

# OUT-LAW

**digital rights**

**web rules**

**round up**

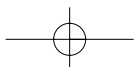
**defamation**

**domain piracy**



**M**

OUT-LAW.COM is the new media and e-commerce service of Masons





## WELCOME TO OUT-LAW...

This is OUT-LAW magazine, the quarterly offline counterpart of Mason's highly successful new economy legal portal, OUT-LAW.COM. Our purpose in creating the magazine is to offer an additional added-value service to our sophisticated and growing client base.

It marks a development of our mission to remain at the cutting edge in delivering customised new legal solutions to internet, telecom and wireless-based businesses on a global basis.

Uniquely, all our content is geared towards this specialist area with clients' particular needs very much at the forefront. In this issue we focus on Stelios Haji-loannou's EasyJet airline to highlight the legal issues involved in putting a service business online. Our Steve McQueen cover story is an analysis of the latest trends in protecting your digital rights while our third feature investigates the need for vigilance to avoid being sued for defamation on the web.

We hope that OUT-LAW will enhance your understanding of the key issues in the wired economy. We also hope that you will enjoy it.

*OUT-LAW.COM is the e-commerce and new media arm of Masons, an international legal practice with a long-standing interest in new media, IT and the Internet. The OUT-LAW site provides guides, articles and news stories relating to everything from the drawing up of on-line contracts and agreements to issues of taxation and defamation.*

### OUT-LAW.COM'S MOST WANTED ...

**If you would like to get in touch, please contact one of the principal members of the OUT-LAW.COM team listed below. You can e-mail us or if you prefer, you can reach us through your usual Masons contact or through [WWW.OUT-LAW.COM](http://WWW.OUT-LAW.COM)**

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PHOTO: COURTESY OF EASYJET



## On a wing and a prayer

**HAJI-IOANNOU HAS FOUGHT TO STOP OTHERS USING THE 'EASY' PREFIX AND BEATEN CYBER SQUATTERS WHO HAD TAKEN EASYJET.NET AND EASYJET.ORG. HE ALSO STOPPED THE USE OF EASYREALESTATE.CO.UK, PARTLY BECAUSE THE BACKGROUND ON THE SITE WAS BRIGHT ORANGE**

**Stelios** Haji-Ioannou inhabits that rare territory in the minds of British consumers, a successful businessman who is seen to be on their side. His airline, easyJet, has revolutionised travel and has just recorded ten million seat sales on line.

But study of the easyJet empire is much more interesting than simply a tale of triumph against the odds. Its growth goes hand in hand with embracing the Internet, and the company is a role model for all those contemplating e-business.

EasyJet states in its terms that it does not issue refunds, yet most businesses trading online are supposed to give consumers a seven-day "cooling off" period. EasyJet benefits from an exemption for sales of transport services where the dates of travel are agreed.

The first page of the easyJet.com site directs you to "important notes" which explain charges and link to the "conditions of contract." Even if you ignore these links when entering credit card details you are forced to confront them later in the process. If an e-commerce site doesn't ensure its conditions cannot be missed by the user, it will have difficulty relying on them in a dispute.

Whenever you enter personal details to a web site, even just your e-mail address, you should see the site's privacy policy or data protection notice. The best practice is to display this in a way that the user can't possibly miss – for example, in a pop-up box. The home page of easyJet.com has a link to the privacy policy – which is the minimum any website should offer.

Haji-Ioannou has fought to stop others using the "easy" prefix and won legal action against cybersquatters who had taken easyjet.net and easyjet.org. It also stopped the use of easyRealestate.co.uk, partly because the site's background was bright orange.

However, it doesn't have an "easy" monopoly. The owner of easyJet.com successfully argued that he wanted the domain name to sell ink jet printer cartridges online, although it has never launched.



### OUT-LAW SILVER BULLETS

**Building business online can mean higher growth  
Play it by the book – it could prevent disputes  
Protect your brand from misuse at all costs**



PHOTO: HULTON GETTY ARCHIVE



# Graven images

Film stars are obsessed with how they appear onscreen - but you should be too

**When** you attempt suicide, the last thing you normally worry about is what happens after you've gone. However, Geoff Peck's life has become something of a cause célèbre since his attempt six years ago to take his own life.

When Mr Peck decided to speed his own journey off this mortal coil back in 1995, he elected to do so in spectacular fashion. He went into the centre of Brentwood in Essex and set about himself with a kitchen knife.

The highly public nature of his suicide attempt proved to be his undoing, since it was caught on CCTV cameras. They were able to rush medical assistance to him, which saved his life.

What makes the incident so interesting, however, is that the council then released its footage, both to the local paper and to national TV. Mr Peck was outraged and is now taking his case to the European Court of Human Rights. When the decision is announced, it will reveal just how far the right of privacy extends in this televisual digital age.

Never before has information been so freely available and its flow so unregulated. The Internet has emerged as a knowledge and information free-for-all; new techniques mean that pictures and the human voice can be electronically deconstructed and recreated as never before. The law is attempting to bring some order to this chaos, but it is inevitably a piecemeal process, following events rather than leading them.

As invasion of privacy becomes easier, so rules to allow its protection

## **IN THE US IDENTITY IS ACTUALLY RECOGNISED AS A COMMERCIAL COMMODITY, AND THE COMMERCIAL RIGHTS OF CELEBRITIES ARE PROTECTED IN THEIR IMAGE**

are progressively being tightened. In England, for instance, the Court of Appeal has already determined that celebrities have a right to privacy.

When the actor Michael Douglas married Catherine Zeta-Jones, they forged an exclusive picture deal with *OK!* magazine. However, photographs taken secretly at the wedding were sold to the rival *Hello* magazine. The pair sued Hello.

In the US identity is actually recognised as a commercial commodity, and the commercial rights of celebrities are protected in their image. This amounts to a right of personality, making it unlikely that the *OK!/Hello* problem would have arisen there.

One incident which did arise in the US involving the privacy of stars was the recent case of the actors George Wendt and John Ratzenberger – Norm and Cliff from the TV series *Cheers* – who were in dispute over their privacy rights.

A company, operating under licence from *Cheers'* studio company Paramount, set up airport theme bars using robots with a striking similarity to the two characters. The actors sued arguing that the robots violated their rights. The parties reached a settlement, but unfortunately the terms were not disclosed so the legal point remains unresolved.

These individual incidents may not have directly involved the Internet, but there is no doubt that the web is becoming increasingly relevant to privacy campaigners. In the UK rights are protected in the Human Rights Act and also in the Data Protection Act, and any website which collects and stores information about its users has to register with the office of the Information Commissioner.

In the US, legislation is less rigorous: websites are not as heavily regulated, and – with the exception of financial sites and those intended for children – are not required by law to have a privacy policy. In general, your details can be used in any way the site operator chooses.

Domain names are also a matter of contention – several stars have sought actions against cybersquatters seeking to buy up the rights to their names. The courts have started to take a tough line on this.

As the use of the net and of new digital techniques expands, we can expect more issues involving privacy to come before the courts. Electronic manipulation of voice and images, for instance, is likely to become more contentious as techniques improve and deliberately altered impressions become more lifelike.

The latest computer software makes it possible, for instance, to reproduce particular accents – and even the sound of individual voices – by electronic synthesis. In theory, if you wanted the voice of the Queen or Sean Connery on your advert, then it would be perfectly possible to electronically replicate it.

Whether it would be legal is quite another matter. The Edinburgh-based company Rhetorical Systems is developing voice synthesis software for markets such as telecoms, e-mails and traffic information. Chief executive Marc Moens says his company does not use celebrity voices, and only has the rights to use the recording of a voice it has taken, not that voice itself. "We do not, however, say that any of our voices sound like someone else,"

"If you wanted to create the voice of, say, someone like Sean Connery, then you would have to have the legal agreement of Connery himself to do it. You would certainly think twice about doing that sort of thing."

Rhetorical Systems has, he says, never created a personality's voice. "If we were to, then the customer would have to ensure they had the legal permission of the person concerned, and we would want to see that permission."

What else might we see in the future? MGM has sold the rights of *The Great Escape* to a gaming company, but while the image of Steve McQueen as he appears in the movie can be manipulated, his face can't be altered.

It's possible that we will soon be able to create digital versions of McQueen, allowing him once again to star in blockbuster films. Whether the courts will allow this to happen is, however, another matter.



### **OUT-LAW SILVER BULLETS**

**New technology can compromise your privacy  
Protect your digital rights as well as human rights  
Be aware of how your rights are used**



PHOTO: HULTON GETTY ARCHIVE



## Careless talk **costs money**

Liberace was famously crying all the way to the bank when he won a celebrated libel case to protect his private life. It's more of a song and dance in the Internet age



The Internet may have turned the world of communication on its head, but has also brought with it unexpected legal side effects. The rigorous rules that preserve individuals' reputation from defamation in the courts around the world often have to be reworked when translated on to the web.

The story of E-silkroad, a recently launched company providing e-commerce development services, and its attempts to preserve its good name from cyber hate mail is a case in point. As the company struggled to establish itself directors were alarmed to find that IceRed.com, a Hong Kong-based bulletin board, was carrying messages that were less than complimentary about them and their associates.

IceRed.com contains discussion boards on which anyone can post messages. Users, who do not need to register with the site and invariably use pseudonyms, simply choose the desired thread of discussion, type their message, and it immediately appears on the relevant page. Those who feel they have been defamed by messages on the site have no way of knowing who initiated the message unless they are given information by the site's operators.

With the help of OUT-LAW.COM's Peter Bullock, E-silkroad has won a court order requiring IceRed.com to disclose the Internet Protocol (IP) addresses of those users who sent the messages. With this information, E-silkroad hopes to identify those responsible. E-silkroad is also seeking damages for libel. The case continues.

#### Internet defamation in the UK

In a similar case, Totalise, the UK-based internet service provider (ISP), earlier this year won an order from the English High Court requiring financial news web sites Motley Fool and Interactive Investor International to disclose the identity of a person who posted defamatory material to their discussion boards using the name "Zeddust".

Both Motley Fool and Interactive Investor refused the request from Totalise for the true identity of Zeddust, so Totalise took them to court. The court decided that the websites could not rely on the same rule that newspapers can rely upon to protect their sources. The judge pointed out that neither Motley Fool nor Interactive Investor took responsibility for what was posted on their discussion boards nor exercised editorial control. The judge also believed that, in any event, disclosure was necessary "in the interests of justice."

These two instances offer snapshots of the new world order in e-commerce law. The issues raise a number of questions.

#### What is defamation?

If you make a disparaging statement about another person that is communicated or published, it can be a defamatory statement. In English law, defamation is split into libel and slander. Generally, slander is when a defamatory statement has been made orally without justification; libelous statements are those that are recorded in some way, possibly by e-mail or on bulletin boards. In Scotland, the distinction between libel and slander is not important. In the event of Internet defamation, the person taking offence can sue the person responsible for the comment, unless it is true or comment on a matter of public interest. There are other defences.

#### Can an internet service provider be sued for defamation?

Yes, if it doesn't act immediately when warned that one of the sites it is hosting contains defamatory comments.

The first UK case of Internet defamation concerned an action brought against Demon, the ISP owned by Thus. A person purporting to be the academic, Dr Laurence Godfrey, made a defamatory posting to a message board which appeared on Demon's news server in the UK. Dr Godfrey told Demon that the posting was defamatory and false and asked the company to remove it. Demon did not do so immediately. Dr Godfrey sued and won his case because Demon had failed to act promptly. A delay of just ten days proved fatal to Demon's defence

#### Can ISPs defend themselves?

Demon demonstrated the flipside of the legal process recently by successfully challenging a High Court injunction protecting the new identities of the Bulger killers. Demon argued that it would be unjust for any ISP to be held liable for disclosing the new identities of Jon Venables or Robert Thompson in circumstances where they were unable to prevent such disclosure.

It was argued that the original injunction was not appropriate to an ISP and alterations to the injunction were agreed between Demon and the lawyers acting for Venables and Thompson. So long as an ISP "takes all reasonable steps" to prevent publication of the prohibited material and, upon becoming aware of such material, removes it immediately from the site then there will be no breach of the injunction by that ISP.

This ruling is in line with the principles established in the EU E-Commerce Directive, which will come into force in by January 17, 2002, and recognises that ISPs should be treated as mere conduits and should not be liable for third party material on their systems.

#### What should ISPs do?

1. Check the terms of agreement between themselves and their subscribers, to ensure that they have the right to remove unlawful and/or defamatory material;
2. Act quickly once a complaint is received BUT remember that the material only needs to be removed if it is unlawful and/or defamatory;
3. If in doubt remove any potentially unlawful and/or defamatory material or seek legal advice;
4. Remember that the law does not require ISPs to monitor its subscribers' sites – it would not be in the interests of ISPs to do so, as they would then run the risk of being treated as a 'publisher' by virtue of their editorial function.

#### What should employers do?

An employer is generally liable for the actions of its employees which they make while carrying out their employment. To protect themselves, employers should draw up an e-mail policy setting out the limits of e-mail and internet access. Employers can also take out internet protector policies which cover defamation by employees using e-mail and other risks such as downloading viruses.



#### OUT-LAW SILVER BULLETS

**Make sure your employees understand the issues  
Put a policy in place  
Make sure you enforce your policy consistently**



PHOTO: PHOTONICA

## ROUND UP: THE BEST OF OUT-LAW.COM

### Data retention rights for Member States

The Council of the EU has agreed to a proposal which would allow individual Member States to introduce their own laws to force internet service providers and telcos to store traffic data for the benefit of law enforcement agencies. However, the proposal is strongly opposed by the European Commission, meaning it is unlikely to succeed in the European Parliament. There have been many misleading reports in the media on data retention. Contrary to what has sometimes been reported, the EU is not calling for all Internet service provider data to be stored for seven years.

### Cybercrime Convention

The Council of Europe (not to be confused with the European Union) has agreed the form of a Convention on Cybercrime which aims to harmonise laws on hacking, piracy, on-line fraud and child pornography. Some non-European countries were also involved in drafting it, so Council members are hopeful that the US, Japan and others will sign it. Countries that decide to abide by it will have to implement its provisions in their domestic laws. This is expected over the course of the next two years.

### Grey import plans anger games industry

The games industry in the UK has been outraged by plans announced by the Secretary of State for Trade and Industry to lobby for reform of trade-mark law and the legalisation of grey trading. Grey trading is the term given to the way in which the pricing and availability of goods in different markets can be exploited by importers. Its legalisation could seriously threaten both games developers and publishers in the UK because games could be legally imported before their official release in the UK.

### Appeal overturns Microsoft break-up

The US Court of Appeals for the District of Columbia has overturned a lower court's order that Microsoft should be split into two separate companies for violations of US antitrust law. However, the seven judge panel unanimously upheld the finding that Microsoft was a monopoly that acted illegally in trying to maintain its dominance in PC operating systems. The case will be referred to another judge in the lower court who must now find an alternative penalty for Microsoft's actions. Chairman Bill Gates has said he is now hoping to settle the case with the Department of Justice.

### French group tries to ban racist website

International Action for Justice, a French anti-racist group, has asked a Paris court for an order to block access by French nationals to Front14.org, a US web site that includes neo-Nazi and racist statements. Incitement of racial hatred is against French law. The action follows a successful case in Paris against Yahoo! in which the portal was ordered to block access to auctions hosted on its US site yahoo.com that sold Nazi memorabilia. Instead of complying with the court's order to introduce filtering software that would detect access by French nationals, Yahoo! removed all offending auctions. However, Yahoo! is hoping for a declaration by a US court that the French court has no jurisdiction over its US web site. The US court's decision is awaited.

### Freeserve wins hyperlink case

In a case against Freeserve, the ISP won a dispute brought by the operators of a web site to which Freeserve had agreed to link. Freeserve argued that it was justified in removing the link because the site was substandard.

### ICANN hits out at unofficial domain names

ICANN, the technical co-ordination body of the internet, has publicly criticised businesses that sell unofficial domain names. ICANN recently authorised seven new domain names, the first new generic top level domain names to be authorised in over a decade. The new ".biz" and ".info" extensions are soon expected to go into operation. However, companies such as New.Net are selling competing domains, such as ".shop", ".xxx" and ".kids" in competition to the ICANN names. The unofficial names are not accessible from all web browsers unless users download a piece of software from the sellers.

### 78% of US companies monitor web use

Nearly 80% of major US companies monitor their employees by checking their e-mail, internet, or telephone connections or by videotaping them at work, according to a recent survey. The statistics are far higher than in the UK. Any business monitoring employees should have a suitable Internet and e-mail policy in place. Such a policy can be downloaded free from OUT-LAW.COM.

