April Media Law Update

ISPs

- The High Court rejected BT and Talk/Talk's application for Judicial Review of the Digital Economy Act --with its domestic three strikes procedure -on all grounds bar the challenge to the cost splitting between rightsholders and ISPs 75%/25% respectively.[1]

- The Advocate General (AG) to the ECJ opined on an appeal from the 2007 case against the Belgian ISP Scarlet by SABAM (a collecting society/agency).[2] The Belgian court had held Scarlet must filter internet traffic for content infringing copyright by using Audible Magic software. The AG found filtering was contrary to privacy of communications and personal data –and could only be permissible under national laws which are predictable and accessible. Unofficial translations suggest such laws must be a parliamentary or debated and pre-existing law. This ruling may impact the current debate on web-blocking.[3]

- A court in Italy[4] found Google liable for defamatory autofill search terms—on the basis that it was responsible for the autofill content --not a mere host protected under the E-Commerce Directive. This seems consistent with the decision in *Google France Sarl and anor v. Louis Vuitton Malletier SA Cases C- 326/08 to C 238/08* which warned that assistance in drafting commercial messages or selecting keywords

[1] http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/Admin/2011/1021.html&query=British+and+Telecommunications+and+plc&method=boolean

[2] *Scarlet Extended v Société belge des auteurs compositeurs et éditeurs, Case C-70/10, 14 April 2011*. This is not yet available in English but see the Press Release at http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-04/cp110037en.pdf.

[3] See the response to a FOIA request about the Home Office strategy for its non statutory voluntary system of blacklisting sites which are potentially unlawful at http://www.whatdotheyknow.com/request/filtering_of_terrorist_material. See also the Nominet Consultation Report referred to in our last update.

[4] See the decision in Italian at http://piana.eu/files/Ordinanza.pdf

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–might jeopardise the immunity. If the ECJ agrees –this may change the current position under English law where publication which is automated and lacks human knowledge/awareness is not publication in libel law. [5]

Publishers

- In the first ruling under the Audio Visual Media Services Directive (AVMSD),[6] the online video regulator (ATVOD) held that video content on four newspapers' (all News Group members) and one magazine's site fell within the AVMSD –as 'programme like.'[7] Many will recall that it was the broadcasters who called for their unregulated competitors to bear some regulatory burden in light of their own onerous obligations under the Ofcom Code. An appeal has been made against the decision to Ofcom –the overall regulator for communications.

Privacy

- Mr. Justice Eady granted a *contra mundem* (against the World) injunction prohibiting any publication of details of the Claimant's intimate and personal life in a case where the married Claimant was being blackmailed by a former partner.[8] Eady J. pointed out that there was no public interest whatsoever in the information[9] and publication posed

[5] See *Metropolitan Schools v DesignTechnica [2009] EWHC 1765 (QB).*

[6] The AVMSD regulates ***online programmes*** and divides media services into linear and non-linear services. Linear being terrestrial type broadcasting and providers of internet protocol TV –where content is pushed at scheduled times. Non-Linear means everything else including on demand. The AVMSD proposes that internet content should comply with minimum rules on protection of minors, incitement of hatred and commercial communications.

[7] See the ruling at http://www.atvod.co.uk/regulated-services/scope-determinations/sunday-times-video-library

[8] See *OPQ v BJM and another* [2011] EWHC 1059 (QB), 20 April 2011. http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2011/1059.html&query=OPQ+and+v+and+BJM&method=boolean

[9] See at §25 *"There is no material on which I could conclude that any of the protected information is in the public domain; nor that there would be a legitimate public interest in its disclosure; nor that there would be any question of exposing or detecting crime; nor that the information would make any contribution to "a debate of general interest": see Von Hannover v Germany, cited above, at [60] and [76]. As was said in Leempoel v Belgium (64772/01) on 2 November 2006: "Whilst the right for the public to be informed, a fundamental right in a democratic society that under particular circumstances may even relate to aspects of the private life of public persons, particularly where political personalities are involved … publications whose sole aim is to satisfy the*

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a serious risk to the mental health of vulnerable members of the Claimant's family. The grant of an injunction to preserve the status quo until trial is not unusual and has been commonplace since Spycatcher: *Att.-Gen. v Newspaper Publishing Plc* [1988] Ch 333 and *Att.-Gen. v Times Newspapers Ltd* [1992] 1 AC 191. In the case before Eady J. the parties reached agreement and presumably the Claimant obtained undertakings from the defendant(s) not to publish. No further order would usually be necessary however the Claimant sought additional protection in this case from third parties who might obtain the information and publish –thus the application for extended and ongoing protection against all parties --on a basis similar to that granted in *Venables and Thompson v News Group Newspapers Ltd* [2001] Fam 430 and *In X (formerly Bell) v O'Brien* [2003] EWHC 1101 (QB). Eady J. explored the development of c*ontra mundem* jurisdiction in light of the ECHR[10] and in contrast to the traditional '*in personam*' (against the person) injunction. This case is interesting in light of the ensuing public debate –in which the self interest of the media in opposing the developing law of privacy seems to be overlooked—in this case, the papers withdrew their opposition to the application once informed of the facts. Indeed, both the press and certain MPs seem unaware that speech is not predominant under EU law. The test for restraining publication in face of competing rights under the Human Rights Act and the ECHR --is the balancing test per see e.g. *Campbell v MGN Ltd* [2004] 2 AC 457 and *Re S (A Child)* [2005] 2 AC 593:

i) neither article (8 or 10) has as such precedence over the other;

ii) where conflict arises between values under Articles 8 and 10, an "intense focus" is necessary upon the comparative importance of the specific rights being claimed in the individual cases;

iii) the court must take into account the justifications for interfering with or restricting each right;

iv) the proportionality test must be applied to each.

This is current law. Whether balancing acts make *good* law and whether their results are sufficiently predictable to enable the media to decide what they can and cannot publish ---is quite another matter.

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curiosity of a certain public as to the details of the private life of a person, whatever their fame, should not be regarded as contributing to any debate of general interest to society.""

[10] European Convention on Human Rights now law under the Human Rights Act 1998.

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Domain Names

- Nominet's '*Landrush*' phase for the 2,640 remaining .uk short domains will begin on 23 May 2011.[11]

- WIPO published a new Overview of decisions by its panel under the UDRP. See http://www.wipo.int/amc/en/domains/search/overview2.0/ .This is an invaluable resource and its majority and minority approach is laudable.

Online Advertising

- *What to do?* The IAB (Internet Advertising Bureau) launched self-regulatory guidelines for businesses engaging in Online Behavioural Advertising (OBA) which it believes will satisfy the E-Privacy Directive (2002/58/EC) requirements coming into force.[12] The Guidelines are based on 7 principles—including transparency to consumers and consumer choice plus limits on targeting children and on the collection of sensitive personal data. *The Guidelines do not require express consent for all forms of OBA and so may not equate to legal compliance.*

- *What not to do...* The Crown Prosecution Service (CPS) has announced that it will not prosecute BT and Phorm under the Regulation of Investigatory Powers Act 2000 (RIPA) for the alleged unlawful interception of internet browsing data. Privacy International has announced it may seek Judicial Review of this decision. You may recall that BT ran three trials of Phorm's webwise system, which monitors an individual's browsing in order to serve targeted ads –2 of the trials were conducted without informing users. Based on complaints about Phorm, in September 2010 the EU Commission found the U.K. had failed to fully implement the E-Privacy Directive (2002/58/EC), under which Member States must ensure the confidentiality of communications by prohibiting private interception and surveillance without the user's consent. The case has been referred to the E.CJ.

Data Retention

[11] http://www.nominet.org.uk/registrants/aboutdomainnames/reserved

[12] See http://www.iabeurope.eu/media/51094/iab%20europe%20self%20regulation%20for%20online%20behavioural%20advertising%20140411%20f.pdf

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- The European Commission is to review the Data Retention Directive (2006/24/EC) 10 enacted after the 2004/5 terrorist bombings in the EU to retain data for law enforcement. The Directive is widely perceived as ineffective due to the substantial disparities in implementation between Member States. The UK Data Retention (EC Directive) Regulations 2009, came into force on 6th April 2009, and apply to 'public communications providers' which include providers of a 'public electronic communications service.' These definitions are themselves controversial as unsatisfactory and unclear –throwing a much wider net than necessary. The Regulations do not relate to content of communications but do catch data relevant to identity and IP addresses as well as other data and require it be retained for 12 months from the date of the communication in such a form that it can be retrieved without 'undue delay.' This is good news for those potentially caught by the Regulations.

Net Neutrality

- The Commission has published a Communication on net neutrality[13]--while we are yet to closely analyse this-- we understand from commentators that in the EU we will have transparency instead of neutrality –despite the potential barrier to entry this poses to internet start ups.

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.

13 http://ec.europa.eu/information_society/policy/ecomm/doc/library/communications_reports/netneutrality/comm-19042011.pdf

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