

Legal Update Corporate / Commercial

Commercial

Advertising during the 2012 Games

A new set of regulations, the London Olympic Games and Paralympic Games (Advertising and Trading) (England) Regulations 2011, came into force on 2 December. The regulations seek to control advertising and street trading in certain areas of London during the Olympic and Paralympic Games. The aim is to prevent ambush marketing, an advertising technique by which an organisation attempts to associate itself with a prestigious event (like the Olympics) without paying for the right to do so (as official sponsors would have done). Restrictions will be put in place from the day before an event to the last day of the event in the relevant area. The recent implementation of legislation specifically in relation to advertising in relation to the Olympic Games or any advertising in and around the areas where the Games are to be held highlights how serious the Government is taking the issue of ambush marketing. If you propose to undertake any form of advertising during the summer period which you are concerned may contravene the regulations in place in relation to such advertising, you should seek legal advice early, so that we can advise on what you should and should not do.

Commercial

Have you considered your use of cookies yet?

You may remember that earlier in 2011 we commented on the amended Privacy and Electronic Communications Regulations 2003 which came into force on 26 May 2011 with the aim of changing how website owners use and seek consent to use cookies on their websites. Alongside the amended regulations the Information Commissioner's Office (ICO) published guidance on the impact of the regulations and in that guidance stated that it would allow a lead-in period of 12 months for

website owners to achieve compliance in relation to cookies as set out in the regulations. The key change organisations are expected to make to comply with the regulations is to ensure that they receive express consent from users of their websites to their use of cookies (instead of relying on implied consent under the previous law).

The ICO has now published updated guidance mid-way through the 12 month lead-in period. The report sets out that the ICO is disappointed with the level of engagement by website owners so far and that when the ICO investigates complaints in respect of the use of cookies, website owners must be able to demonstrate that they are taking steps to achieve compliance and the timescale in which they expect to do so. Further practical advice is set out in the report, including, examples of how website owners could seek consent. If you do use cookies on your website and if you have not done so already, you should be undertaking a comprehensive review of how they are used on your site. You should also consider what information you provide to users in respect of cookies, how this information is portrayed and how consent from users is achieved.

Corporate

TUPE transfers before a buyer is found

In a recent Court of Appeal case (*Spaceright Europe Ltd v Baillavoine and another*) it was held that a dismissal of an employee could be "connected with the transfer" and accordingly fall under the provisions of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE), and therefore potentially be automatically unfair, despite the fact that the identity of a buyer was not known, or even contemplated. The court held that the dismissal of an employee by administrators was connected to the subsequent TUPE transfer. Further, it was held that the

administrators' desire to make the business more attractive to potential buyers did not amount to an 'economic, technical or organisational reason' for dismissal.

burden on a service provider to investigate every trade mark used on packaging that they deal with.

Intellectual Property

Is computer software protected by copyright?

The Advocate General (AG) of the European Court of Justice has, following a reference from the High Court, delivered an opinion on the scope of copyright protection for computer software under the Software Directive. The AG opined that the functionality of a computer program was not protected by the Directive. It was stated that if it was protected as such, it would amount to making it possible to protect and monopolise ideas which would only be detrimental to technological progress. The AG further stated that computer-programming language cannot be protected by copyright, as the language is the means which permits expression. The AG also considered the use of user manuals, however, stated that it was for the national courts to assess whether the reproduction of elements described in a manual could constitute infringement of the copyright in another manual if the elements which were reproduced were the expression of the author's own intellectual creation.

Intellectual Property

Infringement of third party trade marks by service providers

The European Court of Justice (ECJ) has ruled that a service provider who fills packaging supplied to it by a customer, in accordance with instructions from that customer, will not itself be making "use" of a potentially infringing trade mark pursuant to the provisions of the Trade Mark Directive. In practice, this means that where a trade mark that is used on packaging infringes a trade mark of a third party, the service provider will not fall foul of the Directive, provided that it is under order from and follows instructions of its customer. A service provider undertaking this type of services should usually seek to include a provision in its contract which will state that it will not be liable for any breach of a third party's intellectual property rights where it acts under order of its customer. This ruling highlights this point and reflects the fact that in practice it would place a disproportionate

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