

July Media Law Update

Media Regulation Review

The Official Inquiry conducted by Lord Leveson assisted by a panel of experts commenced the first stage of its mandate --an examination of the “*culture, practices and ethics of the press*” including the extent to which the current policy and regulatory framework failed- and recommendations for a more effective policy and regulatory regime. It’s difficult to envisage radical changes resulting –the options for press regulation being broadly; regulation, co-regulation or self-regulation. The status quo is self regulation –that is by The Press Complaints Commission (PCC). This model is dictated largely by need to avoid the perception of state influence and censorship. In contrast –television is a regulatory model –with Ofcom as regulator—historically derived from the scarcity of analogue spectrum. The internet is regarded as co-regulated –that is partly regulated by Ofcom but on a ‘*light touch basis.*’

PCC Reform

The PCC also announced on 6 July 2011 that it would launch its own wide-ranging review of all aspects of current press regulation. The PCC administers the self regulatory code –the Editor’s Code -- <http://www.pcc.org.uk/cop/practice.html>. The Code is explained in the Guidebook at <http://www.editorcode.org.uk/downloads/codebook/codebook.pdf>. The PCC’s jurisdiction is limited to signatories to the Code and participants to its funding body. In late 2009 the PCC extended its jurisdiction to wholly online publications who sign up to its Code and its funding body. These tend to be online magazines. In practice –while the PCC provides a free complaints procedure for the public ---as opposed to other self regulatory code owners (eg. the Advertising Standards Authority in relation to the CAP Code), the PCC is regarded as toothless. It cannot award damages—and this should be changed if it is to survive. Its greatest sanction is rendering a decision against a publisher who must then publish it. You do get what you pay for here. Further, the PCC is regarded as hopelessly pro-media (it comprises 10 lay member of the public and 7 serving Editors) and its decisions –particularly on privacy issues—are often plain astonishing, engaging a kind of Tabloid morality. On the other hand –in cases involving Children where you need very quick action to shut down a story –the PCC works like lightning and will alert email all its members and warn them to stop a story. We wait with interest to see whether any real change will result from all of this.

Fox v Newzbin

In a test case and the sequel to an earlier case, the major US studios (supported by the BPI, IFPI and the Publishers’ Assn) sought an injunction to compel British Telecom (BT) to cut off access to the Newzbin website, under Section 97A of the Copyright, Designs and Patents Act 1988 (CDPA) in *Fox v Newbinz* [2011] EWHC 1981 (Ch).¹

The back story is that last year Fox sued Newbinz itself in *Fox v Newbinz* [2010] EWHC Civ 608 --a copyright infringement claim in relation to Newbinz’s original site—Newbinz1. In that case Newbinz claimed it was a search engine just directed to Usenet rather than the web and was a content agnostic, mere intermediary. This was rejected. The court found the

defendant operated a site designed and structured to promote infringement by guiding premium members to infringing copies and providing them with the means to download them. The court granted an injunction against Newzbin to restrain further infringements of Fox's copyrights now and in the future (but not under §97A²)—the court held the Newzbin1 site infringed copyrights in three ways by: (1) Authorising users' infringements; (2) Joint liability for the users' infringements; and (3) Infringement by making available. 1 & 2 being forms of accessory liability for acts committed by the users.

Subsequently the original site—Newzbin1 ceased operation but a new site --Newzbin2--commenced operation at the same location and in the same manner operated from offshore and beyond the reach of the court.

BT was approached and asked to block access to the site/not to oppose an application for a blocking order. BT refused. The order sought was that BT employ IP address blocking and DPI (Deep Packet Inspection) based blocking—satisfied by use of Cleanfeed (a hybrid system of IP address blocking and DPI-based URL blocking)—the same methods it uses for child porn site blocking –on notification by the Internet Watch Foundation (see our June update).

BT argued it was not a relevant type of intermediary --that its services were no more used by users of Newzbin to infringe copyright ----than the post is so used when an infringing item is posted.³ Arnold J. rejected this based on EU authority.⁴ BT's own status was agreed by the parties to be a mere conduit –so it was not liable except to an injunction, including under §97A. As to §97A's requirement of actual knowledge --this was a matter of domestic law, but within the framework and constraints of European law. Domestic authorities in copyright and libel cases were rejected.⁵ Arnold J found what must be shown is that the service provider has actual knowledge of one or more persons using its service to infringe copyright and it was *not essential to prove actual knowledge of a specific infringement of a specific copyright work by a specific individual*. Arnold J granted⁶ the injunction sought on the basis that BT had actual knowledge of all the facts and matters about Newzbin1; and similarly as to Newzbin2 (due to the evidence in this case).⁷

In *Fox v Newzbin* (above) the court refused to grant an injunction extending beyond Fox' copyright⁸--here the court—citing a privacy authority where the impact of granting a privacy injunction on children was in issue—it was held that where there is evidence that the Convention rights of persons other than the parties are engaged, the court is obliged, to take them into account.

Arnold J is an IP enthusiast. This judgment is typically long but still manages to be conclusory. This is a leap in the wrong direction in our humble opinion and we can expect all sorts of issues from his approach to knowledge here.

News Aggregators—the linking cases

Meltwater

The Court of Appeal upheld the decision in *Newspaper Licensing Agency Ltd and others v Meltwater Holding BV* [2010] EWHC 3099 (Ch) (a media monitoring service providing customers with headlines and extracts from articles on newspaper websites --infringed the copyright in those newspapers if the customer didn't have a "web end-user licence" from the Newspaper Licensing Agency (NLA))) see our May release.

The Public Relations Consultants Association Ltd ("PRCA")⁹ appealed based on the double-licensing point and the Judge was wrong in law on the copyright points.

PRCA argued that in all but the most exceptional cases headlines are not capable of being literary works separate from the work itself. The Court of Appeal applied Case C-5/08 *Infopaq International A/S v Danske Dagblades Forening*.

This seems a death knell for the traditional English threshold of substantiality (and thus a kind of fair use margin once allowed). It also fails to deal with the point raised below that the exclusions is necessary for bibliographic references by use of title.

The Court held the use in question was *consumptive* –dismissing the technical copying arguments. In relation to fair dealing arguments —these were not applicable on terms and as the use was not ‘fair.’ On double licensing –the court affirmed that there was no derogation from grant or exhaustion and there was no duplication as the acts of copying were not the same.

Copiepresse

In a similar Belgian case against Google News, *Copiepresse v Google*, the Court of First Instance in Brussels, No.06/10.928/C, Belgian newspapers claimed that a copyright law suit applied to Google News but not Google's main search engine. Google had excluded the papers from its general search engine during the litigation –in a move that was likely retaliatory.

The case culminated in a ruling by a Belgian appeals court that Google News infringes newspapers' copyright when it links to content from newspaper websites with extracts---see the judgment in French at <http://copiepresse.be/Copiepresse5mai2011.pdf>. See our May Release for detail on the case.

Keywords and eBay

The ECJ gave a decision in *L'Oréal SA v. eBay* Case C-324/09—referred by the English court.¹⁰ This covered ground explored in a number of other European cases decided against eBay.¹¹ The decision is also interesting as it covers near identical territory to the US case -- *Tiffany (NJ) Inc. v. 26 eBay, Inc.*, 576 F. Supp. 2d 463 (S.D.N.Y. 2008) affirmed 600 F.3d 93 (2d Cir. April 1, 2010). Indeed the Advocate General to the ECJ acknowledged that he had relied on the analysis in *Tiffany*.

L’Oreal complained of sale of second hand, counterfeit, unpackaged and parallel (non EEA) L’Oreal goods sold on eBay, use of its marks on eBay’s site and eBay’s purchase of its marks as keywords from Google.

For the keywords to avoid being misleading –they had to comply with the rule in *Google France SARL v Louis Vuitton Malletier SA. C-236/08 to C-238/08* (use of third party trade marks as keywords is permissible —provided there is no confusion as to whether the goods or services originate from the registered proprietor or a third party) so here –the keywords had to identify eBay as the operator of the marketplace and that the goods were being sold through the marketplace. eBay’s promotion of its own services by keywords was not within Art. 5 of the Trade Mark Directive: (1)(a)(identity/identity) as its own services were those of a market place operator and were dissimilar so only Art. 5(2) (dilution) could apply.

The ECJ held eBay does not use the signs on its own site –its users do. eBay’s liability for this therefore fell to be considered under the Ecommerce Directive 2000/31 (rather than any form of direct or secondary liability –whether contributory or vicarious). On hosting under the Ecommerce Directive 2000/31--the ECJ held that an online service provider is not an intermediary within the meaning intended by the legislature when it takes *an active* rather than neutral role. Mere storage of offers for sale on its server, setting the terms of service, receiving remuneration for that service and provision of general information to customers were all neutral. *But promoting and optimising particular offers by a customer-seller to a buyer– gives it knowledge or control over the data relating to those offers so it cannot rely in relation to that data, on the immunity.*

The Court gave guidance on appropriate remedies¹² and a non-exhaustive list of orders it viewed as appropriate and proportionate including orders that the operator (of the online marketplace) take measures to make it easier to identify its customer-sellers. It found there was nothing to prohibit injunctions against an intermediary¹³ prohibiting the repetition of an infringement of a certain mark by a certain user—¹⁴ as this could be complied with simply by closing the client account of the user in question.

Digital Economy Act

Ofcom published a report advising Government on certain aspects of the Digital Economy Act, as requested by the Secretary of State for Culture, Media and Sport. The report on website blocking, which considers a number of questions related to the blocking of websites to reduce online copyright infringement, can be found at: <http://stakeholders.ofcom.org.uk/binaries/internet/site-blocking.pdf>

The Government has decided against web-blocking measures by new regulations. This is in part due to the existing remedy under §97A CDPA ---as employed in *Fox v Newzbin*(above).

Copyright Reform

The Government released its response to Hargraves—with which it was broadly in agreement-- <http://www.ipso.gov.uk/ipresponse-full.pdf>

Audio Visual Works and online distribution

The European Commission has published a Green Paper on the online distribution of audiovisual works in the EU, which is intended to launch a debate on the opportunities and challenges of the online distribution of such works. http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm. This is open for consultation until 18 November 2011.

Privacy

- Lord Neuberger launched a new scheme to provide for data gathering by the Justice system on derogations from open justice and privacy (now –non-disclosure) injunctions. See <http://www.judiciary.gov.uk/Resources/JCO/Documents/Guidance/pd-51f.pdf>. This follows on from his earlier report –see our May release and the original report on super injunctions at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/super-injunction-report-20052011.pdf>.
- The Court of Appeal, refused a privacy injunction to Christopher Hutcheson, to keep the existence of his "second" family secret. The Court accepted that in principle, Mr Hutcheson had a borderline claim to a reasonable expectation of privacy but the balancing act under Article 8 (privacy) and the newspapers' Article 10 (Freedom of Expression) –came down in favour of Art.10. The Court warned that those who conduct their quarrels in public –cannot later insist on clear boundaries between the public and private. Here there was a public interest in the allegations of misuse of corporate funds connected to the second family. (*Christopher Hutcheson (formerly known as "KGM") v News Group Newspapers Ltd and others [2011] EWCA Civ 808, 19 July 2011.*)

Data Protection/EU Commission consults on notifying personal data breaches

The European Commission has published a consultation on whether there is a need for the adoption of practical guidelines to harmonise the notification of personal data breaches across the EU. http://ec.europa.eu/information_society/policy/ecom/doc/library/public_consult/data_breach/ePrivacy_databreach_consultation.pdf¹⁵

Unitary EU patent

The proposal moved closer to completion with the approval of two new regulations by the EU Competitiveness Council comprised of Ministers. The European Commission and 25 EU countries, including the UK, back the current proposals for a unitary patent. Spain and Italy oppose it. This has been mooted for over 12 years but the language requirements have proved

the stumbling block. The new EU patent if approved would have 3 official languages – English, French and French. Europe-wide protection is only possible at the moment by validating a patent registered with the European Patent Office (EPO) in each individual country. To be valid in a country a patent must be translated into its language. If approved the new EU patent is estimated to save £20m in translation costs. A related proposal to establish a dedicated court to hear disputes concerning the new patent –hit a roadblock when the European Court of Justice (ECJ) said in March that such a court would contravene EU laws and a workaround is under development. See <http://www.epo.org/news-issues/issues/eu-patent.html>

E-money

The Electronic Money Regulations (Regulations) came into force on the 30 April 2011 with the intention of creating a clearer regulatory framework for issuers of electronic money in the increasingly popular pre-paid industry. See the FSA Guidance at http://www.fsa.gov.uk/pubs/international/approach_emonney.pdf

Privacy and the right to publish anonymously

See interesting discussion at <http://lauren.vortex.com/archive/000880.html> and <http://lauren.vortex.com/archive/000882.html> looking at the issues in light of Google+ (its social network) and its policies.

Domain Names

- Google acquired g.co as a new domain from the operators of the Country Code Top Level Domain (ccTLD) for Coloumbia
- Sunrise was extended for .xxx. Trademark owners can block their name in the domain rather than defensively register and some 10,000 have chosen to do so.
- See ICANN's FAQ on the new gTLD -- <http://www.icann.org/en/topics/new-gtlds/strategy-faq.htm>.
- The US Govt –*In Our Sites* campaign part 6–seized 16 further Domain Names after purchasing allegedly counterfeit goods from them. Meanwhile Puerto 80 is suing the US for release of the seized Spanish domains from an earlier round. See the EFF's Amici Curiae brief at <http://www.scribd.com/doc/58423110/Puerto-80-v-United-States-Brief-of-Amici-Curiae-EFF-CDT-And-PK-in-Support-of-Puerto-80-s-Petition-for-Release-of-Seized-Property>

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.

¹ See <http://www.bailii.org/ew/cases/EWHC/Ch/2011/1981.html#para1>

² The Information Society or Copyright Directive was transposed into domestic law by the Copyright and Related Rights Regulations 2003, SI 2003/2498. In particular, Article 8(3) was implemented by Regulation 27, which inserted sections 97A and 191JA into Parts I and II respectively of the Copyright Designs and Patents Act (CDPA) 1988: "**97A Injunctions against service providers.** (1) The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright. (2) In determining whether a service provider has actual knowledge for the purpose of this section, a Court shall take into account all matters which appear to it in the particular circumstances to be relevant and, amongst other things, shall have regard to – (a) whether a service provider has received a notice through a means of contact made available in accordance with regulation 6(1)(c) of the Electronic Commerce (EC Directive) Regulations 2002 (SI 2002/2013); and (b) the extent to which any notice includes – (i) the full name and address of the sender of the notice; (ii) details of the infringement in question. (3) In this section 'service provider' has the meaning given to it by regulation 2 of the Electronic Commerce (EC Directive) Regulations 2002.

³ This is the sort of argument that has succeeded in a libel content for Google—see *Metropolitan Schools v DesignTechnica* [2009] EWHC 1765 (QB)—the mere carrier like the telephone system.

⁴ Citing Case C-557/07 *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH* [2009] ECR I-1227 ('intermediary' for Article 5(1)(a) and Article 8(3) of The Copyright Directive 2001/29 included an access provider who merely provides a user with access to the network by allocating him a dynamic IP address but does not himself provide him with any services such as email, FTP or file-sharing services and does not exercise any control, whether de jure or de facto over the services which the user uses).

⁵ See *Bunt v Tilley* [2006] EWHC 407 (QB), and *Kaschke v Gray* [2010] EWHC 690 (QB) (an ISP which performed no more than a passive role in facilitating postings on the internet could not be a publisher at common law and that for knowledge that something as 'unlawful' would require knowledge of the strength or weakness of available defences). At §144 "*First, it was an obiter observation in a case involving an unrepresented claimant. Secondly, Eady J was considering substantive liability for defamation. Thirdly, given the defamation context, it is understandable why Eady J said what he did, since words may be defamatory without being unlawful, most obviously where the statement is justified. Fourthly, Eady J was not considering section 97A or Article 8(3), which were not in issue before him.*"

⁶ CDPA §97A confers on the court a specific and broad jurisdiction to grant an injunction against service providers. On its face, the jurisdiction is not confined to granting an injunction prohibiting the continuation of infringements of which the service provider has actual knowledge. In any event, section 97A must be interpreted and applied consistently with the Court of Justice's guidance in *L'Oréal v eBay*. In my judgment the Court's reasoning demonstrates that the jurisdiction is not confined to the prevention of the continuation, or even repetition, of infringements of which the service provider has actual knowledge. On the contrary, an injunction may be granted requiring the service provider "to take measures which contribute to ... preventing further infringements of that kind". Although such measures may consist of an order suspending the subscriber's account or an order for disclosure of the subscriber's identity, the Court of Justice makes it clear at [143] that these examples are not exhaustive, and that other kinds of measures may also be ordered.

⁷ As to the balancing act between the Studios' copyrights/property rights under Art. 1 of the First Protocol to the ECHR and BT's users' right of freedom of expression under Art.10(1); Art 10 was outweighed. Arnold J. cited the Advocate General in Case C-70/10 *Scarlet Extended SA v Société belge des auteurs compositeurs et éditeurs* but distinguished it as BT was to implement an existing technical solution (Cleanfeed) which it already employed for a different purpose (Internet Watch) so that it was clearly technically feasible and not excessively costly –and the order could be varied. This was proportionate in his view. The Reference questioned an order to introduce, for all its customers, in abstracto and as a preventive measure, exclusively at the cost of that ISP and for an unlimited period, a system for filtering all electronic communications, both incoming and outgoing, passing via its services, in particular those involving the use of peer-to-peer software, in order to identify on its network the sharing of electronic files containing a musical, cinematographic or audio-visual work in respect of which the applicant claims to hold rights, and subsequently to block the transfer of such files.

⁸ [135]: "... I do not believe it would be appropriate to grant an injunction of the breadth sought by the claimants for a number of reasons. First, it is apparent from the terms of Directive 2001/29/EC that it is contemplating the grant of an injunction upon the application of rights holders, yet the claimants are seeking an injunction to restrain activities in relation to all binary and all text materials in respect of which they own no rights and about which I have heard little or no evidence. Second, I do not accept that the defendant has actual knowledge of other persons using its service to infringe all such rights. Therefore I am not persuaded I have the jurisdiction to grant such an injunction in any event. Third, the rights of all other rights holders are wholly undefined and consequently the scope of the injunction would be very uncertain. In my judgment the scope of any injunction under section 97A(2) [sic] should extend no further than that to which I have already concluded the claimants are entitled, namely an injunction to restrain the defendant from infringing the claimants' copyrights in relation to their repertoire of films."

⁹ On the basis that: 1) The headlines to the various articles reproduced in Meltwater News are capable of being literary works independently of the article to which they relate. (2) The extracts from the articles reproduced in Meltwater News with or without the headline to that article are capable of being a substantial part of the literary work consisting of the article as a whole. (3) Accordingly the copies made by the end-user's computer of (a) Meltwater News (i) on receipt of the email from Meltwater, (ii) opening that email, (iii) accessing the Meltwater website by clicking on the link to the article and (b) of the article itself when (iv) clicking on the link indicated by Meltwater News are and each of them is, prima facie, an infringement of the Publishers' copyright. (4) No such copies are permitted (a) by s.28A CDPA dealing with temporary copies, or (b) as fair dealing within s.30 CDPA, or (c) by the Database Regulations. (5) Accordingly, the end-user requires a licence from NLA or the Publishers, whether or not in the form of the WEUL in order lawfully to receive and use the Meltwater News Service.

¹⁰ *L'Oreal v eBay* [2009] EWHC 1094.

¹¹ In particular the three joined cases namely *SA Louis Vuitton Malletier v eBay Inc and eBay International AG; Christian Dior Couture, SA v eBay Inc and eBay International AG; and Parfums Christian Dior SA v eBay Inc and eBay International AG* in the Tribunal de Commerce de Paris, June 30, 2008 (eBay was liable as a broker – not an intermediary host –and so that Takedown provided no defence.

¹² Noting that under Art. 3(2) of the Enforcement Directive 2004/48, such measures must be effective and dissuasive while fair and proportionate and not be excessively costly –observing the prohibition on monitoring (in the Ecommerce Directive) and need to avoid barriers to legitimate trade. Generally measures had to strike a fair balance between the various rights and interests mentioned. The Court cited the discussion in *Promusicae v*

Telefonica Case C-275-06 (That Directives 2000/31, 2001/29, 2004/48 and 2002/58 do not require the Member States to lay down, in a situation such as that in the main proceedings, an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings –subject to the fair balance test). At §68: “*That being so, the Member States must, when transposing the directives mentioned above, take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures trans-posing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality (see, to that effect, Lindqvist, paragraph 87, and Case C-305/05 Ordre des barreaux francophones et germanophone and Others [2007] ECR I-0000, paragraph 28).*”

¹³ See *L’Oreal v eBay*, Case C-324/09 at §141 and the Advocate General at §§181 and 182.

¹⁴ The Advocate General also suggested repeated events may be treated as continuous ongoing activity where the user and the right are constants –and that service providers on notice of the initial events in a continuum may find themselves unable to rely on the immunity. We have long taken this view and, at a minimum, written undertakings should be obtained by the user -not to repeat the conduct--in order to provide a defence to later any repetitions.

¹⁵ The notification requirement which applies to providers of electronic communications services, came into force following the revision of the E-Privacy Directive (2002/58/EC) in December 2009 which was implemented in the UK through the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 (SI 2011/1208) with effect from 26 May 2011. Among other things, the consultation will explore what types of breaches will trigger the notification requirement and what procedure for notification should be followed.