

Update

ISPs

Google announced it will deal with Takedown on its Blogger.com service on a country by country basis. Content removed under local law will only be removed in the jurisdiction in question. To action this, it will redirect/migrate the service to local domains corresponding with the country of the reader's current location. See the release <http://support.google.com/blogger/bin/answer.py?hl=en&answer=2402711>. This comes on the heels of a similar announcement by Twitter. We believe this is a positive development as it avoids the “race to the bottom” scenario whereby the nation with the most repressive (or claimant friendly) laws prevails.

Defamation or Libel?

Google also prevailed in *Davison v Habeeb* [2011] EWHC 3031 arising from its Blogger.com service. The court (correctly) found Google was a host, rather than a conduit, so that it could become liable for content after receiving a Takedown Notice.

In issue was the difference in the defences for intermediaries in the Defamation Act (§1), which refers to knowledge the defendant is contributing to the publication of *a defamatory statement*, and in the E-commerce Directive, which refers to knowledge of *unlawful activity*, that is, libel (a defamatory statement to which there is no defence). This has long been an open question.

The court found while Google had received a Takedown Notice alleging defamation –it faced conflicting claims it was in no position to adjudicate–so could not know whether there was a defence to defamation or not. Unless it knew there was a libel, it was not on notice of *unlawful activity* despite having received a Takedown Notice.

This opens a rich seam of defenses for ISPs. See the case at <http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2011/3031.html&query=Davison+and+v+and+Habeeb&method=boolean>

Ecommerce Directive Review

The EU Commission has announced its Ecommerce agenda for the year which includes a review of the way Notice and Takedown works under the Ecommerce Directive (with potential for more precisely defined procedures). See the agenda <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/12/5>. The Commission noted the vast majority of the 420 responses to the public consultation on e-commerce asked the Commission not to revise the Directive. See http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm

It is widely believed that the Ecommerce Directive, negotiated in the heady days of 2000, could never be replicated in today's polarized environment, given some governments now wish to see internet intermediaries filter and police the internet on behalf of law enforcement.

The agenda also includes a review of the Copyright Directive and a legislative initiative on private copying.

COE Declaration

On 8 December, the Council of Europe launched a Declaration on "the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers."

<https://wcd.coe.int/ViewDoc.jsp?Ref=Decl%2807.12.2011%29&Language=lanEnglish&Ver=original&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>. Laudable but not likely to become legislation.

Agents --post Termination Commission

Pro-Active Sports Management v. Rooney & Ors [2011] EWCA CIV 1444 –tackled the thorny, literally, million pound question; what happens when a footballer (or celebrity) terminates their agent –how long can the agent continue to take a percentage thereafter?

Mr. Rooney's agent claimed a contractual right to commission of 20% on all contracts the agent had procured during the term of the contract—even if due after the expiration of the 8 year term. Mr. Rooney challenged the claim.

The clause provided: "6.2 *In consideration for the performance of the Services, the Client shall pay to the Company....a commission calculated on a percentage of all sums payable to the Client as follows: 20% of the gross sum payable under any contract or arrangements for the promotion, endorsement or advertisement of the Client and/or the exploitation of the Intellectual Property and/or products, goods or services to which the Client is a party.*"

The trial judge said the contract worked perfectly if the agent agreed to provide a range of services for its client in return for a percentage of the income receivable by the client *during the subsistence of the agreement* and found for Mr. Rooney --preferring an interpretation that it would lead to a commercial divorce with a clean break when the agency contract was terminated. The appellate court reversed finding a right to commission arose from success in procuring endorsement contracts and no other criteria, and not the ongoing provision of services. Clause 6.2 did not say "payable during the currency of the [contract]" or contain any other limitation on the word "payable".

Both courts however agreed the contract was unenforceable on the grounds of restraint of trade as Mr. Rooney had only been 17 when he signed it, it imposed very substantial restraints upon his freedom to exploit his earning capacity over a very lengthy period (8 years), well in excess of anything which was to be found elsewhere in the market for agency services of this kind. Mr. Rooney and his parents were unsophisticated and were not advised to and did not take independent legal advice. The trial judge found an 8 year tie for a player of Mr. Rooney's age could not be justified. This left the agent

with a remedy in *quantum meruit* (from the Latin, ‘as much as is deserved’) which would not necessarily be at the contract rate of 20%. This will be the subject of a separate hearing.

Links

The Supreme Court of Canada decided a hyperlink was not *a publication* within the meaning used in the law of defamation –unless it also republishes (extracts) the defamatory statement. See *Crookes v Newton*, 2011 SCC 47 at <http://scc.lexum.org/en/2011/2011scc47/2011scc47.html>

More Google

A French court last month found Google Inc. and its publications director liable for the appearance of a “defamatory” suggested search term under the search engine’s automatic search completion system. The insurance company discovered that when users typed its name into Google, one of the top suggested searches included the word “escroc,” (“crook” or “swindler”). In *Google Inc. vs. Lyonnaise de Garantie*, a Paris court ordered Google to remove the suggestion and pay €50,000 in damages and costs. Google suffered similar results in Argentina and Italy.

Here the cases have gone the other way. See *Metropolitan Schools v DesignTechnica* [2009] EWHC 1765 (QB) where Google was joined as a defendant due to its role as a search engine and was held not to be a common law publisher (so in no need of a defence) due to the neutrality of its algorithm. See also *Budu v BBC* [2010] EWHC 616, Google’s search results yielded three snippets from the BBC news archives in reverse order. Google was not sued (due to *Metropolitan*) but the BBC was sued (without success) for Google’s re-publication and the "the tattoo" it thereby attached to the claimant’s name.

A New Data Protection Regulation

On 25 January, the EU Commission unveiled a new proposal for a regulation on Data Protection. This will undergo significant changes yet. Significantly –it will be a regulation (directly binding on member states) rather than a directive –so one step further than harmonization. See http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf. Reactions have been mixed. Of particular interest is the "right to be forgotten" a development of the (currently unenforceable) existing right to deletion after the purpose has been fulfilled. This promises to be very contentious with implications for speech. We will comment on the proposal in detail in future as it evolves.

PCC

Following the recommendations of the Jackson and Hargreaves Reviews, a new small claims service will be introduced at the Patents County Court, helping small and medium sized businesses protect their copyright, patents, trade marks and designs while benefiting from the PCC’s regime of fixed and limited costs. The jurisdictional limit is to be £5,000. See <http://www.ipo.gov.uk/hargreaves-enforce-c4e-pcc.pdf>

Advertising

Expedia owned TripAdvisor (TA) was sanctioned by the Advertising Standards Authority (ASA) for misleading claims. The ASA said consumers would understand the claims "Reviews you can trust", "... read reviews from real travelers", to mean that they could be certain that the reviews posted on the site were from genuine travelers, and accurately reflected those travelers' experiences of the places they visited. In fact while TA required reviewers to warrant this –it undertook no verification. See the ruling at http://www.asa.org.uk/ASA-action/Adjudications/2012/2/TripAdvisor-LLC/SHP_ADJ_166867.aspx. This seems somewhat harsh as online consumers tend to have a healthy skepticism of reviews and are unlikely to have expected TA to have conducted any verification.

This does not provide legal advice but general information. It is neither a complete discussion nor a substitute for legal advice. This is general information provided on an as-is basis and no warranties are given and no relationship created.