



IT Law Today

Europe's law and practice update for specialists in information technology

Editorial

This month we have some interesting articles on recent developments including one by Olswang on database right and the December decision against the British Horseracing Board. Olswang acted for Attheraces. Electronic disclosure is a huge issue for all IT lawyers and litigators in general. This issue includes an article by Michael Taylor, a legal consultant at Kroll Ontrack, on that subject. Our technology column this month by Jagvinder Kang is on Sarbanes Oxley, an ever-present problem for many of us.

Susan Singleton, susan@singlelaw.com

Database right

Attheraces wins ground-breaking competition case against the the BHB

A judgment (on 21 December 2005) in the claim by Attheraces (ATR) against the British Horseracing Board (BHB) over licensing of pre-race data was hailed as a comprehensive victory for ATR, with the BHB found to hold a dominant market position in the supply of pre-race data, and to have abused that dominant position in breach of EU and UK competition laws.

ATR brought a claim in the High Court, claiming that the threat by the BHB to prevent the Press Association (PA) from supplying pre-race data to ATR constituted an abuse of a dominant position.

The judge, Mr Justice Etherton, found that the BHB has abused its dominant position in relation to pre-race data and has therefore broken Art 82 of the EC Treaty and Chapter II of the UK Competition Act <year?>. The High Court judgment prevents the BHB, the governing authority for horse racing in Great Britain, from forcing ATR to pay significant fees to the BHB for the supply of pre-race data. It is also a landmark case in relation to bringing abuse of dominance claims in national courts of the EU; previously such cases have routinely been dealt with by the European Commission or national competition authorities like the Office of Fair Trading (OFT), rather than the courts.

The case

The claim related to the supply to ATR of 'pre-race data', information on runners and riders that is necessary to enable bookmakers to take bets on horse races. ATR pays PA for the supply of a pre-race data feed for ATR's service to overseas bookmakers,

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Susan Singleton, Solicitor, Singletons • www.singlelaw.com

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with the BHB having a separate agreement to supply the data to PA. The BHB demanded that ATR enter into an additional licence with the BHB to pay for database rights in the data.

After the European Court of Justice ruled in November 2004 that the BHB had no database rights in the data, ATR asked the BHB to clarify the basis on which it sought payment. In response, the BHB said that unless ATR agreed to pay licence fees to the BHB, it would instruct PA to terminate its supply of pre-race data to ATR.

ATR then brought the current proceedings, claiming that the threat by the BHB to prevent PA from supplying pre-race data to ATR constituted an abuse of a dominant position under EU and UK competition laws.

High Court judgment

At the hearing, ATR argued as follows:

- The relevant market for the purposes of the proceedings was the supply of pre-race data – the BHB argued for a much broader market, arguing that it operated **on** *the* market for the supply of the ability to generate value from the whole show of British Racing.
- The BHB was dominant in the market, indeed an effective monopolist – the BHB asserted that it had no dominant position.
- The BHB has abused its market dominance by refusing to supply ATR with pre-race data and threatening to procure the termination of the supply of such data to ATR, even though ATR is an existing (indirect) customer of the BHB and pre-race data is an essential facility controlled by the BHB.
- The licence fees proposed by the BHB were excessive and unfair because they were significantly in excess of the economic value of the BHB's pre-race data and not otherwise justified; and that the BHB was discriminating against ATR, in particular when compared with its direct competitor, Phumelela. The BHB tried to justify the charges on the basis that ATR should pay the BHB for investments made by the BHB and others in British horse racing (*'the whole show'*), irrespective of whether those investments benefited ATR or overseas bookmakers.

On all of these points the Court found in ATR's favour. The judge considered that ATR need pay no more than a nominal sum to the BHB for use of pre-race data and that even overseas bookmakers were not liable for more than a small fraction of the sums that the BHB was demanding.

Implications for the BHB and British horse racing

The judgment comes just days after press reports indicated that the OFT was abandoning its five-year long investigation of the BHB and the Orders and Rules of Racing. The OFT has indicated that investigating the BHB is not an administrative priority, partly because of the availability of court actions. This case is a sharp reminder that the BHB remains vulnerable to competition law attack, this time in the courts rather than before the OFT.

Following as it does the **European Court's** *ECJ's* decision on data in *William Hill* and the BHB's settlement of claims by Irish bookmakers, the case may be expected to mark the end of the BHB's attempts to charge licence fees for data.

Implications for competition law enforcement in the courts

The courts have traditionally been reluctant to entertain often complex and quasi-economic competition law claims. This ground-breaking case is a sign that the courts will act when presented with a well-argued case.

It is timely, as the OFT has signalled that the strain on its resources is requiring it to be highly selective in the cases it deals with (apart from the BHB case, the OFT has suspended pre-merger guidance, until now an integral part of UK competition law). At the same time, the European Commission has just announced consultations on both the rules for bringing competition law claims in courts and the application of the prohibition of abuse of a dominant position. This case is a clear sign that the courts can and will deal with claims under the competition rules.

Comment

The case has resulted in a series of legal firsts:

- The first time a court in the UK has ever found that a business practice is an abuse of a dominant market position.
- The first time a national court in the UK (or, we believe, anywhere in the EU) has definitively ruled that a proposed price or licence fee is illegal because it is excessive.
- The first time a national court anywhere in the EU has applied the controversial 'essential facilities' doctrine, which requires owners of key assets or intellectual property to make these available to avoid distorting competition.

Olswang acted for Attheraces (ATR) in the case.

Olswang, www.olswang.com

Editor's note

The European Commission's evaluation of the protection EU law gives to databases following adoption of the Database Directive (96/9/EC) is now available. It invites views and comments and to provide further evidence **<sense?>** on the economic impact of *sui generis* protection. A press release is available from the Commission website: europa.eu.int/rapid/pressReleasesAction.do?reference=IP/05/1567&format=HTML&aged=0&language=EN&guiLanguage=en and the evaluation is available at: europa.eu.int/comm/internal_market/copyright/prot-databases/prot-databases_en.htm

The editor is **doing <presenting?>** a submission for the Licensing Executives Society, EC Laws Committee. **<is this one body or two?>** Reader who would like to send comments for consideration but who do not wish to contact the Commission directly are welcome to email: susan@singlelaw.com

Electronic disclosure: Civil Procedure Rule 31

The impact of the Practice Direction amendments

*Electronic disclosure has become a major issue for UK businesses following changes to the Practice Direction to CPR r31 of the Civil Procedure Rules made in October 2005. The amendments will require a much more rigorous approach to the way in which electronic documents are created, stored, searched and retrieved **to be implemented by businesses.** **<delete?>** The new Practice Direction also clarifies the obligations on businesses and their legal advisers to consider the availability and relevance of electronic documents at the very earliest stages of litigation.*

Document and data retrieval The Practice Direction now expressly states that where proportionate and reasonable, documents that are stored on servers and back-up systems should be made available for disclosure. With the continued development of electronic communication, this will significantly increase the volume and variety of disclosable document collections (large back-tapes can hold the equivalent of 1 billion pages of paper).

In addition, the Practice Direction specifically encompasses documents that have apparently been '*deleted*'. In many instances, computer forensic experts can find and retrieve the large majority of lost or deleted data while maintaining the integrity of the evidence.

Evidence integrity

The Practice Direction clarifies that an integral part of any electronic document is the metadata associated with it (ie the data about the document itself, such as the 'to' 'from' 'cc'

'bcc' and date/time stamp on emails). Most importantly, metadata can reveal the 'who' and the 'when' about document creation, access, printing and editing.

Lawyers and litigants must be aware that metadata can be altered irrevocably if the electronic document is handled incorrectly, with obvious implications if the document in question is later relied on in court. With a simple action, such as clicking onto a document, having the potential to alter a crucial piece of metadata, lawyers need to ensure that a forensic copy is obtained in order to preserve the data in its entirety.

Due in large part to the significance of metadata, those who wish to review electronic documentation on paper will soon find this method extremely impractical. Lawyers risk losing metadata (blind copyee's <OK?> for example) which is frequently lost when electronic documents are produced on paper.

Reasonable searches and proportionality

The volume and variety of electronic materials produced by businesses continues to increase significantly year on year. It has been estimated that 93% of corporate documents are created, viewed and stored electronically but that 70% of those documents never migrate to paper. With the changes to the Practice Direction to CPR r31, a party may have to verify that they have searched all emails, documents, and spreadsheets in its control. This could mean lawyers having to search through PCs, servers and back-up systems, as well as mobile phones, BlackBerries, laptops, electronic notebooks and even iPods.

Factors for determining what would be proportionate and reasonable include balancing the significance of what might be found, against the cost of recovering the evidence within the context of the issues at stake. Lawyers and their clients will no longer find all relevant evidence or comply with their disclosure obligations simply by looking through boxes filled with paper documents.

As technological products and services now exist that enable large quantities of electronic and paper-based documents to be collected, filtered, reviewed and produced quickly and cost-effectively, objections to disclosure on the grounds of disproportionate cost might now be criticised, and perhaps even penalised by the court.

Meet and confer

The revised Practice Direction requires parties to discuss, at the outset of the litigation and where possible prior to the first case management conference (CMC), issues that may arise relating to the disclosure of electronic documents. Parties must also cooperate at an early stage as to the format in which electronic documents will be exchanged. It is crucial, therefore, for lawyers to be familiar with their clients' IT systems and processes prior to the first CMC. This can potentially be an enormous task as national and multi-national organisations store data on a wide variety of storage devices, usually within disparate locations.

Lawyers also need to be aware of the range of electronic document types in their clients control prior to the first CMC. If they anticipate, or are aware of, a large variety of documents in differing formats, they must consider the potential complexities involved in the retrieval, searching, review and production of their document collection.

There are a vast number of electronic files types, most of which require their own support application in order to review the information contained within them. Depending on the support capability of the review tool the legal teams are using, this can add significant monetary and human resource costs to ensure that all the relevant data is opened properly and reviewed in its native format (to maintain the integrity of the data).

Document repositories

The Practice Direction amendments for CPR r31 means that lawyers should now consider the methods through which they disclose electronic documents if they are to fulfil the increasing requirements that the courts impose. Sophisticated technology exists to enable legal teams to filter electronic documents for relevance and significantly reduce their document collection to a more manageable review set.

These solutions include the scanning and indexing of paper documents into electronic format for inclusion with their electronic counterparts into a single online document repository. As well as providing reviewers with the ability to search through and filter the documents, these tools enable teams to place electronic 'post-it' notes; highlight sections on documents; categorise documents as relevant or privileged; and view electronic documents in their native file formats.

With the existing tools, lawyers and their clients need not worry about significant infrastructure costs in order to integrate all their documents into one repository. All they need is an internet connection as solutions exist whereby legal teams simply access their database of documents securely online. These are fast becoming the popular solution for lawyers who need to search, review and produce vast volumes of paper and electronic documents.

It may increasingly become the case that parties who could use sophisticated techniques for managing and disclosing their electronic documents, and fail to do so, will find themselves at a disadvantage in a dispute. As more than two thirds of UK businesses have been embroiled in litigation over the past 12 months, this is a risk that few can now afford to take.

Conclusion

In light of the recent changes, companies should be thinking more carefully about what documents they create, how they store them and how they decide when to dispose of them. In all likelihood, the trend will be towards a more US-style disclosure process, in which electronic data is an integral part of disclosure and where the courts are unwilling to tolerate the destruction, damage or alteration of electronic evidence.

*Michael Taylor, legal consultant at electronic and paper-based evidence services provider Kroll Ontrack
www.krollontrack.co.uk*

IT law update

Privacy rights – Loreena McKennitt

A difficult issue in the UK is the extent of privacy and data protection rights. In a recent judgment in a case involving Canadian folk singer Loreena McKennitt a 40 page judgment, from Eady J, granted a limited injunction to McKennitt in her attempt to block distribution of a self-published 2005 book by her former friend and employee Niema Ash, *Travels with Loreena McKennitt: My Life as a Friend*.

Ash has to remove seven of 34 sections complained about on the grounds of breach of privacy or confidentiality. Interestingly the judge said that most of the material to which McKennitt objected was either trivial, anodyne, not intrusive or not inherently confidential, but nonetheless awarded the singer 75% of the costs and £5,000 for 'hurt feelings and distress'. The court costs are likely to be over £500,000.

McKennitt's costs are likely to have been about £100,000, although only about 1,000 copies of the book were published and fewer than 400 sold. The judge looked at the European Convention on Human Rights. Article 10 provides that 'everyone has the right to freedom of expression ... without interference by public authority and regardless of frontiers'. However, 'the exercise of these freedoms ... may be subject to such ... restrictions ... for the protection of the reputation or the rights of others, [or] for preventing the disclosure of information received in confidence'.

Article 8 says that 'everyone has the right to respect for his private and family life, his home and his correspondence'. The judge looked at three earlier cases including that on photographs of Monaco's Princess Caroline, that collectively 'acknowledge a "legitimate expectation" of protection of private life, on some occasions, in relatively public circumstances'. He said: