

Brexit & Unitary IP

Art. 50 TEU provides that the treaties will cease to apply either from the date of entry into force of a withdrawal agreement or two years after notification-- unless the EU and Member State decide to extend the period. The special European Council, has finalised and approved the text of the Withdrawal Agreement and the political declaration. The deal will also have to pass through Parliament. The IPO has confirmed that assuming the deal is approved, owners of unitary EU IP, such as Community Trade Marks and Registered Designs will be granted an equivalent UK right and this EU and UK separation will be *automatic* with the new UK right created and protected --with the same priority and renewal dates --all at no cost to the owner. This is known as the *Montenegro* solution --based on the approach adopted in that state's separation from the Serbian system. If a trademark has acquired reputation within the EU, the reputation will also be deemed to apply to the converted trademark in the UK until the end of the transitional period, thereafter, however, the prerequisites for reputation must also be proven. Exhaustion is EEA wide and the government has indicated that if a product bearing the trademark is placed on that market with the consent of the owner by the end of the transitional period, the trade mark rights will also be exhausted with effect for the UK. This was a foregone conclusion as the EU would not tolerate access if the UK adopted international exhaustion (like Singapore). Applications for unitary EU trade marks or designs filed within the transitional period but not registered or granted protection, are not automatically converted, but may be reapplied for in the UK until 30 September 2021 retaining the original filing dates, priority date or seniority. Existing European Patent Office (EPO) granted patents are not unitary nor governed by EU instruments, as such, and will not be impacted although the proposal for a unitary patent and a United Patent Court will be delayed-- although the government has indicated it wants to remain within those arrangements by agreement. Note also that Trade Mark Directive EU 2015/2436 is due to be implemented in the UK by 14 January 2019, corresponding to the Regulation --in force from October 2017.

Brexit and GDPR

Before Brexit, EU law applied by virtue of the European Communities Act 1972. The Withdrawal Agreement provides by Article 127, that EU law (including the GDPR) will be applicable in the UK during the transition period. That agreement also contemplates that during its EU membership, private and public bodies in the UK have received personal data from other Member States and art. 71 of the Withdrawal Agreement specifically provides that, after the transition period, the UK has to continue applying EU data protection rules to this body of "personal data", until the EU has established, by way of an adequacy decision, that the personal data protection regime of the UK provides appropriate safeguards. In summary --we will remain subject to the GDPR for the foreseeable future---and very likely beyond that too.

Apple Safari users' data protection claims

Lloyd v Google [2018] EWHC 2599 (QB) was an application for permission to serve a class action claim out of the jurisdiction arising from Google's use of data in 2011-12 of UK users. The class was defined as those with Apple Ids with OS 4.2.1 or later with a Safari browser that accessed a website participating in Google's Double-Click ad service in what was known as the "Safari-workaround" enabling the tracking, collating and use of their data to sell targeted ads. Earlier claims arising from these facts were dealt with in *Vidal-Hall v Google* [2015] EWCA Civ 31 and were settled before judgment (although it established that damages

for distress were possible in data protection claims) and while the US had taken regulatory action, this was an attempt to recover for the UK users. The harm in question was not the tort of misuse of private information but breach of statutory duty under data protection legislation. The claimants got unwanted ads so the claim was not for distress, but for loss of 'data autonomy' and sought infringement type damages, for the commission of the wrong itself and for the hypothetical data release (borrowed and re-worked from the "notional licence fee" concept in copyright claims). The inquiry for the purposes of permission to serve out of the jurisdiction was threefold: the applicability of a jurisdictional gateway, a reasonable prospect of success and forum conveniens. The second of these saw permission denied. It was held the claim did not have a reasonable prospect of success and so disclose a basis for compensation under the Data Protection Act 1998 as there were no consequences from the breach (of data rights) and the law does not allow for vindicatory awards. There were also issues with the class as the claims were highly fact specific. The claim was bought by the former head of Which, as a representative claimant, on behalf of an estimated 4.4 million users and for a value of between £1-3 billion. The UK is traditionally group litigation or class action *reluctant* and we can see the influence of harm and abuse of process type thresholds from other areas of media law here. In all, it was a sensible decision by Warby J, the current incumbent of the media law list.

Blasphemy

In *E.S. v. Austria*, Application no. 38450/12, the ECHR, balanced the competing rights of art.10, freedom of expression, against art.9, freedom of religion. It held that statements that disparage religion and are likely to result in religious intolerance are not protected by art.10 and that art. 9 imposes an obligation on states to ensure the peaceful co-existence of religious beliefs. The Court found the domestic courts comprehensively assessed the wider context of the applicant's statements, and carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected, and to have religious peace preserved in Austrian society. They discussed the permissible limits of criticism of religious doctrines versus their disparagement, and found that the applicant's statements had been likely to arouse justified indignation in Muslims. The statements were not phrased in a neutral manner aimed at being an objective contribution to a public debate concerning child marriages but amounted to a generalisation without factual basis and so went beyond the permissible limits of an objective debate and were an abusive attack on the Prophet of Islam, which was capable of stirring up prejudice and putting at risk religious peace, so the domestic courts came to the conclusion that the facts at issue contained elements of incitement to religious intolerance. This builds on earlier law. Incitement to intolerance can cross the line and the margin allowed to states is particularly broad in this context. The Court reiterated that a religious group must tolerate the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith, as long as the statements at issue do not incite hatred or religious intolerance. Further, the applicant was ordered to pay a moderate fine of only EUR 480 for the three statements made so under the circumstances, the Court did not consider the criminal sanction disproportionate.

Internet Regulation

The summer saw a flurry of White Papers around the government's Digital Charter, and its proposal to introduce some regulation for social media and 'online harms', the best of which was the Ofcom paper. The government's concern is child protection and online safety. It proposes a self or co-regulatory model due to the benefits of flexibility. Ofcom agreed there is a standards lottery depending on how a clip is viewed (whether it is a broadcast or just uploaded). It made the point that it is impossible to regulate the internet like pre-watershed

TV due to the scale of content and noted the differing audience expectations in each media. They echoed the government line that flexible regulation, based on broad principles set by Parliament, works well and accept that it may be appropriate to deal with issues post publication by regulating providers and platforms' complaints processes so they are penalised not for the harm itself, but for their failure to address it quickly and transparently and on a reasoned basis. We have these models in place for the print and broadcast media –co-regulating standards bodies with an industry code and complaints handling and industry administered dispute resolution. The difficulty is the difference between print (which has no rules on taste or decency or impartiality) and broadcast (which restricts those). The perennial issue is which model is appropriate for online? It cannot sensibly be the TV rules as they were penned in the 1950s for the BBC and cannot be justified as appropriate for regulation of freedom of expression online in the modern world. Nor can regulating the entire internet to a child safety standard be justified. In a similar vein, the Audio-Visual Media Services Directive (AVMSD) has recently been amended. The main features are that the revised rules will strengthen the country of origin principle and extend the Directive to video-sharing platforms so that YouTube is now caught and so are Facebook videos.

Privacy and Cliff Richards

Sir. Cliff succeeded in his claim in *Richards v BBC* [2018] EWHC 1837 (Ch). Sir Cliff's claim was for misuse of private information but the gist of it was for harm to his reputation from the reporting of the raid on his home prior to any arrest or charge. The case affirmed that the subject of a police investigation does have a right to privacy, see the judgment at paragraph 248. The fact of an investigation, as a general rule, will of itself carry some stigma as acknowledged in *Khuja v Times Newspapers Ltd* [2017] 3 WLR 351 (the PNM case re-named in the Supreme Court). Leave to appeal was refused. The judgment included a very long review of what was happening in the editorial team as the reporting and story unfolded but we did not get the legal advice –which was privileged. Had we had that however, it would have been quite clear that the BBC knew that they were on very shaky ground indeed and decided to run the risk. When the target of the reporting is an innocent and very wealthy person—they could have foreseen that the result would be a trip to court. The Tabloids make these decisions all the time and usually decide that the extra sales are worth the damages. Sir Cliff got £210,000 plus his legal costs which will be more than a few million. Of that, the BBC must pay 65% of the £190,000 and South Yorkshire Police, which carried out the raid, 35%. He had already had another £400,000, plus some costs, from the South Yorkshire Police for its role in disclosing and/or confirming the fact of the investigation and the planned raid to the BBC. The evidence showed however that when confronted with the information by the BBC, they confirmed and co-operated mainly in order to delay the reporting and avoid prejudice to their investigation. There was no claim in libel –as having been finally cleared by the police investigation, he had no intention of putting his innocence in issue again. Note there is not necessarily any privacy in an arrest either. It is a fact specific question –and this case did not develop the law any further. There is always a defamation risk in naming prior to charge where the police have not named. Once the police name, the media can repeat with the benefit of statutory qualified privilege. The benefit of waiting until charge to name a person is that the CPS have taken a look at the case and think the defendant has been correctly identified and there is sufficient evidence for a successful prosecution. To name before charge or at the point of arrest is risky as the wrong person (i.e. not the arrested party but an innocent third party) might be identified and could sue or the person who was arrested may be acquitted and sue on the earlier reporting which may well have a meaning closer to guilt than the fact of the investigation, in terms of the Chase level meanings. See our Guide on

Reporting Crime at <http://mcevedys.com/wp-content/uploads/2018/10/contempt-crime-reporting-guide.pdf>.

ASA Code amendments --Influencers

The ASA launched a new guide to help social influencers understand when their posts are ads. The Influencer's Guide has been developed in collaboration with the Competition and Markets Authority (CMA). See the guide at <https://www.asa.org.uk/resource/influencers-guide.html>. The guide explains the rules on affiliate marketing and the line between editorial and advertorial.