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Legal and Regulatory Update

This section of the journal looks at marketing, data protection, technology and e-commerce issues, providing an overview of recent key legal developments in these areas.

Telephone marketing: The importance of the opt-out

Paul Langford

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Telephone marketers need to be particularly careful when embarking on SMS campaigns, given the extent of legal regulation that serves to protect the privacy rights of consumers. World Networks Ltd recently discovered this for themselves, following two complaints to the ASA.

The complaints

The promotional text message campaign that led to the complaints was as follows:

‘Orange customer, you may now claim your FREE CAMERA PHONE upgrade for your loyalty. Call now on 0207 386 4925. Offer ends 4th Aug. T&C’s apply. Opt-out available’.

There were two complaints regarding the message. The first challenged whether the message was misleading, because when the recipient dialled the number given in the message, he was told he was not eligible for a free upgrade.

The second complaint focused on whether World Networks had sought explicit consent before sending the message and whether the text message was misleading, because it did not tell recipients how to opt out of receiving further messages from World Networks.

Both complainants also challenged whether the text message was misleading as it implied that it was sent by Orange.

World Networks’ arguments

World Networks raised a number of points in defence of its actions.

First, it claimed the message did not state that Orange was the sender at all. It addressed recipients as Orange customers because the message had been sent to numbers assigned to Orange. Further, because its automated telephone answering system answered all incoming calls ‘Thank you for calling World Networks’, and because all sales staff answered calls ‘Good morning/afternoon, World Networks’, consumers would understand that the message was not from Orange.

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It also argued that the claim ‘you may now claim your FREE CAMERA PHONE upgrade. T&C’s apply’ implied that customers were possibly — but not automatically — eligible for the upgrade; they would need to meet the terms and conditions before they could receive it. World Telecom said that this was explained to the complainant when he called (in this case, because he had recently received an upgrade, he would not be eligible again for another ten months).

‘Human error’

World Telecom also said the message had been sent because of ‘human error’ and that it had put measures in place to ensure the mistake was not repeated. Customers could call the local rate number included in the message to request to be taken off its list — the call would cost less than a standard text message, which was the standard method to opt out of receiving further messages.

Finally, it had provided a web address as the sender ID for the message and explained that customers could contact it via the website at no cost. Therefore, it considered both methods were acceptable under guidelines provided on the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the Privacy Regulations).

The ASA’s decision

The ASA upheld the complaints: the advertisement breached the CAP Code.

The ASA considered that, as the text referred to the customer’s ‘loyalty’, the recipients were likely to assume that the senders were working directly with Orange to reward long-term customers. As this was not the case, it concluded that the message was misleading.

Misleading message

Although the message stated ‘T&C’s apply’, the ASA considered that the overall impression created by the statement ‘you may now claim your FREE CAMERA PHONE upgrade’ was that all recipients *were able* to claim an upgrade — not that they *might be able* to do so. Therefore, it concluded that the message was misleading.

Consent

On the issue of consent, the ASA noted that World Networks had contacted recipients with whom they had not previously negotiated a sale, without having obtained their explicit consent. Accordingly, the message had been sent without proper consent.

Opt-out

The ASA also considered that the message did not make clear that customers could call the sales number or access the website to opt out, and referred to Information Commissioner’s Office guidance on the Privacy Regulations. The guidance clarifies that stated marketers should provide a postal or email address or a short code number to which recipients could send an opt-out message.

It concluded that the message did not give recipients a clear or simple means of opting out of receiving future messages.

The ASA therefore required World Networks to obtain explicit consent from recipients before sending such text messages in future. It also reminded World Networks that it should provide a clear and simple means for recipients to opt out of receiving future messages, requesting it to seek guidance from the CAP Copy Advice team *before* advertising.

Commentary

This adjudication provides a useful reminder of the need to provide a sufficient opt-out for the purposes of the Privacy Regulations.

Privacy Regulations

The Privacy Regulations apply to unsolicited electronic marketing messages sent by telephone, fax, email or text. Unsolicited marketing material by electronic mail (this includes texts, picture messages and emails) should only be sent if the individual has chosen to receive them, unless the email address was obtained as a result of a commercial relationship (known as the 'soft opt-in'). The recipient should always be given the opportunity to stop receiving the emails.

Before devising any email or SMS-based marketing campaign, marketers should make sure they have considered all of the following questions:

- Can I run this email marketing campaign?
- How was the email address or telephone number obtained?
- Were data protection requirements satisfied?
- Has the recipient consented to receiving marketing materials?
- Can I rely on the soft opt-in?
- Has the recipient opted out from receiving this particular material?
- Have the opt-out registers been consulted?
- Does the email or SMS contain all the information required by the CAP Code, the Privacy Regulations and the E-commerce Regulations?

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Data protection: Tougher penalties for data protection offences

Gary Brooks

The Government recently announced plans to make penalties for the trade and misuse of personal data more severe.

'Blagging'

The Government and the Information Commissioner have been increasingly concerned about an apparent growth in the illegal trade of

personal data, in particular ‘blagging’. ‘Blagging’ is a practice whereby an individual contacts an organisation (typically by telephone) pretending to be someone else (eg the Inland Revenue) in order to extract personal data by deception. The acquired data is then sold on, for example to journalists or debt collection agencies.

Prosecutions

The Information Commissioner carried out a number of prosecutions in 2006 against blaggers. Current penalties of a fine in the Data Protection Act 1998 (DPA) have, however, not provided a sufficiently strong deterrent and have not been viewed as strict enough.

Section 55 of the DPA makes it an offence to knowingly or recklessly obtain, disclose or procure the disclosure of personal data without the consent of the organisation holding the data. It is a separate offence to sell or offer to sell on that illegally acquired data.

Currently, the DPA provides for the following penalties: on summary conviction, a fine not exceeding the statutory maximum (currently £5,000), and on conviction on indictment, an unlimited fine.

Tightening of the law

The Government intends to amend the DPA to make the penalties below available to the Courts, in addition to the current fines:

- on summary conviction, up to six months imprisonment (increased to 12 months imprisonment in England and Wales when s154 of the Criminal Justice Act 2003 comes into force); and
- on conviction on indictment, up to two years imprisonment.

Commentary

Data security measures

This development should at least serve as a reminder to all businesses of the danger posed by blaggers. The DPA requires organisations to have sufficient data security measures in place to prevent unlawful access to personal data that they hold. If blaggers are able to obtain information from your organisation through simple communication such as a phone call, this could be viewed as a data protection breach on your part, unless you can show that you have adequate security procedures and staff training in place to prevent such activity.

The move is part of the Government’s strategy for increased data sharing to deliver better public services to individuals. This announcement is also evidence of a tougher approach to the enforcement of data protection law, which is to be welcomed.

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E-Commerce: Online shopping under the EU microscope

Vanessa Barnett

In a bold move in her first press conference, the new EU Commissioner for Consumer Affairs, Meglena Kuneva, announced in February:

‘We need a root and branch review of consumer rules. At the moment, consumers are not getting a fair deal online, and complex rules are holding back the next generation of bright business ideas. We must find new solutions to new challenges. The question is can we afford to have 27 mini-online markets in Europe, denying consumers choice, opportunity and competitive prices? We need to inject a new sense of consumer confidence into the e-shopping world so it becomes a trusted market space. The rules of the game have changed, it’s time for consumer policy to respond.’

Widespread reform of EU consumer policy is needed

A Commission policy paper published in March underlines that the e-commerce revolution has ‘transformed the potential for integration of retail markets in the EU to give a major stimulus to competitiveness and expand the opportunities for EU citizens’. The paper, however, emphasises that this potential is not being fully realised as business and consumer behaviour has not kept pace with the changes introduced by advances in technology, being restrained by ‘internal market obstacles and a lack of confidence in cross-border shopping’. Widespread reform of EU consumer policy is therefore needed in order for consumers and businesses to fully benefit from the new opportunities which technology has created.

Complex rules

Although we have been living with EU-driven consumer law for some time now, the eight different sets of rules are complex and overlapping and have always been fraught with difficulty from a practical perspective.

For example, can the consumer open sealed packaging and still get a refund? Can the online retailer withhold some of the refund money paid if the returned goods arrive in a shoddy or used condition? What rights does an online retailer have to refuse a cancellation where self-assembly items have been partially assembled? Believe it or not, there have even been arguments about how soon a refund must arrive in the consumer’s account based on the placement of a comma in the Distance Selling Regulations!

EU Commission action

In a consultation which closed on 15 May, the EU Commission focused on key areas for online retail in the United Kingdom: clarifying rules applicable to cooling off periods; clarifying and simplifying the rules on how to return products; setting common rules on who pays the costs

of returning products; simplifying which remedies are available to consumers; considering whether certain rights applicable to goods should be extended to services.

Commentary

According to Forrester Research, the market for online retail sales in Europe is set to more than double in under five years to reach 263bn in 2011, with the number of shoppers growing to 174 million. With that many customers, if you are an online retailer, it pays to follow the Commission's proposals closely.

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Sale of goods: House of Lords decision provides reminder that consumer is king

Paul Langford

A person returns a faulty item for repair. The repair is done competently, but when the person requests details of the repair, such details are not forthcoming. As a result, is that person entitled to reject the item and seek repayment of the purchase cost?

The House of Lords considered this very issue in the recent case of *J&H Ritchie Ltd v Lloyd Ltd*, which provides some valuable lessons for anyone who supplies goods to consumers.

Case facts

The parties entered into a contract for sale of an industrial harrow, which was modified to suit the buyer's requirements. When the equipment was used for the first time, the buyer noticed vibrations and so stopped using it. The harrow was taken back to the seller's premises for inspection, stripped down and fitted with replacement bearings, after which the buyer was told that the harrow had been repaired and was ready for collection. However, despite the buyer's requests, the seller refused to reveal what had been done to repair the harrow and would not provide an engineer's report. All the buyer was told was that it had been repaired to what was described as 'factory gate specification'.

The buyer was concerned about any consequences that the faulty parts could have had on other parts of the harrow, in particular, whether it had been damaged in other ways. Therefore, the buyer decided to reject the equipment and brought an action for repayment of the purchase price.

Lessons for suppliers of goods

The court held that the appellants were entitled to reject the equipment on the ground that it was not in conformity with the contract, a decision which was overturned on appeal.

House of Lords decision

The House of Lords considered the relevant sections of the Sale of Goods Act, which provide that where a buyer is not deemed to have accepted goods, he retains the right to reject them. Such a right would be lost if at any time he decided to accept the goods or was deemed to have accepted them; but the buyer could not be expected to exercise the right to reject until he had the information that he needed to make an informed choice. Accordingly, the seller could not refuse to give the buyer the information that he needed to exercise it.

In this case, the information of the kind that the buyer was asking for was obviously needed to be able to make a properly informed choice between accepting and rejecting the repaired equipment.

Commentary

This case clarifies that a buyer will usually retain the right to reject goods until he or she is equipped with all the facts necessary to make an informed decision as to whether to reject or accept such goods.

Therefore, an important lesson for suppliers — particularly those who sell complex items — is always to provide full details of any repair that is being undertaken in order to fulfil the requirements of the Sale of Goods Act. Such information should be provided *before* commencing any repairs.

The more crucial point when dealing with consumers, however, is to consider the *commercial* implications of your refund or replacement policy. It is possible to spend thousands of pounds on clever legal advice to ensure your terms and conditions cater for the bare minimum requirements under sale of goods legislation, while side-stepping the pitfalls of unfair terms regulation; but what will be the actual cost to your business of such a policy? Always weigh up the potential negative effect on goodwill of just one customer who is either confused — or worse still, frustrated — by your terms and conditions. In many cases, this is likely to far outweigh the occasional savings you might make by not providing a refund or replacement.

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Always provide full details of any repair that is being undertaken

Consumer protection: CD imports lose Wow factor

Vanessa Barnett

The High Court has ruled that the owners of online music retailers CD-Wow were in contempt of court for breaching a 2004 agreement to stop selling illegally imported CDs in the United Kingdom.

The violation

The company's actions in selling such CDs violated European laws designed to prevent infringement of intellectual property rights (IPRs). The law in this area is clear: it allows holders of IPRs to stop unlicensed companies from importing products displaying their brands, or otherwise containing their IPRs, if those products originate outside the European Economic Area (EEA).

Direct infringement

CD-Wow was found to have sourced music CDs outside the EEA and to have imported them without the consent of the record companies, in direct infringement of European legislation prohibiting this.

Commentary

Although a music industry case, it is a reminder that, even in the so-called global e-economy, territorial rights can be brought to bear by rights holders to prevent certain imports from eroding profit margins.

Given the remedies available to rights holders for IPR infringement — injunctions, damages, accounts of profits — this is a wake-up call for all e-commerce businesses to undertake some housekeeping on their product sourcing.

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Copyright: Court of Appeal decides upon the holy grail of copyright protection

Toby Headdon

The co-authors of *The Holy Blood and the Holy Grail* (HBHG) have lost their appeal against the High Court decision in April last year that Dan Brown's *The Da Vinci Code* did not infringe copyright in HBHG. The Court of Appeal's decision is a clear signal that there are limits to the extent of copyright protection.

Limits to copyright protection

The claim

The claim involved the alleged copying of the 'central theme' of HBHG. The Court of Appeal agreed with the High Court's conclusions, pointing out that what Dan Brown took from HBHG amounted only to underlying ideas not protected by copyright. (Copyright protects particular expressions of ideas, eg the specific text used to express an idea, rather than the underlying idea itself.) The Court of Appeal also provided useful guidance for considering the question of copyright infringement.

Commentary

In recent years there have been a number of cases in which claimants have sought to push the boundaries of copyright protection in relation to a variety of subject matter such as ideas in a book (as was the case here), the 'look and feel' of computer programs, magazine layouts etc but have failed.

Anyone producing documents with factual content or ideas will need to bear in mind that copyright protection in those documents is likely to be limited, if it exists at all.

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Copyright: Viacom sues YouTube for \$1bn

Ian De Freitas

Viacom, the owner of MTV, Nickelodeon and other entertainment brands, recently started proceedings for copyright infringement in the New York Courts against YouTube and its owner Google. The claim seeks damages of \$1bn as well as an injunction.

Viacom's complaint

Viacom's complaint focuses on content posted by users of YouTube's service that comes from Viacom's own programmes such as South Park and Sponge Bob Square Pants. Viacom has not given permission for this material to appear on YouTube.

This is the latest in a long line of clashes between content owners and technology platform providers that allow users to post and share material. In 2005, a US Supreme Court ruling in favour of the music industry effectively shut down the Grokster peer-to-peer site. A similar ruling in favour of the music industry was made by the Australian courts in the Sharman peer-to-peer case. Now it is the turn of the broadcasting sector.

Copyright infringement

Control and revenue sharing

The key issues

What is at stake are issues of control and revenue sharing. On the one hand, content owners are quite legitimately asserting their right to share in revenues generated from the re-use of their content. They hold sites like YouTube responsible for encouraging widespread copyright infringement. On the other hand, companies like YouTube are saying that they have created a new and popular service for users and one that advertisers are prepared to pay for and why should they not take the financial credit. They say they are not responsible if some people infringe copyright when using these services. Caught in the middle are users of the service that obviously enjoy the ability to post and view the content.

Commentary

Some media organisations, like the BBC, have struck deals with YouTube over the licensing of content. Viacom's public statements refer to a sense of frustration that they have been unable to reach an accommodation with YouTube that suits them. The lawsuit may just be posturing in what is looking like an increasingly high stakes game of poker between Viacom and YouTube.

The most likely outcome is that the parties will come back to the table to thrash out a deal once the dust has settled. The real question is likely to be how much YouTube will have to pay to make the deal.

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Copyright: Copyright and confidentiality in business correspondence

Ian De Freitas

Protection extends to business correspondence

Following the success by the Prince of Wales in preventing the publication of one of his private journals, *Cembrit v Apex* has highlighted that this protection extends to internal business correspondence. Great care should therefore be taken before making use of or publicising correspondence that you have obtained a copy of.

The case

The case involved a dispute concerning roof tiles supplied by the claimants to the defendants, which the defendants alleged to be sub-standard. The defendants had obtained a copy of an internal letter written by the executive vice president of the claimant company to two directors of its holding company. The defendants claimed that the letter showed that the claimants were aware that the tiles were defective,

despite fighting the action. This letter was then copied and circulated by the defendants in an attempt to force a settlement.

Commentary

The court held that copyright subsisted in the letter and it had been infringed by the defendants copying it. This demonstrates the low threshold of originality required to obtain copyright protection, and that there is no need for the work to have any particular literary merit. It was also held that, since the letter was a private internal communication, it was protected by the law of confidence and its disclosure by the defendants was a breach of confidence.

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Voice over Internet Protocol: Ofcom creeps in

Kieran Healy

New regulatory code

Ofcom recently announced a new regulatory code for Voice over Internet Protocol (VoIP) service providers designed to ensure that consumers have access to key information about the capabilities of their service.

Rising impact

VoIP services continue to have a rising impact on the UK communications sector. Last year, a range of new services was launched and uptake has increased significantly. Ofcom has stressed the potential for VoIP services to offer ‘significant new benefits to consumers, including more competition and choice, lower prices and new services such as second lines and nomadic services’.

In February 2006, Ofcom consulted on its proposals for VoIP. Designed to further the interests of business and consumers, the proposals identified three objectives:

- enabling innovation in a technological neutral fashion
- ensuring that customers and users are well informed and
- maximising the availability of emergency service access.

Regulatory proposals

With these objectives in mind, Ofcom announced the following regulatory proposals in its 2006 consultation:

- requiring providers of Public Electronic Communication Services to comply with a code of practice on the provision of information to customers and

- modifying the definition of a 'Publicly Available Telephone Service' so that only services available to the public for originating and receiving national and international calls and access to emergency services through a normal telephone number have the right to number portability.

General Conditions 14 and 18 modified

Modification to general conditions

After considering responses to the 2006 consultation, Ofcom has decided to modify General Conditions 14 and 18, respectively, to incorporate these regulatory proposals. The deadline for compliance for VoIP providers is 29 May 2007.

Commentary

We await with interest a further consultation, expected this summer, on whether certain VoIP services should be required to offer emergency services access. This is particularly key given that the geographical location of the user may be far away from the VoIP service provider.

Ofcom has also revealed that it is still keeping a watchful eye on other issues relevant to VoIP providers, including naked DSL, net neutrality and the regulation of nomadic services.

With such a rise in popularity of VoIP services, it was inevitable that Ofcom would regulate. VoIP business now must seek to quickly comply while remaining nimble in a highly competitive market.

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Advertising campaigns: New rules for gambling

Tom Russell

In March 2007, the Committee of Advertising Practice (CAP) and the Broadcast Committee of Advertising Practice (BCAP) announced new rules for advertising of gambling in the UK to take effect from 1 September 2007 (the Rules).

The Rules

The Rules will be administered by the Advertising Standards Authority (the ASA), and provide that any adverts that breach the Rules will have to be withdrawn. In the event of serious or persistent breaches, the ASA will have recourse to Ofcom and the Gambling Commission who may consider taking further legal or regulatory action.

Greater freedom

From 1 September 2007, industry sectors such as licensed casinos and betting operators — which have been heavily restricted with regard to

where they can advertise — will be granted more freedom, including the ability to advertise on television and radio. Those television and radio adverts will be subject to the Rules.

The content rules for TV gambling advertisements contained in the BCAP code apply to text services and interactive TV. They contain provisions relating to any portrayal of gambling in advertising as well as adverts for gambling services. The CAP code covers non-broadcast advertising including the internet and so governs UK publishers of advertisements for offshore operators be they licensed in the EEA, Gibraltar or in any ‘white list’ jurisdiction.

The Rules apply largely the same restrictions on content to both non-broadcast and broadcast advertisements.

Objectives and aims

Objectives and aims of the Rules

The Rules are drafted to reflect the three main objectives of the Gambling Act 2005, which will be implemented on the same date, namely that gambling should be kept crime free, it should be fair and open and that children and the vulnerable should be protected.

Examples of the Rules include that gambling advertisements:

- must not portray, condone or encourage gambling behaviour that is socially irresponsible or could lead to financial, social or emotional harm
- must not suggest that gambling can be a solution to financial concerns, an alternative to employment or a way to achieve financial security
- must neither suggest peer pressure to gamble nor disparage abstention
- must not link gambling to seduction, sexual success or enhance attractiveness
- must not portray gambling in a context of toughness or link it to resilience or recklessness
- must not suggest that solitary gambling is preferable to social gambling and
- must not suggest gambling as a right of passage.

The Rules also state, for example, that no child may be included in a gambling advertisement and that no one who is, or seems to be, under 25 years old may be featured gambling or playing a significant role. No one may be shown behaving in an adolescent, juvenile or loutish way in the advertisement and advertisements for gambling must not be of particular appeal to children or young persons, especially by reflecting or being associated with youth culture.

Scheduling of advertisements

Besides dealing with the content of broadcast advertisements, the new rules also police when gambling advertisements may be aired on TV or radio. For example, the scheduling of most gambling adverts in a slot

adjacent to children's programming or programmes directed at under 18s will be prohibited.

Spread betting

The Rules also state that spread betting may be advertised as an investment on specialised financial channels, in specialised financial programming, or on interactive or additional TV services (including text services) only. Spread betting advertisements must also comply with other gambling rules.

Commentary

Although the Rules herald a relaxation of the restrictions in relation to where gambling advertisements may be placed, the restrictions as to content remain detailed and strict. Operators, broadcasters and any publishers of advertisements should ensure that any representation of gambling in advertising is in line with the Rules.

In general, gambling should be portrayed in a 'soft' manner, meaning its role as a responsible, fun and legitimate leisure activity should be emphasised and any sexy, reckless or 'get rich quick' style imagery or messages must be avoided.

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**Restrictions on
content remain
detailed and strict**