Legal update

Microsoft stops McDonald serving spam

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Ewan Nettleton

is a senior associate solicitor in the Intellectual Property Department at Bristows. He specialises in Intellectual Property Law with an emphasis on litigation. He has an MA in Chemistry and a DPhil in Protein Chemistry, and is particularly interested in matters relating to the IT and pharmaceutical industries.

William Jensen

is a trainee solicitor at Bristows currently sitting in the Intellectual Property Litigation Department. He has a BSc degree in Physics and French.

Abstract Spam is a global problem. Having come about as an unwanted side effect of the ease of use of the internet and e-mailing, it is more than a mere inconvenience to e-mail recipients and their IT Departments. Recent estimates suggest that between 50 and 60 per cent of all e-mails sent today are spam.¹ Such a high volume of mostly useless e-mail traffic slows down IT networks, crashes computers, takes up countless man-hours resolving problems, and is a constant source of irritation for users. One estimate puts the cost to UK businesses alone at £1.3bn per year² and the cost worldwide at 39 billion Euros.³ Importantly, spam also creates problems in the public's perception for legitimate electronic marketers and often results in their e-mail messages being blocked, deleted, or lost in a sea of unwanted correspondence.

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INTRODUCTION

This paper discusses the recent case of *Microsoft Corporation v Paul McDonald*⁴ where Microsoft was awarded damages and an injunction against Mr McDonald who had been selling lists of e-mail addresses intended for sending unsolicited e-mails. This case is thought to be the first comprehensive ruling under the regime introduced by the 2003 EU Directive concerning privacy and electronic communications, and the paper seeks to assess the implications of the ruling and the potential of this regime in regulating unsolicited e-mails concentrating on the UK.

BACKGROUND ON THE LEGISLATION

Spammers have traditionally been targeted in the courts using 'old' law in place from before the regime introduced by the 2003 Directive. For example, Microsoft and AOL were successful in a case in France in 2005 against an individual on the grounds that the unsolicited bulk e-mails sent from the individual's Hotmail account breached the terms of use of the MSN Hotmail service and AOL's internet subscription agreements.⁵

Turning to the courts is of course not the only method of tackling the problem, and various other initiatives have been

Ewan Nettleton
Bristows,
3 Lincoln's Inn Fields,
London WC2A 3AA, UK
Tel: +44 (0)20 7400 8000;
Fax: +44 (0)20 7400 8050;
e-mail: ewan.nettleton@
bristows.com

attempted. These include filtration systems that are constantly being improved to allow only valid e-mails through, 'blacklisting' and 'whitelisting' e-mail sources to reject or accept e-mail traffic from them, respectively, and methods of e-mail address concealment.⁶ These do, however, have limits and a balance must be struck between preventing unwanted e-mails and minimising the risk of blocking valid transmissions. A legal means of redress by which e-mail spamming can be controlled will therefore always be desirable.

To combat the problems of spam and regulate other forms of electronic communications, the UK introduced the Privacy and Electronic Communications (EC Directive) Regulations 2003. As regular readers of the Journal will know, these Regulations implemented an EU Directive aimed at, among other things, combating spam.⁷ The pertinent part of the UK Regulations for the *Microsoft* case is to be found at para. 22, which concerns the use of e-mail for direct marketing purposes. This provides that for the transmission of unsolicited communications by means of e-mails to individual subscribers:

- A person shall neither transmit nor instigate the transmission of unsolicited e-mails for the purposes of direct marketing unless the recipient has notified the sender that he consents to the communication being sent by or at the instigation of the sender (ie unless the recipient has 'opted-in').⁸
- E-mails for the purposes of direct marketing are allowed when the recipient's contact details were obtained in the course of a sale or negotiations for the sale of a product or service, *and* the marketing is in respect of that person's similar products and services only, *and* the recipient was given a simple means of refusing at the time and at each subsequent communication (the so-called 'soft

opt-in' that is not relevant to the *Microsoft* case).⁹

THE MICROSOFT CASE

In December last year, Microsoft succeeded in the High Court in asserting the UK Regulations against a supplier of e-mail addresses to spammers, thereby stemming the flow of at least one source of such unwanted e-mail traffic. Microsoft was awarded damages and an injunction preventing the trader from similar activities in the future; Microsoft's senior legal director in Britain suggested that this was the first comprehensive ruling to be handed down in the EU under the 2003 Directive.¹⁰ It is a welcome result to businesses in the UK as it shows that the Courts are prepared to enforce the Regulations on behalf of affected companies even though the requirements of Regulation 22 apply only to unsolicited communications sent to 'individual subscribers'.

The Facts and Arguments

Paul McDonald, trading as Bizads, had been offering for sale lists of e-mail addresses through his website. The e-mail addresses fell into a number of different categories including 'business opportunity seekers' and 'UK franchise seekers'. In relation to the lists of 'business opportunity seekers' the website stated:

'All the people on these email lists have subscribed to receive business opportunities via email. They have completed an opt-in email form direct from a Bizads website. They are waiting for your opportunity or offer'.

Microsoft had set up target accounts in its 'MSN Hotmail' e-mail service to act as decoys to catch spammers. Microsoft were alerted to Mr McDonald's operation through its spam prevention operations using its dummy accounts and users' complaints, and a high proportion of the

people who received e-mails from the purchasers of the database lists had complained that they were receiving unsolicited mail.

Microsoft argued that Mr McDonald, as the owner and controller of the business, had instigated the sending of spam and therefore was liable for breach of Regulation 22. As a result of the spam, Microsoft argued that it had suffered loss by damage to its business's goodwill, because subscribers were less willing to continue to subscribe if they were not protected from spam effectively; furthermore, combating spam was expensive, and additional servers and software had been necessary to cope with the volume of spam transmitted. Mr McDonald put forward several defences, all of which were rejected.

The Judgment

Even though Microsoft was seeking a judgment at an early stage in the proceedings, the Judge found in their favour and granted summary judgment to Microsoft on the basis that Mr McDonald had no reasonable prospect of defending the claim and there were no other compelling reasons why the case should go to full trial. He concluded that Microsoft fell within the class of persons for whom the benefit of the Regulations was intended and that the purpose of the Regulations was to enable a claim for relief to be brought. He awarded Microsoft damages (an inquiry as to the amount of damages being ordered) and, although the Regulations do not specifically entitle the person suffering from their breach to an injunction, he ordered an injunction preventing Mr McDonald from committing further breaches of the Regulations.

Comment

Microsoft's victory is important for the wider campaign to combat spam, and for all those affected by it, including electronic marketers who operate within the confines

of the legislation and do not want to be tarred with the same brush as the spammers. It also confirms that companies affected by breach of the Regulations such as the providers of electronic communications systems may benefit from the protection they provide as well as recipients. This is crucial given that such companies will be better equipped to trace the spammers and discover their identity, and, if needs be, to take them to court.

Although this is thought to be the first comprehensive ruling on the UK Regulations, and indeed the legal regime put in place across the EU by the Directive, it should be noted that Microsoft was not the first to have used the Regulations successfully. A default judgment was given in favour of Mr Nigel Roberts against Media Logistics UK after Mr Roberts made a claim based on having received spam from that company. This case was heard in the small claims court and the Regulations were never put to the test as the judgment was given in default of a defence being filed.¹¹

While it must be acknowledged that the vast majority of spam originates from a relatively small number of individuals based overseas in the US and Asia, the outcome of the *Microsoft* case, and the Court's willingness to grant injunctive relief preventing further breaches, indicate that the Regulations can be an useful weapon in the fight against spam. Furthermore, the case confirms that it is not only the spammers who may be found in breach of the Regulations, but also those who supply the e-mail details they use. It will be interesting to see who the courts will construe as instigators in the future; will they go further than the *Microsoft* case and include those even further removed from the spamming chain?

Moreover, the case shows that the problem is being taken seriously by the Courts as well as the legislators in the UK, and that the UK legislation can be used successfully to help prevent it.

CONCLUSIONS

The *Microsoft* case is a welcome result for those inconvenienced by spam in an age where so much work is done via e-mail, for businesses generally. The judgment should also be welcomed by legitimate electronic marketing companies who work within the remits of the legislation, because they know that others who disregard it may do so at a price, and because it will help differentiate them from the spammers.

The decision has established that the UK Courts will take a pragmatic approach to applying the Regulations, and confirmed that corporate entities affected by their breach may benefit. Furthermore, it is not only the spammers themselves who may be found to be in breach; others such as suppliers of e-mail addresses of unwilling recipients can also be targeted. As well as awarding damages, the decision demonstrates that the Courts are also prepared to grant injunctive relief to prevent those found in breach from repeating their actions, which is likely to be the most effective sanction against them. So, while the global nature of the spamming problem is such that decisions like this are unlikely to stem the tide, they do make use of the Regulations a much more attractive proposition to affected businesses where spammers can be traced and taken to court.

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References and Notes

- 1 Reported at EU Spam Summit in 2003 and in Commission press release 'EU and Asia unite against spam' — 24th February, 2005.
- 2 See article entitled '*Courts put price on unsolicited email*' dated 15th March, 2007 published by Computing.co.uk (<http://www.computing.co.uk/computing/analysis/2185499/courts-put-price-unsolicited>).
- 3 See para. 1 of Lewison J's judgment in the *Microsoft* case referred to in footnote 4 below where he refers this figure being cited by the European Commission in 2006.
- 4 *Microsoft Corporation v Paul Martin McDonald* [2006] EWHC 3410 (Ch) — 12th December, 2006.
- 5 *Microsoft & AOL v Korac* — Tribunal de Commerce, Paris — November 2005.
- 6 Further discussion of such methods is included in an article by Nettleton, E. (2005) 'Getting tough on spam', *Journal of Database Marketing and Consumer Strategy Management*, Vol. 12, No. 4, pp. 357–361.
- 7 Further background is included in the following related articles by Nettleton, E. (2004) 'Electronic marketing and the new anti-spam regulations', *Journal of Database Marketing and Consumer Strategy Management*, Vol. 11, No. 3, pp. 235–240 and Nettleton, E. (2005) 'Getting tough on spam', *Journal of Database Marketing and Consumer Strategy Management*, Vol. 12, No. 4, pp. 357–361.
- 8 Para. 22(2), Privacy and Electronic Communications (EC Directive) Regulations 2003.
- 9 Para. 22(3), Privacy and Electronic Communications (EC Directive) Regulations 2003.
- 10 'Man banned in first case under anti-spam law' — *The Telegraph*, 15th January, 2007.
- 11 See 'Are the Spam Floodgates Open?' dated 12th January, 2006 by Ewan Nettleton published on the Bristows website (<http://www.bristows.com/articles/detail.asp?frmarticleid=821&frmpdtid=2>).