

Legal update

# Commerce and technology

## IN THIS ISSUE

Anti-social behaviour on social networks  
Employment issues arising from the brave new social media world

Social media – what are you doing right now?  
Advantages and pitfalls to conducting business via social media

Bribery act 2010 – prudent preparation for businesses  
Bribery Act 2010 update

PLUS...  
News and views

Diary dates

Unfair contract terms in financial services consumer contracts  
Update

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Newsletter

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# Anti-social behaviour on social networks

## Employment issues arising from the brave new social media world

The rise in popularity of social networks such as Facebook and LinkedIn has brought with it many potential benefits for employers and employees; from allowing us to stay in touch with old colleagues, to building up potential contacts and customers. However, what we do online can have negative repercussions, especially on the employer/employee relationship.

The main problem is not so much the length of time employees spend on social networking sites, but what they are posting on those sites. If employees write negative or critical comments about their employers on social networking sites, this can damage not only the relationship with that employee, but may have far reaching implications for the business, and may lead to a public relations battle. Indeed, in 2006 the Trades Union Congress dubbed Facebook's then 3.5 million users 'HR accidents waiting to happen.' So how can you reduce the risk of this happening, and what can you do if it does?

As this is a relatively recent problem, most of the incidents to date have not gone as far as an employment tribunal or a court room. However, there have been some well publicised instances, and in this article we will look at some real life examples and draw conclusions from these.

### Bringing the business in disrepute

In instances where a business has suffered negative PR due to their employees' online postings, they have sought to rely on the 'bringing the business into disrepute' clauses in their disciplinary policies or employment contracts to cover online misconduct. However, the employer has to prove that the business has actually suffered some damage

to reputation in order to rely on it. In the case of *Taylor v Somerfield* (Unreported 24 July 2007, Aberdeen Employment Tribunal), an employee was dismissed after posting a video on YouTube of himself hitting a colleague with a plastic bag stuffed with other plastic bags whilst at the warehouse of his employer and whilst wearing his work uniform. The video was unclear and did not specifically mention the employer. The employee removed the video from YouTube after just three days, and it was only viewed eight times in that period, three of which were by his managers. The tribunal held that the dismissal was unfair because the company could not show that it had suffered any damage to its reputation, particularly in light of the very low number of viewings of the video. It was also discussed that the actions depicted in the video were not likely to cause damage to the company's reputation. This highlights that employers need to consider the individual facts very carefully before dismissing an employee under such circumstances, unless they can clearly show that actual damage has been caused by the employee's actions.

Additionally, the above case may serve as a warning for employers to ensure that their reaction is proportionate; if an employee posts something on a website with a very small audience (for example, a small group on Facebook), it may be more damaging to the employer to bring wider attention to that post by initiating disciplinary proceedings than if they had taken a more discreet approach. Of course, it may not always be obvious how many people have viewed or are able to view online posts, but it is a practical point to bear in mind.

# ‘HR accidents waiting to happen.’ (Facebook users)



Due to the ease of use, as well as our increasingly online messaging culture, employees might think nothing of criticising their employers in online blogs and social networking sites. In France, a British employee from the accounting firm Dixon Wilson, was sacked for ‘bringing her employers into disrepute’ after it was discovered that she wrote a blog about her working life. She did not mention her work specifically, nor did she identify her real name, however, she did post pictures of herself, and her employers alleged that this was sufficient to identify them. In this instance, the employee won her unfair dismissal claim, again emphasising the need for employers to ensure that the conduct of employees is in fact damaging, before taking any dismissal action.

## Internet usage

In the case of *Grant and Ross v Mitie Property Services (UK) Ltd* (Unreported 2009, Aberdeen Employment Tribunal), two employees were dismissed for excessive internet usage. The employees insisted that they had only used the internet during slow periods and it had not interfered with their work. The employer sought to rely on its internet usage policy which stated that the internet could only be used ‘outside core working times.’ However, the dismissal was held to be unfair, partly because of the insufficient clarity of this policy. Whilst this case is not about social networking specifically, it shows that such employment policies will be considered carefully by tribunals.

This can be contrasted with the case of 13 Virgin Atlantic employees who were dismissed in 2008 for making inappropriate comments about passengers and the company on Facebook. All employees were dismissed for breaking staff policy. This clearly demonstrates how having an explicit policy providing for such an eventuality meant that the employer was able to deal with the situation effectively and with a greater degree of certainty about the outcome, than the previous cases explored by this article.

## I’m bored

Another example, which has been widely reported in the press, is that of Kimberley Swann, a 16 year old girl who was dismissed from her job after posting comments on Facebook that her work was ‘boring.’ Her employers were to a certain extent ‘let off the hook’, because she could not bring an unfair dismissal claim, as she had not been in the job for a year. However this highlights that if Ms Swann had been eligible to bring a claim for unfair dismissal, a clear online usage policy would have been of great benefit to her employers’ case.

In response to this matter, the TUC general secretary Brendan Barber stated that employers need to develop ‘thicker skins’ with regard to such comments, and compared it to ‘following staff down the pub to see if they were sounding off about work to their friends.’ This suggests that trade unions and tribunals may in future expect employers to be able to demonstrate clear and actual damage as a result of the comments and not merely hurt feelings.



There is clearly a difference between chatting with colleagues in a pub and posting comments online; the audience is potentially much wider and the comments are officially recorded. This difference may not be initially obvious to many employees, given the prevalence of social networking sites in our lives and the general assumption that what we do on them is private. There is likely to be a need to educate the work force about what is and is not acceptable behaviour and the potential seriousness of posting such remarks online and which should be enshrined in a robust policy.

### Up to date policies and measured actions

In light of the above, having up to date policies on internet usage, including posts on blogs and social network sites, both in the work place and at home is crucial. It is also important to make all employees clearly aware of such policies and to educate them about what is deemed to be unacceptable behaviour. It is vital for employers to be confident about taking action in relation to what an employee has written online, especially when it has been done outside of working hours, and having plain and unambiguous policies will enable businesses to be more confident and clear about the basis on which disciplinary action may be taken.

Also, when confronted with a situation where an employee has posted critical comments about their work online, employers should consider carefully whether dismissal is a proportionate response to the employee's behaviour. A major factor in making that decision, could be whether a clear policy on internet use inside and outside the workplace has been drawn up and clearly communicated to employees. A common sense approach to the situation is also needed when assessing the actual impact of what has been written.

Ultimately, it is not possible to control everything that employees do, particularly in their own homes and using their own computers. With the emergence of new technologies and new ways of communicating, employers need to educate their workforce regularly and make them aware of the consequences of posting inappropriate or damaging comments online.

# Bribery act 2010 – prudent preparation for businesses

## Bribery Act 2010 update



This article is an update to SmartLaw's Spring 2010 edition "The Bribery Bill dealing with bribery at home and abroad", as there have been several key developments since going to press.

### Background

By way of brief background, the Bribery Act 2010 (the Act), received royal assent on 8 April 2010, however, it is not anticipated that the Act will actually become law until April 2011. This is later than originally anticipated, and is in large part due to a consultation exercise which was recently launched on 14 September 2010 by the Ministry of Justice and closes on 8 November 2010. The consultation relates to one of the defences to the offence of bribery which states that if a company had in place 'adequate procedures' to prevent bribery they may not be held liable if an employee or person connected to the business carried out an act of bribery.

The consultation exercise has involved businesses of all sizes inputting into the sorts of steps that they would expect to constitute 'adequate procedures', a term which this article will later review. The secretary of state will publish the results of the consultation in January 2011.

The rationale behind introducing the Act was that the UK's previous legislation was fragmented and described as having 'a protracted and faltering history'. So in essence the aim has been to introduce legislation which is modern and comprehensive and will enable the UK to enhance its international reputation for the highest ethical standards.

Key to prudent preparation for the implementation of the Act, will be in part, a basic understanding of its key provisions and the expectations of what constitutes good corporate governance. This article only intends to provide a brief summary of the key provisions of the Act.

### Key provisions under the Act

The Act sets out 6 scenarios which constitute bribery. This article will not interrogate the black letter law, but simply provide a brief summary of cases 1 to 3 (as cases 4-6 are subtle variations of 3).

Cases 1 and 2 relate to the active acts of bribery and involve someone promising or actually giving a financial or other advantage (note the advantage is not necessarily pecuniary) which is intended to induce a person to perform a relevant function or activity improperly.

'A relevant function or activity' is defined under the Act and is very broad and can be any function of a public nature, any activity connected with a business, any activity performed in the course of a person's employment or any activity performed on behalf of a body of persons.

Case 3 involves the 'passive' act of bribery which involves a person requesting or agreeing to receive or accept a financial or other advantage with the intent that a relevant function or activity should be performed improperly.



## Who does the Act apply to?

The auspices of the Act are wide, and this is one controversial aspect of the legislation. It applies to any act of bribery which occurs on UK soil, irrespective of the perpetrators' nationality. Companies and partnerships which are incorporated in the UK, even if the act itself occurs abroad are also captured by the Act as are UK subsidiaries of foreign companies.

Those who are resident in the UK, irrespective of their nationality will be held liable under the Act, as will citizens of the UK and British Overseas territories.

## Bribery of foreign public officials

Section 6 of the Act covers the offence of bribery of foreign public officials. It outlaws the paying of bribes to overseas public officials. The purpose of the advantage must be to influence the official in their official capacity and the advantage must be made to obtain or retain a business advantage and/or business itself. In summary, facilitation payments are not lawful and even a small payment to expedite a customs clearance would be illegal, although the Serious Fraud Office has observed that such small scale acts will not be the focus of the legislation.

## Failure of commercial organisations to prevent bribery

It is section 7 which establishes the offence of failure of commercial organisations to prevent bribery which has caused the most controversy and concern. The section introduces a new corporate offence of bribery and establishes that the company does not have to be "the directing mind" to be found guilty of the offence. The offence is 'the bribery of

another person intending to obtain or retain business for the company or obtain or retain an advantage in the conduct of business for the company'.

Presently it is unclear whether an individual who has had involvement with the transaction giving rise to the corporate offence can be convicted as an accessory to the corporate offence. It has been observed that as there is no specific penalty relating to such an offence under the Act, it seems to suggest that an individual cannot be convicted of an accessory offence, however this is something of a grey area and something to review when the legislation becomes operative.

It should be noted that directors are exposed under this new corporate offence, as it could be argued that they have committed a corporate governance failure which may then expose them to separate claims as board directors and individuals. The director could also be subject to a disqualification under the Company Directors Disqualification Act 1968 for a period of up to 15 years. With this in mind, directors may want to extend their directors' and officers' liability insurance to cover the risks.

## Defence to the corporate offence

The Act establishes a defence to the corporate offence which states that:

'it is a defence for the company to prove that it had in place *adequate procedures* designed to prevent persons associated with the company from undertaking such conduct'.

Under the Act, the secretary of state is obligated to publish guidance as to what might be deemed to constitute adequate procedures. These guidelines were initially due to be issued in July 2010, however, the Ministry of Justice has only recently launched its consultation with business on the topic. The principles that business has been consulted on are:

- risk assessment;
- top level commitment;
- due diligence;
- clear, practical and accessible policies and procedures;
- effective implementation; and
- monitoring and review.

# Legally the question of whether a company is guilty of bribery is for the courts.

It should be noted that when the guidance is issued, it is just that, guidance. It is not binding on the courts or the enforcement agencies. Legally the question of whether a company is guilty of bribery is for the courts. Having said this, the guidance should not be ignored and indeed may be adduced as evidence of good corporate practice.

The results of the consultation will be published in January 2011, and the guidance finalised. This article does not wish to pre-empt the outcome of the consultation period, or what will be included in the secretary of state's final form of guidance, however, it will address the sorts of steps that prudent businesses will already be implementing to assist with a smooth transition when the Act comes into force.

## Prudent procedures

- Companies should have a clear statement of anti-corruption culture which is fully supported at the highest levels and accompanied by a Code of Ethics and where appropriate, should have separate policies relating to gifts/payments/charitable donations and sponsorship. The codes should be drafted in clear and unambiguous language and should be publicised internally and on the company's website.
- Any such policies should be supported with compliance infrastructure, so for example a senior officer should be directly accountable for overseeing the anti-corruption programme and should provide regular briefings on developments in the law and practice.

- Supply chain management should be at the forefront of a company's mind, and it should take steps to ensure that its partners/suppliers/contractors, agents and other third parties with which the company does business have in place a code of conduct which explicitly prohibits the making of corrupt payments.

## Penalties

The offences of active and passive bribery and bribing a foreign official carry with them the same penalties. These being, on summary conviction, to imprisonment (not exceeding 12 months), or to a fine not exceeding £5,000, or to both. In the event of conviction on indictment, to imprisonment (not exceeding 10 years), or to an unlimited fine, or to both.

The penalty for the corporate offence is an unlimited fine.

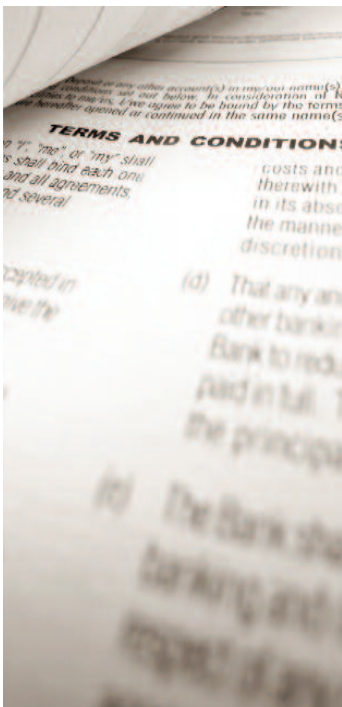
## Conclusion

The scope and reach of the Act is wide. Those who wish to ensure that they and their company stay on the right side of it should be advised to ensure they have in place anti-corruption policies with practical processes in place to implement and review such policies.

Obviously any such policies and procedures should be reviewed after January 2011, when the consultation results are released along with the secretary of state's guidance.

# Unfair contract terms in financial services consumer contracts

## Update



A new private members bill and a new EU directive relating to unfair contract terms in consumer contracts are both currently being debated with a view to clarifying the law relating to unfair contract terms in financial services consumer contracts.

### New private members Bill

The Financial Services (Unfair Terms in Consumer Contracts) Bill (the Bill), was published on 20 October 2010. In essence, it deals with the issue of the fairness of ancillary pricing terms in contracts for the supply of personal financial services.

The Bill seeks to amend the Unfair Terms in Consumer Contracts Regulations 1999 (SI 1999/2083) (Regulations) and to ensure that ancillary pricing terms in consumer contracts can be assessed for fairness and for connected purposes. The Bill also provides that in any proceedings under the Regulations, there should be a presumption that ancillary charges do not form part of the core terms of the contract (ie those terms that define the goods and services and the price paid), unless proved otherwise.

### New Consumer Rights Directive

In October 2008, the European Commission put forward a proposal for a new Consumer Rights Directive relating to all consumer contracts for the supply of goods and services, to facilitate a better functioning of the business to consumer market in the EU. It reviews a number of directives, including the Unfair Contract Terms Directive (93/13/EC). If implemented, this directive will impact on the requirements of the Regulations and, more specifically, the classification of what terms can be assessed for fairness in financial services consumer contracts. As existing EU legislation on financial services is reasonably comprehensive, the proposed

directive will only cover contracts relating to financial services to the extent necessary to fill any regulatory gaps, such as the rules on unfair contract terms.

Neither the Office of Fair Trading (OFT) or the UK government believe that the current wording of the proposed Consumer Rights Directive makes it sufficiently clear that the assessment of unfairness is intended to cover contingent and/or ancillary charges outside the core terms of the contract. The key issue of concern for the OFT is transparency and whether charges included in consumer contracts are likely to be noticed and understood by consumers when they enter into a contract. It is therefore anticipated that the UK government will propose that the directive is amended to include clear principles on contingent and ancillary charges when it is discussed in November this year. The OFT and UK government also support the position that a provision should be included in the new directive to allow ancillary charges to be assessed for unfairness where it is the consumers' view that they do not form part of the core terms.

### The Regulations – unfair contract terms

The 'Regulations' implement EU Directive (93/13/EEC). The Regulations apply to all standard term contracts entered into since 1 July 1995 and make unfair terms unenforceable against the consumer. They apply across a broad range of industries, including the financial services sector.

The Regulations seek to protect consumers from unfair standard terms contained in commercial contracts that seek to reduce or restrict their statutory or common law rights and terms which seek to impose unfair burdens on the consumer over and above the obligations of ordinary rules of law.



Article 5(1) of the Regulations sets out a test for assessing the fairness of a contract term and provides that *'a contract term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.'*

'Good faith' means that financial service providers must deal fairly and openly with consumers. Standard terms may be drafted to protect commercial needs but they must also take account of the interests and rights of consumers by going no further than is necessary to protect those legitimate commercial interests. The bargaining strengths of the parties and any inducement which would cause the consumer to agree a particular term are often considered when deciding if a term is unfair.

Schedule 2 of the Regulations provides an indicative and non-exhaustive list of terms which may be regarded as unfair. These include for example:

- excluding or limiting the legal liability of a seller or supplier in the event of the death of a consumer or personal injury to the latter resulting from an act or omission of that seller or supplier;
- permitting the seller or supplier to retain sums paid by the consumer where the latter decides not to conclude or perform the contract, without providing for the consumer to receive compensation of an equivalent amount from the seller or supplier where the latter is the party cancelling the contract;
- irrevocably binding the consumer to terms with which he had no real opportunity of becoming acquainted before the conclusion of the contract; and

- giving the seller or supplier the right to determine whether the goods or services supplied are in conformity with the contract, or giving him the exclusive right to interpret any term of the contract.

The following contract terms are not covered by the Regulations and are not deemed to be unfair:

- The 'core terms' of the contract – usually those terms that define the goods or services being supplied and fix the price;
- Terms contained in contracts between businesses, private individuals and other non-consumer contracts;
- Terms that are required by law;
- Terms that have been individually negotiated; and
- Terms that are contained in contracts pre-dating 1 July 1995 when the Regulations came into force.

### Supervision and enforcement in the financial services sector

Unfair contract terms have long been the subject matter of disputes between the suppliers of goods and services and the consumer. Today, the Financial Services Authority (FSA) and the OFT are responsible for the supervision and enforcement of these matters in the financial services sector.

The FSA closely monitors the way firms draft their contract terms and regulates what terms can/cannot be included in standard form contracts. The FSA expects all firms to have fair terms in their standard contracts and to have systems and controls in place to ensure the fairness of their consumer

## Footnotes

<sup>1</sup> Office of Fair Trading v Abbey National plc & Others [2009] UKSC 6

<sup>2</sup> Office of Fair Trading v Foxtons [2009] EWHC 1681 (Ch), 10 July 2009, (Mann J)

<sup>3</sup> Timothy Duncan Earles v Barclays Bank plc [2009] EWHC 2500 (Mercantile)

<sup>4</sup> Erherd Eschig v HNIQ Sachversicherung AG (C-199/08)

(2) estate agents imposing charges in their standard terms<sup>2</sup>; (3) terms limiting a bank's liability for damages<sup>3</sup>; and (4) terms restricting the freedom to choose a solicitor<sup>4</sup>.

Recently, there has been some confusion as to the interpretation and application of the Regulations in the UK and what terms will be considered fair or unfair despite the current legislation stating that the 'fairness test' does not apply to the 'core terms' of a contract.

In July 2009, the High Court of England and Wales followed the OFT's view and held that some ancillary charges imposed in the terms of an estate agent's standard contract were unfair. In particular, charges that were in small print were considered to be a 'trap'. These charges were not considered to form part of the core terms of the contract agreed between the parties and could therefore be assessed for fairness.<sup>2</sup>

contracts. This extends to consumer contracts relating to mortgages, insurance, bank, building society and credit union savings accounts, pensions, investments and long term savings agreements.

To ensure firms understand the requirements of the Regulations and implement good practice, the FSA has published various guidelines and reports on the Regulations and good practice, for example; Statement of Good Practice on the 'Fairness of Terms in Consumer Contracts' (May 2005). The FSA's guidelines and reports are available at the FSA's website [www.fsa.gov.uk](http://www.fsa.gov.uk).

The FSA has also implemented a Treating Customer Fairly (TCF) Principle which is designed to ensure an efficient and effective market and help consumers achieve a fair deal.

The FSA and the OFT have the power to take enforcement action through the courts against any firm that falls foul of the Regulations in order to protect consumers. How the FSA enforces its powers is explained in the FSA's Unfair Contract Terms Regulatory Guide which can be found on the FSA's website, by following this link: <http://fsahandbook.info/FSA/html/handbook/UNFCOG>.

The FSA and OFT regularly invoke their powers of enforcement and take action against firms where there is a potential breach of the Regulations and potential consumer harm stemming from that breach.

### Developments in the financial services sector

There have been numerous cases which have been submitted to the UK and EU courts to determine the issue of unfair contract terms in relation to varying issues such as the fairness of (1) unarranged overdraft charges<sup>1</sup>;

However, in a case involving the fairness of unarranged mortgage charges, the Supreme Court held that the unfairness rules in the Regulations could not be applied to assess unarranged overdraft charges in personal current accounts. The Supreme Court decided that the relevant charges formed part of the contract price paid by customers in exchange for a package of services which made up the current account and as such were part of the core terms of the contract. Consequently, by Article 6(2)(b) of the Regulations, the OFT was unable to assess the fairness of the charges.<sup>1</sup> This decision was contrary to the earlier decision of the High Court (see above) and has caused some uncertainty as to how UK legislation on unfair contract terms applies to charges that are 'contingent' or 'ancillary' to the core terms in financial services consumer contracts.

### Next steps

The new private members Bill will receive its second reading on 12 November 2010 in the House of Commons. The proposed consumer rights directive is currently being re-drafted and considered by the European Parliament and it is due to be voted on, on 22 November 2010. At the time of publication the outcome of both these was not known.

It is hoped that the Bill and/or the proposed consumer rights directive will clarify what terms can be assessed for fairness under the Regulations and specifically whether these will include terms relating to ancillary and/or contingent pricing terms to the core terms of financial services consumer contracts.

# Social media – what are you doing right now?

## Advantages and pitfalls to conducting business via social media



### What the fuss is all about and why it matters

Social media is about user-generated content which is used across a diverse range of web based systems, enabling people to 'socially' interact with one another. The most popular social media websites include Facebook, YouTube, Twitter and LinkedIn, although these are really just the tip of the iceberg. Sites such as these provide a whole new platform for conversation, interaction and opportunities.

Bearing in mind that it took radio 38 years to reach 50 million listeners, TV 13 years to reach 50 million users, and the internet 4 years to reach 50 million people, Facebook recorded 100 million users in 9 months and, as of July 2010, has over half a billion users worldwide and is the biggest single destination on the mobile internet. Organisations and web based users have transferred from being content consumers to content producers. We can no longer ignore social media websites, it's part of our daily conversation. Many organisations and individuals have been using social media to their advantage, recognising that it provides an effective way to instantly communicate with their audience.

However, along with the advantages of social media, there are also legal risks. This article highlights some of the trending intellectual property and media related issues in the social media space.

### Using social media to your advantage

One of the biggest concerns facing those engaged in social media or about to engage in it, is the potential lack of control over what is said or how one is portrayed. Companies can take a conservative approach, whereby all content is reviewed and moderated prior to publication. This gives the operator absolute

control of the content that is posted on the website but it is very labour intensive and the operator is assuming responsibility for content. Alternatively, the operator can moderate the site retrospectively. This relieves them of the responsibility for any defamatory or unlawful content, providing that any offending content is removed as soon as they become aware of it. Retrospective moderation leads to a complete loss of control over the quality of the content posted which, given the nature of social media, can lead to instantaneous and widespread damage to the business. Ultimately, irrespective of the way in which a social media site is moderated, the key is to ensure that it is moderated and that there are procedures in place to react quickly to any potentially infringing content.

### Trade mark infringement

A quick search for any major brand name on Facebook, will often reveal hundreds of results, which typically include some official results (such as a global and country specific entry), many unofficial sites (often mislabelled 'official'), fan sites and the disgruntled 'sucks' type sites.

### Use of names and logos

Typical instances of brand misuse (particularly for example on Facebook) are where a brand owner's name and logo is adopted by an unauthorised user. The EU has held that the mere adoption of a company name of itself does not constitute trade mark infringement and that infringement will only arise if the use of a sign affects the registered trade mark's essential function of guaranteeing origin. If a brand name or logo is used but it is clear that the use does not originate from the brand owner, then a finding of infringement is unlikely. Absent reviewing each individual entry on a site such as Facebook, it is not always obvious, at least at first blush, to ascertain what results are official and/or otherwise emanate from the brand owner.

## Impersonation

There is very little to prevent an individual or entity from adopting a user name or sub-domain name that incorporates a third party's registered trade mark. Taking remedial action can often be problematic for the trade mark owner, both from the sheer scale of the problem, to considering issues of adverse publicity that may make a bad situation worse.

In addition, there is a lot of uncertainty over the use of trade marks in social media. Both Twitter and Facebook have trade mark policies but they are not so well developed when it comes to dealing with trade mark infringement issues and/or the practical enforcement of those policies.

Twitter's trade mark policy provides:

*'Using a company or business name, logo or other trademark-protected materials in a manner that may mislead or confuse others or be used for financial gain may be considered to be trademark infringement. Accounts with clear INTENT to mislead others will be immediately suspended; even if there is no trademark infringement, attempts to mislead others are tantamount to business impersonation'.*

Twitter has also adopted a specific impersonation policy, stating that:

*'non-parody impersonation is a violation of the Twitter Rules ... An account may be guilty of impersonation if it confuses or misleads others – accounts with the clear INTENT to confuse or mislead will be permanently suspended'.*

Facebook's IP infringement policy provides:

*'Facebook is committed to protecting the intellectual property of third parties. On this page, rights owners will find information regarding how to report copyright and other intellectual property infringements by users posting content on our website'.*

The practical operation of Twitter's policy was put to the test in a US case brought against Twitter by ONEOK Inc, who claimed that Twitter wrongfully allowed an unauthorised third party to adopt the username "ONEOK", which was not just its corporate name but also a registered trade mark. The unauthorised user posted tweets about ONEOK which ONEOK Inc said were misleading as they had the hall-mark of appearing like an official statement from ONEOK Inc when they were not. ONEOK Inc sought to resolve the issues directly with Twitter and asked Twitter to invoke its trademark policy and terminate or transfer the offending account to them. ONEOK Inc's direct correspondence with Twitter was unsuccessful but after it issued proceedings for trade mark infringement, the account was then transferred to ONEOK Inc.

## Copyright Infringement

In the absence of consent, the use of a copyright protected work will amount to infringement (save for some limited exceptions dealt with below). Operators of social media sites typically have terms of use providing that the user is responsible for making sure that material provided by him on the service does not infringe third party rights.

There is considerable risk of copyright infringement for both users and operators of social media sites. It is important that rights owners not only police the use of their works but also that they clear and vet potential copyright protected content which they use.

In the UK, the operator of a social media service is afforded protection against copyright infringement claims if it is a mere 'host' of content. In practice this means that the operator must not have knowledge of the infringement and once it is notified, it has an expeditious take down procedure. There is no UK case law on the immunities for information society services providers under the E-Commerce Directive. However, there are a number of cases relating to defamation that have explored analogous principles relevant to the scope of the immunities available for internet service providers (see below). Conversely in the US there has been case law. This summer, Google won a landmark ruling in an action brought by Viacom which accused YouTube (now owned by Google) of 'massive intentional copyright infringement' in relation to video clips that appeared on its site. The Judge commented that Google and YouTube could not be held liable for merely having a 'general awareness' that videos might be posted to its site without the requisite consent.

## Defamation

Social media by its very nature involves the expression of thoughts, opinions and information. This lack of face to face confrontation results in people being more willing to make more negative, aggressive or extreme statements than they may ordinarily express. The use of social media means that these negative statements can reach a global audience almost instantaneously.

There are a number of different ways to respond to defamatory statements which range from doing nothing to commencing legal proceedings. A business may decide to use social media to respond, which can be quite an effective way to reach the same audience which were reached by the initial defamatory statements.

The key is to ensure that it is moderated and that there are procedures in place to react quickly to any potentially infringing content.



A recent example of a company that has taken a more heavy handed approach to defamatory statements is Kwikchex, an online reputation service provider. It announced that it is launching a defamation claim against the social media site, TripAdvisor, which allows users to review various travel services and hotels. Kwikchex has launched the claim on behalf of more than 400 hotels and restaurants who argue that TripAdvisor has allowed users to post factually inaccurate information about them, causing great damage to their reputations.

Kwikchex also plans to bring claims against the individuals who have made the fraudulent and defamatory comments on the website. Kwikchex will reportedly publish a list of thousands of reviewers whom it suspects have posted fraudulent and defamatory comments and ask TripAdvisor to notify any of their 'reviewers' who appear on the list. These reviewers will then have 14 days to remove objectionable posts or alternatively provide evidence that they have in fact stayed or dined at the establishment upon which they have commented.

If the claim does succeed in going to trial, it will be interesting to see the Court's approach. In recent cases, the Courts have tended to side with site operators and held that they are not liable for user generated content, provided the operator has appropriate complaint or take down policies in place.

### Data protection and confidentiality

The boundaries between public and private information are blurred with regards to social media sites. The current position appears to be that posting on a public site is generally not private unless it is password protected or the user has high security settings in place preventing outside users viewing it.

Social networking sites may enhance collaboration and help companies connect with customers, but they can also make it easier than ever to share confidential customer data, company secrets and negative product information.

Facebook has been the subject of widespread global criticism by formal bodies such as the European Commission and the Canadian Privacy Commissioner. It was recently further embarrassed when it was revealed that users of Facebook 'apps' have had their private information passed on or sold to third parties.

Social media sites collect, store, use and share a great deal of personal data every day which opens these sites up to exploitation.

### Concluding thoughts

Social media reaches billions of people worldwide and will continue to grow. It can be a very effective tool for business on many levels. We recommend that all organisations should have a strategy as regards to social media, not just dealing with their communications but how they police the use of the IP in the social media space and anticipating what steps they could and should take in the event of a serious misuse of their IP. Owing to the sheer scale of social media, rights owners are likely to find it impossible to take action in respect of all infringements and for public relations reasons, may consider a different approach. As is always the case with developing technology, the law is still playing catch up with the ever changing face of social media. As a result, rights owners should take responsibility for policing their IP rights and cannot rely on social media site operators to do so. It is important to be part of the conversation about your business and this involves being proactive, as opposed to reactive.



## News and views

### Proposed merger of the OFT and Competition Commission

On 14 October 2010, the Government announced its intention to merge the Competition Commission and the OFT, creating a single competition authority for the UK, responsible for merger regulation, market investigations and cartel and anti-trust investigations. It is anticipated that consumer protection and the information role that the OFT currently oversees will be transferred to Citizens Advice and local trading standards offices. The sectoral regulators will retain jurisdiction to enforce competition law in their regulated industries.

The OFT has welcomed the proposal, as have many commentators, lawyers and business leaders who believe the move will streamline the investigation process and eliminate duplication. However, others fear that there may be a risk of downgrading the quality of competition regulation in the UK and a reduction in levels of scrutiny and objectivity.

A final decision on merging the two bodies will be taken following a public consultation in early 2011.

### ICO Consultation on data sharing code of practice

The Information Commissioner's Office (ICO) has launched a consultation on a new statutory code of practice on the sharing of personal data which will run until 5 January 2011. The draft code sets out a model of good practice for public, private and third sector organisations to follow when sharing data.

The Information Commissioner has stated that, 'Under the right circumstances and for the right reasons, data sharing across organisations can play a crucial role in providing a better, more efficient service to customers in a range of sectors ... but citizens' and consumers' rights under the Data Protection Act must be respected'

The ICO is encouraging organisations to offer comments and suggestions on the draft code of practice before the end of the consultation period. A copy of the consultation paper can be found by following this link to the IGO's website: [http://www.ico.gov.uk/about\\_us/consultations/our\\_consultations.aspx](http://www.ico.gov.uk/about_us/consultations/our_consultations.aspx)

### The dangers of varying defined terms

On 18 October 2010, the High Court interpreted the definition of a contract term in the case of *Ericsson Ltd v Hutchison*

*3G Limited*. The parties had amended the termination provisions of their existing outsourcing agreement, including an amendment to the definition of the term "Expiry Date". This amendment also affected other defined terms regarding the handover and exit measures on termination, however, these terms remained unaltered.

The exit period on termination under the original agreement would only exceed 12 months if it was necessary for it to do so. However, after the amendments were made, disputes arose over this definition, as it now appeared that the exit period could go on indefinitely if sufficient notice of termination was given.

The High Court held that the exit period should still be defined as it was in the original agreement (ie only exceeding 12 months if necessary) as this was a commercially sensible interpretation of the contract. This case demonstrates the importance of ensuring that any amendments or variations to a contract are properly carried out and that their effect on defined terms is scrutinised.

### ECJ confirms that in-house lawyers are not covered by legal professional privilege.

On 14 September 2010, in the case of *Akzo Nobel Chemical Limited and Akros Chemical Limited v European Commission*, the European Court of Justice confirmed the existing law in relation to the status of advice from in-house lawyers in the context of European Commission investigations into breaches of competition law. It was confirmed that legal professional privilege only extends to communications with external lawyers who are qualified in one of the EU member states.

The effect of this is that the ECJ has now confirmed that the European Commission can request and review documents and advice prepared or given by in-house lawyers during a competition investigation. It was hoped by the defendant company that legal professional privilege would cover these communications, therefore meaning that the commission could not review them, however it has now been definitively confirmed that it does not.

The practical implications of this for businesses and in-house lawyers are that care needs to be taken to ensure that all communications and advice on potentially sensitive information regarding competition law are dealt with by external EU lawyers (communications with lawyers from outside the EU will not be covered by privilege.) If such information is dealt with by in-house lawyers, then it will be subject to review by the European Commission in the event of an EU competition law investigation.



## Diary dates

### 4 January 2011

The standard rate of VAT will increase from 17.5% to 20%.

### January 2011

The case of the first company being charged under the 2007 Corporate Manslaughter and Corporate Homicide Act will be brought before Bristol Crown Court in January 2011.

### 1 February 2011

The Consumer Credit (Advertisement) Regulations 2010, Consumer Credit (Total Charge For Credit) Regulations 2010, Consumer Credit (Agreements) Regulations 2010 and the remaining elements of The Consumer Credit (EU Directive) Regulations 2010 all come into force on 1 February 2011. These Regulations impose various new obligations on businesses who are covered by consumer credit legislation. Consideration needs to be given to checking compliance in, amongst other areas; advertising, credit agreements; standard documents given to consumers and staff training.

### April 2011

The Bribery Act 2010 comes into force in April 2011. The Act will impose a number of obligations on businesses to prevent bribery. Businesses will need to ensure that they have adequate policies and procedures in place in order to comply with the Act.

## Forthcoming LG Events

### Thursday 25 November 2010

The Direct Selling Association seminar

### Friday 26 November 2010

Natural Resources seminar

### Tuesday 30 November 2010

Leisure Property Forum seminar

### Friday 3 December 2010

Employment seminar

### Friday 10 December 2010

Commercial Law update

For further information relating to these or any other LG seminars, conferences and publications please see our website or contact [info@lg-legal.com](mailto:info@lg-legal.com)

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