Hammonds

COMMERCIAL AND INTELLECTUAL PROPERTY LAW

BULLETIN

SEPTEMBER 2009

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This month's bulletin includes a review of the High Court's decision in *Marathon v Waters* on malicious falsehood and of the Advocate General's opinion in *Google v Louis Vuitton*, the long awaited decision on whether the use of trade marks in Google Adwords is trade mark infringement.

COMMERCIAL

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Right to appeal despite award being 'final, conclusive and binding'

In the case of *Shell Egypt West Manzala GmbH v Dana Gas Egypt*, the High Court has held that a party to arbitration proceedings had a right of appeal against the award of the arbitral tribunal under s69 of the Arbitration Act 1996 even though the parties had previously agreed that the award would be 'final, conclusive and binding'.

Background

Section 69(1) of the Arbitration Act 1996 states:

> "*Unless otherwise agreed between the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings*".

Facts

Shell Egypt (S) and Dana Gas (D) entered into an agreement. Clause 14 of the agreement provided:

> *"The construction, validity and performance of this agreement shall be governed by English law.*
>
> *Any disputes arising out of or in connection with this agreement or the application, implementation, validity, breach or termination thereof shall be settled by arbitration in London, under the Uncitral Arbitration Rules. The number of arbitrators shall be three. The appointing authority shall be the London Court of International Arbitration. The arbitration shall be conducted in the English language. The arbitrators shall not award consequential, punitive or other similar damages in connection with the decision of any dispute hereunder.*
>
> *The dispute shall be submitted to the arbitrators in such manner as they shall deem appropriate and the decision of the majority of the arbitrators, rendered in writing, shall be final, conclusive and binding on the parties …"*

A dispute arose between the parties. The dispute went to arbitration. The arbitral tribunal made an award in favour of D. S sought leave to appeal on a point of law pursuant to s69. D argued that the effect of the words 'final, conclusive and binding' in clause 14 of the agreement was to exclude S's right of appeal under s69.

Decision

The High Court held that in the context of a standard arbitration clause, such as clause 14, the words 'final, conclusive and binding' did not exclude a party's right of appeal under s69. These words did no more than describe the effect of a valid arbitral award on the parties. 'Final' referred to the fact that the successful claimant was precluded by the award from bringing the same claim again in a fresh arbitration or action. 'Binding' meant that each party promised to abide by the award and perform it. 'Conclusive' meant that parties were precluded from reopening in a later dispute individual issues of fact or law that had been decided by the award.

Sufficiently clear words would be needed to exclude a party's right of appeal under s69. The words 'final, conclusive and binding' were not by themselves sufficient to do this. The fact that the parties had used the word 'conclusive' in addition to 'final and binding' did not change the position.

Comment

This decision highlights the need for parties intending to exclude the right of appeal under s69 to draft the exclusion into the arbitration clause carefully and clearly. In this decision, the High Court did not give any guidance on what would amount to the necessary 'sufficiently clear words'. Favourable reference was made to the wording of Article 28.6 of the current ICC Rules which states that by submitting the dispute to arbitration the parties shall be deemed to have "waived their right to any form of recourse". However, the court did not specifically confirm that this wording would be 'sufficiently clear'.

Further reading

Click here for a copy of the judgment

OFT to investigate how businesses advertise and price goods and services

The OFT has announced that it intends to investigate how businesses advertise and price their goods and services both online and offline. The key motivation for the investigation is the increased use of the Internet, which has resulted in new advertising and pricing practices being used. The OFT will investigate the extent to which misleading advertising and pricing is used online and offline and how harmful this is to consumers. The OFT has the power to carry out this investigation under Section 5 of the Enterprise Act 2002 which allows it to conduct market studies focusing on competition and consumer issues.

Specifically, the OFT will look at:

- The scale of misleading advertising and pricing within particular industries or markets, such as the travel or entertainment industry or the markets for furniture or electrical goods. The OFT has yet to confirm which industries/markets it will investigate;

- How effective current consumer protection legislation is (including the relatively new Consumer Protection from Unfair Trading Regulations) and how this legislation applies to online transactions;

- The effect on consumers of particular pricing practices including 'drip' pricing (where consumers only see part of the price upfront and the price increases in increments during the buying process), 'baiting' (advertising discounts which are only available on a very limited number of products), 'reference pricing' (promotions that create a high reference price compared to the sale price, for example, 'was £50, now £20', '50% off' or 'half price'), time limited offers (sales which, for example, last for one day only or which finish at the end of the month) and complex pricing (where it is difficult for consumers to assess the price per product, for example '3 for 2' or non-inclusive prices where lots of separate (often necessary) components are needed to generate a final price). The OFT will also consider how these practices impact on the accuracy and usefulness of price comparison websites;

- The use of personal information in advertising and pricing, in particular behavioural advertising and the practice of tailoring prices to individual consumers on the basis of their personal data; and

- The use of opt-in or opt-out boxes.

Broadcast advertisements will be excluded from the investigation.

If the OFT finds practices that it believes are likely to harm consumers it has a range of actions available to it which include recommending industry self regulation or codes of practice or recommending that the government makes regulatory or legislative changes. If the OFT discovers evidence of breaches of consumer law or anti-competitive conduct by any business in any industry or market it could conduct a detailed investigation and take enforcement action. If the OFT finds that there are features of an industry/market that are anti-competitive then it may make a market investigation reference to the Competition Commission.

The OFT are seeking views on the scope of the investigation which should be submitted by the 18 September. The investigation will begin 'in the Autumn'.

Click here for a copy of the OFT's announcement

European Commission consults on new Vertical Agreements Block Exemption

The European Commission is consulting on its proposals for a new Vertical Agreements Block Exemption Regulation and Guidelines. The current Block Exemption is due to expire in May 2010. The Commission is proposing revisions to the Block Exemption but not fundamental changes. The revisions are thought to be necessary to take account of the increased buyer power of large retailers and the increase in online sales.

The key proposals are:

- Market shares - vertical agreements should benefit from the new Block Exemption if the market share held by each of the parties to the agreement (supplier and distributor) does not exceed 30% on any of the relevant markets affected by the agreement (only the supplier's market share is relevant under the current Block Exemption);

- Online sales – The Guidelines would be updated to reflect the increase in online sales. Advertising on the Internet by a distributor that reaches customers in other distributors' exclusive territories would be treated as passive sales and would not be prohibited. A supplier would, however, be able to require a distributor to sell a minimum amount of products offline;

- Resale price restrictions – resale price restrictions are usually hardcore restrictions but the Commission is proposing that these be permitted if the parties to the agreement can show that the benefits of the resale price stipulations outweigh the anti-competitive effects;

- Upfront access payments – fees that suppliers pay to distributors to 'join' the distribution network would be permitted provided both the supplier's and buyer's market share on their respective markets did not exceed 30%.

The consultation closes on 28 September. The New Block Exemption will be published in early 2010.

The draft revised Block Exemption Regulation and Guidelines can be accessed by clicking here

Defamation online: proposed changes to the multiple publication rule

The Government has launched a consultation on whether changes should be made to the multiple publication rule in defamation actions.

The effect of the multiple publication rule is that each publication of defamatory material gives rise to a separate cause of action which is subject to its own limitation period (of one year). This means that multiple legal actions can be brought in respect of the same defamatory material and that publishers can be liable many times over.

The multiple publication rule creates particular difficulties in relation to online material. Each hit amounts to a new publication in respect of which a fresh cause of action will lie. This is particularly problematic in relation to material held in an online archive. A publisher can find itself liable for defamation when the archive material is accessed even though this is long after the initial publication and even if proceedings have already been brought in relation to that initial publication.

The Government proposes changing the law so that a single publication rule would apply. This would mean that the limitation period would begin to run from the date of initial publication and that only one cause of action would lie in respect of defamatory material, even if copies of it continue to be made and re-published years later. The Government is also considering a possible intermediate option which is retaining the multiple publication rule but extending the defence of qualified privilege to online archives, meaning that no action would lie for publication via an online archive after one year has passed from the initial publication. The availability of this defence would be subject to the condition that the publisher must update its online archive to include a reasonable letter or statement by the person defamed by way of explanation or contradiction.

If a single publication rule is the preferred option, the Government also proposes extending the limitation period for defamation actions to three years. The Government is consulting on whether this extended period should run, as now, from the date of publication of the material or changed to run from the date of knowledge of the person defamed, with a ten year long stop from publication to prevent the publisher being exposed to unlimited liability. The Government also seeks views on whether the courts should continue to have discretion to extend the limitation period (be it one or three years) if it is equitable to do so.

Any changes made to the law would apply to defamation both online and offline.

The consultation closes on 16 December.

Click here for a copy of the consultation paper

Services Directive: Trading Standards to run consumer information portal

The Department for Business, Innovation and Skills (BIS) has published its September update on the progress towards implementation of the EU Services Directive (2006/123/EU).

The Services Directive aims to make it easier for service providers to offer their services to customers in other EU countries, whether by providing services remotely from their home territory or by establishing in another EU country. The Directive also places additional obligations on some service providers to give certain information to their customers about their services. The deadline for implementation of the Directive is 28 December 2009. The Services Regulations will implement the Directive in the UK but currently they are still in draft form.

There is one item of particular interest in the Government's September update relating to Article 21 of the Directive. Article 21 requires an online portal to be established via which consumers can obtain information about their rights when buying services in other member states and their means of redress if things go wrong. The aim is to help consumers make more informed choices when considering buying services from elsewhere in Europe and make it easier for them to widen their choice of suppliers. BIS has announced that the Trading Standards Institute has been chosen to operate this portal, which is expected to go live by the implementation deadline. Details of the website address will be released just prior to this date.

Click here to access BIS's September update

Click here for a copy of the Services Directive

INTELLECTUAL PROPERTY

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Malicious falsehood words can 'refer' to a business where its interests are closely linked to the subject of the falsehood

In the case of *Marathon Mutual Ltd and another v Waters and another*, the High Court has held that a company could sue for malicious falsehood even where the words complained of did not actually refer to it.

Background

To succeed in an action for malicious falsehood, a claimant needs to prove that (1) the defendant published to third parties words which are false; (2) that they refer to the claimant or its property or its business; (3) that they were published maliciously; and (4) that special damage has followed as a direct and natural result of their publication.

Facts

The First Claimant, Marathon (M) was a mutual protection fund specialising in insuring care homes. The Second Claimant, Regis (R) was in the business of managing mutual protection funds, including M in relation to which it took a management fee of 11.5% of M's income.

The First Defendant, Waters (W), was a director of M. In September 2008, he resigned and became a director of the Second Defendant, Primecare (P) an insurance broker also offering insurance services to care homes in competition with M.

In November 2008, P and W sent a letter to M's customers and W also telephoned one of M's customers. M alleged that in the letter and during the telephone call, P and W made various disparaging remarks about M. M brought proceedings against W and P for malicious falsehood.

R also sued for malicious falsehood although it had not been mentioned or referred to at all in the letter or telephone call. R argued that its income was directly limited to the income of the companies it managed, of which M was one. Accordingly R alleged that when M suffered damage by way of a fall in business as a result of the words complained of, it also suffered damage of a reduced income.

This was a preliminary application in relation to the parties' statements of case and so it was not necessary for the court to decide whether M and R's claims succeeded in substance. The question for the High Court was only whether R should be entitled to continue with its claim at all. W and P argued that R should not be allowed to continue with its claim. They argued that the words used in the letter and telephone call did not refer at all to R. They argued that it was an essential element of a claim in malicious falsehood that the words should refer to the particular claimant and be false in relation to him/her. The fact that R had suffered loss as a result of an alleged malicious falsehood against another should not be sufficient to give it a cause of action of its own. Therefore R's claim should be struck out.

Decision

The High Court held that, for a malicious falsehood claim, there must be some reference, direct or indirect, in the words complained of to the claimant or his/her business, property or other economic interest, although it was not necessary that the words caused the recipients to actually identify the claimant. The court said that to allow a claim in malicious falsehood to proceed where the words did not refer to the claimant at all would open the floodgates to claims and would fall foul of Article 10 of the ECHR would required any restrictions on freedom of expression to be proportionate.

The High Court held that although the words allegedly used in the letter and telephone call did not refer to R at all, R could proceed with its claim. This was because the management of M was the essential subject matter of R's business. R and M's interests were so closely connected that any attack on M would also be an attack on R and would sufficiently refer to R's business.

Comment

This case is interesting, as it appears to have expanded which is meant by the requirement that the words complained of must 'refer to the claimant'. It seems that a business will be able to bring a claim in malicious falsehood in respect of words that do not identify it or refer to it at all provided that its interests are so closely linked with the business that is the subject of the words that the words, by extension, also 'refer' to it.

There is yet to be a hearing on the substance of the claims made by M and R.

Further reading

A copy of the judgment is only available via subscription services. The citation is *Marathon Mutual Ltd and another v Waters and another* [2009] EWHC 1931.

Opinion of Advocate General in Google Adwords trade mark infringement reference

Advocate General Poiares Maduro has given his opinion in the three joined references from the French Cour de cassation in *Google v Louis Vuitton*, *Google v Viaticum* and *Google v CNRRH*. The opinion concerns whether the use of trade marks as keywords in Google Adwords is trade mark infringement.

Summary

The Advocate General's opinion was as follows:

- There was no trade mark infringement by Google (1) allowing advertisers to select in Adwords keywords corresponding to trade marks; or (2) displaying ads in response to those keywords.

- The selection by advertisers of keywords in Adwords corresponding to trade marks was not trade mark infringement.

- The use of keywords corresponding to trade marks did not affect the essential function of the trade marks as a guarantee of origin or the other functions of the trade marks which included the guarantee of quality and communication, investment or advertising. A trade mark proprietor should not be given an absolute right to control the use of its trade mark.

- The fact that Google's use of keywords might contribute to trade mark infringement by third parties did not in itself amount to trade mark infringement.

- Should Google be liable under the law of a Member State for featuring content that involved trade mark infringement, it would not be able to rely on the hosting exemption in Article 14 of the E-Commerce Directive (2000/31).

For a detailed analysis of the judgment, please read on.

Background

Article 5(1) of the Trade Marks Directive (89/104) defines what constitutes trade mark infringement.

"*The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade:*

(a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered;

(b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods and services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public which includes the likelihood of association between the sign and the trade mark."

Article 14 of the E-Commerce Directive (2000/31) establishes a liability exemption for hosting activities:

"*Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:*

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) *the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information."*

Facts

The basic facts were the same in each of the references. In each case, the trade mark proprietor's trade marks were being used as keywords in Google Adwords. Entering these trade marks into Google's search engine triggered the display of ads for sites offering identical or similar products to those of the trade mark proprietor. In the Louis Vuitton reference, ads for sites offering counterfeit goods were triggered. Google were found liable for trade mark infringement in the French courts both at first instance and on appeal. In each case, the Cour de cassation referred various questions to the ECJ for a preliminary ruling. Because of the similarity of the issues, the three references were joined. The three references all posed the same basic question: does the use by Google, in its Adwords advertising system, of keywords corresponding to trade marks constitute an infringement of those trade marks under Article 5(1) of the Trade Marks Directive?

Decision

The Advocate General's opinion was that this did not amount to trade mark infringement. His reasoning was as follows:

There are two "uses" by Google of the keywords: (a) when Google allows advertisers to select the keywords; and (b) when Google displays their ads. For either to amount to trade mark infringement under Article 5(1), the trade mark proprietors would need to establish that the four cumulative conditions in Article 5(1) were satisfied, namely (1) that the trade mark proprietors had not consented to the use by Google of keywords corresponding to their trade marks; (2) that Google's use takes place in the course of trade; (3) that Google's use related to goods or services which were identical or similar to those covered by the trade marks; and (4) that Google's use affects or is liable to affect the essential function of the trade mark, which is to guarantee to consumers the origin of the goods or services, by creating a likelihood of confusion on the part of the public. It was clear that the trade mark proprietors had not given their consent.

In relation to (a), the selection of the keywords:

Use in the course of trade? – Satisfied. The pay per click system meant that this was a commercial activity carried on by Google with a view to gain.

Identical/similar goods/services? – Not satisfied. The use must entail a link to goods or services which are identical or similar to those covered by the trade mark. There was no such link as the use was limited to a selection procedure which was internal to Adwords and concerned only Google and the advertisers. The service being sold, therefore, was Adwords which was not identical or similar to the trade mark proprietors' goods or services.

Affect the essential function of the trade mark? – Not satisfied. Where the preceding condition is not met (identical goods/services), there is no risk of confusion.

Therefore, the use of allowing the selection of keywords did not constitute trade mark infringement.

In relation to (b), the displaying of adverts:

Use in the course of trade? – Satisfied. The pay per click system meant that this was a commercial activity carried on by Google with a view to gain.

Identical/similar goods/services? – Satisfied. By displaying ads in response to keywords which correspond to trade marks, Google establishes a link between those keywords and the sites advertised, including the goods and services sold on those sites. The sites concerned sell goods/services identical or similar to those covered by the trade marks.

Affect the essential function of the trade mark? – Not satisfied. The display of ads establishes a link between the keywords corresponding to the trade marks and the sites advertised but that link would not cause consumers to confuse the origin of the goods or services offered on those sites. Consumers are aware that Google's search engine is a search tool. They know that not only the site of the trade mark owner will appear in the search results and sometimes they may not even be looking for that site. The users will only make an assessment as to the origin of the goods/services advertised on the basis of the content of the ad and by visiting the advertised site. No assessment will be based solely on the fact that the ads are displayed following the entry of keywords corresponding to trade marks.

Therefore, the use by the display of adverts did not constitute trade mark infringement.

The Advocate General also gave his opinion on a number of other questions:

- Could Google's use of keywords which correspond to trade marks affect other functions of the trade marks besides their essential function of guaranteeing origin?

  Other functions included guaranteeing the quality of goods and communication, investment or advertising. All of these functions are related to the promotion of innovation and investment. These needed be balanced against the interests of freedom of expression and freedom of commerce and competition and open access to ideas, words and signs. These interests require that a trade mark proprietor is not given an absolute right to control the use of its trade mark as a keyword. The use of keywords opens up access to information via the Internet. This would be closed down if trade marks could generally not be used as keywords.

  Therefore, the use of keywords corresponding to trade marks should be found not to affect the other functions of a trade mark. This is the case even if the trade mark in question has a reputation.

- Does Google's possible contribution to trade mark infringement activities by third parties itself amount to trade mark infringement?

  No. This would involve a significant expansion of the scope of trade mark protection towards a concept of contributory infringement and would inhibit the delivery of information by search engines. Google would have to block so many words from Adwords (and therefore lawful sites) that the nature of the Internet and search engines as we know it would change. Trade mark proprietors must point to specific instances of illegal use of their trade marks in order to be able to prevent their use. They should not have a 'blanket' power to do this on the basis that some trade mark infringement may occur.

- Does the liability exemption for hosting apply to the content featured by Google in Adwords?

  It was necessary to consider this question because Google may be liable under the national law of a Member State for featuring content that involves trade mark infringement. The question was whether Google would be exempt from such liability under Article 14 of the E-Commerce Directive.

  Providing hyperlinks and search engines amounted to an information society service. However, the advertising activity involved in Adwords did not amount to hosting as the content featured in Adwords was not neutral. Google had a direct interest in Internet users clicking on the ads links. The liability exemption was intended only to apply to service providers who remained neutral as to the information they carried or hosted.

  Accordingly, the liability exemption for hosts should not apply to the content featured in Adwords.

- Does the use of keywords by advertisers, when they select them in Adwords, amount to trade mark infringement?

  No. The selection of keywords is not a commercial activity but a private use on the part of the advertisers as there is no consumer audience involved. Also, this selection could take place for many legitimate uses (comparative advertising, product reviews, purely descriptive uses etc) and to find that the selection amounted to trade mark infringement would preclude those legitimate uses. Trade mark proprietors are not left without protection because they can intervene when the content of the ads are harmful to their trade mark and involve a risk of confusion.

Comment

Whilst this decision will come as a relief to Google and other search engines, it will not be welcomed by brand owners who were hoping to retain greater control over their trade marks. The Advocate General's opinion merely guides the ECJ. The ECJ's judgment is expected early next year.

E-COMMERCE

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ECJ confirms that distance sellers cannot claim compensation for returned goods

The ECJ has handed down its judgment in the case of *Pia Messner v Firma Stefan Kruger*, a reference from the German Court. The case concerns the interpretation of Article 6 of the Distance Selling Directive (97/7/EC), specifically whether a seller should be compensated for the use which a consumer has made of goods when the consumer withdraws from the contract and returns the goods within the specified withdrawal period. Advocate General Krstenjak gave her opinion in this case earlier this year which was reported in the March edition of this Bulletin.

Background

Article 6(1) of Directive 97/7/EC (Directive) provides:

> *"For any distance contract the consumer shall have a period of at least 7 working days in which to withdraw from the contract without penalty and without giving any reason. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. The period for exercise of this right shall begin from the day of receipt of the goods by the consumer where the obligations laid down in Article 5 have been fulfilled. If the supplier has failed to fulfil the obligations laid down in Article 5, the period shall be 3 months from the day of their receipt by the consumer."*

Article 6(2) of the Directive provides:

> *"Where the right of withdrawal has been exercised by the customer pursuant to this Article, the supplier shall be obliged to reimburse the sums paid by the consumer free of charge. The only charge that may be made to the consumer because of the exercise of his right of withdrawal is the direct cost of returning the goods. Such reimbursement must be carried out as soon as possible and in any case within 30 days."*

Article 5 contains provisions concerning the information which suppliers must provide to consumers, in particular their right to withdraw from the contract.

The Directive was implemented into UK law by the Consumer Protection (Distance Selling) Regulations 2000.

Facts

The defendant ran an internet based mail order business. In December 2005, the claimant purchased a used laptop from the defendant for €278. The defendant's terms and conditions stated that customers could return the goods within 14 days of receipt for a full refund. They also said:

> *"Your attention is expressly drawn to the fact that you are liable to pay compensation for the deterioration in goods ordered from us as a result of use for the purpose for which they were intended."*

In August 2006, the laptop developed a fault which the defendant refused to repair. In November 2006, the claimant returned the goods to the defendant seeking a full refund. The defendant argued that it was entitled to compensation from the claimant for her use of the laptop for 8 months. The defendant calculated this compensation to be €316.80. The claimant issued proceedings for the return of the purchase price.

The German Court made a finding of fact that the claimant had never received proper notice of her right to withdraw from the contract. German law implementing the Directive states that there is no long-stop date on the right to withdraw where the consumer is not given proper notice of the right to do so. Therefore the issue in this case was not whether the claimant could return the laptop after such a long period had elapsed since purchase (the court was clear that she could) but whether the defendant could claim compensation for her use of it during that period. The German Civil Code included a provision entitling sellers to charge consumers for the use made of goods prior to their return to the seller. The question for the ECJ was whether this provision was compatible with Article 6(1) and 6(2) of the Directive.

The Advocate General's opinion was that this provision was not compatible with Article 6(1) and 6(2) of the Directive. Compensation was a form of charge and Article 6 made it clear that the only charge that could be made to the consumer exercising the right of withdrawal was the direct cost of returning the goods. The Advocate General felt that this accorded with the spirit of the Directive which was to promote distance selling. An obligation on consumers to compensate sellers would have a deterrent effect.

Decision

The ECJ agreed with the Advocate General. It held that the Directive aimed to give consumers the chance to inspect goods that they had not seen and charging them for using goods they returned under the Directive would deter them from making use of their rights under it. However, the ECJ said that if the consumer's use offended principles such as good faith or caused unjust enrichment, a supplier might be able to charge the consumer.

Comment

This opinion should be of limited concern to suppliers under distance contracts subject to the UK Regulations as it will not change the position for them. The UK Regulations do not contain a provision like that in the German Civil Code. The ECJ's decision is, however, useful in confirming that UK distance sellers cannot require consumers to pay for the use they have made of goods prior to returning them within the relevant withdrawal period.

Further reading

Click here for a copy of the judgment

DATA PROTECTION

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ICO guidance on changes to notification fee

On 1 October 2009, the Data Protection (Notification and Notification Fees) (Amendment) Regulations will come into force introducing a two-tier notification fee system for data controllers.

Currently, all data controllers pay a flat annual notification fee of £35. From the 1 October, data controllers with an annual turnover of £25.9 million and 250 or more members of staff will pay increased fees of £500. Public authorities with more than 250 members of staff will also pay the increased fee. All other data controllers and charities, small occupational pension schemes and business that have been in existence for less than one month will continue to pay £35.

The Information Commissioner's Office has published guidance, which explains the new notification system and how a business should assess whether its turnover and staff numbers fall over the higher fee threshold. The guidance also explains why the two-tier system has been introduced. The ICO says that the higher fee is directly proportionate to the level of resources invested by the ICO in regulating larger organisations.

Click here for a copy of the ICO's guidance

MEDIA

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Video Recordings Act 1984 is not enforceable

The Department for Culture, Media and Sport has issued a letter to the video industry stating that the Video Recordings Act 1984 (Act) is not currently enforceable.

Under the Act, certain videos, DVDs and video games must be classified and age rated by the British Board of Film Classification (BBFC) before release in the UK. It is a criminal offence under the Act to supply these works without a classification certificate. The letter from the Department for Culture, Media and Sport states that, in 1984, the government failed to notify the European Commission of the existence of the then new Act as required by the Technical Standards and Regulations Directive (83/189/EEC). The Directive established a standstill period of 3 months during which Member States had to notify draft legislation subject to the Directive to the Commission before it could take effect. The failure to do this means that the classification and labelling requirements of the Act are not enforceable in the UK until the situation is rectified. This means that retailers may, for now, legally sell what should be age restricted videos, DVDs and video games to anyone, including children.

First ruling on reasonable royalties for music video broadcasts

In the case of *CSC Media Group Limited v Video Performance Limited*, the Copyright Tribunal has, for the first time, considered the royalty rate payable for broadcasting music videos.

CSC, which runs seven music video channels, disputed the 20% headline royalty rate and the £700,000 advance demanded by VPL to broadcast its repertoire on CSC's channels.

The Copyright Tribunal considered that although music video was clearly worth more than commercial radio as a licensable commodity, VPL could not justify demanding a royalty rate of 4 times the maximum payable for commercial radio. Taking into account:

- Other music video licences;
- The decline in advertising in music video channels due to increased internet usage;
- The promotional effect of music videos; and
- CSC's profitability

the Tribunal decided that a reasonable royalty rate would be 12.5% of CSC's gross revenue subject to the deduction of advertising and other costs. It also decided that 30% of the anticipated royalty should be paid in advance.

Click here for a copy of the Copyright Tribunal's decision

ADVERTISING

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ASA announces review of how it carries out its core functions

The Advertising Standards Authority (ASA) has announced that it will be carrying out a review of its processes to ensure that it is operating efficiently and effectively on behalf of consumers and the advertising industry. The review will focus on (1) the handling of complaints and investigations from the public and competitors (2) the ASA's proactive monitoring of advertising (3) the ASA's compliance work to enforce its decisions and (4) the provision of pre-publication advice and guidance by the Copy Advice team. The review will not look at the contents of the CAP and BCAP codes.

The review will begin in the Autumn and will be carried out by an external party (yet to be appointed). The resulting recommendations, if implemented, will not alter the functions of the ASA but how it carries them out.

Click here for a copy of the ASA's announcement

For further information on any of the items covered in this bulletin please speak to your usual Hammonds contact