



TABS™ Update Technology And Brands

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Beware - the National Consumer Agency cometh!

Retailers should note that the National Consumer Agency (the “Agency”) is not afraid to use its powers to prevent what it considers to be unfair, misleading, aggressive and prohibited commercial practices. Established in 2007, the functions of the Agency are to promote and protect the interests and welfare of consumers.

One company that recently incurred the wrath of the Agency was Tesco Ireland Limited (“Tesco”). The Agency reportedly instituted legal action against Tesco in the Dublin District Court for eight alleged breaches of the Consumer Protection Act, 2007 (“the Act”) in relation to the misleading practice of charging higher prices for a range of products than that displayed and one alleged breach of product pricing regulations (namely, failing to display the price of a product).

Last month, Tesco was convicted on one charge with the other eight charges being taken into consideration and was fined €600. The Agency was awarded its costs of €1,500 plus VAT and expenses of €1,596 which related to the inspection undertaken by an authorised officer at certain Tesco’s stores in Dublin, Limerick, Ennis, Maynooth, Wexford town, Carrick on Shannon, Clane and Greystones.

Under the Act, the Agency has wide-ranging powers to tackle misleading practices and breaches of pricing legislation. The majority of such breaches are dealt with by the Agency issuing fixed payment notices (on-the-spot fines) or compliance notices on traders. The Agency has reported that in the year to date, it has served 34 fixed payment notices and 14 compliance notices on businesses across a variety of retail sectors.

The lesson for other retailers is that they should ensure their operations comply with consumer protection legislation otherwise they can expect a call from the Agency. There is no time to lose – review your operations today before it is too late!

‘America Invents Act’ enacted

Companies and inventors alike should note that US President Barack Obama recently signed into law the “*Leahy-Smith America Invents Act*”, also known as the “*America Invents Act*” (the “Act”) which makes huge changes to the current patent legislation in the USA.

Over the course of the next 18 months, the Act will substantially reform the US patent system. Most notably, under the Act, the US patent system will move from the “first to invent” system, to a “first to file” system, which is the more widely used patent registration system internationally. The “first to file” system means that when the US Patents and Trademarks Office are deciding whether an invention is novel or not, the state of the art will be considered at the time the patent is filed and *not* at the time the invention was created.

It is intended that the new system will reduce the heavy backlog of applications (currently in the region of 680,000). It is also hoped that the new system will encourage and stimulate innovation and reduce/prevent costly litigation regarding “patent trolling” which arises in the “first to invent” system. Under the new system, there will be a fast track option for patent processing for start-ups which aims to reduce the current average waiting time for patent applications of almost 3 years to 12 months.



New Consumer Rights Directive adopted

Irish businesses should note that, last month, a new Directive on Consumer Rights ("the Directive") was formally adopted by the European Union. The Directive will replace Directive 97/7/EC on the protection of consumers in respect of distance contracts and Directive 85/577/EEC to protect consumer in respect of contracts negotiated away from business premises. Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees as well as Directive 93/13/EEC on unfair terms in consumer contracts will remain in force.

The purpose of the Directive is to substantially strengthen consumer rights throughout Europe particularly when shopping online. When the Directive is published, Member States will have two years from the publication in the Official Journal to implement the Directive into national legislation.

Provisions of the Directive include the following:

- i. **Hidden charges and costs on the Internet will be eliminated** - consumers will be protected against "cost traps" on the Internet such as paying for "free" services (for example, horoscopes or recipes). Now, consumers must explicitly confirm that they understand that they have to pay a price.
- ii. **Increased price transparency** – traders will have to disclose the total cost of their products/services as well as any extra fees. Consumers will not have to pay charges or other costs if they were not properly informed before they placed an order.
- iii. **Banning pre-ticked boxes on websites**
- iv. **Extending the days within which a consumer can change their mind** – the period under which consumers can withdraw from a sales contract (for whatever reason) will be extended from 7 to 14 days, starting from the moment the goods are received as opposed (under the old legislation) to the conclusion of the sales contract. Extra protection is to be provided where there is a lack of information. If a business does not clearly inform the consumer about the withdrawal right, the return period will be extended to a year. The right of withdrawal will also be extended to online auctions (such as eBay) but goods bought in auctions can only be returned when purchased from a professional seller.
- v. **Introduction of an EU-wide model withdrawal form** – a model withdrawal form has been prepared which can be used by consumers (but they are not obliged to do so) if they wish to withdraw from a contract concluded at a distance or at the doorstep, thereby making it more accessible and faster for consumers to withdraw.
- vi. **Better refund rights** – refunds must be made within 14 days of withdrawal which includes the costs of delivery. Unless traders offer to collect the goods themselves, they may withhold the refund until they receive the goods or until the consumer has supplied evidence of having returned the goods, whichever is the earliest.
- vii. **Clearer information on who pays for returning goods** - if traders want consumers to bear the cost of returning goods after they change their mind, they have to clearly inform consumers about that beforehand, otherwise they have to pay for the return themselves.
- viii. **Eliminating surcharges for the use of credit cards and hotlines** – traders will not be able to charge consumers more for paying by credit card (or other means of payment) than what it actually costs them. Furthermore, traders that operate telephone hotlines will be unable to charge more than the basic telephone rate for telephone calls.
- ix. **Better information on digital products** – clearer information on digital content will have to be provided including compatibility with hardware and software and the application of any technical protection measures, for example limiting consumers' right to make copies of the content. Consumers will also have the right to withdraw from purchases of digital content up to the moment the downloading processes begins.

Nothing in the new Directive prevents traders from offering consumers contractual arrangements which go beyond the protection provided in the Directive. Watch this space for further updates.



Royalties Decision challenged

Retailers that play music in their stores should note the appeal to the Commercial Court of the recent decision of the Controller of Patents, Designs and Trade Marks (the "Controller") which reportedly could halve the royalties payable from next January.

The case arose from a complaint filed by a retailer in Wexford with the Controller. The retailer disputed a claim by Phonographic Performance (Ireland) Limited ("PPI") for royalties dating from 2005 to 2009. It claimed that PPI was wrong to invoice it for the years prior to 2009 claiming that it had not played music in its convenience shop at that time. The retailer also challenged an invoice seeking payment of €100.64 for royalties in 2009 and instead, paid €50.54.

PPI said that the invoice issued in 2009 related to an amount assessed in accordance with Tariff No. 7 relating to the Public Performance of Sound Recordings and Broadcasts as background music at retail premises, with an effective date from 1st January 2009. In relation to the invoices prior to 2009, PPI claimed that they reflected the tariffs effective at that time. It also claimed that €50.54 did not represent a fair payment.

The Controller found that the retailer had no liability to PPI for the years from 2005 up to 30th March 2009. The Controller also ordered PPI to adjust the structure of its Tariff No. 7 applicable to retail premises in the manner set out by the Controller. It was ordered that the new adjusted scale come into effect from 1st January 2012.

PPI appealed the decision which will be heard by the Commercial Court which is a division of the High Court. PPI claim that the Controller acted outside his powers under the provisions of the Copyright and Related Rights Act 2000 arguing that the Controller could only determine the complaint of the complainant retailer and not issues between PPI and other users of recordings falling under the scope of Tariff No. 7.

If the appeal is unsuccessful, it is reported that the new tariff rates ordered by the Controller will cut royalty payments by between 17% and 78%, with the total amount of royalties due from music played in retail stores nationally being reduced from €2 million in 2009 to about €1 million annually. Watch this space for further updates.

And Finally....

Maureen Daly, Partner and Head of Technology And Brands was a speaker at an intellectual property conference which took place in the Royal Marine Hotel, Dun Laoghaire, Co. Dublin on Thursday 27th October 2011. The conference was entitled "*Protecting your most important asset*".

In her talk, Maureen spoke on the importance of intellectual property rights for businesses and explained how they can protect these assets and maximise their potential by way of commercial exploitation.

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