

OUT-LAW

e-commerce directive

encryption

round up

data protection

funding



M

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



WELCOME TO OUT-LAW...

Welcome to the second issue of OUT-LAW magazine, the quarterly offline counterpart of Masons' highly successful new economy legal portal, OUT-LAW.COM.

First, we'd like to thank readers for the positive feedback we received on the launch issue.

In the current edition we focus on how the new European Union legislation concerning disclosure of information on web sites will affect your company's own on-line presence. We tell you how to comply.

The box-office success of the new blockbuster movie *Enigma* provides a timely opportunity for us to examine encryption. Given recent global events, encryption is under close scrutiny. We help you ensure that your company is aware of the issues and we provide an action plan to take these points further.

Our profile features Danny Ruta, founder of Mindwarp Pavilion, who sought specialist advice from OUT-LAW.COM when setting up his innovative mind-mapping company.

We hope you will enjoy the latest issue of OUT-LAW and that you keep sending us your feedback.

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

LONDON

jon.fell@out-law.com
russell.booker@out-law.com

SCOTLAND

john.salmon@out-law.com
derek.stroud@out-law.com

LEEDS

paul.sanderson@out-law.com
luan.kane@out-law.com

MANCHESTER

rosemary.jay@out-law.com

BRISTOL

jon.fell@out-law.com

HONG KONG

peter.bullock@out-law.com

DUBLIN

eamonn.conlon@out-law.com

GUANGZHOU

david.cox@out-law.com

SINGAPORE

mark.tiggeman@out-law.com

BRUSSELS

barbara.linehan@out-law.com



LAST YEAR POP MUSIC IDOL BRITNEY SPEARS FINISHED THE YEAR NUMBER ONE ON THE LIST OF MOST SEARCHED FOR PEOPLE, PLACES OR THINGS AMONG THE USERS OF SEARCH ENGINE LYCOS, TROUNCING FELLOW CELEBRITIES PAMELA ANDERSON AND JENNIFER LOPEZ.

Name, rank and number

New laws are due to come into force in the UK by 17th January 2002 which apply to the web sites of every business. This is the date by which all Member States of the EU must accommodate the provisions of the E-commerce Directive in their domestic laws. The UK Government is now working on the necessary steps. So what changes are required on your web site?

Contact Us

The directive requires that certain information which explains who you are must be displayed on your site. Many sites already provide some of this - but possibly not all of it. Some additions may be needed in your site. Here's what you need to include:

- The name of your business - not just the brand name
- Your contact e-mail address - not just a "contact us" form
- Your geographical address
- Your company registration number or equivalent trade or public register number

About Us

If your profession is a regulated profession, such as an accountancy firm, you must name your regulating body and link to its rules.

Check Out

If your site involves selling on-line, the terms of contract must be available on the site. It is not enough to display these in a pop-up window; the customer must be able to store them - so a full page would make more sense, which the customer can print or save.

Although outside the scope of the directive, there are many ways of incorporating the terms of contract. A safe way of doing this is to make viewing the terms unavoidable in the ordering process. You can do this by displaying them before the order is completed in such a way that the user must click acceptance of the terms before he can complete his order - making it hard for him to later argue that he didn't know about the conditions. Pricing must also be clear and unambiguous. If a sale

is subject to VAT, you must say so and include your VAT number. You must also state whether delivery costs are included, and if they are not, what they are.

B2C sales

If selling to consumers, you must explain the steps necessary to conclude the contract, for example explain the point at which the consumer cannot change his mind; what needs to be done to identify and correct input errors before placing the order, for example click a "Clear Form" button; and whether the contract is "filed" and whether the consumer can subsequently access the contract - for example, do you have a "Manage My Account" area on your site? You must also include a link to any codes of conduct to which your business is subject - for example if you sell .co.uk domain names, you are subject to the rules of Nominet, the .uk registry, so you should link to the rules on Nominet's site.

Any order placed on your site must be acknowledged without delay, but think carefully about the wording of automated responses. If the response is an acceptance of the customer's order, a binding contract will be created. This can backfire for you if you cannot fulfil the contract or have incorrectly priced the goods.

B2B sales

If dealing with other businesses only, you can escape the above requirements for consumer sales by dealing with all issues in your terms and conditions. So your terms and conditions should cover the extent - if any - to which such information is to be provided and the way in which the contract will be formed.

Conclusion

The e-commerce directive will require only slight amendment of content for many companies. But this may be the time to take a look at the other laws affecting your site. For instance, do you comply with the Data Protection Act and the Distance Selling Regulations? If you would like OUT-LAW.COM to carry out a legal audit of your site, please e-mail our editor, Struan.Robertson@out-law.com for details of how we can help.



OUT-LAW SILVER BULLETS

The new rules should be in UK law before January 17, 2002. All business web sites are affected, so check that yours complies.

PHOTO: HULTON GETTY ARCHIVE

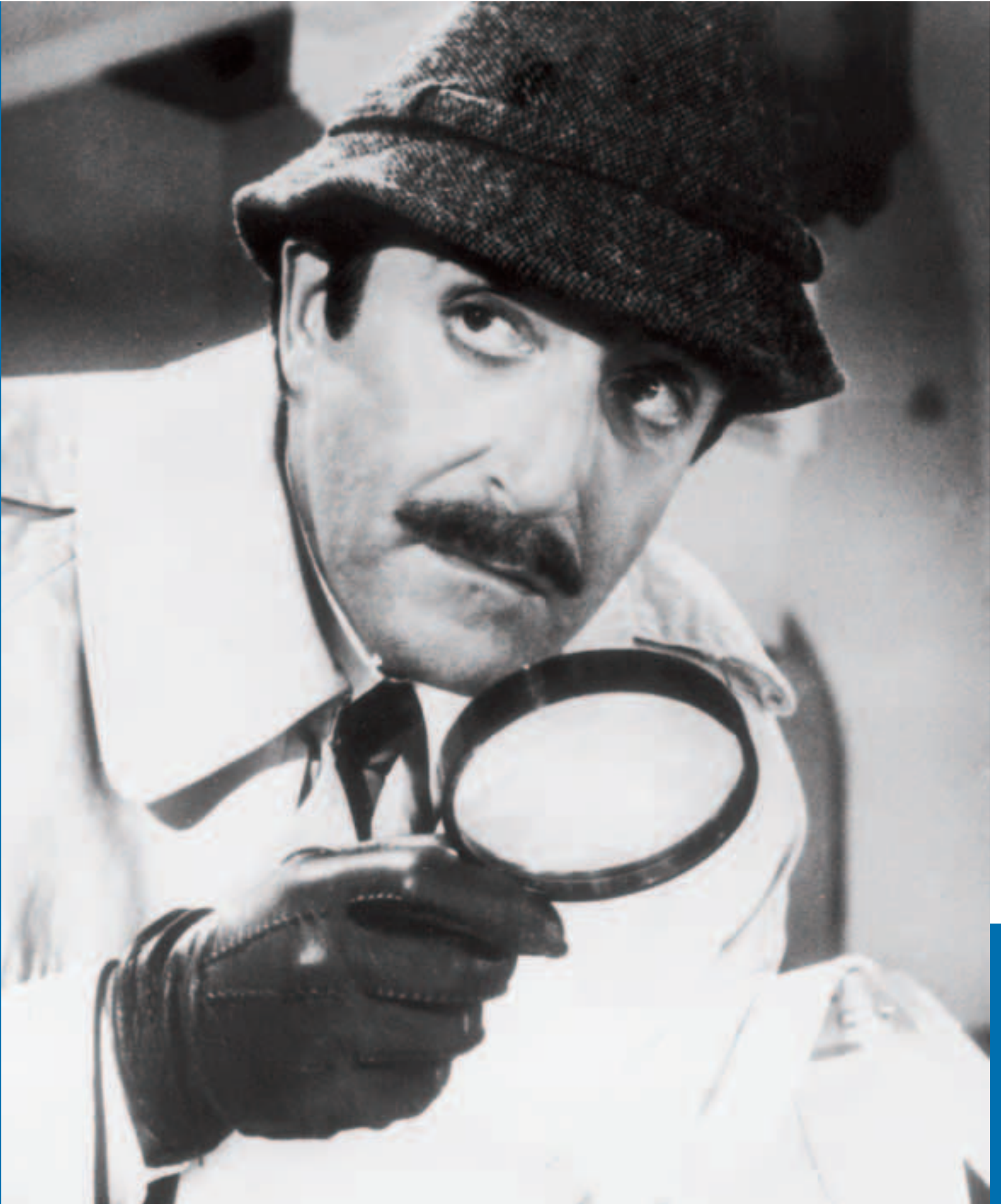
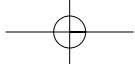
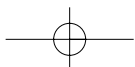


PHOTO: HULTON GETTY ARCHIVE



The Cryptography Enigma

Cryptography is all about information security, a services market which was last year valued at \$6.7 billion by industry analysts IDC. Within four years, IDC forecasts that this figure will rise to \$21 billion as businesses attach increasing importance to information security services.

The criminal element

The security offered by cryptography can be vital for businesses that demand confidentiality in their information access or exchange. The Data Protection Act requires all businesses holding data about individuals to take "appropriate technical and organisational measures" against unauthorised access to, and use of, that data. The act doesn't specify cryptography, but industry practice may expect a certain level of security to comply with this.

However, cryptography makes governments nervous because the technology can be used by terrorists to communicate without detection. Accordingly, governments have put restrictions on the use of, and trade in, encryption product. Indeed following the recent attacks in the US, even tighter restrictions have been proposed.

What is the relevant law?

The EU passed a Directive on Electronic Signatures (a term which is broader than just digital signatures) which should have been fully implemented in member states by July 19. In fact, Member States are taking different approaches to the directive. Britain has implemented the part of the directive which provides that electronic signatures will be effective and admissible as evidence in courts and in most cases will have the same effect as manual signatures. The directive also sets out the requirements for electronic signature certificates and certification services, to ensure minimum levels of security for so-called advanced signatures and allow their free movement throughout the internal market.

Encryption is addressed by the Regulation of Investigatory Powers Act in Britain – a law which allows for the issue of a warrant to intercept the communications of an individual or company. If, in doing so, a law enforcement agency intercepts an e-mail that is unreadable because it is protected by encryption, the agency can demand an intelligible copy of the e-mail (or any encrypted file) and a copy of the key itself. Failure to comply is an imprisonable offence. The presumption is that if you can be shown to have had the key in your possession then you will be deemed still to have the key or access to it. It may be difficult to prove otherwise.

There were also concerns that the UK government was considering a proposal that would require every owner of a key to give a copy of that key to a trusted third party – known as "key escrow". The rationale behind this was that it would give law enforcement easy access to intercepted encrypted messages. Against this argument is a consequent compromise of

CRYPTOGRAPHY MAKES GOVERNMENTS NERVOUS BECAUSE THE TECHNOLOGY CAN BE USED BY TERRORISTS TO COMMUNICATE WITHOUT DETECTION.

security when the encryption is being used legitimately. Also, criminals are unlikely to comply – they will simply use non-compliant encryption products. Fortunately, it now seems that the government will not be going ahead with this proposal.

The terrorist attacks in the US have renewed the interest of lawmakers on both sides of the Atlantic in clamping down on cryptography, but the risk to business in banning strong encryption would be enormous, and criminals would find the products they need elsewhere.

What should you do?

Consider the information your business holds or exchanges electronically. Next consider the risk to your business if that information were to be accessed by unauthorised individuals. This could be direct, such as the loss of your trade secrets, or indirect, like the threat of legal action if you compromise a client's confidential information.

If the risk is significant, you could consider cryptography in some form. Inexpensive and easy to use digital signature services which can encrypt your e-mail communications are widely available. But, you must balance this against the practicality: encrypting your e-mail also puts requirements on the recipient to have compatible software and understanding.

What is cryptography?

Cryptography has many forms, the best known being encryption, which is the use of an algorithm to encode or encrypt data so that only the intended recipient, using a special key, can decrypt and understand the data. A message encrypted with state of the art software is virtually impossible to decode without the key. However, cryptography is not just about keeping information secret; it's also used for authentication, so that, for instance, a company's extranet has stronger protection than just the usual username and password, or so that individuals in that company can sign their e-mails with digital signatures.

What is a digital signature?

It's an electronic signature that authenticates the identity of the sender of a message. It can be used also to ensure that the content of a sent message is unchanged. If a digital signature is used, it is still possible for the recipient to see the message in plain text.

What is a digital certificate?

It is an electronic document issued by a certification authority (CA) and usually contains your name, a serial number, an expiration date and a copy of your public key

(which anyone can use to encrypt messages to send to you – you then open the messages with your private key) and the digital signature of the CA. Use of a CA when doing business on-line allows anyone to check that you are who you say you are.

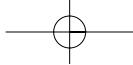
What is Public Key Infrastructure (PKI)?

A PKI can be used by a company to securely and privately exchange data and money. It involves a digital certificate being issued that can identify an individual or company – but also offers directory services that can store, allocate and revoke certificates as and when necessary. There are several vendors of business PKI solutions – see e.g. RSA.com, Baltimore.com or VeriSign.com.

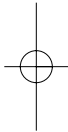
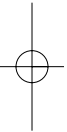


OUT-LAW SILVER BULLETS

Consider the existing risk to your information based on the security you have in place. Decide if cryptography would benefit your business.

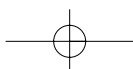


PHOTOS: ALAN RICHARDSON PHOTOGRAPHY



Let's do the **Mindwarp** again...

A Start-up Case Study





In 1984, Danny Ruta was a student struggling to learn medicine from several heavy textbooks. "I found it hard to remember what I was reading. At first I thought it was a problem with me," reflects Ruta, "but then I discovered that the average person forgets 80% of what he reads within 24 hours." This was when Ruta discovered Mind Maps.

Mind Maps were the invention of education enthusiast Tony Buzan back in the late 1960s. These maps are a means of helping students remember large quantities of information using only key words and images. Ruta began designing Mind Maps on his computer but, finding this time consuming, suggested to publishers that textbooks should be sold with their own Mind Maps. Publishers observed that this was not viable because few students had computers - but this was in 1984.

Ruta has since left his medical career behind to co-found The Mindwarp Pavilion, based in Dundee, with IT colleague Gary Leaver. The company designs, publishes and sells on-line Mind Maps for some of the best selling text books in medicine, business management, marketing and other subjects. Mindwarp's target markets are the 12 million undergraduates in the US and 1.4 million in the UK, almost all of whom now have computer access.

Ruta came to John Salmon, a partner with Masons, the law firm behind OUT-LAW.COM: "John helped me identify and deal with the legal issues in what we were doing and helped advise on how to structure the business going forward." Salmon's team helped structure the company and put together all the necessary legal agreements, taking equity in the company in lieu of part of the legal fees.

Salmon helped Ruta secure business angel funding. Salmon observes:

"There are many other potential sources of funding, such as venture capital, debt financing and IPO. However, whatever type of funding is sought, we would suggest that the business deals with some key issues":

- Has a business plan been prepared? All potential investors will require to see a comprehensive and sound business plan.
- Will any confidential information be disclosed during negotiations? If so, has a confidentiality agreement been put in place?
- Does the business have rights to the intellectual property? For example, should it consider applying for patent and/or trade mark rights and if so, in which countries? Does it have necessary third party consents or licences?
- Have the key suppliers been identified and have they entered into agreements with the business?
- What is the structure of the business? E.g. if it's to be a private limited company, has it been decided how equity will be divided among owners, directors, investors and possibly employees?
- Are there employment agreements in place with the key employees?

The Mindwarp Pavilion is about to enter into its second round of funding. It is seeking an additional £2.5 million from venture capital houses before the end of the year. Ruta admits that in the current economic climate, it won't be easy. But he adds, "we have total confidence in our product, confidence we were able to justify in the first round to some of Scotland's most experienced investors. We're positive we'll do it again for round two - and take our business into profit."

John Salmon can be contacted at John.Salmon@out-law.com.



DANNY RUTA, CEO, THE MINDWARP PAVILION LTD.



OUT-LAW SILVER BULLETS

Get legal advisers involved from the start. They can help you prepare your business plan and structure your business according to your goals.



PHOTO: PHOTONICA

ROUND UP: THE BEST OF OUT-LAW.COM

Too late to panic!

From October 24, the Data Protection Act 1998 applies to all organisations which process personal data – just about any business in the country. The new Act potentially covers most records going back for a hundred years. Individuals are given greatly enhanced subject access rights. The very keeping of records has fundamentally changed – organisations now require legal justification for maintaining any personal records.

For any organisation a key step to successful operation under the Act is to give individuals a notice at the time when their personal data are collected, telling them exactly what information the organisation is going to hold, what it is going to do with the information and why, and also whether it will disclose the information to anyone else, and what such third parties might do with it.

The Act divides organisations which use personal data into data controllers and data processors. Data controllers feel the full force of the Act; data processors are not directly affected. Nevertheless the Act requires data controllers to impose on their data processors contractual obligations to keep the personal data safe and secure, and ensuring that the data controller controls what the processor can do with the data. They must also extract a security guarantee, and check that the activities of their data processors are in accordance with the contract, perhaps by undertaking an audit. See OUT-LAW.COM for more information.

Typosquatter challenged for 5,500 domain names

A US individual, John Zuccarini, has been charged by the Federal Trade Commission with violating federal laws for using more than 5,500 domain names to divert internet users from their intended destinations to one of his own sites.

Cybersquatting is normally taken to mean the bad faith registration and use of a domain name.

Typosquatting is a form of this that relies on a web user making a "typo" when entering an address in his or her browser. Zuccarini registered the domain names which were misspellings of legitimate domain names for popular sites. He registered 41 variations on the name of pop star Britney Spears. Surfers looking for a site who misspell its address or invert a term are taken to Zuccarini's sites. They are then bombarded with a rapid series of windows displaying ads for goods and services ranging from internet gambling to pornography.

Few British e-tailers comply with distance selling rules

According to the National Consumer Council, on-line retailers in Britain are breaching e-commerce laws. Few UK sites were found to comply with the Distance Selling Regulations which came into force last year. They give consumers who buy goods and services by mail order, over the internet or by telephone, key basic rights to prior information, written confirmation, a seven-day cooling off period and delivery of goods within 30 days. According to the results of a survey carried out by the NCC, only 17% of British sites met legal requirements and informed customers of their rights to cancel within a few days of delivery (compared to 39% in the EU overall).

Hacker changes Yahoo! story

A news story on Yahoo!'s site was altered by a hacker who exploited a security loophole in the portal. 20-year-old Adrian Lamo changed a Yahoo! story about Russian programmer Dmitry Sklyarov to read that Sklyarov was facing the death penalty for his alleged breach of US copyright laws. Yahoo! says it has now taken steps that block unauthorised access. Lamo had used scanning software to obtain the URL of one of Yahoo!'s open proxy servers. He then configured his browser to connect to the proxy and entered Yahoo!'s news authoring facility without having to enter a password, by posing as an employee of the company.

Still no decision in Europe on spam law

The European Parliament has failed to reach a decision on a proposal for a directive that included provisions for the possibility of banning of unsolicited commercial e-mail, better known as spam. The draft legislation would have banned all sending of spam unless consumers consented to receive it. This opt-in approach was opposed by some individual member states, including Britain, which argued that consumers should specify if they do not want to receive spam, this being the opt-out approach. Despite voting to support the opt-in approach, the Parliament voted to reject the legislation as a whole. The proposals will now be sent back to a committee for a re-drafting.

New .info and .biz domain names

Domain names ending .info are now live on the internet and can be bought like any other name. Those ending .biz were due for launch on October 23. However, NeuLevel, the organisation responsible for the .biz domain name registry, is also facing legal action over a claim that it is running an illegal lottery. The claim is the result of the rules adopted by NeuLevel for advance allocation of .biz names to those with trade marks in potential domain names.

