



## TABS™ Update Technology And Brands

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### Whats Yours is Mine?

Companies that commission another to create software should take note of the recent English Court of Appeal judgment which highlights the importance of determining the ownership of intellectual property rights from the outset of a commercial relationship.

On 26<sup>th</sup> September 2005, Meridian Associates Limited (“MAL”) produced for GlaxoSmithKline (“GSK”) a paper setting out various proposals for the introduction of an integrated financial forecasting system called Project Vista. As part of the project, a computer software called StratX was created, the source code for which was written by Mr Aldersley. When MAL was wound up, the project was continued by Meridian International Limited (“MIL”).

On 9<sup>th</sup> January 2006, a meeting took place at which an oral agreement was reached whereby IP Enterprises Ltd (a company formed by two former employees of MAL, Mr Richardson and Mr Aldersley), Mr Richardson and Mr Aldersley would complete the work on Project Vista and StratX (“January Agreement”). Following this meeting, Mr Richardson sent an email to MIL which contained the terms that had been agreed as well as the statement, “*This is as I understand the situation as we agreed yesterday - if you do not agree please let me know, today*”. No reference was made in the email to intellectual property rights. MIL never replied to the email. There was no dispute that Mr Aldersley was the author of the software’s source code which had been written while he was working for IP Enterprises Ltd.

In High Court legal proceedings commenced on 20<sup>th</sup> March 2007, MIL claimed that it was an express or implied term of the January Agreement that the copyright in StratX should be assigned to it. This was dismissed by the court. The High Court held that MIL had not established its claim in relation to an alleged express term. On the issue of an implied term, the court stated that it must not go any further than what is necessary to make the contract work (namely, what is necessary for business efficacy). It therefore refused to imply a term into the contract that MIL was entitled to the copyright in the software. It stated that IP Enterprises Ltd was the owner of the copyright. This was appealed by MIL.

The Court of Appeal was only concerned with whether the High Court was correct to reject the contention that there was to be implied into the January Agreement for its business efficacy that (a) the source code and programme files for the software together with any documentation or other materials necessary to use, compile or maintain the software (including the databases created in connection with it) would be provided to MIL on demand or in any event at the end of the work; (b) the rights in confidence belonged to MIL; (c) copyright in those materials belonged to MIL and that legal title would be assigned to MIL. The Court of Appeal agreed with the judgment of the High Court and dismissed the appeal. The court said that it was difficult to see why Mr Richardson, Mr Aldersley and IP Enterprises Ltd would agree, on being asked by an officious bystander, that a term assigning copyright was intended.

This case highlights the importance when entering into software contracts to determine from the start precisely who retains ownership of the intellectual property rights in the software. Once it has been decided whether a licence or assignment is appropriate, this should be clearly provided for in the contract. Companies should seek legal advice in these cases because it is always better to be safe than sorry!



## Be Data Protection compliant or else!

The importance of companies ensuring that they have appropriate security measures in place was illustrated recently with the problems encountered by the on-line recruitment website, [www.jobs.ie](http://www.jobs.ie). When the website operator, Jobs.ie learnt that curriculum vitae of people who had availed of the company's online recruitment services were illegally accessed and downloaded by (unknown) persons, it contacted the Data Protection Commissioner who investigated the matter.

When it had fully investigated the incident, the Data Protection Commissioner found that the company had not taken adequate security steps to protect the personal data in its possession which is contrary to the Data Protection Acts 1988 and 2003 ("the Acts"). It was also found that Jobs.ie had retained personal data contrary to the requirements of the Acts. However, Jobs.ie was commended by the Data Protection Commissioner for how it dealt with the matter. On learning of the illegal access and download of curriculum vitae on its website, Jobs.ie immediately put in place additional security measures to minimise the potential for any repetition of the incident and on its own initiative, immediately contacted all persons who were affected by the illegal access. It also has taken on board all recommendations made by the Data Protection Office.

Companies controlling or processing personal data are legally obliged to take appropriate measures against unauthorised access to, alteration, disclosure or destruction of the data in particular where the processing involves the transmission of the data over a network, and against all other unlawful forms of processing. Companies are also required not to keep personal data for longer than is necessary for the purpose or purposes for which it was provided.

As reported in last month's TABS Update, in his annual report for 2007, whilst welcoming the increasing trend among companies to notify him of accidental disclosure, the Data Protection Commissioner stated that this is not a substitute for properly designed information systems that keep personal data secure from accidental disclosure.

The lesson for companies is that they should take their data protection compliance obligations very seriously. Failure to do so can have not only financial consequences but also damage a company's reputation, not to mention create a headache for its PR/Communications Team! Companies should review their operations today to ensure that they have the appropriate security procedures as well as clear data protection policies in place. The time to act is now – talk to your legal advisors today!

## On the Conference Circuit

Members of the Technology & Intellectual Property Unit attended the annual meeting of the European Communities Trade Mark Association ("ECTA") which took place in Killarney, Co. Kerry earlier this month. ECTA is an international organisation whose members from industry and private practice have an interest in trade marks, designs and related IP matters.

## And Finally....

Maureen Daly, Partner and Head of the Technology & Intellectual Property Unit has been nominated by her peers as one of the world's leading practitioners in the area of Internet & E-commerce for the independent guide, "*The International Who's Who of Business Lawyers*" (2008 edition) published by Who'sWhoLegal.

In addition, Maureen Daly was nominated by her peers for inclusion in the inaugural *Best Lawyers*® list for Ireland in the areas of Information Technology and Intellectual Property.

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