

IP & Media Update Sept 2013

Social Media; The High Court granted an injunction restraining former employees from using confidential information (customer emails) gained through the employer's LinkedIn groups in their new competing business (for the issue of a press release). The court was influenced by the fact the employees made preparations for their new business while still employed. While some cases take the view that mere preparations are permitted, they can breach the duty of good faith as well as contract terms. See *Whitmar Publications Ltd v Gamage & Ors* [2013] EWHC 1881 (Ch). This is one of only a handful of decisions on social media to date.

Linking; decisions in two cases are awaited from the European Court of Justice:

1. Case C-348/13 BestWater International, from the German Bundesgerichtshof on whether *embedding* public domain works is a new communication to the public.
2. Case C-466/12 Svensson, a reference from the Swedish Svea hovrätt, as to whether a *clickable link* constitutes a communication to the public.

A right of Communication to the Public is an exclusive right of a copyright owner and therefore when third parties exercise it, they potentially infringe.

Domain Names; ICANN held a recent meeting at which four registry agreements for Internationalized Domain Names (IDNs) were agreed, including:

- The Arabic word for "web"
- The Russian word for "online"
- The Russian word for "website"
- The Chinese word for "game"

Issues have arisen in relation to some generic Top Level Domain (gTLD) applications although many have been approved. One of the first withdrawn was an application for .swiss by Swiss Air after the Swiss government objected. Applications for .patagonia and .amazon were opposed by Argentina and Chile and Brazil and Peru respectively.

Trade Marks; Sky sued Microsoft over the name SkyDrive Microsoft has adopted for its cloud storage service. Sky succeeded on both trademark infringement (including dilution or blurring given the reputation of Sky's marks) and passing-off. Microsoft is expected to appeal. See *British Sky Broadcasting Group Plc & Others v Microsoft Corporation Microsoft & Another* [2013] EWHC 1826 (Ch).

Copyright; the UK Government announced amendments to copyright law and one of the key proposals is the long delayed format shifting exception (first proposed by the Gowers review in 2006) so that private individuals will have the right to copy content they have bought onto any device they own for personal use. The Intellectual Property Office (IPO) has published the draft legislation. Other exceptions relate to parody, quotation, public administration, data analysis for non-commercial research, education, research, libraries and archives, and access to copyright works for people with disabilities. See <http://www.ipso.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>

Image Rights; the singer, Rihanna, succeeded in a claim against Topshop, a major high street store, over its sale of a T-shirt featuring her image. As the UK does not have image rights, she had to rely on the common law tort of passing off in the form of false endorsement. She succeeded but on the very particular facts that she had previously endorsed Topshop's goods, her general endorsement earnings, and the fact the photograph of her image was taken during a photo shoot for an album and was associated with that album. See *Robyn Rihanna Fenty v Arcadia* [2013] EWHC 2310 (Ch).

Libel; the Ministry of Justice has consulted on draft Regulations under s. 5 of the Defamation Act 2013, the new defence for website operators who follow a process to be set out in Regulations. We have undertaken a preliminary analysis of the new regulations. Please contact us if you would like a copy.

Libel costs; the Government is consulting on Qualified One Way Costs Shifting (QOCS) for libel claims. It proposes cost protection orders for parties against the *loser pays* costs regime on a limited and means tested basis to protect those of *modest means* from any liability (over and above an award of damages). Cost caps are also proposed for those with *some means*. This is part of a package of reforms including agreed costs budgets and implementation (for libel and privacy) of the general prohibitions on recovery of the After the Event (ATE) premium and the uplift in CFAs (Conditional Fee Agreements). <https://consult.justice.gov.uk/digital-communications/costs-protection-in-defamation-and-privacy-claims>

Re-named Court; the Patents County Court is now called the Intellectual Property Enterprise Court.

Digital Sales; the new draft Consumer Rights Bill will extend Sale of Goods type law to these and includes:

- A definition of "digital content" as data in digital form;
- Standards such as satisfactory quality, fitness for purpose and compliance with description;
- A right to compensation for damage to devices or content where the trader fails to exercise reasonable skill and care;
- Remedies where digital content standards are not met, such as a right to repair or replacement or the right to a refund.

Disclosure Orders; in *Various claimants v News Int.* ([2013] EWHC 2119 (Ch)), it was held that Norwich Pharmacal (innocent third party type) disclosure could be ordered against the Metropolitan Police despite the fact that they did not "participate" in the original wrongdoing. This significantly expands this remedy and also raises questions about use of material in the hands of the police –covered by Absolute Privilege for defamation purposes.

Hacking; the Court of Appeal ruled that hacking into saved voicemail messages after the recipient has already heard them is still an interception of a communication "in the course of its transmission" for the purposes of the offence under section 1(1)(b) of the Regulation of Investigatory Powers Act 2000 (RIPA). The defendants, all former editors or journalists at the News of the World, had argued that hacked messages were not intercepted "in the course of transmission" because the transmission was already complete, but the court rejected the argument on the basis that transmission is a continuing state of affairs and is not limited to the first occasion when the intended recipient accesses the message. The technical analysis by the

Court is, in our view, strained and will potentially raise questions for providers of services which interpose themselves at any stage in the communication channel. See *R v Edmonson and others* [2013] EWCA Crim 1026, 28 June 2013.

Data Protection; the High Court ruled that businesses are under a duty to respond to all Subject Access Requests (SARs) they receive but need not be concerned about all possible future SARs when deciding to delete personal data records. See <http://www.bailii.org/ew/cases/EWHC/Ch/2013/2485.html> . See also the new IPO Code of Practice on SARs http://www.ico.org.uk/news/latest_news/2013/~media/documents/library/Data_Protection/Detailed_specialist_guides/subject-access-code-of-practice.pdf

On 25 August 2013 new rules were introduced for telecoms and ISPs on their duty to notify authorities of personal data breaches. The rules require them to notify within 24 hours of detection of the breach and affected individuals are to be notified 'without undue delay.' The UK Information Commissioner's Office (ICO) says it will publish [updated guidance](#) on the new procedure. See [European Commission Regulation \(EU\) 611/2013](#) of 24 June 2013 (the Notification Regulation) on the measures applicable to the notification of personal data breaches under the ePrivacy Directive (2002/58/EC) and see the revised ePrivacy Directive ([2009/136/EC](#)).