



Performance

ARTHUR COX

EXPECT EXCELLENCE

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TechBrief

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We hope you find TechBrief of interest. However, if you would prefer not to receive it in the future, please reply to our e-mail with "Unsubscribe" in the Subject box.

This document contains a general summary of developments and is neither a complete nor definitive statement of the law. Specific legal advice should be obtained before taking action.

In this the twenty-third edition of TechBrief, the Arthur Cox Technology & Life Sciences Group Bulletin, we look at a range of issues across our practice areas and some recent developments in law.

See the "InBrief" and "About Us" sections for some information on who we are and what we have been up to recently. As ever, any feedback you may have on these bulletins is welcome.

Google Executives Prosecuted for Breach of Privacy over YouTube Clips

On 24 February 2010, an Italian court in Milan found three Google executives guilty of violating Italian privacy laws. The executives were fined and received six-month suspended jail sentences. The case is controversial on a number of levels, not least because the court appears to have found that the liability exemptions for those hosting websites in the EU E-Commerce Directive were overruled by local Italian privacy laws.

Background

The original complaint related to a clip posted on YouTube showing a child with autism being bullied by four classmates in a Turin school. The video was filmed with a mobile phone and posted on the site in September 2006 where it remained for two months.

Criminal Charges

Italian prosecutors argued that Google was negligent as it had been on notice of the clip for the two months it was online not least because it had topped the "most entertaining videos" list on the Italian site, had 5,500 views and 800 posted comments. Many of the comments were critical and asked for it to be taken down.

Prosecutors named the Google executives because Italian law holds corporate executives responsible for a company's actions.

When the matter was raised by the Italian police Google removed the offending clip within two hours in line with the 'Notice and Takedown' procedures in the E-Commerce Directive. Google also assisted the police in identifying the bullies in the clip who themselves were subsequently prosecuted.

Privacy Breach v E-Commerce Directive

Prosecutors argued that because Google handles user data and uses content to generate advertising revenue, it was a content provider, not an information society service provider who could enjoy an exemption from liability under the E-Commerce Directive. Accordingly, it was successfully argued that Google had infringed the Italian privacy law which prohibits the use of personal data with the intent of harming the individual or making a profit.

Decision

In Milan, Judge Oscar Magi sentenced the Google executives in absentia to six-month suspended sentences for violating the privacy of the victim. He held that Google did not act fast enough to remove the clip from the YouTube site. The executives were cleared of defamation charges.

Implications

Google and many in the wider US Internet industry have reacted angrily to the judgment. One of the executives in question, the senior vice president and chief legal officer, David Drummond, was quoted as saying that the verdict "sets a dangerous precedent" which meant "every employee of any Internet hosting service faces similar liability". The US embassy in Rome backed Google, saying in a statement that it was "disappointed" by the decision.

Given how quickly Google acted to remove the clip, the case does seem at odds with the principles in the E-Commerce Directive and it may prove to be an isolated case. However, ten years on from the adoption of the E-Commerce Directive, it is a timely reminder that the scope of the liability exemptions available to Internet intermediaries and those hosting content are not unlimited and a more pro-active approach to removing content may be merited in certain cases.

Increased Fines for Breaches of Data Protection Laws in the UK

The UK government recently announced a change in UK data protection law whereby the UK's Information Commissioner ("ICO") shall be entitled to levy fines of up to £500,000 on organisations in the UK for serious breaches of data protection law. This change in law is almost certainly

driven by a number of high profile data security breach incidents occurring in the UK within the past three years. While this new law will not have application in Ireland, data controllers and data processors should closely watch developments in the UK, given that (1) Irish and UK data protection laws are relatively similar (being largely based on the same Directive-95/46/EC); and (2) if this approach is a success in the UK, the Irish Data Protection Commissioner may seek to adopt similar proposals into Irish law.

The Law

The Data Protection (Monetary Penalties) (Maximum Penalty and Notices) Regulations 2010, enacted under section 55A of the UK Data Protection Act 1998 (the "Act"), has granted the ICO the power to issue a '*monetary penalty notice*' in issuing fines of up to £500,000 on data controllers for serious data security breaches. The procedural steps in issuing and enforcing a monetary penalty notice are set out in the Data Protection (Monetary Penalties) Order 2010.

This new power came into force on 6 April 2010. All data controllers processing in the UK's public, private and voluntary sectors are subject to this new provision.

Relevant Factors

In investigating a breach of data protection laws, the ICO will examine whether any of the principles of data protection law have been breached. Relevant factors to be considered by the ICO in deciding if a fine is merited (and if so, what this fine should be) include: the nature of the personal data, the gravity of the breach, whether it was negligent or deliberate, the likelihood of substantial damage and distress to individuals and the reasonable steps the organisation has taken to prevent breaches. The ICO will also consider factors such as the size of the relevant organisation, its sector and its resources.

The new regulations provide that the ICO will initially serve a '*notice of intent*' if it is proposed to serve a monetary penalty notice. A monetary penalty notice can be varied or cancelled by the ICO and there is a right of appeal.

Relevance to Ireland

While there is presently no statutory obligation under the Irish Data Protection Acts 1988 and 2003 to report a data security breach to the Irish Data Protection Commissioner, the Irish Commissioner has published guidance on his website, entitled "*Breach Notification Guidance*" wherein he advises that any wrongful disclosure of personal data should be notified to his office immediately upon the data controller becoming aware of such a breach. This guidance further suggests that data subjects affected by such a disclosure should be notified as well.

For the present time data controllers would be wise to take legal advice prior to reporting any breaches (whether security or otherwise) to the Commissioner and/or to individual data subjects.

Ryanair, Screen-Scraping, and the Importance of Website Terms & Conditions

A recent decision of the Irish High Court which confirmed that Ryanair has the right to bring proceedings in Ireland against websites that reproduce details relating to its flights without its permission has highlighted just how important it is to have an appropriate set of Terms & Conditions of Use attaching to your website.

The Facts

Ryanair initiated High Court proceedings against each of Billigfluege and Ticket Point, both German corporations, in response to what it alleged was “unauthorised scraping and mis-selling of tickets from Ryanair’s website” by acts of screen-scraping. Screen-scraping is a process used by so-called ‘*information aggregators*’, whereby the aggregator accesses the target site, electronically reads and copies information from the displayed webpage(s), then redisplay the information on their own site. The aggregator’s site may be a price-comparison site, a competitor of the target, or a reseller of the products or services, often leveraging off the draw of the relevant information and profiting from the increased traffic.

The defendants argued that Irish courts do not have jurisdiction over these proceedings and that they should have been brought before German courts. They claimed that there was no contract in existence between them and Ryanair. They stated that the Terms of Use “lack contractual force because they are nothing more than a set of unilaterally imposed conditions which they never agreed to”. They also noted the absence of the traditional features of a legally binding contract, including any effective date and the lack of consideration.

The Case-Law

In an interesting analysis of the case-law, Justice Hanna noted that in a previous case, *Ryanair v Bravofly and Travelfusion*, Ryanair sought to avoid the application of its own jurisdiction clause which at the time provided for the exclusive jurisdiction of the UK Courts. The defendants were successful in having the proceedings dismissed based on the enforceability of Ryanair’s own exclusive jurisdiction clause. Ryanair subsequently changed its Terms of Use to nominate Ireland as the appropriate jurisdiction in the event of a dispute.

The High Court also referred to US case-law, including the decision in *Caspi v Microsoft Corporation*, in which it was confirmed that the ordinary principles of contract law apply to online terms and conditions, and the fact that the contract was entered through the medium of the Internet made no difference.

A note of caution is evident, however, to avoid the practice of hiding the terms and conditions or of not bringing to the specific attention of users any particularly onerous or unusual terms. US case-law is again quoted where it is noted that “reasonably conspicuous notice of the existence of contract terms and unambiguous manifestation of assent to those terms by consumers are essential if electronic bargaining is to have integrity and credibility”. In the context of onerous or unusual provisions that should be brought to the specific attention of consumers, Justice Hanna quotes from the decision in *Interfoto Picture Library v Stiletto Visual Programmes* where it is noted that “if one condition in a set of printed conditions is particularly onerous or unusual, the party seeking to enforce it must show that that particular condition was fairly brought to the attention of the other party”.

The Decision

Based on the foregoing analysis, the Court determined that a legally binding contract existed between Ryanair and Billigfluege, the defendant having agreed to the terms of the Terms of Use which constitute a contractual document entered into by both parties. The consideration was provided by Ryanair in the making available of the information for use by the defendant.

Practical Effects of the Decision

From a practical perspective, what does this mean for those who have an online presence? The importance of an appropriate set of Terms & Conditions of Use cannot be overstated. Amongst the factors relevant in adopting appropriate terms are the following:

1. ensure that the Terms are available at all times for inspection by browsers;
2. take appropriate steps to ensure that the Terms are brought to the user’s attention, such steps to be commensurate to how onerous or unusual any particular terms may be;
3. ensure that the Terms comply with all relevant rules and regulations, including, for example, the Distance Selling Regulations 2001, the E-Commerce Regulations 2003 and the Consumer Protection Act 2007, as well as any industry-specific rules or regulations;
4. include an appropriate data protection notice and where personal data (including cookies) are collected, you are required by law to have a separate Privacy Statement;
5. include a protective notice on copyright, data-base rights (if appropriate) and any other intellectual property rights proprietary to the owner of the website; and
6. include any necessary disclaimers and limitations of liability, taking into account what will or will not be enforceable, as well as the degree of notice that must be given to users of those disclaimers and limitations.

Case Note: BSKyB v EDS

On 26 January 2010, the UK High Court delivered its long anticipated judgment in the *BSkyB v EDS* case. The trial was a legal marathon, lasting over 100 days, involving over 70 witnesses and 500,000 documents and incurring legal fees in excess of £70 million. While damages have yet to be finalised, EDS has already made an interim payment on account of damages of £200 million. Although the decision has not raised any new legal concepts, nor is it likely to fundamentally alter the manner in which customers and suppliers approach IT procurement (as some had anticipated), it is still an important summary of the law in the area. Given the likely scale of damages and associated costs it also highlights the importance of supplier and customer vigilance during pre-contractual negotiations through to project completion.

Background

The dispute arose out of a successful tender bid by EDS in 2000 to install a new Customer Relations Management System (“CRM”) (i.e., call centre) for BSKyB. The tender competition was ultimately between EDS and PriceWaterhouseCoopers, with EDS prevailing in the end. The initial contractual budget was for £50 million with a two stage timeline - nine months for the initial “go live” stage out to 18 months for full completion. The project faltered almost from the offset, soon requiring contract renegotiations. The project was eventually completed by March 2006 at a cost of some £265 million. By this stage, EDS had been removed from its primary role as systems integrator and reduced to the role of basic IT supplier. As a result, BSKyB instituted proceedings against EDS, claiming some £709 million in damages, alleging, amongst other claims, negligent misrepresentation and repudiatory breach of contract. The contract contained a financial cap of £30 million on EDS’s liability. Therefore in order for BSKyB to recover damages beyond this amount, it needed to successfully circumvent the contract clause, choosing to do so by claiming fraud on the part of EDS.

BSkyB’s Claims

While BSKyB made claims under a number of different categories, it was its claim as to fraud that was crucial to taking damages outside the £30 million liability cap. BSKyB claimed that EDS had made fraudulent misrepresentations as to time, costs, resources, technologies available and methodology, both at tender stage and during subsequent renegotiations. BSKyB had alleged that EDS’s representations as to the project timeline were what had tipped the award of contract in its favour.

Briefly, the court found as follows:

1. EDS was liable in fraud for misrepresentations as to time made both at tender stage and at the time of conclusion of the prime contract. The court found no fraudulent misrepresentations as they related to costs, resources, technologies and methodologies.

2. EDS was liable for negligent misstatement and/or misrepresentation under the Misrepresentation Act 1967.
3. EDS was in breach of the prime contract both prior to and after the signing of the letter of agreement amending its terms.
4. The court found that EDS was not guilty of other misrepresentations made, nor was the company in repudiatory breach of the prime contract.

Of the above findings, it is that of misrepresentation founded in fraud that is of most significance, as this brought potential damages outside of the contractual cap on liability.

Fraudulent Misrepresentation

Generally speaking, fraudulent misrepresentation is difficult to establish and Justice Ramsey’s decision does not change the law in that regard.

It appears that the findings as to fraudulent misrepresentation stemmed in large part from the activities and behaviour of one EDS employee in particular, Joe Galloway, lead salesperson for EDS’s bid. On the evidence, the court found that he had knowingly and fraudulently misrepresented EDS’s ability to deliver the project within the timelines set out in its tender. Justice Ramsey put significant weight on the fact that Mr. Galloway repeatedly perjured himself before the court while giving evidence. Amongst other claims, Mr. Galloway appeared to entirely fabricate the details of an eighteen month period spent studying for an MBA at Concordia College in St. John on the US Virgin Islands, while simultaneously working for a Coca Cola operation, which operation, the court found, did not in fact exist. In a twist that will go down in the lore of contract disputes, Mr. Galloway’s perjury was “effectively and amusingly” demonstrated when counsel for BSKyB obtained, online and for a small fee, a similar MBA from the same institution for his pet dog, Lulu. The nature and extent of the perjury had been so extensive that the court felt it could not rely on the truthfulness of Mr Galloway’s evidence.

Furthermore, the court found that at all times Mr. Galloway had acted entirely out of self interest, making representations that sought only to secure a deal he felt would advance his own career prospects, with little or no regard for the ability of EDS to deliver in the time he held out. As such, the court felt that the misrepresentations had been made in full knowledge of their deceit and likely impossibility. It should be noted that some of the facts on which the finding of fraud is based are unusual.

Implications

While the judgment does not raise any novel legal principles, it nonetheless highlights the damage an errant employee can cause. In light of the scale of the trial and the likely size of damages, it is of the utmost importance that suppliers are confident in the integrity of their salespeople and ensure their internal procurement

procedures, protocols, policies and training are designed so that no one employee can make representations and commitments which cannot be delivered upon. It should be borne in mind that attempts to contractually exclude liability for fraudulent statements of an employee will struggle to stand up to judicial scrutiny, and the effectiveness of such exclusions remains very limited in scope. Parties should also ensure that any representations on which they seek to rely are specifically incorporated into the contract.

Ultimately, both suppliers and customers need to be aware of the effect of all representations, irrespective of whether they are made early in the negotiation process or closer to the contract date. As such, they should ensure that their legal teams are included in, and aware of, all negotiations and correspondence from the start.

In Brief

In this section, we let you in on what we have been up to in the past few months. If you would like further information about any of the items below, please contact any member of the Technology & Life Sciences Group.

5th Annual Data Protection Practical Compliance Conference

The 5th Annual Data Protection Practical Compliance Conference, Ireland's largest data protection conference, will be taking place in Dublin on 11-12 November 2010 in association with the Data Protection Ireland Journal. The conference, which will bring together information and compliance professionals to discuss data protection issues faced by Irish organisations, will be chaired by **John Menton** and include presentations by **Rob Corbet**, **Dr Robert Clark** and **Colin Rooney**.

Internet Growth Acceleration Programme (iGAP)

Arthur Cox sponsored the finale of the inaugural Internet Growth Acceleration Programme (iGAP). iGAP is a six month programme hosted by Enterprise Ireland which is aimed at high potential Internet start-ups designed to equip them with the practical tools needed to formulate aggressive international growth plans and scale their businesses. **Rob Corbet** is one of iGAP's selected business advisers. **Colin Rooney** and **Emmet O'Grady** also attended an iGAP networking event hosted by Enterprise Ireland on 17 February last.

Society for Computers & Law (SCL)

Pearse Ryan attended two Society for Computers & Law (SCL) events in London on 4 March 2010, including an outsourcing event entitled "*Partnering & Outsourcing Masterclass*" and the SCL Annual Lecture 2010 entitled "*Transformations: Technology, India & the Law*".

Irish Software Innovation Network

Rob Corbet spoke at the launch of the Irish Software Innovation Network at IBEC on 3 February 2010. ISIN (www.isin.ie) is a free matchmaking service between Software Companies and Third Level Research Institutes, connecting businesses easily to world class expertise, knowledge and research.

Irish Technology Leadership Group

John Menton attended the Irish Technology Leadership Group event in San Jose California in March 2010 and the opening of the Irish Innovation Center in San Jose.

Irish Information Security Forum

Pearse Ryan attended the Irish Information Security Forum chapter meeting discussing the law on cybercrime on 14 April 2010.

Data Protection and Whistleblowing

Colin Rooney presented to the Irish branch of the Institute of Internal Auditors on 10 February 2010 on the operation of whistleblowing schemes in the context of Irish data protection law.

In Brief (contd.)

EuroITCounsel

Pearse Ryan attended the biannual meeting of EuroITCounsel, of which Arthur Cox is the Irish member, hosted by Walder Wyss & Partners in Zurich on 7-8 May 2010.

Google Books Settlement Update

An update on the current status of the Google Books Settlement by Emmet O'Grady was published in the Internet Newsletter for Lawyers & Law 2.0, accessible at <http://www.infolaw.co.uk/newsletter/>

Data Protection Issues for Financial Institutions

Colin Rooney spoke on the data protection compliance issues facing the financial services industry at Financial Services Ireland's data protection seminar, which was held on 26 February 2010 in IBEC's offices.

Information Security & Cybercrime

Pearse Ryan and Andy Harbison of Grant Thornton presented to the Chief State Solicitors Office on the topic of information security & cybercrime on 16 April 2010.

Recent Developments at ICANN

On 26 February 2010, Emmet O'Grady attended a discussion on "Recent Developments at ICANN" at the Institute of International and European Affairs.

Franchise Agreements

An article by Emmet O'Grady was published in the Sunday Business Post on 14 February 2010 on the importance of getting the terms of a franchise agreement right.

Recent Developments

EMI & Others v Eircom

On 16 April 2010, Mr Justice Charleton delivered his keenly awaited judgment in the case of *EMI & Others v eircom*. The High Court judgment approved the settlement terms agreed between the music industry and eircom which will require eircom to implement a 'three strikes' approach to subscribers who are engaged in illegal filesharing activity. The court was not swayed by the various arguments put forward by the Data Protection Commissioner that the implementation of the so-called 'graduated response' would infringe the data protection rights of subscribers. Arthur Cox represented eircom in the case. We will provide a detailed article on the implications of the case in our next edition.

Recent Developments

Council Resolution on the Enforcement of Intellectual Property Rights

On 1 March 2010, the Competitiveness Council of the European Union adopted a resolution calling for the adoption of measures and initiatives to enhance the enforcement of intellectual property rights in the internal market. In the text of the resolution, the Council emphasises the importance of establishing consistent and effective enforcement across the EU and invites the Commission, in cooperation with Member States, to assess how best to enhance coordination, cooperation, information exchange and mutual assistance between national and European authorities involved in combating counterfeiting and piracy with the cooperation of economic operators. The resolution suggests enlarging the scope of the European Observatory on Counterfeiting and Piracy, implementing effective awareness campaigns focused on consumers and young people and invites Member States and the Commission to promote the protection of intellectual property in international agreements. Most notably, the Council invites the Commission to submit proposals for a Directive on criminal measures aimed at combating counterfeiting and piracy indicating a stronger push in the internal market to effectively protect the interests of intellectual property right holders.

About Us

The Technology & Life Sciences Group at Arthur Cox



John Menton Partner

John is head of the Technology & Life Sciences Group. He specialises in computers, software, internet and venture capital for technology companies, in addition to advising on intellectual property and research transactions involving Universities and other research institutions.

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Declan deals with a wide range of commercial work including reorganisations, insurance, mergers and acquisitions, MBOs, venture capital finance and joint ventures. He also acts for a number of international and domestic clients in respect of regulatory and intellectual property issues including clients in the pharmaceutical and manufacturing industries.

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Rob Corbet Partner

Rob's practice is primarily focused on the legal aspects of technological innovation. He has been recognised by Chambers Europe as a "leading individual" for his IP and IT practices. He has particular experience in data protection and in the betting and gaming industries. He is editor of Data Protection Ireland (www.pdp.ie), author of the Ireland Chapter of the *International Privacy Guide* (Thomson Reuters) and co-author of *Technology and IP Law* (Tottel/Law Society).

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Pearse Ryan Partner

Pearse specialises in outsourcing, sourcing and technology transactions, including business process, IT and facility management outsourcing, system and software procurement. Pearse also practices in related areas, involving e-commerce, computer fraud/security, IT-related disputes and advising on re-orientation of ongoing problem projects. Pearse acts for a broad range of customers and suppliers, with an emphasis on project work and public procurements.

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Colin Kavanagh Partner

Colin has a broad based corporate and commercial practice with particular focus on the life sciences and media industries. Colin's practice focuses principally on corporate transactions and re-organisations and commercial contracts. Colin is also head of the firm's Media and Entertainment Group and advises a broad spectrum of clients on commercial, regulatory and intellectual property matters relating to the media industry.

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Prof Robert Clark Consultant

Bob specialises in intellectual property law. He has published the definitive intellectual property law texts: *Irish Copyright and Design Law*, *Intellectual Property Law in Ireland*, and the most up to date contract law text: *Contract Law in Ireland (6th edition) 2008*. Bob is the Chair of the Government appointed Sales Law Review Group, and as a consultant to the Law Reform Commission he is working on a report examining Irish Insurance Contract Law.

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Colin advises on intellectual property, e-business and information technology issues. He specialises in data protection, freedom of information and information management issues, with a particular emphasis on advising in these areas in the context of e-commerce matters.

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Emmet specialises in intellectual property and IT matters. He also has expertise in e-commerce matters, including domain name issues and other internet-related matters. Emmet's background is in commercial law and he advises on a wide range of commercial contracts generally. He also has experience in the areas of sports law and betting, gaming and lotteries.

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Iseult specialises in corporate and commercial transactions across a wide variety of industries in the technology and life sciences sector. Having in-house experience in the US headquarters of a global pharmaceutical company, Iseult has a background in supporting international commercial operations in respect of general contracting, regulatory matters and post-merger integration.

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