

Media and IP Update May 2014

Trade Marks

OHIM issued an April common communication to harmonise treatment of black & white and colour marks in the EU. See <https://oami.europa.eu/ohimportal/en/news/-/action/view/1091009>. A trade mark in black & white is no longer identical to the same mark in colour for priority purposes unless the differences are insignificant. The same rule will apply for relative grounds. The genuine use rule remains as before. The common practice will apply from 2 June 2014 and be implemented by all national trade mark offices and apply to all filings after that date. Infringement is out of scope of the common practice. Brand owners should review portfolios accordingly.

Copyright

The Hargreaves review of IP and its recommendations were broadly accepted by the Government and in March 2014, it laid before Parliament the final drafts of the Exceptions to Copyright regulations. See <http://www.ipso.gov.uk/types/hargreaves/hargreaves-copyright/hargreaves-copyright-techreview.htm>. These were expected to be in force by June. However, the Joint Committee on Statutory Instruments has concluded its consideration of three of the five copyright exceptions statutory instruments but raised questions about the private copying and parody exceptions. It is believed that these may now be held for the foreseeable future.

Data Protection

The right to be forgotten: The CJEU has held Google is a data processor and data controller for the purposes of the Data Protection Directive and must comply with a data subject's request to delete true and correct (but old) personal data from its search results irrespective of the continued publication of the original publication. The claimant complained about search results containing information about a real-estate auction connected with attachment proceedings for the recovery of his social security debts --some 16 years ago. The Court found that the general public's interest in freedom of information and Google's own economic interests were outweighed by the privacy and fundamental rights of the individual. The interference with his rights was substantial given the vast reach over private life and data which could not otherwise have been connected (or only with great difficulty). Indeed search was a greater disseminator than the original publication. By exploring the internet automatically, constantly and systematically in search of information published, the operator of a search engine 'collects' such data which it subsequently 'retrieves', 'records' and 'organises' within the framework of its indexing programmes, 'stores' on its servers and, 'discloses' and 'makes available' to its users in search results. These operations were unquestionably 'processing' within the meaning of the Directive— which did not discriminate between types of operators. It would undermine the guarantees of the Directive were it otherwise. Google was caught by the Directive it had a Spanish subsidiary which sold advertising space to the Spanish. See Case C-131/12, *Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González*. <http://curia.europa.eu/juris/document/document.jsf?text=&docid=152065&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=257894>

The right to be forgotten has been one of the more controversial provisions debated in the new Data Protection Regulation (further harmonising the law and directly enforceable in all member states as a regulation as opposed to a directive) expected to be approved by the Council of Europe in June 2014. Some of the same underlying issues have also arisen in libel, namely the fact that due to search, a story is no longer yesterday's chip paper but rather a permanent tattoo on an individual's name and reputation. Cases have explored the need to update and correct articles as situations and facts evolve. In other contexts (e.g. rehabilitation of offenders) it is accepted that after a period of time, a person should be entitled to move on.

Exemptions: The NGO Global Witness is being sued by four individuals associated with a Guinean mining company the subject of a Global Witness investigation, seeking orders for the deletion of their personal data. Global Witness is defending on the basis that the suit is an attempt to stifle a genuine

investigation into corruption and it relies on the exemption in §32 of the Data Protection Act 1998 for journalism. Its ability to rely on the exemption will go to the heart of the case, the outcome of which will be of interest to many other NGOs and non-profits.

Website Blocking

ISPs; The CJEU held that ISPs can be required to block access to sites making available infringing content even where there is no contractual connection between the site and the ISP. However, the ISP must be entitled to select the relevant measures and it will be a defence to show that all reasonable measures have been taken in light of the interference with the public's right to freedom of information. See C-314/12, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH*.

IP remedies; The City of London's Police IP crime Unit (PIPCU) established late last year, has now shut down various file sharing sites including the 'Sports Torrent Network,' boxingguru and others. It also claims in April 2014 to have marked World IP Day by suspending more than 2,500 websites selling counterfeit goods. Rights holders can complain and refer directly by following submission guidelines. See <http://www.cityoflondon.police.uk/advice-and-support/fraud-and-economic-crime/pipcu/Pages/Make-a-referral.aspx>

Super flagger; Google has granted the UK Metropolitan Police 'super flagger' status in relation to YouTube videos deemed to threaten national security and violate the Terrorism Act. Google maintains any decision to remove content will remain its own.

Privacy

Children of the famous; Paul Weller, on behalf of his children, obtained £10,000 damages from the Daily Mail for misuse of private information (and breach of the Data Protection Act) in relation to photos of them shopping on a family day out in LA. Although the photos were legally taken under State law, their publication in the UK in the Mail online was actionable. There was a reasonable expectation of privacy and the children's interests prevailed over the Mail's Art. 10 rights as there was no public interest to justify the publication. The court adopted the PCC Code provision that the fame of a parent will not provide a justification without more. See *Weller & Ors v Associated Newspapers Ltd* [2014] EWHC 1163 (QB). As one of the Mail's witnesses noted about her decision to publish, the litigious record of the subject is a key factor and Mr. Weller's family can now expect to enjoy a greater degree of privacy in future.

Medical data; The ECHR found that the release of sensitive and private medical data on an individual to a state institution for an administrative inquiry (exercising no clear public function or interest) about her during her lawsuit against a hospital was an unjustified interference with her private life and Article 8 rights. See *L.H. v Latvia* [2014] ECHR 453.

Communications

Lobbying; The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 is now in force and concerns about its impact on speech for civil society and third sector organisations continue. Part 1 requires those lobbying government to be registered. Part 2 limits third party spending on 'controlled expenditure' or campaigning that can reasonably be expected to promote or procure electoral success --even where no party or candidate is referred to --related purposes such as public awareness or discourse are discounted. Caps were in place previously under the Political Parties, Elections and Referendums Act 2000 but limits are reduced and eligible expenses extended and sanctions are criminal. The Joint Committee on Human Rights and others sought to delay assent due to concerns about stifling debate on issues of public and national interest and chilling freedom of speech, expression and association but instead a review has been promised after the election. See <http://www.legislation.gov.uk/ukpga/2014/4/contents/enacted>

Crisis Management; The British Standards Institute has released a new standard on Crisis Management which should be of interest to communications professionals. See <http://shop.bsigroup.com/en/ProductDetail/?pid=00000000030252035>