

Update

Libel Online

The government responded to the Joint Parliamentary Committee on the draft Defamation Bill. It rejected the proposed new Takedown and Leave Up orders. See our October update for the detail of the Joint Committee's report. The government felt the Committee's suggestions for online libel were unworkable based on the ISP's response. The government accepts the current position is unsatisfactory and that ISPs need more protection. It noted its resource concerns for the courts and the risks of mini-trials on Leave Up and Take Down orders and that claimants going to law for Takedown would seek other relief (damages and costs) whereas currently they stop at achieving Takedown.

The government's preferred option is for ISPs to act as a liaison between the person complaining about a defamatory posting and the author (where the identity and contact details of the latter were unknown to the complainant. The ISP would contact the author (or if this did not prove possible, take the posting down). If after an initial exchange of correspondence the issue remained in dispute, the ISP would be required to provide disclose the identity of the author to the complainant, who would then have to sue him/her to get Takedown ---and no claim could be taken against the intermediary.

Presently ISPs force a complaining party to get a court order before they will disclose a customer's identity (a Norwich Pharmicial order) which the ISPs do not oppose so this is not good news for ordinary individuals. Authors lose privacy (an Art. 8 right) and the right to publish anonymously (a qualified Art. 10 right) –now without any court protection or supervision. This is important given Norwich Pharmicials have been refused in the past where what was posted was 'mere abuse' or "saloon bar moaning." It's also not good for individuals defamed online –given both the cost of litigation and the hurdle of *substantial harm* which often means defamation of the ordinary man in the street is often struck out as not worthy of the court time, impacting Art 6 (fair trial/due process).

Privacy –Sex video

In August 2011, the singer and TV personality, Tulisa Contostavlos,' Public Relations agent was informed by The Sun newspaper that an attempt had been made to sell to it the footage of Tulisa engaged in sexual activity. The PR made a public statement on her behalf that the tape was a fake, and that she had never allowed anyone to film her having sex. This statement was reported in The Sun. On 19 March 2012, Mr. Justice Tugendhat granted an emergency interim "non-disclosure" injunction, prohibiting anyone from '*using, publishing, communicating or disclosing all or any part of the film to any other person*'. That application was made in private (in order not to defeat the purpose of the order/proceedings). Thereafter Tulisa herself posted an online video in which she accepted that it was her in the footage and blamed her ex boyfriend, Mr. Justin Edwards, for its disclosure on the internet. She said she did not recall the making of the footage, or any footage of that kind and that is why her PR had denied the story. On 26 March 2012, the same Judge, continued the non-disclosure order until the trial or further order (on an application

made in public given Tulisa's own publicity) with additional provisions necessary so that the purpose of the proceedings was not to be defeated including sealing the court file and service on third parties. See [*Contostavlos v Mendahun*](#) [2012] EWHC 850 (QB) (29 March 2012).

The decision makes no new law and applied *the reasonable expectation test* to privacy under Art. 8: "*The question is what a reasonable person of ordinary sensibilities would feel if she was placed in the same position as the Claimant, had faced the same publicity*" (from *Campbell v MGN* [2004] 2 AC 457 at §49) (under the Human Rights Act there was no counterbalancing value as no public interest or freedom of expression was engaged). The court noted that the fact the material has already made the public domain will not prevent it from restraining publication of photographs as there is a "*fresh intrusion of privacy when each additional viewer sees the photograph.*"

Media Regulation

The PCC (which we have criticized in the past as toothless and lacking independence) will be closed even before Lord Justice Leveson reports --so discredited is it. A new interim regulator will be established until Leveson recommends how it should be replaced. The chairman of the PCC, Lord Hunt, has promised the replacement body will be "a robust, independent regulator with teeth". Hunt, replaced Baroness Buscombe last year amid mounting claims of phone hacking. Hunt said: "*I decided early on that the problem really was that the PCC was being criticised for not exercising powers it never had in the first place, so I recommended we start again with a new body with a press regulator with teeth.*" This is a point well made in our view.

Copyright

-File sharing

The Digital Economy Act will now be implemented after the failure of the final legal challenge by BT and TalkTalk against last year's judicial review. Three senior judges in the Court of Appeal ruled that the government could not make ISPs pay a proportion of the case fees attached to the act. The government is now able to send out warning letters to UK internet users accused of illegal file sharing.

-Snippets

Germany's coalition has proposed a novel copyright law for news publishers to ensure they are compensated by "commercial traders" that use their snippets online. The snippets would enjoy copyright protected for one year.

In the EU/UK ordinary copyright law has been applied to headlines and small extracts --and for the ordinary copyright term of life of author plus 70 years--despite the traditional English law control of a requirement that the taking had to be substantial. See our July release and the

discussion of *Case C-5/08Infopaq International A/S v Danske Dagblades Forening, Copiepresse v Google, the Court of First Instance in Brussels, No.06/10.928/C* and *Newspaper Licensing Agency Ltd and others v Meltwater Holding BV [2010] EWHC 3099 (Ch)*.

-Filtering

Mr. Justice Arnold in the Chancery Division found for the record companies and against the ISPs --granting an injunction forcing the ISPs to block Pirate Bay in *Dramatico Entertainment Ltd & others v British Sky Broadcasting Ltd & others* [\[2012\] EWHC 268 \(Ch\)](#). The case does not make new law but applies the Newbinz cases (also Arnold) from last year. See our July 2011 release on those cases. Another long decision from Arnold and not unexpected.

Domain Names

-Appealing Nominet

Judge Birss QC who sits in the Patents County Court and who held that the decisions of a Nominet-appointed expert in .uk domain name disputes were subject to review by a court was overturned by the Court of Appeal. This is a ruling we think is plain wrong. The standard rule in international and domestic arbitration is that manifest error/errors of law are grounds for appeal –unless the parties have agreed otherwise. The Nominet Policy and Procedure provide that the courts have concurrent jurisdiction and that DRS proceedings should be halted when a party goes to law so parties have not agreed to surrender their rights to appeal by registering a .uk domain name.

.domains

Some parties have been attempting to front run the new gTLDs process by registering generic names as trade marks preceded by a dot –so .library, .music etc. Thus when a third party seeks to apply to register the generic Top Level Domain –they will find a party whose mark they will have to acquire.

Internet Governance

The Council of Europe (CoE) adopted a comprehensive Internet Governance Strategy to inter alia protect the “*Internet’s universality, integrity and openness as a means of safeguarding freedom of expression regardless of frontiers and Internet freedom,*” and protect standards for granting the unimpeded cross-border flow of legal internet content or human rights standards on network neutrality. The [CoE strategy is here](#) for 2012 - 2015.

Cookies

As the deadline for complying with the new cookie law approaches (26th May 2012), the International Chamber of Commerce (ICC) has launched guidelines to help companies comply with the new EU rules, see http://www.international-chamber.co.uk/components/com_wordpress/wp/wp-content/uploads/2012/04/icc_uk_cookie_guide.pdf. However, the UK's data protection watchdog is not likely to take action against the users of data **analytics** cookies on websites even if they fall foul of new EU rules on cookie consent, it said: “ *Although the Information Commissioner cannot completely exclude the possibility of formal action in any area, it is highly unlikely that priority for any formal action would be given to focusing on uses of cookies where there is a low level of intrusiveness and risk of harm to individuals.*”

Keywords

The US Court of Appeals for the Fourth Circuit overturned the district court's decision in the Rosetta Stone case and ordered that the issues be examined in more detail by the district court. This is bad news for resellers of genuine goods. The district court decision in Rosetta Stone v Google (E.D. Va.) 3 August 2010 granted summary judgment to Google as one of a long line of US keyword cases. The primary claim was that keyword auctions were direct infringement under the Lanham Act (the US Trade Mark statute). The Court found no intent to confuse and insufficient evidence of actual confusion as to origin or source; the Plaintiff's evidence being unreliable and/or de minimis. It found the average consumer for the Plaintiff's language products comprised well-educated consumers who could afford to spend hundreds of dollars on the software and were likely to do their research and whose “*expertise and sophistication would tend to demonstrate that they are able to distinguish between the Sponsored Links and organic results displayed on Google's search results page.*” The court found that generalised knowledge of infringements was insufficient and Google did not have specific knowledge. It was not vicariously liable as there was no exercise of joint ownership or control over the infringing product. There was no dilution as Google did not use the trade marks to identify its own goods and services and Rosetta Stone's brand awareness had only increased since Google revised its trademark policy in 2004. The court also found that Google's use would have been protected by the functionality doctrine had it been infringing (a product feature is functional if it is essential to the use or purpose of the article or if it affects the cost or quality of the article). Keywords had an essential indexing function because they enable Google to readily identify relevant information in response to a web user's query and advertisers relied on the keywords to place their products and services before interested consumers --this promoted competition and enabled consumers to locate information, goods, or services and compare prices. If Google was deprived of this use of the Rosetta Stone Marks, consumers would lose the ability to rapidly locate potentially relevant websites that promote genuine Rosetta Stone products at competitive prices.

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