

# OUT-LAW

net nazis

dvd hacker

wireless games

round-up

asp help





## FROM THE EDITOR...

One of the issues we look at in this third edition of OUT-LAW Magazine is how best to deal with application service providers, or ASPs.

ASPs have struggled to live up to the hype which has long surrounded them. In January, USi filed for bankruptcy protection. As the world's best known ASP (it recently boasted monthly revenues in excess of \$10 million), the news came as another blow to the industry.

However, there is still an expectation of success. Microsoft recently embraced the ASP model with its .NET strategy; and Xevo, regarded as a leading ASP infrastructure pureplay, has just secured \$20 million in funding. Further, the industry could actually benefit from the general tightening of IT budgets because the ASP model can reduce the costs of software licence fees and may provide free upgrades. If you're tempted to use an ASP, check out our Top 10 Tips.

Struan Robertson, Site Editor, OUT-LAW.COM  
struan.robertson@out-law.com

*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

## You are invited to a free breakfast with OUT-LAW.COM



OUT-LAW.COM is holding a series of free breakfast briefings in London and Glasgow to discuss two new European laws affecting e-businesses. These will explain what a UK business needs to know about the Directive on Electronic Signatures and the E-commerce Directive. The breakfast seminars will be as follows:

London, Thursday 28 February:  
The Directive on Electronic Signatures

London, Thursday 14 March:  
The E-commerce Directive

Glasgow, Thursday 7 March:  
The Directive on Electronic Signatures

Glasgow, Thursday 21 March:  
The E-commerce Directive

The events are expected to provide a lively and informative couple of hours with valuable feedback by industry experts.

A full agenda is available at [www.out-law.com](http://www.out-law.com). To book your place, or if you have any questions, please contact Alex Morley on [alexandra.morley@out-law.com](mailto:alexandra.morley@out-law.com) or 020 7490 6252.





# Net Nazis

**Yahoo!** recently won a ruling in a US court which said that, in effect, it could ignore an earlier decision by a French court that ordered it to make changes to its web site. The original action against the US-based portal had been brought in Paris by anti-racism groups which were concerned that Yahoo!'s US site was breaking French law. Those anti-racism groups are now planning an appeal. The significance of the case is that it could reshape the laws of internet jurisdiction – where a business can sue and be sued.

The problem began with Yahoo! auctions which allow users to sell whatever they want online. Among the items for sale were pieces of Nazi memorabilia such as badges, flags and uniforms. This is legal under US law. French law, however, forbids the exhibition of Nazi propaganda and artefacts for sale. Accordingly, Yahoo! forbade the auctions on its equivalent French site at yahoo.fr, nonetheless French internet users could access the US site at yahoo.com.

The League Against Racism and Anti-Semitism and The Union of Jewish Students successfully sued the US company in Paris. Yahoo! was given until February last year to put measures in place that would block access by French users who were to be recognised by their IP addresses, their use of certain keywords, or their self-identification of geographic region. It wouldn't be a full-proof filter, but it would likely have blocked most French users. The penalty for failure to implement these measures was to be a daily fine of almost £10,000.

It may be no coincidence that Yahoo! announced last year that it was introducing a new policy to ban the sale of "items associated with hate groups". According to the company, however, the move was based on moral grounds, not legal grounds, and its battle with the French groups continued. At the time of writing, Yahoo!'s self-imposed ban is ineffective.

Yahoo! did not appeal the decision of the Paris judge to a higher French court. Instead, it asked a US Federal Court in San Jose, California, to declare that France has no jurisdiction over Yahoo! in the US and therefore could not enforce its order. The US court took the view that the French order was an "impermissible restriction on speech" and that the US Constitution precludes its enforcement within the US. The French anti-racism groups have vowed to appeal while their lawyers have also called for an international treaty to solve the issues raised by the case.

The approach of the US court is curious because the case is not just about freedom of speech. The bigger issue, the one relevant to businesses around the world, is whether or not there is a requirement for a business in one country to comply with the laws of another. US courts already have an established theory for determining whether they have jurisdiction over foreign web sites which basically runs as follows: if the foreign site is merely brochure-ware, there is unlikely to be jurisdiction in the US. However, if it is a site on which US users can transact business, there is likely to be jurisdiction in the US. Unfortunately, in what appears to be a display of double-standards, the Californian district court made no mention of this theory in dismissing the notion that the French court could have jurisdiction over the Yahoo! site.

Potentially, the decision means that US companies can ignore foreign laws when selling abroad. Yet US courts do expect non-US sites to comply with US law when dealing with US citizens. The French court was not acting unreasonably when ordering a US site to comply with French law in respect of French nationals. In the UK, we advise businesses to comply with all the laws of the countries they target and, wherever possible, to adopt the highest standards in all dealings. Despite the curious logic of the Yahoo! decision, we will continue to do so.



## OUT-LAW SILVER BULLETS

**Your site should continue to comply with the laws of every country it targets and, where possible, it should meet the highest standards in all dealings.**



PHOTO: PHOTONICA

## Press to Play\_

Wireless Gaming could be the next killer app for mobile technology. The Games Kitchen is convinced its Wireless Pets™ is just the beginning...

**New** consoles from Sony, Nintendo and Microsoft have created uncertainty in the computer games market, with developers unsure which platform will attract the largest user base. Yet the one platform that, in terms of potential user base, stands head and shoulders above the PlayStation, GameCube and Xbox is the mobile telephone. According to market researchers The Yankee Group, there are more than 600 million mobile telephone users globally and, while the market for so-called wireless games is still in its infancy, early indications suggest it could be enormous.

The games range from simple single-player games of the kind now embedded in most handsets, to on-line multiplayer games exploiting current and emerging networking technologies. Wireless gaming is one of the few successful applications for WAP technology. As anyone with a WAP telephone will know, the technology is very limited. The graphics cannot compare with consoles, or even internet-based PC games. However, the crucial business advantage for wireless gaming is its ability to

generate revenue. The system of micropayments used by mobile telephones contributes to a market for wireless gaming and entertainment software which, according to Datamonitor analysts, will be worth \$6 billion within four years in the US and Western Europe alone.

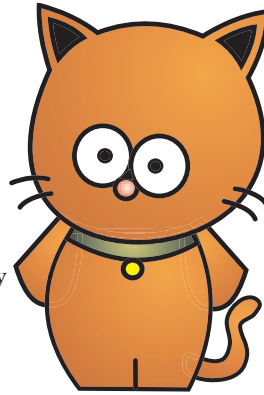
One company which is making good progress in this industry is The Games Kitchen, based in Livingston, Scotland. The software company was founded in 1999 by two university friends, David Thomson and David MacQueen. Since formation, it has become one of the world's leading developers for wireless games.

The simplicity of wireless games, a necessity of the technical constraints, makes development time short and the cost relatively inexpensive when compared to console games. In less than three years, The Games Kitchen has released over 20 titles for technologies such as WAP and SMS.

The company's most successful game to date is Wireless Pets™. Through a deal with various network operators, WAP phone users can adopt their own "little bundle of virtual joy" with a choice of names such as Toothy the Dinosaur and Katty the Cat. Over days, players use their telephones to feed their pets, play with them or enter them in pet shows with a view to winning prizes or earning Pet Pennies.

In its first four months of release, Wireless Pets™ generated over six million minutes of play, most of which were revenue generating. The game is supported by Genie in the UK as well as operators in France, Germany, the US, Singapore and the Philippines.

David Thomson, The Games Kitchen's chief executive and head chef, is confident that this is only a taste of things to come in wireless gaming. "The arrival of 2.5G will change how we use mobile telephones," he says, referring to WAP's successor technology which is now being rolled-out in the UK. It is an intermediate technology between today's



Katty the Cat

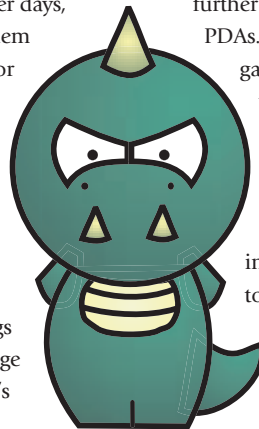
so-called second generation mobiles, or 2G, and the much-hyped 3G technology, currently on trial in Tokyo. According to a recent study from The Shosteck Group, "wireless games will start to flourish when 2.5G systems, not 3G systems, become widespread."

Thomson explains: "Instead of being limited to paying according to the length of a call, 2.5G will allow operators to charge by the amount of data transferred. Micropayments are what make wireless gaming financially viable and 2.5G increases the range of billing options as well as the complexity of the games that can be offered." The company will be able to charge, for instance, 5p per meal purchased for Katty the Cat, instead of payment being based on the length of the call. Alternatively, a pet lover might prefer to add a £2.50 monthly subscription for the game to his standard mobile telephone bill.

Despite the economic climate, the company secured its first round of external funding at the end of last year. The investment of almost \$500,000 in new equity and debt, mostly from a business angel consortium, will help The Games Kitchen to develop its core titles further and to expand into emerging markets, including games for PDAs. "There are plenty of web sites offering downloads of PDA games. But the games are either free and invariably dreadful, or the prices are outrageous – sometimes as much as \$30, which is close to price of a console game. We plan to exploit the market gap for low cost, high quality games," says Thomson. Again, mobile telephones will be used to take payment.

Advisers from OUT-LAW.COM assisted The Games Kitchen in its recent financing and are currently helping the company to protect its intellectual property rights in Wireless Pets™, taking special care of Toothy the Dinosaur and Katty the Cat.

For more information about the company, see [www.GamesKitchen.com](http://www.GamesKitchen.com). For help with corporate and IT legal issues, contact OUT-LAW.COM.



Toothy the Dinosaur

- The Games Kitchen has been contracted by a leading telephone manufacturer to write a game it wishes to embed in its new handsets. This involved a development agreement detailing the game to be provided, the platform on which it will operate, the milestones for development, the payment structure and the rights to any potential sequels for the game and ownership of the intellectual property rights in the game such as trade marks and copyright.
- The Games Kitchen inked a distribution agreement with Digital Bridges, another Scotland-based games company. This left The Games Kitchen to concentrate on software development and operation while Digital Bridges negotiated the revenue sharing deals with the mobile networks.
- The stars of Wireless Pets™ are cartoon characters which are protected by copyright and which can potentially be registered as trade marks. The look and feel, and text content of the game is also protected by copyright and the brand name Wireless Pets™ may also be eligible for trade mark protection. The established popularity of the

game will help in any dispute that may arise if another company copies the ideas or designs of The Games Kitchen.

- The Games Kitchen's new investors were taking equity in the company. Before investment was made, it was necessary to change the company's articles of association – the document which sets out the rules by which the company operates from day to day, covering matters such as voting rights at board meetings and how and when shares can be issued or transferred. Due diligence was carried out, a standard procedure when investing in private companies. To prepare for this, all The Games Kitchen's existing contracts had to be reviewed to satisfy its investors that, for example, it held all the necessary rights in its games and that it had suitable contracts of employment with its key staff.



## OUT-LAW SILVER BULLETS

**2.5G presents opportunities that can be exploited by small companies but they need to make sure that they protect their assets.**



PHOTO: HULTON GETTY ARCHIVE

# Cleopatra, comin' at ya

Cleopatra was known to have a great ASP. Stop! My aching sides!

If your business is thinking of using an ASP, what should you watch out for? Here are our top ten tips...

1. The guaranteed service level is one of the most important issues for any customer of a service provider. Downtime may be outside the control of an ASP, so service levels of 100% will not be guaranteed. Instead, a percentage in the range of 98% to 99.9% may be offered. Bear in mind that the contract is likely to provide that this calculation of uptime will exclude periods of planned downtime for maintenance. Also check what "teeth" (if any) the agreement offers. Often there will be provision for a rebate of part of the fees paid and a right to terminate the agreement if service levels are not achieved. Bear in mind that this may be your sole remedy for failure to achieve service levels. The shorter the period over which the uptime is calculated, the better for the user.
2. The ASP will almost certainly try to limit liability. If you rely on the provider to the extent that you will suffer substantial loss in the event that service is lost, such clauses can limit the damages you can recover. You can try to negotiate the limitation of liability, but there is a safety net if negotiation fails: if the limitation is unreasonable, it might not stand up in court.
3. If you are using more than one provider, check that there is no conflict in the terms and the undertakings of each party which could result in a situation where A can blame B and B can blame A.
4. Ownership of data is unlikely to be an issue - but check the agreement for this, just in case the ASP is claiming rights to your data which you consider unreasonable.
5. Check your rights upon termination of the relationship, whether by the decision of either party or in the event of one party's liquidation. Ensure not just that you can retrieve your data but that you will be able to do so in a format which keeps the data useful to you. There is no point in the data being returned in a format which you cannot use without the ASP's proprietary software.
6. Similarly, ensure that the ASP frequently gives you back-up copies of your data in a usable format. If the ASP suddenly goes into liquidation, you might find that you get no further assistance, regardless of any undertakings you were given initially.
7. The level of security offered by an ASP should be checked out. As soon as your business takes its activities on-line, the risk heightens for the security of your data storage, back-up and transfers. You would also want the ASP to have an obligation to review security precautions on an ongoing basis. Satisfy yourself not just that there are sufficient technical protections, but also that you have legal protections - again, limitations of liability must be studied. These are provisions which should be dealt with in any event in a data processing agreement which is required under the Data Protection Act.
8. If your ASP is based abroad, the likelihood is that the contract is governed by the laws of that country. The service provider is unlikely to agree to change this to either the English or Scottish legal system. If you are considering entering into a contract governed by, say, US law, take into account the added costs that may be involved if you have to take claims or enforce judgments in the US.
9. Watch out for the provisions on terminating the deal with an ASP. Some agreements will include terms which penalise you for early termination. You can try to negotiate out of this, but the penalty is often a necessary consequence of the huge up-front costs which an ASP must incur to get started. The ASP may need a commitment from customers to make its business model succeed. Another exit provision to look for in the agreement is for assistance in migrating to an alternative ASP without losing business continuity.
10. ASP customers often want more than the ASP can deliver, which is not in itself unusual in a service provider relationship. However, the ASP is often acting as an intermediary, providing use of software which is licensed to the ASP by a third party. The ASP may have already agreed terms with the third party and cannot renegotiate these terms whenever it signs up a new customer. Accordingly, for the end user who wants more than the ASP delivers, negotiating the ASP's standard conditions can be an uphill struggle.

## What is an Application Service Provider (ASP)?

An ASP is a company that offers access over the internet to applications that would otherwise be running on the end user's computer. ASPs are seen as a cost effective solution both for organisations wanting to save on expensive software packages and for those wanting to outsource.

"The right ASP can reduce risk and dramatically cut the costs of developing and implementing applications. Second generation ASPs have developed software specifically for web delivery, allowing optimised security and performance. Say

goodbye to maintenance and support headaches - your ASP takes care of that for you, while you take care of your business." Amanda Burgauer, Managing Director, Sharedbase, an ASP of information management systems.



## OUT-LAW SILVER BULLETS

**Don't always assume that the standard terms of an ASP are non-negotiable. Look out for data security, liability and exit provisions.**



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

### UK delays E-commerce Directive

The UK is among 10 of the EU's 15 member states that missed the deadline for implementation of the E-commerce Directive on 17 January 2002. Only Austria, Finland, Germany, Ireland and Luxembourg managed to meet the implementation deadline. The Directive, examined in the Autumn issue of the OUT-LAW Magazine, covers matters such as the information to be available on web sites for consumers and the national law that will apply in cross-border transactions.

Last month, the DTI announced that there will be a further consultation period before implementation of the directive in Britain. The DTI said that responses from its initial consultation "clearly identified the need for further consultation, in order to clarify the legal framework". The DTI added that it hopes for sympathy from the European Commission. E-Commerce Minister Douglas Alexander said that the Government "now expects to implement the Directive during the summer."

### Contractors lose IR35 appeal

The Professional Contractors Group has lost an appeal which challenged the legality of the controversial IR35 tax legislation. It has vowed to continue lobbying against the tax which treats small businesses in the knowledge-based sector as "disguised employees" for tax and National Insurance purposes.

The PCG considers IR35 illegal under European law. The Court of Appeal disagreed, as did the High Court before it. However, judges acknowledged that the dividing line between employment and business for contractors was "often debatable".

A PCG spokesperson said: "We will drive test cases through the court which demonstrate beyond a shadow of doubt that our working practises are those of genuine businesses and I predict that within the next two years, IR35 will be a voluntary tax, as knowledge-based companies will be able to demonstrate with certainty that they are real businesses."

### Does your web site satisfy data protection rules?

The Information Commissioner, responsible for enforcement of the Data Protection Act, has commissioned a study to ascertain the extent of compliance by British web sites, to be carried out during January and February 2002. All UK-based web sites should have been fully compliant with the Act of 1998 since 24 October 2001. The study will review the compliance of a wide range of web sites operated by both large and small organisations.

### EU agrees how to charge VAT on downloads

The EU has reached agreement on how to apply VAT to digital products such as the sale of software by download instead of by posting a box containing discs. The proposal would require suppliers of digital products from outside the EU to charge VAT on sales to private consumers. However, for these suppliers, in the case of sales to business customers in the EU (at least 90% of the market), the supplier would continue to sell without having to apply VAT (which would be paid, as now, by the importing company under self-assessment arrangements).

Under the compromise reached, VAT would be levied on non-EU suppliers' sales to non-business customers according to a system whereby these suppliers would have to register with a VAT authority in just one member state, but the VAT levied would be the rate applicable in the member state where the customer was resident. The VAT revenue would be re-allocated from the country of registration to the country of the customer.

### Council pays for using unlicensed software

In an out-of-court settlement, Clackmannanshire Council in Scotland has agreed to pay an undisclosed sum to the Business Software Alliance (BSA) for the use of 470 copies of Microsoft Office 97

without valid software licences. The Council made the mistake of buying loose licences from a rogue trader who delivered them to the Council in plastic supermarket bags. The Council presented these licences to Microsoft for verification. However, because they were sold separately from a software package they were declared invalid and therefore illegal. They also proved to be counterfeit. The BSA raised court proceedings on behalf of Microsoft because the Council refused to purchase valid licence to replace the illegal ones.

### Norway's DVD hacking hero faces jail

A Norwegian teenager has been charged under the country's anti-hacking laws for co-writing and using a piece of software. Jon Johansen became a cause-célèbre when, aged 15, he co-wrote a program called DeCSS which can be used to break the copy protection on DVDs. The US movie industry asked the Norwegian authorities to take action. Their fear is that software such as DeCSS promotes DVD piracy, although Johansen claims he only wrote the program to allow him to play his own DVDs on his Linux-based PC. If convicted, Johansen, now aged 18, faces the prospect of up to two years' imprisonment.

