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LES MEMBERSHIP: WHAT'S THAT ALL ABOUT?

LES (Scottish Branch) at its evening events regularly asks members to speak on the benefits of LES membership. John's presentation was noteworthy for its depth, humour and persuasiveness and, at the request of attendees, was suggested for newsxchange™ as an example to us all as to how to promote our Society.

I first became aware of LES as a young patent attorney, i.e. many years ago. An opportunity to join arose in 1998, after I moved from London to Scotland. That was the year the LES International Conference came to Edinburgh. Like many new members, the offer of reduced conference rates in exchange for signing up as a member was too good to miss. My level of activity since then has been somewhat up and down, but I have never considered abandoning my membership, so what is the attraction?

I first became aware of LES as a young patent attorney, i.e. many years ago. An opportunity to join arose in 1998, after I moved from London to Scotland. That was the year the LES International Conference came to Edinburgh. Like many new members, the offer of reduced conference rates in exchange for signing up as a member was too good to miss. My level of activity since then has been somewhat up and down, but I have never considered abandoning my membership, so what is the attraction?

Can it be the name? To be honest, at least from the UK perspective, the name Licensing Executives Society is no help. Licensing doesn't tell the lay person our business. You wouldn't call yourself an executive with your colleagues or friends down the pub without expecting a little gentle ribbing. (On the positive side, you do get to choose the "executive length" socks at Primark.) It not their fault, but I suspect the term can be used with a little less irony by LES' founding fathers in North America. In the same spirit of innocence, someone decided a proper acronym for the UK and Ireland branch of the Society would be LES-BI. Let's just say, you'd better have a very good relationship with your firm's IT department before you type that into Google.

In spite of that, obviously I feel myself to be at some level to be a "Licensing Executive", so what's behind the label? A broad range of people. Me, I am a practising Patent Attorney: my core activity is obtaining, fighting or defending patents and other IP for my clients. Within my profession, and no doubt for those in different professions, there are well recognised and essential professional body memberships. Through the meetings and publications of these societies we can meet others in our own profession in the UK, across Europe and throughout the world, and exchange knowledge of our essential core skills. But this activity is meaningless unless, in a commercial context, it relates to my client's interests in exploiting their patents and IP. Therefore some interest in licensing seems natural, and my work for clients would be less valuable if licensing advice were not on the menu.

Whatever your profession, there is an element of mystery in the move into IP licensing and commercialisation, which is truly a multi-disciplinary activity. Outside LES, however, it is easier to learn how to fight with patents than it is to learn the more constructive arts of licensing. LES provides access to a unique

set of education and resources in its courses, conferences, books, journals, as well as access to databases of members with skills through the Directory. These resources can be fully exploited by those moving into licensing as a full time activity, or dipped into for those with more peripheral interest.

Most importantly, though, LES brings you into contact with - gulp - other kinds of people. Membership is not limited to one profession all sharing the same perspective and basic knowledge, but a variety of individuals from the professions, business, academic, medical and industrial world, with knowledge and skills complementary to one's own. The Society works at a global level through LES International, also through national societies such as LES Britain-Ireland, and through local branches such as our excellent branch here in Scotland. All members, however minor their interest and activity in the commercialisation of IP, will find the Society offers a unique opportunity to make valuable and precious work contacts and friends, colleagues from all disciplines and sectors, be it local, national or world-wide. Attending international meetings, one can see the strength of friendships that have built between the long-standing members. These are the people, you will find, who together have facilitated the growth of the global companies, brands and technologies that surround us. The conference program always includes room for social activities, and even a little dressing up as you can see from the photograph. It's the only place I could ever honestly tell people "I'm in a rock'n'roll band". Though it's a few years since I was able to attend, I have it in mind that me and my sporrans will get another outing very soon!

John and his wife, Sally, with Tim Lowman, an esteemed Canadian member, dressed for the occasion as a Mountie!

One thing that makes LES special, then, is perhaps summed up in the word "Society"; the word we don't have to explain apologetically to our friends down the pub. But even if your sights are set closer to home, membership brings news of local events through LES News Exchange, and serious articles in the international journal. Each issue of Les Nouvelles contains more than I could ever want to know about a wide range of topics, but forms a useful reference for me and my colleagues on those occasions when unfamiliar questions arise. For the annual subscription of just £140, these publications, let alone discounted attendance at various CPD and social events, make the cost of membership extremely good value.

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John and his wife, Sally, with Tim Lowman, an esteemed Canadian member, dressed for the occasion as a Mountie



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President's Diary

I am writing this in mid October, just before heading to Orlando to speak at the annual meeting of LES USA/Canada. Given the pace of recent world events, I have no idea how relevant my initial comments will be by the time you read this. But I obviously cannot ignore the developments of the last few months - and nor can our Society.

What may this all mean for us? In the short term, we have given careful consideration as to how best to minimise the risk of any of the Society's funds disappearing in the current turmoil. I have been in close contact with our Treasurer, and he and I have consulted widely with others. We have concluded that our funds are as safe as they can be with the bank in which they are currently deposited; but we will obviously monitor this closely as events continue to unfold. That is the first piece of good news. I believe the longer term prognosis is also more positive for the Society and its members than many may think. The current global financial situation will, I believe, present significant opportunities for technology transfer and IP practitioners; and I think we should adopt an optimistic attitude to ensure we all make the most of those opportunities. There will of course be casualties, and I would encourage any member who faces hard times to use his or her LES network to try to find ways of minimising the downside - for example seeking advice from others who may have been through similar personal or institutional difficulties or asking about potential new job opportunities should you need or want to move from your current position. Our meetings will continue to provide excellent opportunities for members to discuss these sorts of issues informally. There will also be opportunities for members to use their skills to help businesses and other organisations make the most of their key assets - their IP - when cash may be difficult to come by through other means, and the value of more traditional assets is heading south. Again, the training and networking opportunities presented by our meetings should help everyone on this front.

So I encourage you all not to succumb to the doom and gloom stories the mainstream media has been feeding us recently, and instead focus on the opportunities that have now been presented to us all.

Turning to more routine affairs, I am pleased to report that our Society has been busy in the last few months, and that we are making progress in relation to each of my three main objectives: Youth, Relevance and Responsibility. Here are some of the highlights:

- There have been meetings in the North East, the North West, Scotland and London. All of the meetings have been well attended, and received positive feedback. Some are reported elsewhere in this issue. My thanks to all those who have helped organise these meetings, and to those who have spoken at or participated in them.
- We were honoured to be chosen by **Adam Liberman** to be the first member Society he visited as the new President of LES International. Adam gave an excellent

presentation to a packed house on managing IP in a public institution (drawing on his experience over the last few years as General Counsel of Australia's CSIRO). I was delighted to see many new and younger faces, in the audience including many from universities; and, over drinks and dinner afterwards, to learn of the enthusiasm of a number of this group to join the Society. Adam also gave a presentation to members of Council on his key objectives for the coming year. We will put a copy of his presentation up on the website shortly. You will see that he plans to "shake things up". Watch this space! (**Jennifer Pierce** provides more background in her report on the Amsterdam delegates meeting.)

- A number of Council members had a busy weekend in September at the LESI delegates meeting in Amsterdam, with some staying on for the pan-European meeting immediately afterwards. Following excellent preparation by **Anne Lane**, Jennifer Pierce and others, we received final confirmation that London will be the location for the 2011 LES International meeting. This is fantastic news, and will provide an excellent opportunity not only for us to showcase our capital city but also to network with fellow-minded practitioners from around the world. So block the dates now: June 5-8 2011. There was also discussion of how to encourage more younger members to join (confirming that LESI shares our view that this is a key priority for the Society) and how we can raise the profile of IP as a key commercial asset, and relevant to many organisations' daily operations, including on the community investment side (again, matching our commitment to relevance and responsibility). (Social responsible licensing was also a key theme in the presentation Adam Liberman gave, and in a number of the questions from the audience, and we are looking to arrange a meeting specifically on this theme later in the year. Anyone wishing to be involved in this meeting, either as speaker or participant, should let **Mark Wilson** or me know).
- **Christi Mitchell** and others continue to fly the LES flag in discussions with the European Commission about the introduction of a IP Certification for technology transfer practitioners in Europe.
- **Meredith Lloyd-Evans**, Chair of the Renewables Committee, gave an excellent presentation at our Council Meeting in September on the plans of the Committee over the coming months. It is clear that this Committee is going from strength to strength under Meredith's enthusiastic leadership, and I encourage all of you to take part in the events it is organising.

Finally, I am delighted to announce that Jennifer Pierce has agreed to be our next Vice President. She is not due to take over from Mark Wilson until the summer of 2010, when Mark takes over the Presidency from me. However, with so much going on, and the 2011 LES International meeting in London to prepare for, we thought it best to plan ahead. I am grateful to Jennifer for agreeing to take this on. Formal congratulations, and more about Jennifer's background, will follow in due course.

And, as the festive season will be upon us by the time you read this: Seasons Greetings to you all!

Nigel Jones
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HOW TO CUT & PASTE YOUR WAY TO COURT



It's the case that has draftsmen across the country reaching for their IP precedents. Peter Prescott QC (sitting as a Deputy High Court Judge) opens his judgment in Oxonica Energy Ltd v- Neuftec Ltd, [2008] EWHC 2127 (Pat), 5 September 2008:

"How do we interpret a formal commercial agreement if it is ambiguous and we have reason to believe that its draftsman did not have a deep understanding of the relevant law?"

The case concerns a licence which, in the opinion of the Court, was written by a draftsman who was not always clear in his own mind about what he was doing and, when not clear, allowed his word processor to do the thinking for him by lifting and bolting together bits of legal phraseology from a medley of precedents. Peter Prescott QC gave an entertaining but damning account of the drafting in the Licence. The quotes below are taken from the judgment. The main conclusions from the case relevant to intellectual property are as follows:

1. Know How

In this instance know how was "all the information possessed by a licensor which a licensee would like to have too, in order to help him get started", which means that "know how" does not necessarily need to be secret in order to constitute "know how".

2. Two meanings of the word "Application"

Two meanings of the word application are possible in the context of patent applications:

Meaning 'A':

"The legal state of affairs that is constituted when a person requests the competent authority to grant him a patent and that request is still outstanding."

Meaning 'B':

"The content of the document or documents which that person filed with a view to initiating the above; most pertinently, a description of the invention together with at least one claim purporting to define it".

Meaning A is temporal by its very nature, it ceases to exist as soon as the application is withdrawn, refused, or granted. Meaning B is "a historical fact that never goes away, no matter what the Patent Office does, or anyone else does. It exists in perpetuity". Even the draftsmen of the Patents Act 1977 have fallen foul to using the two meanings of "application" interchangeably without proper distinction, caution must therefore be exercised.

3. The definition of Licensed Products

Under the Licence, the Licensor was paid, amongst other remuneration, a royalty on the sales of "Licensed Products" by the Licensee. Licensed Products were defined as "any product,

process or use falling within the scope of claims in the Licensed Application or Licensed Patent". Ambiguities therefore arose as to the exact meaning of "Application" and "or" in the context. The ambiguity of "Application" is dealt with above, the ambiguity of "or" is clear it can be used both to create mutual exclusivity (as in "double or quits"), or to connect two or more conditions, the satisfaction of any one of which will suffice (as in "working knowledge of German or French an advantage").

Unfortunately, both interpretations presented by the parties of the two ambiguities led to problematic conclusions. The Court therefore held that the same expression "Licensed Products" could be interpreted in this particular Licence as having different meanings in different parts of the agreement, according to the context. "Licensed Products" was used in two contexts in the Licence:

- (i) the exclusive licence given to the Licensee to exploit the Licensed Products; and
- (ii) the obligation on the Licensee to pay royalties on sales of the Licensed Products.

The Court held that in context (i) Licensed Products covered a different scope than in context (ii). However, it should be noted that the circumstances of this case were extreme and called for special arrangements, care should be taken before adopting this recommendation in other situations.

4. Interpretation in the face of ambiguity

The Court confirmed the modern approach to the interpretation of commercial documents what counts is what the language of the document, in its context, means to a neutral and reasonable person who has all the background knowledge that is reasonably available. "Background knowledge" can include relevant law, but not the parties' intentions or their previous negotiating positions. Thus, sometimes when incorrect language is used the neutral and reasonable person can, from their background knowledge, infer the correct meaning. In this instance the Court found an "interpretation [of the Licence] that best accords with business common sense", rather than one which placed too much weight on a literal analysis of the words used.

The importance of drafting from understanding as opposed to creating an ambiguous melting pot of different precedents is obvious. A little more understanding at the start could mean a lot less money at the end.

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STORMY WATERS AFTER MISTRIAL IN US FILE-SHARING CASE - BUT ARE UK PIRATES SAFE?

The US judge who presided over the nation's only successful copyright infringement case for file-sharing by an individual, has declared it a mistrial. He said he had committed a "manifest error" in his instructions to the jury and the award of damages of \$222,000 was "unprecedented and oppressive". This decision is likely to have wide implications for the US record industry's fight against file-sharing, but could the same outcome occur in the UK?

Judge Davis originally returned a landmark verdict in favour of the Recording Industry Association of America ("RIAA") against Jammie Thomas, for making songs available on the Kazaa peer-to-peer ("P2P") file-sharing network. It was the first time the US record industry had won a trial for file-sharing, as most cases settle out of court for a few thousand dollars. The heart of the issue was whether making a copyrighted work available for download over a P2P network constitutes "distribution" under US laws.

Ms Thomas was found liable for sharing 24 songs so the record companies' award worked out at \$9,250 per song. Ms Thomas appealed, arguing that the level of damages was disproportionate to the loss suffered.

There was no dispute that Ms Thomas had violated RIAA's reproduction rights by uploading the songs, but Judge Davis had incorrectly told the jury that the act of "making [songs] available" via a P2P network was sufficient to prove unauthorised distribution, "regardless of whether actual distribution has been shown". In his revised opinion calling the mistrial, Judge Davis now states that the US Copyright Act doesn't use the words "making available", and that simply putting songs into file-sharing networks does not equate to distribution unless you can prove that someone else downloaded those songs. The RIAA had not, so a re-trial has been ordered.

What would happen if the "Ms Thomas" case came before a UK court?

Unlike the US, the UK now has a "making available" right introduced as a result of the 2001 EU InfoSoc Directive, as implemented by the UK Copyright and Related Rights Regulations 2003 (amending the Copyright, Designs and Patents Act 1988 ("CDPA")). Therefore as well as section 16 of the CDPA, which reserves to the copyright owner exclusive rights to copy and communicate their works to the public, there is now a section 20 right that covers the "making available" of literary, dramatic, musical or artistic works, sound recordings or broadcasts to the public. A communication to the public includes making a copyright work available:

"...by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them." (Section 20(2)(b), CDPA).

This is aimed at prohibiting unauthorised posting of copyright material on the web (including illegal activity over unlicensed P2P networks). The UK equivalent to the RIAA, the British Phonographic Industry (BPI) that represents most of the UK record industry, has previously won two cases in the High Court against individual file sharers for making sound recordings available over P2P networks, with individuals in each case settling on average for damages of £1500 and £5000.

Another difference with the approach in the US is that in the Thomas case, for example, infringement was dealt with by means of a hearing before a jury who had power to award statutory damages of up to \$150,000 per infringement. In the UK this type of case, like the vast majority of instances of file-sharing, would usually be heard in the civil courts before a judge only and damages for civil infringements in the UK would have to be compensatory (relating to actual loss suffered) rather than punitive as is often the case in the US.

In his revised opinion Judge Davis refers to current US statutory damages for copyright infringement, as being "wholly disproportionate" and says that Congress should amend the Copyright Act to address statutory damages, where a party did not infringe in search of commercial gain. He goes on to say: "Unfortunately, by using Kazaa, Thomas acted like countless other Internet users. Her alleged acts were illegal, but common. Her status as a consumer who was not seeking to harm her competitors or make a profit does not excuse her behaviour. But it does make the award of hundreds of thousands of dollars unprecedented and oppressive".

Judge Davis' change of heart in the case may be a blow to the US music industry's campaign against illegal file-sharers. However, despite the apparently stronger legal position of record companies in the UK, the prospect of having to track down, successfully identify and attempt to take legal action against thousands of individual illicit file-sharers (very often with only an e-mail alias to identify them), has so far not been proving particularly attractive.

One option (which the BPI has been exploring) is to enlist the support of Internet Service Providers ("ISPs") to act against customers who infringe copyright. At the same time there has been reluctance on the part of ISPs to become actively involved in monitoring content, due to the legal consequences for themselves. Specifically, they may no longer be able to rely on the "mere conduit" defence available under the Electronic Commerce Regulations 2002 if they became aware of infringement. There is also the more basic question of who bears the costs involved in policing user activity over their networks. Indeed, following strong pressure from consumers, privacy groups and the telecoms industry, MEPs recently rejected the idea that ISPs should filter all downloads and punish copyright infringers proposed as part of the EU telecoms reform package.

However, in July 2008 a Memorandum of Understanding was signed between the BPI and the six largest ISPs in the UK to co-operate in tackling illegal file-sharing (with ISPs initially sending letters to alleged infringing account holders). This was hailed as a "significant step forward" by the record industry. The UK Government Department for Business Enterprise & Regulatory Reform (BERR) is also currently considering possible legislative solutions to the illegal file-sharing issue. The Government's preferred option appears to be to foster a co-regulatory system, under which ISPs and right holders would agree non-statutory codes of practice (to be approved by Ofcom) setting out a procedure for taking action against persistent infringers, and educating consumers.

Whatever the result, these and other legislative developments are also being watched closely by other creative industries (notably film and television), who are similarly feeling threatened by file-sharing as well as internet piracy generally.

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SCREEN-SCRAPING: RYANAIR LTD. V. BRAVOFLY LTD.

The practice of screen-scraping is not specifically dealt with under European legislation, nor has there been a definitive judgement on its legality emanating from the European Courts. The Irish courts will consider the legality of screen-scraping for the first time in the pending High Court case between Ryanair Limited (“Ryanair”) and Bravofly Limited (“Bravofly”).

The travel websites operated by Bravofly offer users the ability to search and compare the flight prices and timetables of a number of airlines, in return for an administrative fee.

Ryanair claims that the practice of “screen-scraping”, by which websites collect information from an airline’s booking infrastructure to offer flights to customers without using the airline’s website directly, and the use of unauthorized hypertext links, are in breach of copyright legislation and in breach of its website terms and conditions.

In August, Ryanair threatened to cancel flights booked through screen-scraping websites. The European Commission issued a letter of enquiry to Ryanair warning that such cancellations could breach the EC (Compensation and Assistance to Air Passengers) (Denied Boarding, Cancellation or Long Delay of Flights) Regulations 2004.

The Database Right

Directive 96/9/EC on the legal protection of databases (“Directive”), was implemented into Irish law by the Copyright and Related Rights Act. In order to qualify for protection, substantial investment must have been made in the obtaining, verifying or presenting of the database.

The European Court of Justice (“ECJ”) in British Horseracing Board v William Hill indicated that a database right is infringed through the unauthorized reconstituting, through cumulative acts of extraction, of the whole or a substantial part of the contents of the database or, through the making available to the public, by the cumulative effect of reutilization, the whole or a substantial part of the contents of such a database, which seriously prejudices the investment made by the maker of the database.

The outcome of British Horseracing Board left the extent of the database right uncertain. The ECJ held that William Hill’s use of horseracing data did not infringe the British Horseracing Board’s database rights since the listings for horse races did not represent a “substantial investment”. The real investment was in the actual organisation of the horse races rather than in the preparation of the database of listings.

Therefore, it is not sufficient that the investment is primarily in the business to which the database relates. A successful claim by Ryanair to a database right would probably require the “substantial investment” to be in the database itself.

If this is found to be the case, the screen-scraping by Bravofly could amount to extraction and re-utilisation and constitute infringement of the database right if such extraction/re-utilisation related to “a substantial part” of the contents of the database. Ryanair may seek an account of profits made by Bravofly which could incur a substantial payment from Bravofly to Ryanair.

There is widespread concern that the database right is not currently working as intended. It is to be hoped that the Irish courts will take this chance to shed some light on the legal principles of the database right.

Unauthorized Access to Data

The Criminal Damage Act 1991 criminalises unauthorized access to data. It is possible that screen-scraping activities constitute an offence under this Act. However, the Electronic Commerce Regulations 2003, which implement the Electronic Commerce Directive 2000, provide defences to “information society service” providers – the mere conduit defence, the caching defence and the hosting defence. These defences offer protection to such providers against civil and criminal liability (although an injunction may nonetheless be granted against such providers).

Hypertext Links authorization required?

In one of the earliest Internet legal judgements, the 1996 Scottish case of *Shetland Times v Wills*, Lord Hamilton in the Court of Sessions held that “deep linking” into the website, past the front page, was unacceptable. However, this case may be of limited authority as the decision was only an interim order without full argument of possible defences, and was decided at a time when the internet was younger and its search functionality much less developed. It is arguable that URLs are not protected by copyright as they neither meet the required thresholds to be treated as a literary work, nor do they possess any original content.

Furthermore, the internet’s architecture is premised around the linking of webpages through hypertext. The argument that the authorisation of a website is necessary before hyperlinking may be carried out could open floodgates where every website which has been hyperlinked may sue the website which has put the hyperlink in place. This, and the fact that such a finding could undermine the very viability of the internet, could sway the court from accepting Ryanair’s claim. It is often argued that when one publishes material on the internet, one impliedly licenses at the very least hyperlinking and, more widely, the caching and indexing of material by search engines.

Search Engines

A successful outcome for Ryanair could potentially make all search engines by their very nature illegal. Data aggregators such as Bravofly simply offer users access to information collated by a specialized form of search engine. The difference between data aggregators and search engines such as Google, Yahoo, et al, is that the former confine their service (of providing information collated by either the service provider or by third parties) to one type of site such as those of airlines, while the latter potentially collate information from the entire internet. When Google scrapes the website of any given company, it displays part of the content of the company’s site on its search engine results page (“SERP”), along with parts of the websites of the company’s competitors. Many companies do not have a problem with this practice as the majority of traffic is often derived from SERPs, which in turn generates new business.

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1. [2004] ECR I-10415
2. Section 320(1) of the Act
3. Section 320(1) of the Act
4. Section 324 of the Act
5. Section 324(1) of the Act
6. E.g., DG Internal Market and Services Working Paper, “First evaluation of Directive 96/9/EC on the legal protection of databases”, 12 December 2005
7. Section 5 Criminal Damage Act 1991
8. S. I. No 68 of 2003
9. Directive 2000/31/EC
10. regulation 16
11. regulation 17
12. Regulation 18
13. *Shetland Times v Wills* [1997] F.S.R. 604
14. “Search Engines, data aggregators and UK copyright law: a proposal”, Allgrove and Ganley, 2007 E.I.P.R. 227



News from the Regions

LES Scottish Branch



Our Summer event for 2008 was attended by over 50 people, drawn from the professional services, HEIs, the public sector and (potential) licensors. It was held in partnership with Glasgow Opportunities, and introduced a number of licensing case studies, looking at the pros and cons, the highs and lows, as well as the lessons learned during deal-making.

The event was hosted by Norman Trotter OBE, the Grand-daddy of licensing in Scotland, being former Chairman of the Scottish Branch of the Licensing Executives Society and Founder and Chief Executive of the Licensing Centre, as well as having held various senior positions at Ferranti and Honeywell in the UK and Brussels.

Norman introduced **Desmond Cheyne, director of various well-known fashion brands including Katharine Hamnett and Jasper Conran.**

With licensing in the fashion sector focused on trade marks, he highlighted the major points to look for in a "deal", whether with manufacturers, distributors or retailers. He cautioned against licensees who structure a licence agreement merely to take the IPR out of the market or sterilising it; he emphasised that the agreement should detail how commercial exploitation in various geographies will take place and the level of investment expected to support this, advising that licensing territory by territory as usually the best way to control exploitation, ensuring the licensee or licensees have the capability to take the IPR to market and allowing for quality control of how the actual commercialisation takes place.

Licensors often need to be able to exercise control over the licensee, something that is particularly important with fashion brands, where marketing communications will play a critical part in brand development and consumer perception. In this area, Desmond commented, it is normal for fashion licensors to control advertising and promotional material, exercising their commercial judgement to best support the brand.

Desmond discussed how royalty rates should be aligned with sector standards and a combination of upfront payments and annual minimum payments could help focus the mind of the licensee, ensuring that they remain focused on commercial development. Planning for failure, concluded Desmond, should also be done at the outset, with licensors determining legal jurisdiction of agreements in order to avoid costly international litigation in unfamiliar territories.

We were delighted also to welcome LES first-time attendee Kenneth Park, MD of Mondrago Multimedia, a small recently-formed Glasgow company which specialises in tourism training and which has licensed courses and associated packages and services to universities and colleges round the UK.

Kenneth explained that for Mondrago, licensing deals with customers involved a mix of software and printed training materials, which capture the know-how of the company's founders. As is often standard with software user licensing, annual training, email support, and certification are all provided as part of the package.

After receiving expert advice on licensing, the company registered relevant trade marks and created a "standard" licence document. While individual negotiations with Further Education Colleges varied depending on the size and needs of them as customers, the document provided a template to control software distribution and use. Kenneth admitted, however, that issues around controlling licensees and preventing copying are ones they have regularly to address.

Kenneth added that as with any type of licence deal, deciding on appropriate pricing models and monitoring how licensors use the IPR could be challenging for a small company. He advised that the

secret was to be aware of the potential pitfalls and legal issues, and to build them into the exploitation model.

Alison Bryce of Maclay Murray and Spens, members of Lex Mundi, an international IP Practice Group based in Texas, provided an overview of a recent legal survey into global trends in commercialisation via licensing.

The Lex Mundi report demonstrated greater uniformity than many expected but also some noteworthy exceptions! EG - Know-how can be licensed in most countries, but in others only when bundled with patents or copyright material. The research focused on a number of key licensing areas, including management of jointly-owned intellectual property rights, the licensing of know-how, royalty payments, registration and disputes.

The research also highlighted that there were no standard royalty rates globally, and whilst most respondents said registration of IP was not necessary, it was definitely recommended for exclusive licensing deals, because of the obvious help with third party negotiations and enforcement. The majority of disputes were still dealt with in court. Arbitration was less common, but was increasingly being built in to the initial licence documents. The research concluded that there are still significant variations internationally in how the details of licence deals were handled and in local legislation. As a result, seeking expert legal advice in all jurisdictions was essential.

LES Irish Branch



The first two events of this year's 2nd Friday IP lecture series in conjunction with Forfás have been held. On 12 September, Alistair Payne (Matheson Ormsby Prentice) and Barry Moore (Hanna Moore & Curly) spoke on the topic of IP and the financial services industry. On 17 October, Peter Bolger (Mason Hayes+Curran) gave an update on recent developments on design law. Both events were very well attended with approximately 40 attendees for each. The Board of LES would like to thank the speakers for their time and effort. **The new contact in Forfás concerning these events is Ruth Card. The next talk will be given by Brian McElligott (DFMG Solicitors) on file sharing, internet, infringement of rights and impact on licensing at Forfás on Friday 14th November 2008.**

For further information or for a copy of any slides from our presentations, please contact pbolger@mhc.ie.

LES North West Region

"Intellectual Property Manchester United's 12th Man"

The North West Group of The Licensing Executives Society are delighted to welcome Patrick Stewart, Head of Legal and the first in-house lawyer at Manchester United, to address us. **Patrick joined Manchester United** in March 2006 from Team Marketing. Since joining, Manchester United has signed the biggest shirt sponsorship deal in the UK with Insurer AIG. Patrick has also worked on a string of deals with companies such as Audi, Betfair, Budweiser and secondary ticket exchange Viagogo. Patrick's responsibilities include the sponsorship, marketing and media side of the business. Intellectual Property is a significant part of Manchester United's strategy. Patrick will explain how Intellectual Property is Manchester United's 12th man and will show us examples of the brand in action.

As this is likely to be a very popular meeting **please book early as places will be limited.** The meeting will commence in the Brindley Room at 6.30pm and will be followed by dinner (which includes wine) in Albert's Shed restaurant at 7.30pm. For further information please contact:

Paul.Bentham@addleshawgoddard.com



Report on LES London Regions September meeting

National law firm, Shoosmiths, brought together some of the world's leading IT figures to discuss the impact of Free and Open source Software (FOSS). Over 40 people attended the event, held at Withers LLP offices and chaired by Alex Newson of Shoosmiths.

The Firefox Internet browser, Linux and OpenOffice.org are all examples of FOSS, which unlike traditional proprietary software, are generally available to download from the internet without the cost of a licence.

The first speaker, **David Harris**, an IP and IT Barrister, gave an enlightening introduction to the legal issues, focussing on GPL2 the most commonly used open source licence. He discussed the origins of FOSS as a movement and gave a brief rundown of the four freedoms: the freedom to run software for any purpose; the freedom to study how the software works and adapt it, the freedom to redistribute copies and the freedom to improve the software and release those improvements. He also spoke of the advantages and disadvantages of this type of software. In particular, he described one common problem faced by companies, which is the use of open source software by IT programmers. This use often breaches the licence terms as programmers frequently incorporate open source code into commercial products, thereby infringing copyright. This, for companies' legal teams, is a potential minefield.

This was followed by a more business-centric talk given by **Mark Lange**, senior policy counsel at Microsoft EMEA Law and Corporate affairs. Mark discussed different IT business models including proprietary software and FOSS and their coexistence, peaceful or otherwise. Contrary to popular opinion, Mark told us how Microsoft is not averse to using open source software. Although Microsoft would, of course, prefer to use their own operating systems, and would actively sell theirs above all other products, the market is such that Microsoft has had to adapt following client demands. The only disappointment for Mark was that he could not perform the demonstration on his Ubuntu Linux laptop due to the technological constraints of the venue, but this did not reduce the impact of the talk for the audience.

The final talk was given by **Gerry Gavigan**, Chairman of the Open Source Consortium. Not surprisingly, he was very much in favour of a widening open source use. He provided a constructive argument about the benefits of open source, taking the standpoint that any restriction on the use of software was ultimately not good for business or the consumer.

A lively question & answer session followed, covering issues such as the use of FOSS within businesses and - what has to be the most commonly debated IT/IP law subject - software patents.

FOSS was identified by the LES Laws Committee in early 2008 as a "hot topic". The popularity of the event demonstrates that FOSS is likely to remain a hot topic for some time to come.

Mirin Diver, Withers
Alex Newson, Shoosmiths

International Delegates Meeting of 27th and 28th September Amsterdam

Adam Liberman formally took office as the new President of LES International. He has proposed a series of initiatives to try to ensure that the Society meets the current challenges that it faces.

They include a review of the name and brand image of the Society. This is more than just a makeover and raises fundamental issues about the Society's mission. Should the

Society be doing more than just licensing? Most delegates thought that it should and that it does. If this is the case then we should ensure that is reflected in the name.

Adam is also keen to ensure that LES reaches out to younger licensing professionals and with this in mind is supporting initiatives such as the initiative that Anita Roberts is leading in LES B&I to encourage more active participation by younger members.

We look forward to working with Adam and to helping him to achieve his goals, more especially as they fit well with our aims and plans. If any reader has any good ideas for a new name for LES, which better expresses our aims and aspirations then please let us know. Likewise, if you are interested in working with Anita or Barry then please contact them directly as they would very much like to hear from you.

Jennifer Pierce, Charles Russell

LES Scandinavia Annual Conference 2008, Helsinki

The UK was well represented among the speakers at LES Scandinavia's meeting at the beginning of September. I opened the conference in my capacity as LESI Vice-President, and Stephen Potter and Tim Frain made presentations on the second day. The opening session was focussed on a talk by the speaker of the Finnish Parliament, Sauli Niinistö, on developments in the world economy and their interaction with innovation.

Scandinavia has a reputation for design and this was reflected in the presentation of Stefan Lindfors who took us through the ups and downs of his career, starting with his radical "Scaragoo" design for an adjustable lamp, which he produced as a student project, and finishing with his recent toroidal PLUP water bottle. The Monday afternoon company visits included a trip to the Marimekko factory; unfortunately we could not visit the printing machines, but we heard about the history of the company, which has faced severe financial difficulties on at least two occasions. The other factory visit was to KONE cooperation.

The conference dinner was held at the Suomenlinna Sea Fortress, a short boat ride from Helsinki. The only occasion that it has been bombarded was by the British in 1855 in connection with the Crimean war. I felt quite apologetic. A presentation was made to Kari Sipilä on the occasion of his retirement from the Board, although he will remain involved in certain projects for the Society.

LES Scandinavia incorporates its AGM into the Annual Conference and this is held early on the second day, which gave the rest of us an opportunity to linger over breakfast. Jonas Gulliksson has been appointed as president for two years and the society is already making plans for the Pan-European conference in Copenhagen and Malmö next year. The afternoon session was devoted to aspects of co-operating with China and India, and the conference was closed by Jonas Gulliksson and Kaisa Fahllund.

Stephen Powell



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Events Diary 2008-2009

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For further information please contact regional officers for LES events in Britain and Ireland (see panel on the left of this page or visit the LES B&I website <http://www.les-bi.org/>) and the officers of national societies for overseas events (see LES directory or the LESI website <http://www.lesi.org>)

LES North West Region 4 November 2008

"Intellectual Property Manchester United's 12th Man"
 At The Brindley Room
 Albert's Shed Restaurant
 Manchester M3 4LZ
 (Tel: 0161 893 8656)
 18:30 start
 For further information contact:
Paul.Bentham@addleshawgoddard.com

LES/CIPA joint seminar Half day meeting 10 November 2008

"Competition Law in IP"
 Agreements restricting competition, abuse of dominant position in litigation, licences and agreements. Registration and buffet lunch.
 12:30-17:00
 At CIPA
 95 Chancery Lane
 London WC2A 1DT
 Contact: Sally Young at the above address for further information or
 Fax: 020 7430 0471

LES London Region 13 November 2008 Date change

"Managing and Monitoring Licensees"
 KPMG
 8 Salisbury Square
 London EC4Y 8BB
 For further information contact:
les@glasconf.demon.co.uk

Thought about advertising in
newsxchange?
 Contact **Cara** at the LES
 Administrative Office
 Email: **les@glasconf.demon.co.uk**

LES Irish Branch 14 November 2008

LES/ Forfás Friday Lecture
 Breakfast meeting
 "File sharing, internet, infringement of rights and their impact on licensing."
 At Forfás, Dublin
 For further information contact:
pbolger@mhc.ie

LES Irish Branch 5 December 2008 date change

AGM and Christmas Dinner
 For further information contact:
pbolger@mhc.ie

LES Education

Fundamentals of Intellectual Asset Management
9-11 March 2009
 Cranfield Management Development Centre. This excellent three-day course has been developed by the Licensing Executives Society the premier worldwide organisation for all those involved in intellectual property exploitation and offers a comprehensive and complementary mix of lectures and interactive exercises.

Who should attend?

The course is aimed at anyone from beginner's level to those with up to two years' experience in licensing. It is a valuable introduction to this field whether you have a legal, academic, financial or other business background. For further information please visit the LES B & I website:
www.les-bi.org

Welcome!

Council is pleased to welcome the following new members to the Society: **Shirley Ann Black**, Arthur Cox; **Graham Burnett-Hall**, Marks & Clerk Solicitors; **Gemma Louise Christie**, Boulton Wade Tennant; **Caoime Daly**, BCM Hanby Wallace; **Dominic Dryden**, Olswang; **Emma Nolan**, University of Leeds; **Tom Sheridan**, MacLachlan & Donaldson; **Michael Whelan**, Waterford Institute of Technology; **David Williams**, Page White and Farrer

Members on the Move >>>>

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Please remember to tell our administrator, **Cara McIlwraith**, if you change your office address so that we can continue to send you LES information and newsxchange™. Her address is:

LES Administrative Office, Northern Networking Ltd
1 Tennant Avenue, College Milton South, East Kilbride
Glasgow G74 5NA

Please also remember to change your contact details in the Membership Directory on the LESI website. As a service to our members the editor will print any change of company and location in newsxchange™. Please contact **Mary Elson**, elson.mary@btinternet.com

Membership

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A membership application form may also be found on the LES B&I website: www.les-bi.org

