IP & Media News

MC EVEDYS SOLICITORS & ATTORNEYS

Our newsletter on recent developments
May 2018

Internet Regulation

We made a submission on the future regulation of the internet to the House of Lords Committee and you can find our submission here. We focused on effective remedies as well as freedom of expression and took the view that the law already dealt with the issues of concern. On Sunday, on the Andrew Marr program, proposals were unveiled for universal age verification by platforms and proposed legislation introducing a stick to encourage better behaviour, namely fines. There may be a new regulatory function responsible for harm reduction within social media. This suggests the regulator is with us already and it may be Ofcom. In such a model, all providers of a social network service would have to notify the regulator of their work and comply with basic harm reduction standards. The government may legislate a positive statutory duty of care from the operators, to users of their services. Oversight may be a high systemic level. Needless to say, this raises many issues from a Freedom of Expression perspective — see our submission. It is however, a typically British approach and we see similar models in operation for the print press and advertising. It allows the government to constantly lean on the co-regulated and that is the objective.

Trade marks

The latest tour de force by Mr. Justice Arnold is the decision in Sky Plc & Ors. v Skykick [2018] EWHC 155. Some points (partial invalidity due to width of registration and lack of intent to use for all goods/services) were referred to the CJEU but subject to those issues, there was a likelihood of confusion and the own name defence failed as the use by Skykick would not be in accordance with honest practices. Note the evidence showed that there was awareness of the Sky mark and a failure to clear properly internationally before the US based start-up adopted its name. For the practitioner, note that the decision sets out with wonderful clarity where we are on class headings (after the 10th edition of Nice only 5 of the general indications in the class headings lack clarity and they are class 7 (machines), 37 (repair and installation), 40 (treatment of materials) and 45 (personal and social services)), see para. 152. It also deals with the issue of territorial scope of likelihood of confusion within the EU—see para. 259-267.

Copyright

A recent case pending before the CJEU may apply the rule governing the communication to the public right by hyperlinking to images already online to cases where the images are copied rather than linked. We previously reported on the rulings in Svenson C-466/12 and Bestwater C-

348/13 and GS Media C-150/16 (not infringing to link or embed when the work is already online and there are no new technical means or a new public, provided that if for commercial purposes, due diligence is required as to the rights status of the original). The Advocate General in Cordoba C-161/17 applied a similar reflexive approach to the reproduction right –where the image is copied rather than linked to. This makes sense and we expect the court to uphold the decision.

Investigatory Powers Act (IPA)

Readers will recall that the domestic challenge to DRIPA succeeded in R (Davies and Watson v Secretary of State for Home Dept. [2015] EWHC 2092 and was affirmed on appeal, EWCA Civ 1185 and by the ECJ (in Tele2 Sverige & Watson & Ors C-203/15 and C-698/15) but by that time DRIPA had been replaced by the IPA. The court of appeal has now found that based on the Watson decision, retention notices under the IPA are non-compliant as: (1) access to retained data is not limited to serious crime (as required) and (2) access is not subject to prior review by a court or an independent administrative body. The Court of Appeal gave the government time to amend the IPA accordingly in its decision at [2018] EWCA Civ 70. That judgment contains a fascinatingly and erudite discussion of what happens when there is a ruling that legislation is incompatible with the Human Rights Act (this is an interpretation issue only given our parliamentary supremacy and the inability of our courts to strike down legislation in a Marbury v Madison US way). There is also a fascinating discussion on how s.72 of the EC Act works and how it would need to be undone should that come to pass on any Brexit scenario.

GDPR

As the General Data Protection Regulation (GDPR) comes into effect across Europe on 25 May 2018, in addition to advising our clients on how to respond, we also have a new Privacy Policy. Your contact details are currently securely held within our database either because you have previously received our updates or other publications or because you have responded to an event invitation. It’s very important to us that any information we send you is relevant and welcome. If you are happy to keep receiving these updates and mailings kindly let us know. Otherwise, this may be our last update to you. If you wish, we will stop sending you information and event invitations and remove you from our database, please let us know if that is the case.

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