

Update

Copyright

The European Court of Human Rights in Strasbourg rejected the appeal of Pirate Bay founders who asked the Court to overturn the Swedish courts which found the operation of the file-sharing service Pirate Bay a violation of Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR). The Swedish courts sentenced the individuals to less than one year in prison and damages of €5 million euros. This was appealed on grounds that the Pirate Bay's purpose was merely to facilitate the exchange of data online and was protected by ECHR Art 10 (Freedom of Expression). The Court unanimously affirmed that the right to share even copyrighted material for commercial purposes is covered by Art 10 but held the Swedish courts had correctly balanced the two conflicting rights (freedom of expression and copyright) and the rulings were not disproportionate--in part as the appellants had not removed the copyright protected material from their website despite having been requested to do so. See application no. 40397/12

Channels 4 & 5 and ITV won a case against TVCatchup Ltd (TVC) which provided an online TV service comprised of live streams of content which the public was already legally entitled to watch in the United Kingdom by virtue of their television licence with added advertising. The Court of Justice for the EU (CJEU) held that the retransmission of works constituted a "communication to the public" and therefore infringed the copyright of the broadcasters -- whose rights were not exhausted. It also noted that the content transmitted by TVC was not the same as that transmitted by the broadcasters. See <http://curia.europa.eu/juris/document/document.jsf?text=&docid=134604&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=146971>

Domain names

.uk: Nominet announced it will not be proceeding with the .uk, due to concerns by owners of .co.uk about preserving their priority. These concerns could have been dealt with by a number of rights protection measures and this is therefore surprising. Nominet says it will explore other options. See <http://info.nominet.org.uk/go.asp?/bNOM001/m9HIG9/uDS1P9/xSWAG9>

Trade Mark Clearing House: on the 26 March ICANN launches the clearinghouse. This is a central verification repository for trade marks to facilitate the "priority" given to existing mark owners when new gTLD (Generic Top Level Domains) are launched (also known as "Sunrise" periods) and for claims services (notification and watching services warning owners of attempts to register domains similar to their marks). Registration in the Clearing House does not create any new rights but provides evidence of rights meeting its criteria. The following can be registered:

- (a) Nationally or regionally registered word marks from all jurisdictions.
- (b) Any word mark that has been validated through a court of law or other judicial proceeding.
- (c) Any word mark protected by a statute or treaty (such as geographical indications and designations of origin).

Guidelines have now been issued that clarify and expand on the criteria above. See http://www.trademark-clearinghouse.com/sites/default/files/files/downloads/TMCH%20guidelines%20v1.0%20_1.pdf

Owners of registered marks who wish to use the Clearing House for Sunrise periods must also provide proof of use. Owners of unregistered or common law marks will find they cannot meet the criteria and should consider registering their marks. Note that inclusion in the clearing house will protect identical matches only and not similar marks. Registration of one mark costs USD\$150.

Consumer ODR

A new EU Online Dispute Regulation (ODR) was approved. The ODR Regulation is designed to provide an out of court redress tool for e-commerce users to boost consumer and business confidence in the digital single market as the Commission believes that the lack of efficient means of resolving disputes affects consumers' confidence in shopping across borders. It wants disputes over online transactions to be settled faster and more cheaply than through the courts. The chief tool of the ODR is a new 'online platform' for consumers to submit complaints about contracts with businesses--which will be linked to national ADR schemes which will seek to resolve the disputes. The system will not apply to disputes arising from offline sales and will not prevent consumers unhappy with the outcome from litigating. No jurisdictional limit appears to have been determined as yet. Traders will be able to refer customers who are unhappy to the system if they are not satisfied with internal complaint handling.

Takedown

The Court of Appeal handed down judgment in *Tamiz v Google*. The case concerned Google Inc.'s liability for content on Blogger.com *after* a Takedown Notice and whether it was a publisher at common law and, if so, had a defence of Secondary Responsibility under the Defamation Act. Google had (with permission) forwarded the Takedown Notice to the blogger in question who had removed the comments about two months later. The appellate court noted the difference in libel law between primary (authors, editors and proprietors) and secondary publishers (distributors and printers who have a defence of innocence if they can show they do not know of the content). Google's passive role as a search engine was distinguished from its role as a host here. The court noted that *after* a Takedown Notice, Google could be a secondary publisher. As to the defence for secondary publishers (once innocent dissemination and now statutory in section 1 of the Act), the appellate court agreed

Google had acted with reasonable care on receiving the Takedown Notice but as it had the relevant knowledge once it received the Takedown Notice it would not be able to claim the defence under the Act. Any liability could only relate to the two month period and was it was improbable that significant numbers of readers had accessed the comments in that time --the court agreed that the "game was not worth the candle" and it would be an abuse of process to maintain it. The decision is very important as other courts have found that Google was not a publisher. Crucially, the appellate court did not go on to the Ecommerce defence and so the court below's decision on that defence stands. We covered this in earlier updates.

Toy Cars and Trade Marks

Warner Brothers recently won its claim that the Batmobile is a copyright-protected character and a California federal court ruled that the Batmobile, as an "extension of Batman's own persona", was a character entitled to copyright protection. Gotham Garage's building and selling of full-sized, road-ready replicas infringed the copyright. The Court also held that the defendant's vehicles infringed Warner Brothers' trade marks because the replica vehicles feature trade marked bat symbols. A similar issue to the trade mark point was dealt with differently in the EU in *Opel v Autec* Case C-48/05, where Autec AG manufactured remote-controlled scale model cars, under the trade mark 'Cartronic,' including a remote-controlled scale model of the Opel Astra V8 coupé, bearing the Opel logo. Opel had registered the Opel mark both for motor vehicles and toys. Opel sought to restrain. Autec said its use was not 'use as a trade mark' and so the origin function of the Opel logo was unaffected, as it was obvious to the public that the scale model did not come from the manufacturer of the vehicle of which it was a replica and the public were not confused by such use, which was common in the toy industry. The Court agreed saying the public was used to replica toys and did not perceive the Opel logo on the scale models as an indication that those products came from Opel and the use did not affect the essential function of the Opel mark.