutical proceedings are usually commenced against the website operator. Serving the Defendant directly (i.e. through Twitter) provides a quicker and cheaper route while still leaving open the Norwich Pharmaceutical avenue if necessary.

The Defendant has complied with the order. If the Defendant had not complied, a Norwich Pharmaceutical order could have been sought against Twitter in order to contact the Defendant using more traditional means.

£500,000 penalty proposed for data protection breaches

January

The Ministry of Justice announced, this month, that it plans to give the Information Commissioner the power to impose penalties of up to £500,000 on data controllers who seriously breach the Data Protection Act 1998.

February

If the proposal were enacted into law, it would give the Information Commissioner the power to issue a “monetary penalty notice” if a data controller seriously contravenes any of the data protection principles. A ‘serious contravention’ is one that:

- (a) would be likely to cause substantial damage or distress; and
- (b) is either deliberate or reckless (i.e. the data controller knew or ought to have known of a risk of a serious breach but failed to take steps to prevent it.)

March

The Information Commissioner’s draft guidance, which sets out how this potential new power would be exercised, states: “The purpose of the monetary penalty notice is not to impose serious financial hardship on a responsible data controller”. A monetary penalty notice will only be used as a punishment where there has been a deliberate or reckless handling of personal data. When deciding the extent of the penalty, the Information Commissioner will take into account the data controller’s size, the financial resources available to the data controller and the sector in which the data controller operates.

April

Before issuing a monetary penalty notice, the Information Commissioner will have to issue the data controller with a ‘Notice of Intent’, setting out details of the proposed penalty. The data controller will then have 28 days in which to make written representations to the Information Commissioner. If, having considered the data controller’s representations, a monetary penalty notice is then issued, a data controller will have 28 days in which to pay it. If the penalty is paid within 28 days, a discount of up to 20% will be applied.

May

June

At present, the Information Commissioner has limited powers to “punish” offenders of the Data Protection Act. The Information Commissioner can issue enforcement notices for breaches of the data protection principles. However, as enforcement notices merely require a data controller to change its practice, the Government believes that enforcement notices alone are not appropriate sanctions for serious breaches of the Data Protection Act.

July

August

The Information Commissioner can bring criminal proceedings for some data protection offences, including non compliance with enforcement notices, failure to notify as a data controller and unlawfully obtaining personal data.

September

October

The new penalty would allow the Information Commissioner to directly punish serious offenders of data protection law. Although not a criminal sanction, the power to impose a “fine” of up to £500,000 should deter businesses from breaching the data protection principles and encourage compliance with the Data Protection Act.

November

Coupled with the Government’s proposal to introduce prison sentences (up to a maximum of 2 years) for offences of unlawfully obtaining personal data, this new proposal clearly shows that the Government is now taking the area of data protection very seriously.

December

A good month for... unfriending people

Blame Facebook. For everything. In particular, blame it for the New Oxford American Dictionary's 2009 Word of the Year: "unfriend". The definition of "unfriend", which is (unusually for an "un" word) a verb, is "to remove someone as a 'friend' on a social networking site such as Facebook". A spokesgeek for the Dictionary stated "*In the online social networking context, its meaning is understood, so its adoption as a modern verb form makes this an interesting choice for Word of the Year.*" Of all the words that could have been chosen from the world of social networking, this has to be the most depressing – verb: to fall out with a friend.

A bad month for... Saying "WoW that's nuts"

In the US (for it could only be in the US) a man is seeking [Dr Evil] one million dollars [Dr Evil] in damages from the makers of World of Warcraft (WoW), claiming the role playing game has turned him into a recluse, alienated from the real world. He claims that he can no longer function in the real world, having become addicted to life in a fantasy world. Perhaps evidencing that he is, in fact, alienated from the real world, the man making the claim has attempted to subpoena numerous music and film stars (including Winona Ryder) to provide evidence on his behalf. The man has allegedly already sued Microsoft, Sony and Nintendo for issues he had with their games consoles, so he is no stranger to the courts...

Internationalised Top Level Domain Names

This month, ICANN (the Internet Corporation for Assigned Names and Numbers) implemented a new fast-track application process for new internationalised top level domain names. This will allow national domain name registries to apply for country code top-level domain names (TLDs) which comprise non-Latin letters.

Presently, all TLDs must be made up of letters from the Latin alphabet (e.g. .uk, .fr, .de etc). This is despite it being possible to register second-level domain names featuring non-latin script with registries of some TLDs. In order for an application to succeed, the TLD applied for must relate to the country or territory's name in its official language and the

application must have the support of the country or territory's government.

The previous technical and security issues, including that some latin script domain names could be spoofed by using non-latin characters, have broadly been resolved, so there was no reason to continue to restrict TLDs in countries which use a non-latin script. A huge number of the world's internet users do not use a Latin-based script as their native language. As ICANN commences its planned release of any gTLDs applied for, it will be interesting to see how much time passes before ICANN allows non-latin script TLDs to be applied for generally.

Withdrawing internet access without trial – the EC debate

During 2010, the EC legislature (Council, Parliament, and Commission) has been considering a proposal known as the "telecoms reform package" which will combine and simplify the existing EC telecoms legislation. One sticking point in discussions about the content of the new legislation has been whether Member States' governments should be able to introduce laws which would allow users' access to the Internet to be cut off if there was a suspicion of file sharing.

In October, the Parliament stated that it required an amendment to the proposed legislation so that no restriction could be imposed on the fundamental rights and freedoms of end users without judicial authority. In other words, the Parliament was insisting on an obligation for rights-holders to obtain a court order before cutting off internet access.

This month, the Parliament stepped down from its position and agreed new wording

with the Council. The wording now has a requirement for a "prior fair and impartial procedure", a right of appeal, and for measures to be taken with respect for the principle of presumption of innocence and the right to privacy. However, there is no specific requirement for the Governments of Member States to require rights holders to obtain a court order (or to engage in any court proceedings) before requiring an internet service provider (ISP) to withdraw or limit a user's internet access.

In a press release, the Parliament attempted to justify abandoning its insistence that rights holders must obtain a court order because it claimed the wording it had suggested went beyond the EC's competencies. It considered that a general requirement to obtain a court order would have required a harmonisation of Member States' judicial systems, which is not within the EC legislature's power.

Audiovisual Media Services Regulations 2009 announced

January

This month, the Audiovisual Media Services Regulations 2009 (the “ Regulations”) came into force. They implemented the much talked about Audiovisual Media Services (AVMS) Directive, which required Member States to establish a regulatory system for on-demand services that provide television and television-like programmes (e.g. online channels) and to ensure that they adhere to particular standards.

February

The Regulations apply to “ on-demand programme services” which is likely to apply to many online video providers. Services will be caught by the definition if:

- the principal purpose is the provision of programmes of a form and content which are comparable to those usually included in television programme services;
- access is on-demand;
- a person has editorial responsibility for the programme;
- it is made available by that person for use by members of the public; and
- the person who has editorial responsibility is under the jurisdiction of the United Kingdom.

March

The Regulations set out a regulatory framework and minimum content and advertising standards to which such services must adhere. They also modify the definition of a television licensable content service so that broadcast services provided over the Internet will also require a broadcasting licence from Ofcom.

April

May

June

While the general rule under the AVMS Directive is that product placement is prohibited, Member States were given the option to permit it in films and certain types of programmes. Despite previous indications by the Government that product placement would not be permitted, the Regulations do permit the maximum amount of product placement allowed by the Directive. For example, product placement is permitted in on-demand services, films, sports programmes and light entertainment, or where there is no payment involved. It is not permitted in children’s programmes, news and current affairs programmes and no programmes may include product placement of tobacco, tobacco companies or prescription medicines. In addition, warnings that explain the programme features product placement must be screened at the beginning and end of the programme and after every advertising break.

July

August

There are many other general conditions, including, for example, that product placement must not directly encourage the purchase of goods or services, must not affect the editorial independence of the service provider and must not encourage behaviour prejudicial to health or safety. In addition, there are alcohol specific content restrictions.

September

October

Ofcom will be given powers to regulate on-demand programme services and ensure that they comply with the minimum standards. They may designate also one or more bodies to act as co-regulators. Most likely, the Association for Television On Demand will be designated as co-regulator with Ofcom for programme content and the Advertising Standards Agency will be designated as the co-regulator for advertising. The Regulations specify that the relevant regulatory authority may give the contravening provider of an on-demand programme service either an enforcement notification and/or impose a financial penalty on the provider. The maximum penalty is the greater of 5 per cent of the provider’s applicable qualifying revenue or £250,000.

November

December

A good month for... actually making use of that escrow account

The NCC Group, one of the largest software escrow providers, has reported a 150% increase in source code releases in 2009. The pressures of the recession had caused a large number of software developers to bite the dust, making the recovery of source code from escrow crucial. The release of source code lets the customer continue to use the software and allows third parties to support and maintain the software. Using the news to promote its services, the NCC said: *“The devastating effects of the downturn are well documented, and for businesses suffering during the recession, losing essential software could be the final nail in the coffin. The potential for software companies to become bankrupt is very real.”*

A bad month for... world peace (between mobile phone providers)

Ladiieeeeees and Gentlemennnn, tonight's fight is the one we've all been waiting for – two heavyweights in the mobile phone industry go head to head in the battle of all battles. Limering up in the red corner is Nokia, armed to the teeth with mobile technology patents. Doing push-ups in the blue corner is Apple, goading Nokia by smugly waiving its new iPhone towards the red corner. The fight is taking place in the US courts, where Nokia claims that the iPhone infringes 10 of its patents and Apple claims that Nokia's touch-screen phones infringe 13 of Apple's patents. The result of the fight is likely to be a draw, but it might be a hell of a fight in 2010 before we get there...

Virgin found not to infringe patent

This month, Virgin Media successfully defended a patent infringement claim brought against it by Gemstar TV Guide International Inc (Gemstar). Gemstar sued Virgin Media for alleged infringement of three of its patents relating to electronic programme guides (EPGs). These consist of the “Single Channel Patent”, the “Favourites Patent” and the “Transfer Patent”. Virgin disputed the infringement and claimed that the patents should be revoked as covering non-patentable subject matter, lacking novelty and being obvious from certain prior art.

The Single Channel Patent related to a television schedule system incorporating a user interface, capable of shifting the focus from numerous channels to just one. The court found that the patent should be revoked because the invention did not have a “technical effect” and was excluded from patentability on two grounds: (1) as a

presentation of information and (2) as a program for a computer.

The Favourites Patent related to a facility allowing the user to select certain channels as favourites through a user interface. The court found that the patent should be revoked because it was “plainly a computer program” and “an example of a presentation of information”, both of which are excluded from patentability. It was also not novel.

The Transfer Patent related to a facility allowing the user to transfer a recording to a secondary device (e.g. to a DVDR). The court found that the patent did have a “technical effect”, namely the movement of data to a secondary device, and was therefore patentable. It was not merely a computer program. However, the court found the patent had been anticipated by prior art in a patent application made by Toshiba and therefore lacked novelty and was revoked.

Microsoft does deal on Browser Bundling

The noughties, as the tabloid press persistently labelled the last 10 years this month, featured a drawn-out battle between Microsoft and the EC Commission, which brought competition law proceedings against Microsoft in respect of its Windows operating system. This month, perhaps signalling an end to the battle, the Commission accepted a commitment from Microsoft in respect of the way in which consumers would be offered browsing software for use with their operating system. Microsoft has been fined a total of €1.68bn by the EC Commission on this issue, and the new agreement should see Microsoft escape further financial penalties.

The agreement follows the 2007 complaint made to the EC Commission by Opera (the developer of an alternative browser) that Microsoft bundles its Internet Explorer browser with its dominant Windows operating system in a manner that breaches competition law. According to a web analytics company, the present market share of Microsoft's Internet Explorer is

about 56 per cent of global internet traffic, followed by Mozilla's Firefox at about 32 per cent, with Opera, Google and Safari having less than 5 per cent.

As part of its agreement, Microsoft is promising to offer new users of its Windows operating system a screen allowing them to choose between all of the rival browsers, which will be displayed in a random order. However, it is hard to tell whether the agreement will change the popularity of other browsers, particularly when most Windows' users are used to using Internet Explorer.

Google's Chrome browser has struggled to claim any significant market share since its launch more than a year ago, and Google is presently seeking to enter into deals with computer manufacturers to have its browser pre-loaded onto operating systems. It seems strange and a little unfair on Microsoft, in particular given Google's online dominance, that it is legally unable to conduct itself in the same manner...

Sustainable ICT strategies: Copenhagen Accord and beyond

“ We have become a knowledge society. Businesses’ ICT footprints grow daily, fuelled by the need to digitally store, access and communicate the ever growing volume of information and data they generate.”

“This progress is not enough” – US President Barack Obama

“The Copenhagen Accord may not be everything that everyone hoped for. But this decision of the Conference of Parties is a new beginning, an essential beginning. ... We have the foundation for the first truly global agreement that will limit and reduce greenhouse gas emission, support adaptation for the most vulnerable, and launch a new era of green growth.” – UN Secretary-General Ban Ki-Moon.

The failure of the UN Framework Convention on Climate Change to deliver a legally binding agreement to tackle climate change in December was disappointing – but it remains an undeniable fact that politicians, legislators and businesses are now more focused on protecting the environment than ever before.

Businesses are acutely conscious of the need objectively to scrutinise their business models, to cater for and implement the next generation of low-carbon, waste and water technologies which will enable their existing processes and functions to be more cost and resources efficient, and to cope with future legal and market challenges.

However, many businesses have yet comprehensively to review the contribution to their overall costs of energy, waste, water or transport, or the general impact on the environment of the Information and Communications Technology systems, infrastructure, devices and services that underpin and support their operations (ICT). The real cost savings, environment and other benefits achievable by focusing on the “green” or “clean” aspects of the procurement strategy for that ICT should not be underestimated.

Below we highlight some of the reasons why businesses should reinvigorate their focus on sustainable business practices, and some of the practical steps that can be taken in ICT systems and services procurement to optimise sustainable performance and cost efficiency.

Why develop a “green” ICT procurement strategy?

ICT is responsible for a growing proportion of businesses’ energy and waste budgets, greenhouse gas emissions, carbon footprint and general environmental impact.

We have become a knowledge society. Businesses’ ICT footprints grow daily, fuelled by the need to digitally store, access and communicate the ever growing volume of information and data they generate, applications growth and the implementation of new technologies such as smart metering and cloud computing and other new business models. In the UK, data centres alone are estimated to account for more than 2% (and rising) of all electricity consumption. In addition to the energy that ICT equipment consumes during its use, the energy, water and materials used in its manufacture, the packaging and logistics associated with its distribution and disposal at the end of its useful life can all have a material environment impact.

“Investors, employees and customers are increasingly looking at the “green” credentials of businesses, goods and services when making decisions regarding investment, employment and where to place their custom.”

Although the benefits of green procurement strategies are becoming better understood, it seems few procurers of ICT goods and services are taking significant practical steps to ensure suppliers deliver on promises relating to the sustainability or environment impact of the ICT goods and services they buy.

“...climate change is one of the greatest challenges of our time. We emphasise our strong political will to urgently combat climate change...” – Copenhagen Accord.

Policy makers are increasingly looking at ways to facilitate the transition to an energy-efficient, low-carbon and low waste economy. This, along with significant political and economic concerns surrounding energy security and rising energy costs, form the basis of an increasingly long and compelling list of reasons why now is a good time to start taking “green” ICT procurement seriously.

Why is it time to review the “green” aspects of your procurement strategy?

Cost savings: ICT contributes materially to the energy consumption of most businesses. A focus on reducing the energy, water and other resources and consumables your ICT consumes, full life cycle costing, use of innovative technologies and the timing of equipment refreshes can have a material impact on your energy bills and operating expenditure. With an ever-growing number of ICT tools being developed for monitoring, measuring and controlling power usage, ICT is increasingly recognised as having the capacity to make a significant contribution to allowing businesses to reduce their consumption.

Government procurement policies: Although the Copenhagen Accord only “recognised” the scientific case for keeping temperature rises to no more than 2°C and failed to set out any binding commitments to emissions reductions to achieve that goal, it did emphasise and prioritise the need to accelerate technology development. The EU Commission has already released a European Code of Conduct on Data Centres Energy Efficiency, and in its recent recommendation it clearly stated that governments should seek to mobilise ICT to facilitate the transition to an energy-efficient, low carbon economy.

Through the activities of the Sustainable Procurement Task Force and the increasing prevalence of sustainability guidelines and contractual requirements produced by the Office of Government Commerce (OGC), the UK Government is demonstrably beginning to push its sustainability agenda into the public procurement arena. OGC continues to look at opportunities to incorporate environment and sustainability requirements in its Model Contract for ICT services, with new provisions introduced in the recently released version 2.3 and further new provisions anticipated in version 2.4.

To meet their carbon reduction targets policy makers will need actively to promote behavioural changes in ICT procurement and use, as well as increase investment in clean tech research and development. As a result we can expect to see further regulation in this area, with the Government using taxation and goods and services legislation to incentivise the development, production, location and use of (or penalise any failure to use) energy efficient data centres and ICT.

Increasing environment impact regulation: In the UK we have already felt the effects of the introduction of the Restriction of the Use of Certain Hazardous Substances in Electrical and Electronic Equipment Directive and the Waste Electrical and Electronic Equipment Directive (directives relating to the use of certain hazardous substances in electrical and electronic equipment and dealing with the end of life recycling and disposal of such equipment, respectively).

The impact of the Eco-Design Regulation will begin to be felt in January 2010. Similarly the European Commission's action plan to boost the role of ICT in "greening" the EU economy, the Climate Change Act 2008 (the UK's long-term framework to tackle climate change) and the Carbon Reduction Commitment (a mandatory scheme affecting certain businesses to promote energy efficiency and help reduce carbon emissions) are all having an impact, requiring organisations to scrutinise their business models.

"A well communicated "green" procurement strategy, drawing in all key stakeholders, with board-level sponsorship can help address these issues and add real value to your business."

Environment impact reporting obligations, driven by regulatory and corporate social responsibility requirements, are on the increase. Investors, employees and customers are increasingly looking at the "green" credentials of businesses' goods and services when making decisions regarding investment, employment and where to place their custom. A failure to keep pace with market trends in this regard could ultimately have a damaging effect on the market share of a business, its ability to grow and its attractiveness in the eyes of investors. The ability of a business to demonstrate vision and adapt to the demands of a low carbon economy and comply with the growing raft of environment impact legislation will inevitably become a significant feature of the transactional due diligence process, having a direct impact on business valuations. Businesses that are demonstrably environmentally-aware are becoming increasingly seen as indicative of a management team focussed on cost control and addressing future business risks – making them more attractive to investors.

A well communicated "green" procurement strategy, drawing in all key stakeholders, with board-level sponsorship can help address these issues and add real value to your business – both in terms of short term operational cost efficiencies and long term shareholder value. As the use of ICT by businesses increases in the coming years, procuring ICT equipment with a more environmentally friendly focus becomes even more imperative.



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For information on green supply chain management and cleantech matters generally, visit our online Cleantech zone at http://www.law-now.com/law-now/zones/LN_Cleantech.htm

Google books in a broader European policy context

“ One of the effects of the discussion as to whether European rights are adequately represented and protected under the Settlement has been that it has brought consideration of digitisation of materials to the fore in Europe and sparked rigorous debate around how this issue should be handled. ”

Google's controversial project to digitise the world's books, and the proposed Google Books Settlement (the "Settlement") with authors and publishers of copyright works in the US, which gained preliminary approval from a federal judge at the end of November 2009, has potential implications for European copyright law and policy and the online distribution of copyright works in Europe.

A US only settlement?

At first glance, the Settlement does not have effect in Europe. Readers outside the United States will not benefit from the service because the service will not be available outside the US.

However, European (and other non-US national) authors who previously published their copyright-protected, but now out of print, publications in the US, are concerned that Google wishes to scan and make these works available to the public through the Google Books facility. Critics have suggested that Google Books will effectively create a de facto monopoly on digital access to a huge number of works, including those belonging to Europeans.

It was originally argued that European authors and publishers whose books have been scanned from American libraries may benefit from new revenue streams as American readers are made aware of and purchase their books. They could do this either by registering to control online access to their books or opt out (in the same way that American authors can do).

However, having come under fire for not providing adequate protection for foreign authors and publishers, Google recently stated in a European Commission hearing that it will exclude all European books that are still "commercially available". Therefore, such books will no longer be available to American consumers through a search on Google Books, unless the copyright owner has expressly agreed that the book could be included (under previous proposals, non-US copyright owners would automatically fall within the scope of the Settlement unless they actively opted out within a specified time frame).

Further amendments were made to the Settlement in November 2009, due to continued international concerns, following which works will only be included in the digital project if they have been registered in the US, or come from the UK, Australia or Canada. This means that 95% of all foreign works will no longer be included in Google's digital book archive. As an additional protection, authors and publishers from the UK, Australia or Canada will have their own representation on the board of the planned rights registry to oversee the settlement.

European Resistance

The main opposition to the Settlement in the US had focused on claims that the terms violate copyright and anti trust law. However, in its criticism of the Settlement, the US Department of Justice also addressed concerns about the inadequacy of representation to protect the interests of foreign rights holders. Of most concern were the trading partners of the US, for example, France and Germany; both France and Germany filed a formal objection to the case in New York.

Germany filed an opposition to the Settlement citing multiple reasons why the current Settlement proposal is not acceptable for German authors and should be rejected in its entirety. The German government suggested changing the Settlement so that it worked entirely on an “opt-in” basis or, at least, to exclude German and other international authors and publishers from its scope.

In contrast to Google Books, the German and European initiatives that are currently in development to create non-commercial digital libraries, such as the “European” or “German Digital Library”, have demonstrated that the benefits to society that Google purports to bring from Google Books are not unique to the proposed Settlement, and indicate that it is possible to achieve digitisation while complying with traditional copyright rules.

Sparking the European debate

One of the effects of the discussion as to whether European rights are adequately represented and protected under the Settlement has been that it has brought consideration of digitisation of materials to the fore in Europe and sparked rigorous debate around how this issue should be handled. As expected, Google has taken a keen interest.

The EC Commission held a series of meetings and hearings on the issue, including discussion of its own culture digitisation programme, Europeana, earlier this year in which various interested parties, including Google, have participated.

The policy behind the proposition

The EC Commission has expressed that it is looking for a “truly European solution in the interests of European consumers”. They favour an approach that is led and guided by the public sector, but also stated the need for private sector support in both the development of new technologies and the time required to complete the digitisation task.

Digitisation has many benefits. It has the potential to improve public access to a huge body of knowledge by allowing users to search the text of millions of books. The proposed Settlement would therefore open the door to new research opportunities. In addition, there is a so-called “book famine” – currently only 5% of books in Europe per year are converted into accessible electronic formats.

However, there are concerns that the EC Commission’s proposal would effectively make a single entity the gatekeeper of all of this information, at the expense of copyright owners. Google’s own technology has also been criticised as producing substantial inaccuracies, although these are likely to be merely teething problems that will be ironed out through use.

Ultimately, there is a balance to be struck between the public and online users on the one hand and rights holders and the publishing industry on the other. The Commission aims to resolve these differences.

Libraries v Publishers

A further issue is that there is clearly a huge divergence between the interests of libraries and those of publishers. Libraries and Universities want to prioritise the public interest and advocate a more ‘permissive’ copyright system which they argue facilitates a more cost effective way of digitising books on a mass scale, as opposed to obtaining specific consent for every individual work they wish to digitise. This envisages a set of “public interest exceptions” which would enable libraries and similar institutions to enjoy a blanket exception to current rules, thus allowing them to digitise their entire collections. Such exceptions would need to be defined by legislation.

“ However, there are concerns that the EC Commission’s proposal would effectively make a single entity the gatekeeper of all of this information, at the expense of copyright owners.”

Publishers, collecting societies and rights holders argue that collective licensing agreements are the best solution to the issue, especially since they can be tailored to new technologies. In addition, they suggest that mandatory exceptions could “undermine economic rewards and encourage so-called free-riding”, by creating unfair competition and discouraging publishers from investing in new business models. Instead, they see that the crucial issue should be to ensure that a good faith search using existing databases is carried out in order to identify and locate the rights holders.

Orphan Works

One of the biggest challenges facing digitisation across the board is how to deal with so-called orphan works, i.e. those which are still copyright protected but whose copyright owner cannot be found. These reportedly make up a massive 90% of publications housed in European libraries.

The way that the amended Google Books Settlement deals with the issue is that any money that is made from “orphan works” will be held for 10 years in case the owner of the copyright is traced, with any unclaimed money after that time distributed to charities in Australia, Canada, the UK and the US.

The Commission recently suggested that one possible way of dealing with orphan works was to make them an exception to copyright law. Given that there is currently no definition of “orphan works” under European law and given the difficulties of determining at what point a work becomes “orphan”, this may be harder to implement in practice.

Looking to the future – The digitisation race

Overall, concern is rising in Europe on both sides of the discussion that, if it does not follow suit and digitise its libraries on its own terms and within the constraints of European copyright law, it will effectively be left behind by its forward-thinking counterparts in the race to digitisation and that, as a consequence, Europe’s reputation as a cultural hub could suffer in the future.

However, the opposition to the Google Books issue and the time that it is taking to reach a settlement acceptable across the board in the US creates the opportunity for Europe to take the lead and forge its own.

This article is based on an article first published in “The Online Magazine for Global Competition Policy” on 30 October 2009.

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Optimising your outsourced services

Have you outsourced your IT or a business function to a specialist third party service provider? Are you receiving complaints from customers about the service they receive? Are your internal stakeholders raising concerns that the arrangement is not delivering the anticipated service improvements, efficiencies or cost savings? If so it is probably time to review your outsourcing arrangements and get them back on track ...

Many businesses are facing this challenge. With the increased pressure on margins, costs and profitability brought about by the current economic climate the need quickly to address performance issues features high on the corporate agenda. This article highlights some of the steps you can take to identify and address problems you may be encountering, without having to undertake a wholesale renegotiation or reprourement of the services.

Identify the scope and nature of each problem

The first step to getting your service back on track is to review the business case for and the original expectations of the outsourcing against what is being delivered/achieved and what your contract requires.

Identify each specific area of concern. Is it a failure to deliver cost savings or improvements in efficiency, missed milestones, scope creep or lack of innovation? Are you paying for services you do not need or are you simply not getting value for money? Are you faced with persistent breaches or missed service levels, loss of key personnel or a general perception of customer dissatisfaction? How is your relationship with your supplier? Is it one of partnership, working closely together to maintain and improve performance levels, or has it deteriorated and become more contentious?

If performance of the services is largely in line with the contract's requirements, but key stakeholders or customers appear unsatisfied, interview them to ascertain their concerns. Use the contractual tools available to you to get the information you need. Request reports be provided and kept up to date, exercise your audit rights. Open a dialogue with your supplier - ask it to identify the areas of your relationship that could work better from its point of view.

Identify the root cause of the problem

The root cause of problems in outsourcings can usually be traced back to one of the following:

- *Assumptions made/decisions taken at the time of contract.* It is difficult to predict with certainty and contract for all eventualities connected to outsourcing a business function - a good outsourcing model is designed to flex and adapt to changing commercial needs, market forces and regulatory changes. However, your business focus, volumes or requirements may have materially changed since the original contract date.
- *Lack of knowledge or time when the original contract was negotiated.* Businesses are often under significant time pressure to close outsourcing deals in tight timescales and as a result may not have had sufficient time to fully evaluate potential service providers (e.g. for competence, experience and cultural fit) or prepare for the impact of the consequent business restructuring an outsourcing brings. It may now be apparent that there is a mismatch between your and your

“ With the increased pressure on margins, costs and profitability brought about by the current economic climate the need quickly to address performance issues features high on the corporate agenda.”

supplier's expectations, or that some of the outsourced processes involve high levels of customer contact or are otherwise unsuitable for provision by your supplier. Perhaps there was an over-focus on cost savings, to the detriment of the overall service, which now needs to be addressed. If insufficient due diligence was undertaken or some dependencies were not identified further services or investment may be required for the services to be performed as originally envisaged. Finally the services description in the contract may lack clarity, the service levels may be insufficient or the pricing assumptions on which the charges were based may have been incorrect.

- *Difficulties arising in the performance of the services.* These often arise from the loss of key members of your or your supplier's personnel, resulting in a lack of know-how or understanding of your business. Other issues that typically arise include ineffective communication or governance or insufficient availability of information, issue tracking, performance monitoring or reporting. Performance may not be in accordance with the required service levels - perhaps due to a failure to deploy best practice processes or enabling technologies. If project milestones are being missed your supplier may be suffering from delayed or refused regulatory consents, technical problems with its solution or unexpected supply chain problems. It may also (perhaps unknown to you) be facing financial difficulties.

Optimise value for money

Cost optimisation can help you achieve your target cost savings and establish a competitive advantage. Consider:

- Benchmarking the contract, services and/or charges to identify the differences between the performance of your supplier and the performance of a benchmarked industry 'best practice' leader. A good benchmark process will identify the root causes of your problem and provide information you can use to develop an appropriate solution. It should also identify market best practices and new technologies you can deploy to improve your competitiveness. Not all benchmarking is prohibitively expensive or complicated. It can be used in a targeted manner, e.g. to identify any misalignment of your charging methodology, contractual service levels, or of the technology and processes employed by your supplier, with best practice.
- Encouraging innovation - incentivise and require your supplier to investigate, identify and deploy new technologies, processes and best practice that will make their service more efficient, increase productivity, improve communication and reduce their cost base - so that the benefits can be passed on to you. This should be a collaborative effort, looking at both the performance and receipt of the services. Sometimes the best way to improve your supplier's performance is for you to adopt new technologies or tailor your internal processes to enable your supplier to be more efficient in the way it delivers the services, thereby reducing its and your costs.
- Renegotiating or flexing your contract. Look to unlock hidden value within your cost structure by adjusting the pricing for volume metrics to reflect changes in your business or for any anticipated decrease in the underlying cost profile over time of the infrastructure required to provide the services. You may also be able to terminate or substitute unused services.
- Targeted training: (i) of your supplier's personnel, to ensure they understand your business model and processes, enabling them to work more efficiently as an extension of your own team; and (ii) of your own personnel, to help them get the best out of your supplier.
- Requiring continuity of supplier personnel. When key personnel engaged in provision of the services leave or move to other projects their knowledge of your relationship, past performance, systems and working practices goes with them. This can have a material impact on service efficiency. High personnel attrition rates may also be indicative of financial or other instability at your supplier. If your contract does not already do so, identify and tie in key supplier personnel and seek to manage the turnover of personnel engaged on your account to reasonable levels.

“ The best-run outsourcing relationships demonstrate a truly collaborative “ partnering” approach, with customer and supplier working closely together.”

Improve communication and relationship management

The best-run outsourcing relationships demonstrate a truly collaborative “ partnering” approach, with customer and supplier working closely together. To achieve this the supplier needs to engage and retain personnel that fully understand the customer’s business and objectives. There needs to be regular, pro-active communication and customer satisfaction feedback and a well-understood and implemented governance process covering all aspects of performance, incident and breach reporting, issue tracking and resolution and dispute resolution procedures.

Outsourcing involves handing over management and delivery of a business process. To achieve a successful arrangement you need senior level buy in to the process and material investment in managing the relationship with your supplier. It is essential you retain high quality individuals with responsibility to monitor and manage internal expectations and the performance of and communication with the supplier. You also need to ensure you are delivering on your own customer obligations to prevent their non-performance adversely impacting your supplier’s ability to perform its obligations.

Governance processes are not just about controlling your supplier. In addition to reviewing supplier-generated reports, your business should provide regular feedback on your supplier’s performance against expectations, perceived service delivery failings and threats and concerns relating to anticipated or persistent breaches, enabling them to be dealt with at an early stage. If you are not achieving this, or it is not clear who internally has ownership of problem management, consider applying industry-based management practice disciplines aligned to your internal processes and organisational structure. Provided you have the management capability and desire to operate and police those disciplines they should drive better management of your relationship with your supplier, enabling issues to be addressed before they become service level failures or contract breaches.

And finally ...

You may be in dispute, but be careful to control your communications and deliver a consistent message to avoid repudiating your contract, being in anticipatory breach of contract or undermining your negotiating position. If there has been a breach of contract, take care to reserve your position and preserve your rights. Once the problem or dispute is identified, consult with your legal or other professional advisers and explore the contractual and commercial options available to you.

If you can, find a solution that has an upside for both parties - it will help you re-establish trust and a strong working relationship with your supplier.



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Digital Economy Bill heralds Government plans to tackle P2P file-sharing

“To many, the most intriguing and controversial aspects of this Bill are the provisions relating to peer-to-peer (P2P) file-sharing.”

The Digital Economy Bill echoes some of the key recommendations set out in the Government's Digital Britain White Paper. To many, the most intriguing and controversial aspects of this Bill are the provisions relating to peer-to-peer (P2P) file-sharing.

ISP obligations

The Government's latest consultation response on P2P filesharing, published in November 2009, confirms its intention to introduce two new obligations on ISPs:

- 1 To send letters to subscribers identified by rights holders as allegedly responsible for a breach of copyright.
- 2 To collect anonymised information on serious repeat infringers (based purely on the notifications provided by rights holders). This information will be made available to rights-holders together with personal details on receipt of a court order.

The Digital Economy Bill includes some useful detail, for example on the content of notifications, but many of the thorny issues remain to be tackled. At the time of publication, there appear to be no limits on the number of requests rights holders can make of ISPs, nor any guidance on standards of evidence to be provided. It is likely these two issues alone will be a source of intense lobbying as rights holders and ISPs seek to defend their evolving business models.

Technical Measures

Perhaps the most controversial element of the plans as set out in the Digital Economy Bill is that it allows the Secretary of State (currently Lord Mandelson) to oblige ISPs to impose technical measures on serious infringers. The wording of the Draft Digital Economy Bill makes it clear that this power could be exercised entirely at the Secretary of State's discretion, even if Ofcom were to recommend against it. The proposal also allows the Secretary of State to specify criteria for taking technical measures against a subscriber and the steps to be taken.

A Legal Disconnection?

The Government's consultation response stated that technical measures shall include disconnection, and does not exclude the possibility that customer accounts could be cut-off solely on the basis of information provided by rights holders and without a prior fair and impartial hearing or trial. The Government seems to be compensating for this by introducing, not just one, but two appeal procedures.

There has been much debate recently as to whether such a process would be compliant with Human Rights and the Telecoms Package, which has recently been approved by the European Parliament. While the point remains contentious, it seems unlikely that a procedure that specifies that customers may be cut-off from the Internet when their activity levels (as identified by rights holders) reach certain levels, without an independent review of evidence by a court or impartial tribunal, would comply with the new compromise wording in the Telecoms Package.

“ Ultimately, it is certain that the cost of these proposals will, one way or another, have to be passed on to consumers.”

“ However, the current version of the Bill seems disappointingly opaque and at times fails to transpose the spirit of the Government’s consultation response into meaningful legislative commitments. ”

Paying the Bill

The Government’s consultation response sets out what appears to be a rather unsatisfactory and unclear compromise position on costs:

“...The legislation will therefore amend our proposal so that all costs will be covered by the party that incurs them. However rights holders will be charged a standard flat fee for each notification they send to an ISP. This flat fee will be based on the average cost to an ISP of processing a notification (to be established via an audit by Ofcom). The fee will apply to all ISPs in scope. It will also be set at such a rate so that in effect ISPs and rights holders share the cost of notifications.”

Interestingly, and by contrast, the Digital Economy Bill does not require a standard fee to be paid by rights holders to ISPs. Rather it provides the Secretary of State with a broad power to specify cost obligations, which may relate to payments by rights holders to ISPs and payments by both ISPs and rights holders to compensate Ofcom. ISPs will be concerned that the provisions do not contain a firm legal commitment to compensate them. In the absence of express provisions in the legislation, ISPs may feel hard done by. After all, if the Government is serious about compensating ISPs, albeit perhaps only in part, then why is this not set out as an obligation in the legislation? Ultimately, it is certain that the cost of these proposals will, one way or another, have to be passed on to consumers.

Rewriting Copyright

The Secretary of State has also reserved to himself a broad power to amend copyright law for the purpose of preventing or reducing the infringement of copyright by means of the Internet. Such a wide-ranging power is unusual, and one would normally expect to see substantive changes to copyright law approved by Parliament rather than delegated. The move appears to be in response to the UK Intellectual Property Office’s recent consultations and reviews of copyright law. The Government has already had to table amendments to this provision to counter criticism



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