June Media Law Update

Libel

- We submitted comments on the draft Libel Bill – http://inforrm.wordpress.com/2011/06/29/mcevedys-response-to-the-draft-defamation-bill-consultation/ . The submission period has been extended to 19 July so you are still in time if you wish to submit. [i]

- See the BBC coverage of the Select Committee dealing with the Bill, at http://www.bbc.co.uk/iplayer/episode/b012cz91/Select_Committees_Defamation_Bill_Committee/ , with Government Ministers saying they'd been given a limited brief for reform (by whom we wonder?).

- An early resolution scheme was launched –to arbitrate Libel claims and/or disputes as to meaning in Libel by the Times' former in-house lawyer, Mr. Alistair Brett –a veteran of many a claim –and retired High Court Judge, Sir Charles Gray. See http://www.earlyresolution.co.uk/

Privacy

- *Mosley* --Having failed before a panel of seven Judges of the European Court of Human Rights (ECHR), Mr. Mosley has made a request for his case to be referred to the Grand Chamber of that Court–comprised of 17 Judges.

- We attended a debate organised by the Index on Censorship and the LSE on the topic "*Injunctions are a Necessary Evil"* at which Mr. Mosley spoke in favour of injunctions (and privacy) together with Hugh Tomlinson and against David Price and Suzanne Moore. It was a lively and, at times, very amusing debate. Some made the point that we may have to choose between a markedly reduced press or a healthy and thriving one funded by the proceeds of this private information—a real consideration in the age of declining circulations. Mr. Mosley spoke eloquently on criminal activity in the media and a craven police and Government.

- *Goodwin* --the injunction was partially lifted. There was no reasonable expectation of privacy (in relation to the fact of their relationship or her job description) and even if it was otherwise --it would have been overridden by the public interest in disclosure because Sir Fred was a prominent public figure.[ii] The decision is interesting for its discussion of the concept of a public figure—a key component in the privacy analysis and one that EU law draws very narrowly (almost limited to politicians) whereas the UK media likes to cast a very much wider net—see §§65-68.

Twitter

Twitter apparently handed over the personal details of a user who posted comments critical of four individuals being Councillors of South Tyneside Council –after they lodged a Complaint in California—based on Wordpress's presence there.[iii] Twitter was not sued and it does not

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appear the Court made any order against Twitter--or indeed against anyone else from the case records.[iv] This sails very close to the rule in *Derbyshire County Council v Times* [1993] A.C. 534 which prohibits local authorities and political parties from using public funds to sue for Libel –due to the public policy that democratically elected governmental bodies be susceptible to strong criticism. The rule does not extend to individuals. Many of the posts in question appear vulgar, banal, trivial and bordering on satire and political speech has the highest level of protection under Art. 10 of the European Convention on Human Rights. We can only assume the claimants funded the action themselves and not from Council funds.

Social Networking

- Facebook was criticized for its facial recognition feature which auto suggests the names of people featured in photos uploaded by users. Facebook's defence was that users could opt out or alter their settings. A complaint was made to the FTC in the US and in the UK, the ICO investigated. This will be studied by the EU Commission's Privacy Advisory Group –the Article 29 Working Party.

- The European Commission is reviewing its agreement on "Safer Social Networking Principles for the EU." 2010/2011 Commission tests on 14 out of the 21 social-networking websites that signed that agreement,[v] found only Bebo and MySpace have default settings to make minors' profiles accessible only to their approved list of contacts and only four websites (Bebo, MySpace, Netlog and SchülerVZ) ensure that minors can be contacted by default by friends only. However, most give minors age-appropriate safety information and prevent their profiles from being searched via external search engines.[vi]

Digital Economy Act

The Court of Appeal has refused BT and TalkTalk leave to appeal against the failed judicial review of the provisions of the Digital Economy Act 2010.

Astroturfing

The Times found hotel owners in the UK were paying up to £10,000 to agencies that said they could improve travel review rankings and, in some cases, could discredit rival businesses. These agencies 'sold' followers on social media sites for 24p each, the paper found. They used multiple accounts and hired writers who could use different writing styles to fake a groundswell of support for a business and its services. This is a breach of the CAP Code - at http://copyadvice.org.uk/CAP-Code.aspx. Within the EU, the law on advertising has been harmonised by the Unfair Commercial Practices Directive (2005/29/EC). Misleading, deceptive and false and unfair advertising are prohibited by the Directive as are other objectionable practices. The Directive annexes a black list[vii] of practices which are considered unfair in all circumstances. Astroturfing is a blacklisted practice: *"22. Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer."* The implementing regulations are the Business Protection from Misleading Marketing

Regulations 2008 (BMR) and also the Consumer Protection from Unfair Trading Regulations 2008 (CPR).

Cookies

Despite the 26 May 2011 implementation date, the UK has granted a one year enforcement holiday from the new Privacy and Electronic Communications Regulations, based on EU law changes. In its press release, the ICO stated that website operators have up to one year to 'get their house in order.' The government said it would work with website operators to '*come up with workable technical solutions.*"[viii] Here's what Techcrunch had to say: http://eu.techcrunch.com/2011/06/22/want-a-90-drop-in-your-site-visitors-yes-folks-you-too-can-implement-eu-cookie-law/

"Web blocking"

As you will be aware --a black list is operated by the Internet Watch Foundation (IW) – primarily dealing with porn. We have long been concerned that IW has no statutory underpinning whatsoever –and that speech can be suppressed by the Police in the absence of predictable and certain law and without *any* scrutiny or due process. Now the CTIRU (Counter Terrorism Internet Referral Unit) has developed an *unlawful* blocking list for use across the public estate, and apparently removed material from the internet 156 times within 15 months. The Open Rights Group (ORG) has investigated and advises that the practice is that the Met Police, SOCA and Trading Standards report suspected criminality to internet registrars, registries or hosts, depending on circumstances. While they do not request takedown –they advise it and inform the relevant body that they may be liable under the Proceeds of Crime Act if they do not take action. Thus the host, registry or registrar takes liability for their action or inaction"[ix] Indeed –having been a victim of this --Nominet has been consulting with stakeholders prior to determining its future policy on the issue—see http://www.nominet.org.uk/policy/issuegroups/. UK copyright lobbyists have now held confidential, closed-door meetings with the Minister for Culture, Communications and Creative Industries, to discuss a plan to establish *expert bodies* to decide on "swift" blocking to be approved by a judge using a "streamlined" procedure. Apparently, public interest groups like ORG asked to attend the meeting, but were shut out. We think any judicial scrutiny would be a big improvement—but the trend towards the privatization of justice continues. We worry what will follow once this is in place and comments at the Index on Censorship Lecture about "*technical measures*" that may be necessary suggests that sites that publish information in breach of privacy injunctions may be blocked.

More censorship

Indeed --censorship of the Internet is also suggested by the UK Mothers Union in "*Letting Children be Children - Report of an Independent Review of the Commercialisation and Sexualisation of Childhood*".[x] This sort of thing is popular and we have long watched with dismay as EU regulators talk about (that precise legal standard) "*harmful content*" and protecting children from it.

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Domain Names

The ICANN Board approved new gTLDs on June 20 –Jan to April 2012 after 6 long years of debate. The application period will run from the 12 January 2012 to 12 April 2012. On 27 April 2012 a summary list of applications will be published and the first results from the ICANN evaluators will be published in November 2012. This means that new gTLDs could begin to go live from early 2013. The cost of an application is $185,000 –with reductions of up to 76% possible for developing nations.

It's expected that from the current 22 –the gTLD space will now grow exponentially. Observers anticipate that most of the new applications will be for .brand, .place and .green etc. In fact some predict that given the increased scope for cybersquatting and the impossibility of defensive registrations in all gTLDs –many brands will now register their own gTLD. For those that do not –due to the Clearing House –taking advantage of Sunrise periods to protect established marks is easier than ever before –subject to the requirement to prove use. See the Applicant Guide Book which explains the process and the rules- http://www.icann.org/en/topics/new-gtlds/rfp-clean-30may11-en.pdf .

We sat on some GNSO Working Groups on these issues in 2007 – the Protecting the Rights of Others and Reserved Names WGs. We don't like:

- The fact that the GAC (Governmental Advisory Committee) can issue an Early Warning --- that an application might be problematic, e.g., potentially violate national law or raise (that precise legal standard and now a restriction on speech) '*sensitivities*.' Note that any Government can raise a Warning and no consensus is required. See p.1-6. This is a race to the bottom ---a point we made in 2007.

- GAC –gets another bite of the cherry during the Objection filing period –and can submit a GAC Advice on New gTLDs –namely a statement from the GAC that an application should not proceed as submitted (or on only terms) but should identify the objecting countries, the public policy basis for the objection, and the process by which consensus was reached. This is to create a strong presumption for the Board that the application should not be approved—and if the Board does not act in accordance with this type of advice, it must first try to reach a compromise but if none can be reached –it should provide its rationale. See p.1-10 and 3.2.

Interestingly:

- The String Similarity Panel who will assess the application at the evaluation stage will employ an algorithmic score for the *visual similarity* between completing gTLDs and reserved names as an objective measure for consideration by the panel, as part of the process of identifying strings likely to result in user confusion. The algorithm, user guidelines, and additional background information are available to applicants for testing and informational purposes—at p.2-7. See the algorithm at http://icann.sword-group.com/algorithm/

- The test for String confusion is "*where a string so nearly resembles another visually that it is likely to deceive or cause confusion."* For the likelihood of confusion to

exist, it must be probable, not merely possible that confusion will arise in the mind of the average, reasonable Internet user. Mere association, in the sense that the string brings another string to mind, is insufficient to find a likelihood of confusion. The finding of the String Similarity Panel --does not prevent a third party opposing an ongoing application based on a wider test for visual, aural, or similarity of meaning.

- The third parties noted can object to an application on any of the following grounds:

1. *String Confusion Objection* – The applied-for gTLD string is confusingly similar to an existing TLD or to another applied for gTLD string in the same round of applications (with standing limited to the relevant entity). This will be determined by the International Centre for Dispute Resolution based on its Supplementary Procedures for ICANN's New gTLD Program- see http://www.icann.org/en/topics/new-gtlds/rfp-clean-30may11-en.pdf.

2. *Legal Rights Objection* – The applied-for gTLD string infringes the existing legal rights of the objector. These will be determined by WIPO based on its new rules. See http://www.icann.org/en/topics/new-gtlds/draft-wipo-rules-28may10-en.pdf

3. *Limited Public Interest Objection* – The applied-for gTLD string is contrary to generally accepted legal norms of morality and public order that are recognized under principles of international law.

4. *Community Objection* – There is substantial opposition to the gTLD application from a significant portion of the community to which the gTLD string may be explicitly or implicitly targeted.

3 & 4 –may be raised by the Independent Objector (IO).

More on this to follow next month.

UDRP

It seems that the decision has already been taken on the reform and ICANN has decided not to fix what is not broken –see the report at http://gnso.icann.org/issues/prelim-report-current-state-udrp-27may11-en.pdf. Our own view is that the system does work well –but that Panels should have as many speech specialists as trade mark ones—as the UDRP is a compromise between both concerns but is constantly moving to the rights as it is implemented by only half of the argument.

OHIM and WIPO sign co-operation agreement

No doubt arising from, and anticipating, the Clearing House proposals --WIPO (World Intellectual Property Organisation—responsible for international patent and trade mark treaties and registrations),

which recently launched its WIPO Gold database, has agreed with OHIM (Office of Harmonisation for the Internal Market—responsible for Community Trade Mark registrations and other registered EU IP) have agreed to share data. We will see a lot more of this –as players position themselves for the future –and it will be interesting to see how this develops in light of the Hargreaves review proposals for digital rights exchanges –these must be the way forward and the Clearing Houses will be standing incumbents when they arrive.

FOIA

In *R (Department of Health) v Information Commissioner*, the High Court, applying the approach set out in the *Common Services Agency* case, ruled that nationwide statistics relating to late abortions did not constitute personal information under the Freedom of Information Act 2000 as they did not give rise to sufficient risk of identification of the doctors or patients involved.

[i] See http://www.parliament.uk/business/committees/committees-a-z/joint-select/draft-defamation-bill1/news/joint-committee-on-the-draft-defamation-bill-committee-extention/

[ii] http://www.bailii.org/cgi-bin/markup.cgi?doc=/ew/cases/EWHC/QB/2011/1437.html&query=Goodwin+and+v+and+NGN&method=boolean

[iii] See the Complaint: http://www.scribd.com/doc/56639355/Case-CIV482779-IAIN-MALCOLM-VS-DOES-1-10.

[iv] At http://openaccess1.sanmateocourt.org/openaccess/CIVIL/civildetails.asp?casenumber=482779&courtcode=A&casetype=CIV&dsn=

[v] Namely Arto, Bebo, Facebook, Giovani.it, Hyves, Myspace, Nasza-klaza.pl, Netlog, One.lt, Rate.ee, SchülerVZ, IRC Galleria, Tuenti and Zap.lu

[vi] See http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/762&format=HTML&aged=0&language=EN&guiLanguage=en

[vii] See Annex 1: http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:149:0022:0039:EN:PDF

[viii] See Mr Vaizey's press release.

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[ix] The UK Home Office's updated Prevent Strategy aimed at countering terrorism, states the *necessity* of Internet filtering. Moreover, according to the strategy report, TACT (the Terrorism Act) allows the Government to charge website owners with encouraging terrorism and publishing terrorist information if they do not remove unlawful content. See the review at http://www.homeoffice.gov.uk/publications/counter-terrorism/ct-terms-of-ref/counter-terrorism-terms-of-ref?view=Html .

[x] See the Report at https://www.education.gov.uk/publications/standard/publicationDetail/Page1/CM%208078. This dovetails with the European Commission's COSPOL Internet Related Child Abuse Project (CIRCAMP) -- is to lobby for internet blocking in the European Union, both at an EU and a national level and to support its implementation. CIRCAMP promotes the use of blocking at a domain level (blocking a full domain rather than a particular page).

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