October Media Law Update

Human Rights/Bill of Rights

We attended the Law Society conference on Human Rights and had the great privilege of hearing Justice Albie Sachs of South Africa's Constitutional Court and Justice Juan Carlos Henao Pérez President of the Constitutional Court of Columbia. Justice Sachs, who was seriously injured when his car was bombed by the SA Security Services, was inspiring. Justice Juan Carlos Henao Pérez President of the Constitutional Court of Columbia was also a very interesting speaker on the role of that court and its exceptional use of the Economic and Social Rights. We will be submitting to the current consultation on a UK Bill of Rights shortly.

Libel reform

The Joint Committee (Lords and Commons) reported on reforms to defamation law but urged the Government to go further. Most interesting are the Joint Committee's novel proposals for dealing with online Libel:-

1. Different treatment for attributed and anonymous statements.
2. For attributed statements:
    a. ISPs should be obliged to publish complaints (beside the statement complained of) and leave both up in order to benefit from intermediary safe harbours and defences.
    b. A complainant seeking removal must apply to a court for a Take-Down Order— by an expedited and inexpensive paper based procedure.
3. For anonymous statements:
    a. Statements should be taken down by the ISP upon receipt of a complaint, unless the poster/author agrees to identify themselves, in which case the procedure above should be followed.
    b. The ISP can apply on public interest grounds for a "Leave-Up" Order and benefit from intermediary safe harbours and defences.

See the report--http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-defamation-bill1/news/publication-report/. We made a submission on the original

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bill—and it seems some of these points have been dealt with: http://inforrm.files.wordpress.com/2011/06/mcevedyfullsubmission.pdf.

It remains to be seen how the government will respond and what the procedures will look like –the devil will be in the detail. In general however –this must be an improvement from the current position given content is pulled by most ISPs --no questions asked. We are concerned however at some comments that internet content is different from offline content.

Criminal domain suspensions and "Anti-Abuse policies"

There was a further stakeholder meeting and developments in the consultation by Nominet (ccTLD registrar for the domain ".UK"). Over the past few years Nominet has been regularly requested by UK Criminal Authorities to take action in relation to Child Pornography and other cases of serious criminal activity ---and has to date done so on a discretionary basis and without court orders. See the consultation at http://www.nic.uk/policy/issuegroups/current/criminalactivity/ .

It is our view that such suspensions should be extraordinary, limited to criminal activity within the jurisdiction of the Crown Court, and the matter should be bought before a Judge by 10am the next morning for a Takedown Order. We have assisted civil society groups with this issue as part of our Pro-Bono work.

VeriSign, which manages the database of all .com internet addresses, unveiled a policy allowing it to shut down "non-legitimate" domain names when asked to by law enforcement—in a Registry Services Evaluation Process (RSEP) document. VeriSign cited the Nominet proposals as a precedent. Without any explanation it then withdrew the proposal days later....

SOPA

SOPA is a new US bill which seeks to create a blacklist of Internet domains suspected of intellectual property violations. The Electronic Frontier Foundation calls it "disastrous." *http://news.cnet.com/8301-31921_3-20126590-281/rep-lofgren-copyright-bill-is-the-end-of-the-internet/*

Blocking Injunction

The final order was given in *Twentieth Century Fox Film Corp & Ors v British Telecommunications Plc* [2011] EWHC 1981 (Ch) on 26 October 2011, (see our July update for an analysis of the full decision). This new order decided the outstanding issues such as the terms of the injunction. See the judgment- http://www.bailii.org/ew/cases/EWHC/Ch/2011/2714.html. The final order was in the following terms:

"*1. In respect of its customers to whose internet service the system known as Cleanfeed is applied whether optionally or otherwise, the Respondent shall within 14 days adopt the following technical means to block or attempt to block access by its customers to the website known as Newzbin2 currently accessible at www.newzbin.com, its domains and sub-domains and including payments.newzbin.com and any other IP address or URL whose sole or predominant purpose is to enable or facilitate access to the Newzbin2 website. The technical means to be adopted are:*

> *(i) IP address re-routing in respect of each and every IP address from which the said website operates and which is notified in writing to the Respondent by the Applicants or their agents; and*
>
> *(ii) DPI-based URL blocking utilising at least summary analysis in respect of each and every URL available at the said website and its domains and sub-domains and which is notified in writing to the Respondent by the Applicants or their agents.*

2. For the avoidance of doubt paragraph 1 is complied with if the Respondent uses the system known as Cleanfeed and does not require the Respondent to adopt DPI-based URL blocking utilising detailed analysis..."

IP Licences

See the ruling of the ECJ in **Joined Cases C-403/08** *Football Association Premier League Ltd, NetMed Hellas SA, Multichoice Hellas SA v QC Leisure, David Richardson, AV Station plc, Malcolm Chamberlain, Michael Madden, SR Leisure Ltd, Philip George Charles Houghton and Derek Owen* and C-429/08 *Karen Murphy v Media Protection Services Ltd*

This ruling has far reaching implications for territorial licensing and green-lights grey/parallel content –finding that a system of licences for the broadcasting of football matches which grants broadcasters territorial exclusivity on a Member State basis and which prohibits television viewers from watching the broadcasts with a decoder card in other Member States is contrary to EU law.

Freedom of Information Act (FOI)

The University of Stirling appealed against Philip Morris' requests for details about its research, a large scale study into the effects of smoking involving 6,000 people between the age of 13 and 24. The Scottish Information Commissioner found against the University. The purpose is thought to be to challenge, discredit or expose selective results/aspects by access to the raw data –of use to those with an agenda to misrepresent or undermine research. Academics have raised concerns about the impact on academic freedom. Interesting questions arise however where public funds are employed.

Privacy

In *Ferdinand v Mirror Group Newspapers* ([2011] EWHC 2454 (QB)) Nicol J. dismissed a claim for misuse of private information where the story was a "kiss n' tell" story –that was 5 years old. Although the information was private and protected by Art. 8, on the balancing act –the Art 10 rights won out on grounds similar to *Campbell v Mirror Group* [2004] UKHL 22—namely public interest in correcting a false image or hypocrisy particularly given his position as the English Captain and as a role model.

The ECJ gave judgment in C-509/9 and C-161/10 *edate Advertsing v X and Martinez v MGN*. By way of background, the general tort rule under the Brussels Regulation (on Civil Jurisdiction and Judgments) is (by Art 5(3)) the court with jurisdiction is the place of the "harmful event" and in the context of defamation is both: (1) the place of the event; and (2) the place where the damage occurred. Where a libel is published in a number of Member States, the claimant has the option of claiming against the publisher: (a) in the State where the publisher is domiciled/established for damages for *all* of the harm caused by the defamation; or (b) in *each* State in which the publication was distributed solely in respect of the harm caused in *that* State (provided he has a reputation there), per *Shevill v Press Alliance*, Case C-68/93. The ECJ has now clarified that where the claim sounds in *privacy and related rights* – the state where the victim has his "*centre of interests*" shall have jurisdiction for all damage in the EU. This will usually be his habitual residence. So the victim can sue in there or in each state in the EU for the damage to him in that state only.

ACTA

The United States, Australia, Canada, Korea, Japan, New Zealand, Morocco, and Singapore signed the Anti-Counterfeiting Trade Agreement (ACTA) at a ceremony on October 1, 2011, in Tokyo. The EU has not yet signed. This US promoted measure was highly controversial primarily for the secrecy with which negotiations were conducted and due to a leak by the EU commission of an earlier draft. Note the sensational language–infringing goods are now *counterfeit* and *pirated*. This was watered down after initial complaints and on the whole it would not make any real change to current English law. Of concern are the information

sharing provisions and the standing committee. See the text at

http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf

Genes & Patents etc

- In *Oliver Brüstle v Greenpeace e.V.* Case C-34/10 the ECJ held that the uses of human embryos for industrial or commercial purposes', not patentable per se, and also covers the use of human embryos for purposes of scientific research. See the press release-http://curia.europa.eu/jcms/upload/docs/application/pdf/2011-10/cp110112en.pdf. We noted with some scepticism press reports that '*scientists'* condemned this result –and wonder whether this might more precisely be scientists within in the pharmaceutical industry?

- In *AMP v USPTO*, the Federal Circuit Court of Appeal considered whether Myriad's claim for an isolated DNA coding was patentable. The case was brought by various civil society and advocacy groups, academics and a variety of doctors and patients. Only one of the academic doctors who had received a cease and desist letter was found to have standing. The Plaintiff argued that because the isolated and native DNA contain the same genetic code, they are not "markedly different." The Department of Justice filed an amicus brief and argued that the test of patent eligibility should be a "magic microscope"—if the exact sequence can be seen in nature, the sequence should not be patent eligible, but if the exact sequence cannot be seen present in nature, it should be patent eligible. The lower court held isolated DNA sequences are not patent eligible. This was reversed. The Court examined the distinction between a product of nature and something patent eligible under §101 by the test that "*turns on a change in the claimed composition's identity compared with what exists in nature.*" The Court discussed the structural difference between isolated DNA and DNA in its natural form and the majority found: isolated DNA has a markedly different chemical nature from the native DNA and concluded isolated DNA is therefore patent eligible. One Judge discussed the possible impact of a change in policy on the biotechnology industry, and thirty year history of DNA patenting in it and rejected the "magic microscope" test as a "child-like simplicity" and emphasized the difference in the utility of isolated DNA from DNA in its natural state: "*diagnostic testing . . . is not a natural utility . . . . The claimed DNA does not serve the ends of nature originally provided. Instead, the isolated DNA sequences have markedly different properties which are directly responsible for their new and significant utility."* In short the ruling was that while claims to genetic diagnostic methods were unpatentable, claims to screening methods were patentable.

Social Networking

ACAS released a guide to social networking for employers. A copy of the ACAS guidelines is available here.

More Internet Regulation

UK media regulators joined forces today to launch ParentPort, a new website aimed at helping parents make their views heard on issues relating to programmes, adverts, products and services. ParentPort (http://www.parentport.org.uk/) has been set up to make it easier for parents to complain about material they have seen or heard across the media, communications and retail industries- find out more about the website here.

Media Regulation

Ofcom published new guidance on the television watershed and music videos, and research into parents‟ and teenagers‟ opinions and concerns on pre-watershed television programming. The guidance can be found on the Ofcom website at: http://stakeholders.ofcom.org.uk/binaries/broadcast/guidance/831193/watershed-on-tv.pdf.

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