



TABS™ Update Technology And Brands

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Duty of care owed to website users?

Website owners should take note of a judgment delivered by the Court of Appeal in England which examined the extent to which a duty of care might be owed to consumers in relation to statements made on websites and relied on by consumers. Although such judgments are not binding in Ireland, they would be of persuasive value to an Irish court.

The background to the case was as follows. The website of Swimming Pool & Allied Trades Association Limited ("SPATA") contained the names of members which SPATA had vetted *"with checks on their financial record, their experience in the trade and inspections of their work"*. The website also stated that members *"are required to comply fully with the SPATA construction's standards and code of ethics, and their work is also subject to periodic re-inspections after joining"*. When requested, SPATA supplied an information pack and members' list which contained details of suitably qualified and approved installers in the customer's area. The pack included a contract check list which set out the questions that customers should ask a tenderer together with those which must be asked of the trader before work commenced and prior to releasing the final payment.

Mr and Mrs Patchett ("the Patchetts") selected a contractor listed on SPATA's website to build their swimming pool. The Patchetts did not contact SPATA for the information pack and members' list. In fact, there was no direct communication between SPATA and the Patchetts. Before the work was completed, the contractor ceased trading and the Patchetts instituted proceedings claiming that, as they relied on the statements on SPATA's website, SPATA were liable in negligence for the costs of hiring a new contractor and the money the Patchetts had paid to the original contractor.

The Court of Appeal rejected Patchetts' claim. It stated that *"the question of duty of care depended on the basis of the statements actually made and the way in which they would be objectively understood.....SPATA was not saying that its members...were at all times creditworthy. No warranty was given. SPATA was saying that before each member joined, checks were carried out on its financial record and on its experience in the trade and there were inspections of its work. It was also saying that its work was subject to periodic re-inspections after joining. It was not saying that (the trader) would install the claimants' pool in a sound and competent way; simply that its work had been checked in the past and had been up to SPATA standards."* The Court stated that when the website is *"read as a whole, it urges independent enquiry"*. In the case at hand, it did not believe that the relationship between SPATA and the Patchetts was that of advisor and advisee. There was not sufficient proximity to give rise to a duty of care. Furthermore, it did not think that *"it can fairly be held that SPATA assumed a legal responsibility to the claimants for the accuracy of the statements in the website without further enquiry which the website itself urged. It is common ground that if the claimants had asked for and obtained an information pack, they would have learned the true facts. They would have learned that (the trader) was only an affiliate member and that, as such, (the trader) was not the subject of the checks referred to and its customers would not have had the benefit of" SPATA's bond or warranty.* However, the court did not rule out the possibility that a website owner may owe a duty of care to its users in other circumstances.

To avoid future difficulties, website owners should ensure that their websites contain disclaimers or exclusion clauses which make clear the extent to which users can rely on information on their websites. Furthermore, they should highlight additional or independent verification that users should obtain. If in doubt, legal advice should be sought.



“It’s mine, not yours”

There is a case progressing through the Commercial Court which shows the importance of companies protecting their intellectual property rights against misappropriation by their former employees and contractors.

Koger Inc. and Koger (Dublin) Limited (“Koger”) instituted proceedings in the High Court against James O’Donnell, Roger Woolman, David Gross, and H.W.M. Financial Solutions Limited (the “Defendants”) claiming breaches of confidence and copyright infringement. Koger claims that the Defendants’ software, ManTra was developed using confidential and copyright information obtained from Koger. They also claim that the Defendants used confidential information relating to Koger’s business in marketing their product and solicited a number of Koger’s employees or contractors. These allegations have been denied by the Defendants.

The case was recently before the Commercial Court on the issue of discovery. While the parties agreed that all of the documents sought by Koger were discoverable, the Defendants argued that the documents should only be reviewed by Koger’s experts, not by Koger themselves or their legal advisors. The Defendants believed that disclosure would undermine its business because if they succeeded in the legal action, even though the documents would be returned, the competitive position between the parties could not be restored to the position prior to proceedings. Koger however argued that only granting their experts access to the documents would result in them suffering an unfair advantage in the conduct of the legal proceedings. They needed to examine the ManTra product and review the documents relating to its creation in order to prosecute their claim. The Court stated that “*the case was a finely balanced one*” but came to the conclusion that “*the interests of justice require limited disclosure of the material in question*”. It therefore ordered disclosure of the documents to Koger’s legal advisors and to a nominated officer of Koger under strict conditions.

Whatever the outcome of the case, the lesson for other companies is that they should protect their intellectual property rights against misappropriation by their employees and contractors. Nowadays, it is all too easy for employees who wish to leave their employment to copy (and bring with them when they leave) their employers’ intellectual property (including confidential information). The same also applies to contractors and other third parties that supply services who have access to companies’ proprietary and confidential information. Companies should therefore review their operations to ensure that their intellectual property rights are protected before it is too late!

The Data Protection Commissioner comes knocking....

The importance of complying with data protection legislation was highlighted recently when it was reported in the media that the Data Protection Commissioner (“DPC”) had reached an agreement with the National Roads Authority (“NRA”) regarding the storage of personal details of motorists using the new barrier-free tolling system on Dublin’s M50 motorway.

The issue arose from a complaint by a journalist over the retention of personal data by the toll operator, BetEireFlow Limited. They discovered that details and toll passages of motorists who did not register for a tag or for video recognition of their vehicles were stored on a central database under a single account number.

When the journalist complained that the storage was contrary to the Data Protection Acts, they were advised by the operator that a twelve month storage period was necessary to confirm when a motorist had used the service and that it was not appropriate to anonymise the data. When the journalist filed a complaint with the DPC, it entered into discussions with the NRA. It has now been reported that proposals have been agreed with the DPC which will include a plan to allow motorists to opt for anonymised travel on the M50 provided certain rights are waived (including the right to challenge a transaction that has already been deleted).

As all companies must comply with data protection legislation, it is essential that they review their operations to ensure that they are lawfully collecting, storing and using personal data. Act today before the DPC comes knocking!



Recently passed Regulations

- **Copyright**

Under Sections 133 and 257 of the Copyright and Related Rights Act 2000, rights owners are entitled (where it is impracticable for them to apply to the District Court for an order) to seize infringing copies, illicit recordings, articles or devices. Once seized, the person must (within 30 days) apply to the District Court for an order to dispose of the copies, articles or devices. The form of notice to be given at the time of seizure to the owner, occupier or person in charge of the place where the infringing copies, illicit recordings, articles or devices are seized has now been prescribed under the Copyright and Related Rights Act 2000 (Notice of Seizure) Regulations 2009 (S.I. No 440 of 2009).

- **Data Protection**

Under Section 4 of the Data Protection Acts 1988 and 2003 (as amended), an individual has the right to be informed by a data controller whether personal data is kept by them and to be supplied with a copy of that information. However, under Section 5(d), the right of access does not apply to "*personal data kept for the purpose of performing such functions conferred by or under any enactment as may be specified by regulations made by the Minister, being functions that, in the opinion of the Minister, are designed to protect members of the public against financial loss occasioned by (i) dishonesty, incompetence or malpractice on the part of persons concerned in the provision of banking, insurance, investment or other financial services, or in the management of companies or similar organisations; or (ii) the conduct of persons who have at any time been adjudicated bankrupt*".

With the economic downturn, there has been an increase in the number of data access as well as freedom of information requests in relation to financial matters. Accordingly, by introducing the Data Protection Act 1988 (Section 5(1)(d)) (Specification) Regulations 2009 (S.I. No 421 of 2009) ("the Regulations"), the Minister for Justice, Equality and Law Reform has restricted an individual's right of access to personal data kept by the Director of Corporate Enforcement ("DCE"), officers of the DCE and inspectors appointed by the High Court or the DCE. The main function of the DCE is to ensure that individuals and bodies comply with Irish company law and to institute proceedings against those who disregard the legislation.

And Finally....

On 1st December 2009, Maureen Daly, Partner and Head of the Technology And Brands Unit in Beauchamps and Mark O'Connell BL (barrister and former political correspondent with the Sunday Business Post) were speakers at a breakfast seminar entitled "*The Legal Do's and Don'ts of using Images*" which was organised by The Marketing Institute of Ireland and hosted by Beauchamps. The seminar examined the legal issues involved in using images as well as privacy rights in Ireland. A lively Q&A session followed the two presentations.

On 4th December 2009, Maureen Daly was a speaker at a conference organised by the International Trademark Association entitled "*Examining European Trademark Issues and Developing New Strategies Conference*" which took place in Vienna, Austria. In the session entitled "*Which Battles to Fight First – Cost-effective Enforcement Strategies*", Maureen examined the issue of litigating an intellectual property dispute throughout Europe as well as whether Alternative Dispute Resolution has become an integral part of the judicial system in certain jurisdictions such as Ireland, the United Kingdom, France, Germany and Australia.

We wish all our readers a happy, peaceful and prosperous 2010!

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