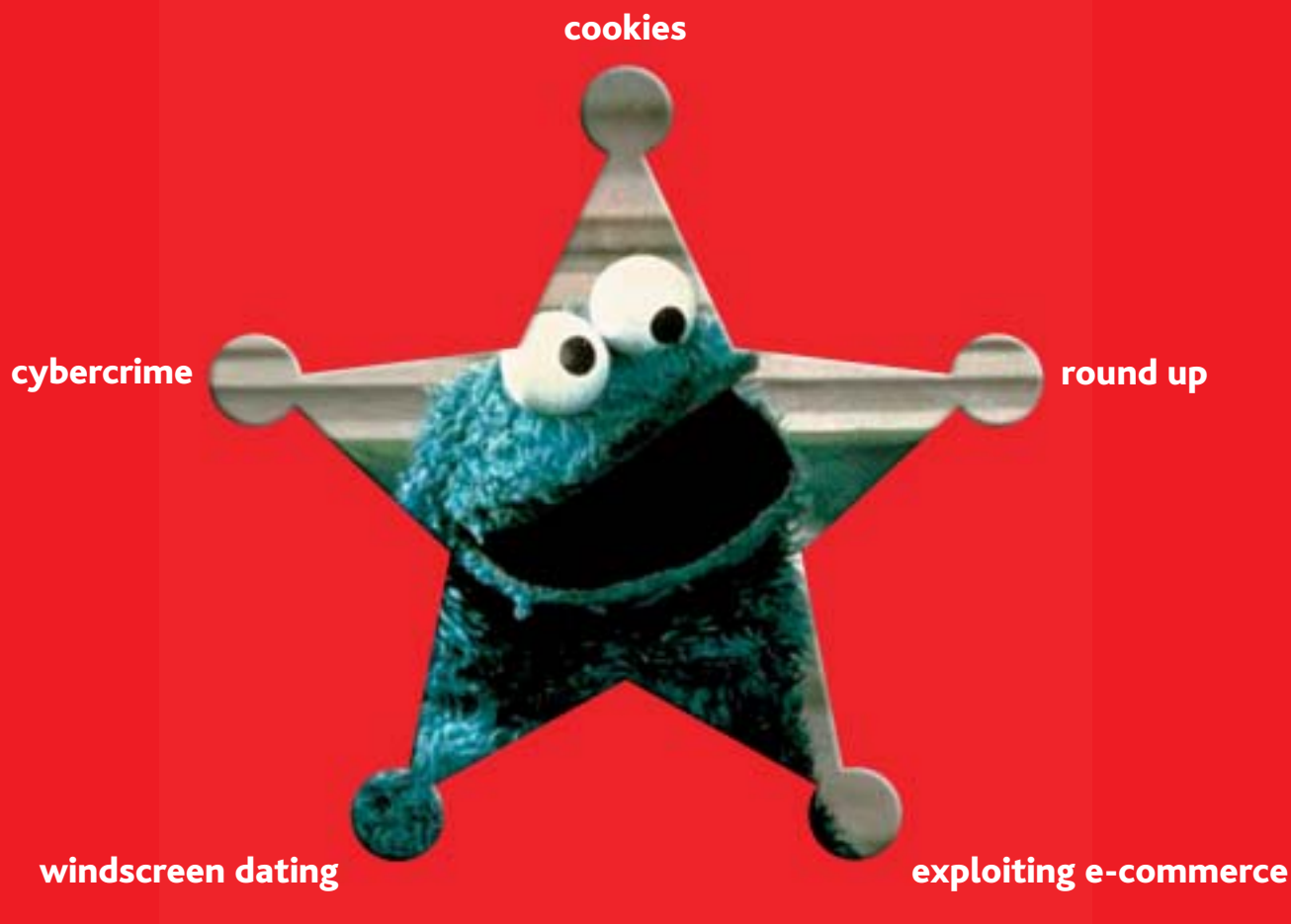


OUT-LAW





FROM THE EDITOR...

This month, we look at cookies – the small text files sent by web sites to a visitor's hard drive to store simple information – and the surrounding privacy debate. The EU is regulating the use of cookies and, at the time of writing, we do not know how strictly.

This comes as Strathclyde University announces that it is developing a successor to cookies. Its new software, according to Strathclyde, "can collect almost any item of information and is almost impossible to detect." Within its reach are individual keystrokes and "the whole range of a user's internet usage rather than activity on one particular site." Notwithstanding Strathclyde's claim that safeguards to prevent misuse will be developed, the software is likely to fan the flames of the privacy debate.

Depending on the wording adopted by the EU, this cookie successor may or may not be regulated; sometimes laws dealing with specific technologies are not future-proof. Our preference is for a hands-off approach. Yes, internet users should be informed about cookies and similar technologies; but Europe's lawmakers must take great care to understand the technologies they are regulating and the risks for business if they go too far.

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

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

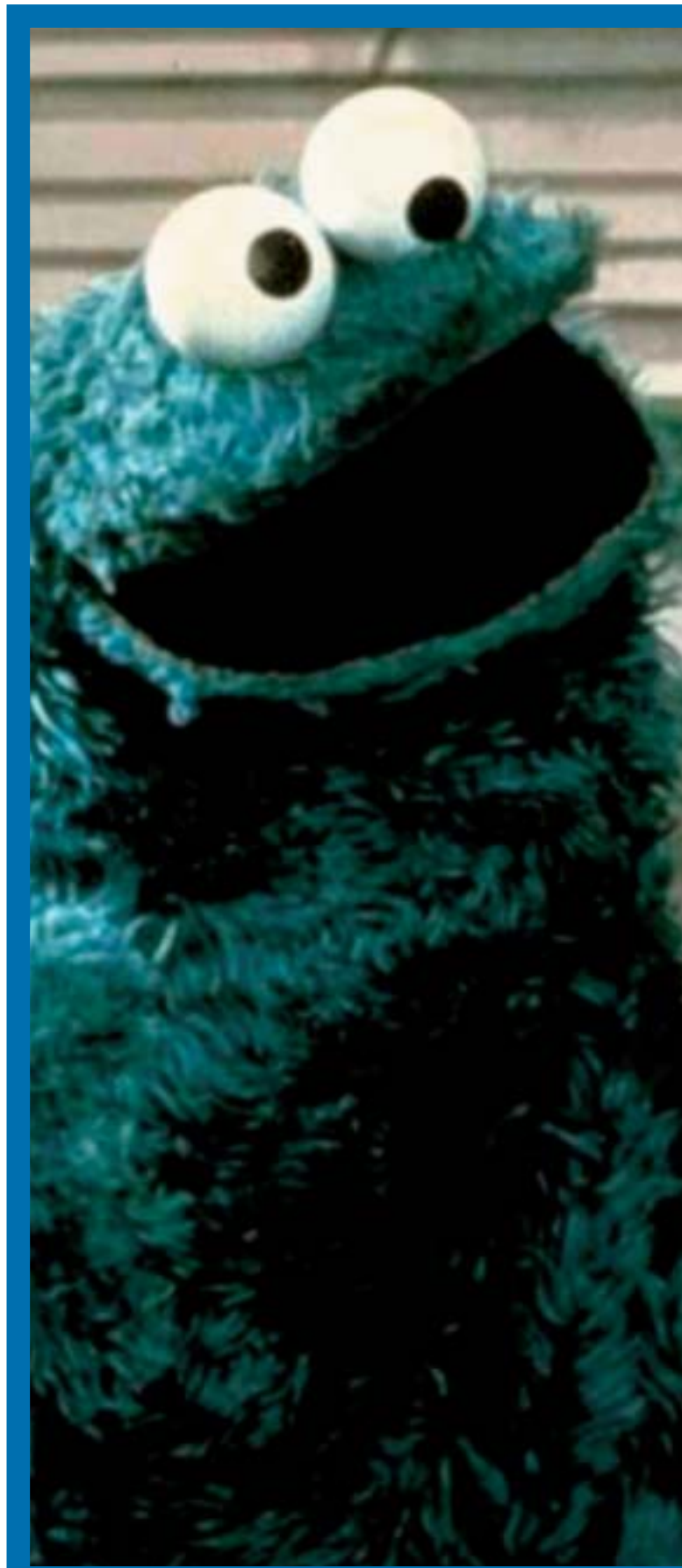
david.cox@out-law.com

SINGAPORE

mark.tiggeman@out-law.com

BRUSSELS

barbara.linehan@out-law.com



C is for Cookie

A new European law on data protection is expected to impose certain conditions on the use of cookies. If implemented, it could protect privacy at the expense of e-commerce, making the cookie debate a hot topic in Europe.

Cookies are small files that a web site can send to a visitor's computer to allow the site to "remember" the user and his or her preferences. Cookies can also be used to rotate the banner ads that a user sees on one or more web sites and for advertisers to track the effectiveness of these ads. Most commercial sites use cookies; without them, e-commerce would be less efficient.

The European Parliament, however, has expressed this concern: "Some cookies contain very sensitive information such as credit card numbers, passwords and even the full name of a user without any protection against unauthorised access. The wide majority of users is completely unaware of

cookies being planted on the PC they are using and therefore do not know that such sensitive information is left on semi-public PCs open to abuse for any other user of the same PC."

Part of the reason for the concern is that the default setting in most internet browsers is to allow web sites to send cookies to the user's hard drives.

An early Parliament proposal for the forthcoming "Directive on the processing of personal data and the protection of privacy in the electronic communications sector" proposed a prohibition on cookies "unless the explicit, well-informed and freely given consent of the users concerned has been obtained."

In practice, this would likely mean that web sites would have to ask users to click an "OK" button before receiving cookies; and this must be done before allowing the user to do anything that requires the sending of a cookie. Businesses argued that

this would damage e-commerce in Europe, giving non-European businesses an unfair advantage.

The European Council rejected this proposal – saying that web sites should instead give prior information about the use of cookies. In practice, this does not solve the problem because the web site must still notify the user prior to sending a cookie – which could deter the user. In addition, the cost of re-designing every EU site would be enormous.

In April this year, a committee of the European Parliament took another step back, to the relief of industry. It accepted that a user should not be warned before a web site installs a cookie. This committee said: "Users should have the right to refuse the installation of cookies, but [the committee] felt that it would suffice to guarantee users of the possibility of accessing clear information on the purposes of cookies, thus rejecting the Council's view that users should receive this information in advance."

By the time you read this, the European Parliament should have voted on the issue. It is to be hoped that the Parliament follows its committee. This is not expected but, if it does, web sites will be able to continue sending cookies to visitors, without giving advance notice.

There is, however, a twist in the tale. Britain's privacy chief, the Information Commissioner, recently indicated that she supports the strictest conditions on use of cookies; and that she interprets existing data protection law to mean that prior consent is required before sending cookies.

The opposing interpretation is that existing data protection laws require that cookies should not store nor make available to web sites any personal data from an identifiable user, unless the user has consented to provide that data in accordance with the Data Protection Act. This has been our advice to businesses in the past.

The question for businesses is which interpretation to follow. The safest approach is to follow the Commissioner's view; but facing legal action for failing to make these changes is a commercial risk that most businesses are likely to run.



OUT-LAW SILVER BULLETS

The UK's privacy chief expects consent before sending cookies. This is the safest option for businesses, but waiting for clearer cookie laws is a risk that you may wish to run.



PHOTO: HULTON GETTY ARCHIVE

Shop... 'til you drop

How to exploit the rules of e-commerce

Early this year, Kodak.com misstated the price of a digital camera being offered for sale on its site. The company initially refused to fulfil the orders placed, and legal action was taken by disgruntled customers who argued that the company had entered into a contract with them from which it could not withdraw. The company capitulated, although not without a few weeks of bad publicity. A few weeks later, IT supplier Dabs.com made a similar mistake, under-pricing an Xbox package.

Confusion over what happens in the event of a pricing error is relieved by new rules on e-commerce that are expected to come into force in Britain this summer. These rules will implement the

E-commerce Directive, albeit behind the EU's schedule. If an e-tailer takes advantage of the flexibility in these rules, there is now no reason to be out of pocket when the price of a £200 product is misquoted as £2 and ordered in bulk. This article explains how to do it.

Suppose TopTrombones.com is selling trombones to UK consumers for £200 with free delivery. The pricing must be clear and unambiguous and it must state whether the price is inclusive of VAT and delivery costs. When a customer clicks the button to 'buy', the site should take him to a page displaying the terms and conditions. Pop-up windows to display this small print should be avoided.

Here are a few things to include in these terms and conditions: make it clear who is selling – for example, London Music Stores Limited, trading as TopTrombones.com, together with the geographical and e-mail address. Describe clearly what the customer is getting and what it will cost, including all taxes and delivery costs (say, £200 per trombone). Identify the arrangements for delivery of the trombone, and point out that the consumer has a seven working day period during which he can return the trombone for a full refund.

The terms must tell customers how and when the contract is formed. This is where the new rules can be used to the seller's advantage. It is possible to sell on-line and take payment by credit card without concluding the contract on-line. The solution is to provide that the customer is making an offer on the site and that the contract will be formed only if the customer's order is accepted – and that taking payment from the customer's credit card does not indicate acceptance. This may, at first glance, seem unfair on the customer. It is not, and it is legal, but only if the site is up-front about it, to avoid misleading the customer.

On-line merchant accounts provide for making refunds to a customer's credit card. Therefore, the terms should explain that, while the customer's card may be debited before the contract is formed, if the customer's order is ultimately rejected, a refund will be made immediately.

TopTrombones.com should also include the following term:

"By clicking the 'Accept' button you agree to these terms and conditions. By completing and submitting the following electronic order form you are making an offer to purchase goods which, if accepted by us, will result in a binding contract."

The phrase, "if accepted by us," is very important.

A few other things to include. Make sure

the user has scrolled to the bottom of the page before clicking his acceptance of these terms. By doing this, you improve your position in the event that a customer claims there was no opportunity to read your terms.

Next, the customer is taken to the order form where he completes the quantity of goods and his delivery details. It would be good practice to offer three buttons: submit, clear and cancel. The 'clear' button is needed because the new rules require a means for the customer to correct any errors.

Then take the user to the page on a secure server where his credit card details are taken. This page should state: "Your card will be debited with the sum of £200 when you click the Submit button. This will be refunded if your offer is refused." Repeat the choice of submit, clear and cancel.

When the card details are validated, give the customer a confirmation page. This should not confirm a contract; it should instead confirm that the order has been received and that the order is being processed. It is helpful to give the customer an order number at this stage so that he or she can chase-up any problems. It is good practice, though not legally required, to ask the user to click a button on this confirmation page to indicate that he has read the confirmation – for example a 'continue' button, linking to the homepage of TopTrombones.com.

Additional information should be e-mailed to any customers who are consumers, to comply with existing rules on e-commerce known as the Distance Selling Regulations. This largely repeats the information described above. More details can be found in OUT-LAW's article at www.out-law.com/php/page.php3?page_id=thedistance_selling959789574.

Finally, dispatch the goods. If a typo labelled the trombones at £2 and someone ordered 500 of them, TopTrombones.com could politely – and legally – refuse the order.

Think it couldn't happen to you? Think again...

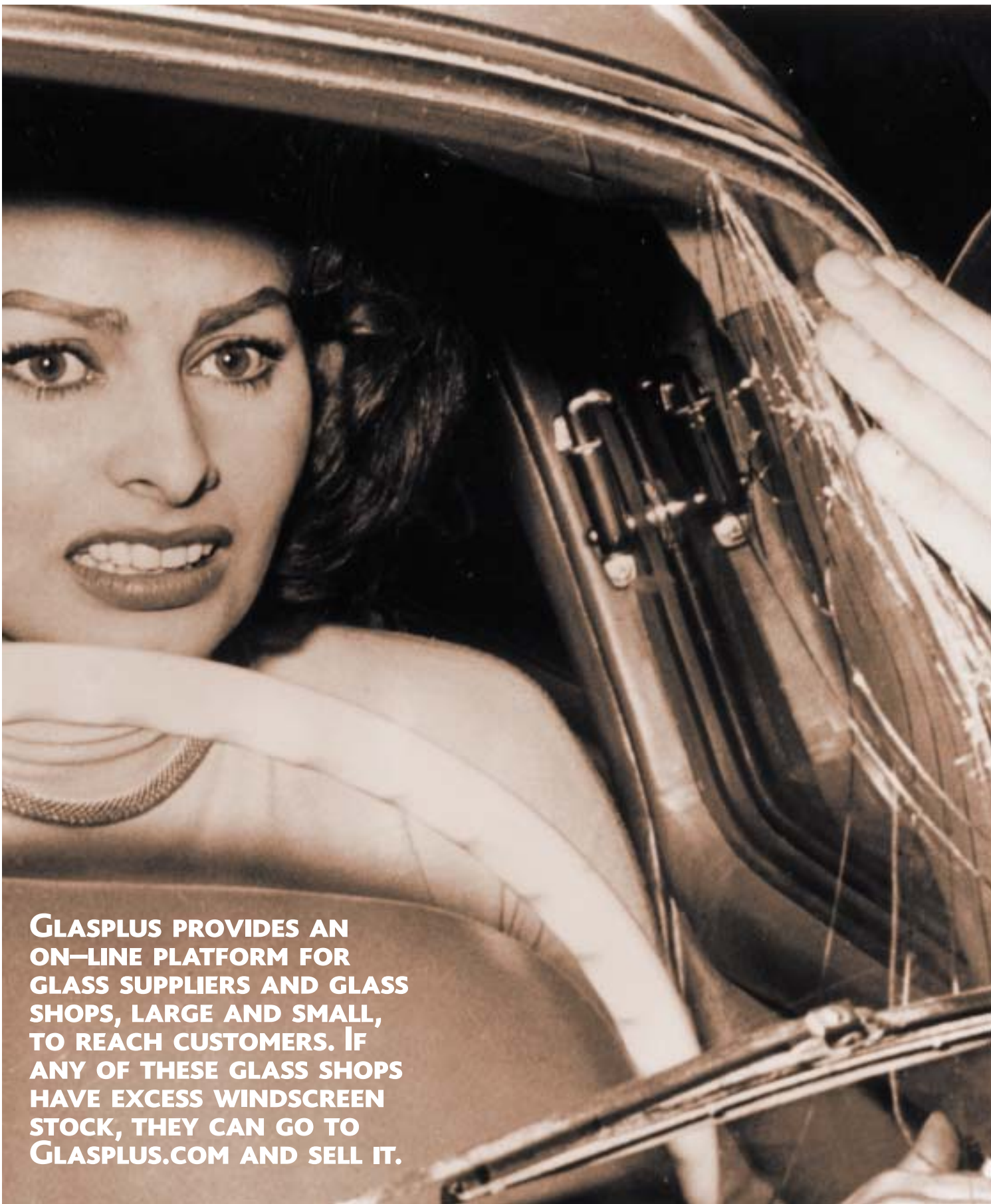
GREAT BRITISH PRICING COCK-UPS

- In March 2002, leading IT retailer **Dabs.com** advertised an "Xbox Ultimate Bundle" for £249. The price should have been £379. The company initially refused to fulfil orders; it then changed its mind as "a gesture of goodwill." Only 13 orders were placed.
- The same month, **Komplett.co.uk**, a small IT retailer, advertised 512MB memory cards for £13 each, apparently £82 below cost price. Many orders were placed and credit cards debited. The confirmation e-mail appeared to amount to a contract. However, the company refused to fulfil orders, pleading that to do so would be "economic suicide." Instead, it offered them, one per customer, at £49 each.
- In January 2002, **Kodak.com's** UK site featured a digital camera package, priced at £100 instead of £329. The number of orders placed is unknown, but Kodak's e-mail confirmation referred to a contract having been formed. Kodak initially refused to fulfil orders but then relented, possibly acknowledging its shaky legal position.
- In September 1999, **Argos.co.uk** advertised Sony televisions for £2.99, instead of £299. Thousands of orders were placed – and refused. However, contrary to some media reports, Argos was protected by the wording of its order confirmation which merely said the order was being processed, without saying it was accepted.



OUT-LAW SILVER BULLETS

Provide plenty of information on your site - who you are, pricing, how the process works etc., relieving any confusion that might otherwise exist.



GLASPLUS PROVIDES AN ON-LINE PLATFORM FOR GLASS SUPPLIERS AND GLASS SHOPS, LARGE AND SMALL, TO REACH CUSTOMERS. IF ANY OF THESE GLASS SHOPS HAVE EXCESS WINDSCREEN STOCK, THEY CAN GO TO GLASPLUS.COM AND SELL IT.

The Internet's Dating Agency for Windscreens

Broken-hearted Ford Capri, mid-30s, WLTM...

A new B2B marketplace has found a potentially lucrative match-making niche in the broken windscreen market. When a windscreen needs to be replaced, the car owner goes to a windscreen replacement specialist – known in the trade as a “glass shop” – which has to identify and then find the correct part. This is not too time consuming if the car is the latest model Ford Fiesta; but it's not so easy when the car is, say, a 1989 Volvo 340 or a 1958 Jaguar Mark 1. The latter category accounts for around 20% to 30% of the European windscreen market. E-commerce, SMS text messaging and some smart deal making have been brought together by Glasplus.

Glasplus provides an on-line platform for glass suppliers and glass shops, large and small, to reach customers. If any of these glass shops have excess windscreen stock, they can go to Glasplus.com and sell it using the site's auction service.

Managing director Jeff Boekstein explains: “Glasplus offers a web-based platform that invites the glass shop to enter the make and model of any car. Our database, fed by the suppliers, will tell the glass shop where the right windscreen is available locally, how much it will cost and when it can be delivered.

The glass shop then chooses the best deal and, right away, can tell its customer how long the replacement will take.”

Membership of the service is free of charge. One revenue stream for Glasplus is a commission that it takes on sales. Another revenue stream is a payment made for an insurance validation service.

The insurance service offers an on-line validation system against a database of motor policies drawn from the UK's major insurance companies. By simply entering the registration number of the vehicle, the system will validate the claim. If the vehicle is covered, the glass shop will be provided with details of any excess payable against the

claim. The system removes unnecessary administration costs for both the insurer and the glass shop, while speeding up the entire claims experience for the policy holder.

This insurance service also operates by SMS text messaging. “A technician attending a customer only has to text us the car's registration number,” says Boekstein. “Our computer receives the data and replies, to let him know whether or not the customer is covered for windscreen replacement – which can save the customer needing to pay and then claim back the cost of the replacement.”

Boekstein is confident that Glasplus, which launches in June, will revolutionise the market.

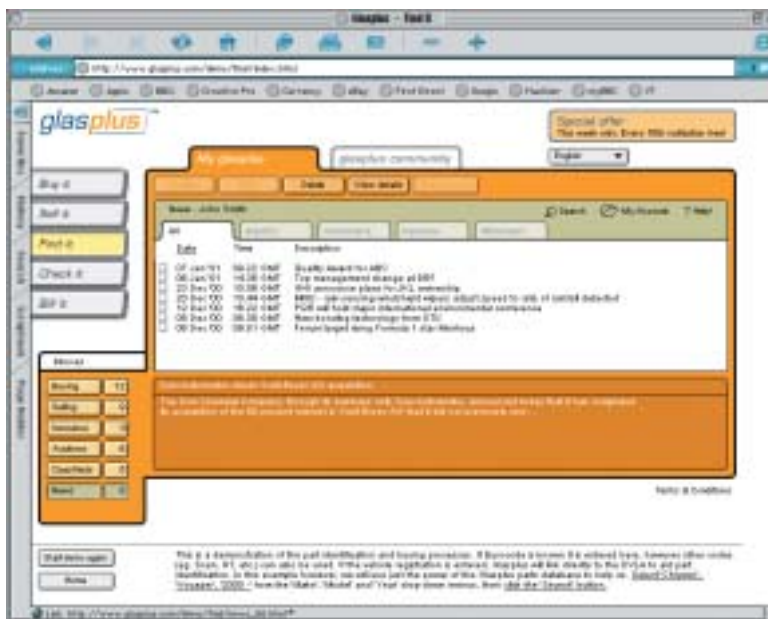
“Glasplus addresses all the major issues that a Glass Shop faces daily by using technology to remove unnecessary paperwork.”

For the business idea to work, the company had to first convince insurers, glass shops and suppliers that using its service would help them to make money. For the insurers, data protection was a significant obstacle.

Personal information is provided in taking out insurance and there are limits on what can be done with that data. Masons, the law firm behind OUT-LAW.COM, came up with a solution to

enable the sharing of the minimum data required by Glasplus without breaching any privacy rights of the motorists. In addition, it put together all the terms and conditions for the site and negotiated a hosting and maintenance agreement with the software developer retained by Glasplus.

Boekstein concludes: “It hasn't been easy getting this far – we're a small team launching at a time when it's unfashionable to be a pure-play dot.com – but we're also certain that we've built the place where the automotive replacement glass industry will meet on-line to do business – and it's a huge industry.”



OUT-LAW SILVER BULLETS

Using the database that belongs to another party can raise data protection issues. Seek advice before sealing the commercial terms of the agreement.



ROUND UP: THE BEST OF OUT-LAW.COM

New cybercrime laws

A UK bill is aiming to amend the country's anti-hacking legislation of 1990 so that it covers denial of service attacks, in which a server is flooded with false and untraceable requests, ultimately crashing it. Currently, such acts could fall through a loophole – although that does not make them legal. They could be prosecuted in England under the Criminal Damage Act, or in Scotland as the crime of malicious mischief.

In April, the European Commission published a draft Directive that also addresses denial of service attacks in addition to hacking and viruses. The EU proposal says that, where damage is caused by illegal access to or interference with information systems, the punishment will be a custodial sentence of not less than one year.

Selling financial services on-line

Financial services companies will be forced to give consumers additional rights when buying their products over the web under a draft EU Directive. A committee of the European Parliament decided to give consumers a period of 14 calendar days in which to withdraw from such deals, although in some cases the period will be 30 days or even 3 months. Under the Distance Selling Regulations in force in the UK for non-financial products, consumers are given a cooling off period of only seven working days.

US lifts ban on virtual child porn

Computer-generated images that depict child porn are now legal in the US, provided they are not in fact photographs of real children, following a decision in April by the country's Supreme Court.

A trade association representing the porn industry successfully argued that the Child Pornography Prevention Act of 1996 was unconstitutional. The law targeted computer technologies that can be used to alter an innocent picture of a child into a

depiction of a child engaged in sex. The Free Speech Coalition said it supports a ban on child porn, but argued that the legislation could ban non-obscene sex scenes in respected films. The ruling has shocked groups that campaign against child porn. New laws are being prepared.

In the UK, child porn is illegal under the Protection of Children Act. It defines children as those under the age of 16 and those giving the impression that they are under 16. Pseudo photographs are also caught.

Offshore server cannot escape UK law

Faced with a claim that its system infringed another company's patent, bookmaker William Hill argued that UK patent law could not apply because its servers that host the system are based offshore. The English Patents Court disagreed. Menashe Business Mercantile Ltd. successfully argued that, once a punter within the UK connected to the offshore server via the internet, then the system fell within its patent, and that this was an infringement.

The court found that the invention was "the system as a whole, the combination of elements" and "common sense dictated that infringement could not be avoided by siting part of the system outside the UK."

KaZaA cleared of copyright infringement

The Court of Appeals in Amsterdam ruled in April that users of file-sharing service KaZaA may be infringing copyright – but the company that runs it is not. KaZaA is the most popular of several free peer-to-peer services that launched in the wake of Napster. Unlike Napster, KaZaA is, at least in theory, impossible to shut down – which makes any ruling on the legality of its service somewhat academic.

The music industry is moving towards copy protection in CDs. Celine Dion's recent album contains code which threatens to crash PCs. Eminem's forthcoming album will also contain this

protection. However, all protection efforts to date have been circumvented by MP3 enthusiasts. Even if a CD were made with unbreakable copy protection, it could still be "ripped" as an analogue signal from a regular CD player and the loss in sound quality may be an acceptable price to pay for MP3 fans.

Games rulings contradict

A judge in Missouri has said that video games are not protected by free speech, in upholding a local law that bans sales of violent games to those under the age of 17. However, a few weeks previously, a court in Connecticut ruled that games are protected by free speech, in dismissing a case against the makers of Mortal Kombat. The mother of a 13-year-old boy had sued Midway Games after he was stabbed to death by a friend while apparently imitating a fight scene in the game.

Lawsuits concerning the violence of games appear to be increasing in frequency. Sony Online Entertainment is currently being sued in the US by the mother of a 21-year-old man who took his own life while playing the game EverQuest. Elizabeth Woolley argues that Sony should have distributed the game with a warning about its addictive nature.

