



TABS™ Update Technology And Brands

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Beware of sending unsolicited messages!

Companies involved in the telecommunication industry should note the outcome of the action taken by Realm Communications (“Realm”) against the Irish Data Protection Commissioner, Billy Hawkes (“the Commissioner”).

In the High Court, Realm challenged the Commissioner’s attempts to prosecute it for sending unsolicited text messages for the purposes of direct marketing. Realm argued that the Commissioner was obliged to seek an amicable resolution to the complaints before proceeding to prosecution. Under the European Communities (Electronic Communications Networks and Services) (Data Protection and Privacy) Regulations 2003 (“the 2003 Regulations”), it is an offence to send an unsolicited communication (including SMS message) for the purposes of direct marketing where the person to whom the unsolicited communication is sent has not consented to receiving that communication.

In the High Court, Mr Justice McCarthy refused to issue a declaration that the Commissioner acted unlawfully, stating that even if an amicable resolution took place, it would not remove the fact that the 2003 Regulations had been breached. Nothing would expunge or render inadmissible evidence of the breach, such that a prosecution could not be maintained.

In order to prevent the above argument being raised by others in similar actions, the Government recently introduced regulations which came into force on 12th December 2008 (“the New Regulations”) that include a provision that the Commissioner may bring and prosecute proceedings for an offence without having first attempted to amicably resolve the complaint. While this clarification was welcomed, there was doubt as to what the legal position was in respect of offences committed and prosecutions commenced before the New Regulations were introduced. The High Court judgment has now clarified that position.

Other changes introduced by the New Regulations include (a) increasing the penalty for a summary offence from €3,000 to €5,000 in respect of unsolicited communications; (b) the creation of an indictable offence for contravention of the regulations relating to unsolicited communications, the penalty for which is a fine, not exceeding €250,000 or if 10% of the turnover exceeds this figure, an amount equal to that percentage in the case of a body corporate or €50,000 for individuals; and (c) providing for the prosecution of an officer of a body corporate for an offence irrespective of whether the body corporate itself has been proceeded against or been convicted of the offence.

Companies should note the warning from the Commissioner that he will have no hesitation in applying the full force of the New Regulations to those that make unsolicited contact with their customers for marketing purposes. As it is evident that consumers are increasingly filing complaints with the Commissioner in relation to unsolicited communications, companies should immediately review their operations to ensure that they are data protection compliant because ignorance of the law is not a defence. There is no time to lose – seek advice now before the Commissioner comes a knocking!



Liability of ISPs for illegal downloading

Internet Service Providers (“ISPs”), telecom firms, artists and companies involved in the music or film industries should note that the legal action instigated by EMI Records (Ireland) Ltd, Sony BMG Music Entertainment (Ireland) Ltd, Universal Music (Ireland) Ltd and Warner Music (Ireland) Ltd (“the Record Companies”) against Eircom (the largest broadband ISP in Ireland) has started in the Commercial Court (which is a division of the High Court that can deal with intellectual property cases). The trial is to last 4 weeks.

The Record Companies issued legal proceedings in the Commercial Court seeking orders restraining Eircom from infringing copyright in sound recordings owned by, or exclusively licensed to them by making copies available to the public. The advantage of the Commercial Court is that actions are expedited and managed by the court. This means that cases can be heard and judgment delivered within six to eighteen months from the date proceedings are commenced. There is also a high rate of settlement before the Commercial Court.

The legal action reflects the growing concern within the music industry about the scale and cost of illegal downloading. It is estimated that 20 billion music files were illegally downloaded worldwide in 2006 and that such activities cost the Record Companies €14 million a year.

The current legal action is a change in tactics by the Record Companies. Originally, the Record Companies issued legal proceedings against individual illegal downloaders. However, such actions have cost the Record Companies €600,000 but only €70,000 in compensation has been obtained. The Record Companies has therefore turned their attention to ISPs, seeking their assistance in tackling illegal downloading. The current action was instigated when Eircom refused to provide such assistance. The Record Companies argue that specialised software such as that provided by Audible Magic Corporation can (and should be used by Eircom to) filter peer-to-peer traffic and prevent specified recordings from being shared. However, Eircom have advised that it is not in a position to run Audible Magic’s software on its servers.

Watch this space for further updates on the outcome of the action. In the meantime, companies involved (directly or indirectly) in the illegal downloading of music and other (copyright protected) material should review their operations to ensure that they do not infringe the intellectual property rights of third parties, seeking legal advice if in doubt.

Artists and companies involved in the music or film industries should also seek advice if their works are being used without their consent because as our clients have discovered, the Commercial Court plays a vital role in the protection of intellectual property rights in Ireland. There is no time like the present to discuss your intellectual property queries with a member of our Technology & Intellectual Property Unit – contact us today!



In the News

Maureen Daly, Partner and Head of Technology & Intellectual Property appeared on the current affairs programme, "Today with Pat Kenny", which has a listenership of 291,000, on RTE Radio 1 (one of the principal national radio stations of the public service broadcaster, Radio Telefis Éireann) on Monday 22nd December 2008 where she discussed the legal issues associated with sharing files (such as music) over the internet.

On the Lecture Circuit

Maureen Daly, Partner and Head of Technology & Intellectual Property was the speaker at a breakfast seminar, organised by the Licensing Executives Society and Forfás (the national policy and advisory body for enterprise and science), on Friday 16th January 2009. Under the title "*Looking after your Database Rights*", Maureen talked about the legal protection afforded to databases and provided practical tips on how companies can look after them. A lively Q&A session followed the talk.

Date for your Diary

10th February 2009

The Technology & Intellectual Property Unit will be hosting a breakfast seminar entitled "*Advertising Campaigns - Beware of the Legal Minefield!*" at our office on Tuesday 10th February 2009.

We are honoured to have Ed McDonald, Chief Executive of the Association of Advertisers in Ireland and board member of the Advertising Standards Authority of Ireland ("ASAI") and Central Copy Clearance Ireland as one of the speakers. Mr McDonald will discuss the role of advertising as well as the application of codes of practice such as the ASAI and the Broadcasting Commission. The other speakers are Maureen Daly and Niall O'Brien of this office. For details of the programme or to register for the seminar, please see the events section of our website www.beauchamps.ie.

Future Event

Beauchamps Solicitors will be hosting a breakfast seminar entitled "*Funding and Protecting your Ideas*" in the G Hotel, Galway in the coming weeks.

The seminar promises to be interesting and informative. Watch the events section of our website for details of the date, speakers and the full programme.

The Technology & Intellectual Property Unit wishes all its readers a happy, peaceful and prosperous 2009!

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