Links & Copyright

In an eagerly anticipated ruling, it was held that linking to copyright works freely available on another website is not copyright infringement. This is based on the fact that there is no 'new' public to that originally authorised by the copyright owner. This will not apply where a paywall or other restriction means that a new public is reached, see Case C-466/12, *Svensson v Retriever Sverige AB.*

Contrast *ITV v TV Catch Up Ltd* (C-607/11) where an internet TV service provided users 'live' streams of TV broadcasts but ensured they could only access content they were already legally entitled to watch in the UK (by virtue of their television licence) ---beyond a limited exemption, it was held there was a communication to a 'new public' and the fact they would have been entitled to see the original broadcast under their TV licences was of no relevance.

Similar issues also arose in the 'pub landlady case' –where the publican provided access to the public via a screen and speakers and was held to have made a new communication to the public as the original authorisations contemplated only private and domestic circles and the communication was profitmaking (although in that case as no charge was levied by the pub, an exemption applied), see Joined Cases C-403/08 and C-429/08 *Football Association Premier League Ltd v QC Leisure* [2011] ECR I-0000 and FALP v Leisure QC [2012] EWHC 108.

Keywords

Recent cases clarified that a keyword advertiser should use his own name in his keyword triggered ad and avoid using his competitor's name or *actual mark* in the ad itself. The law was put to the test by Lush who sued Amazon for infringement of its CTM word mark 'Lush.' Crucially, Amazon does not sell Lush products and products displayed by Amazon pursuant to a search request for ' Lush ' fell into one of three categories: (1) goods owned and sold by Amazon; (2) goods owned by a third party where Amazon provided a range of services such as stocking, dispatching the order, customer service and returns; and (3) goods owned by a third party where the sale is fulfilled by that or another third party. There were two ads in issue. The first was as follows:

Lush Soap at **Amazon**.co.uk
*www. **Amazon.** co.uk/lush+soap*
amazon .co.uk is **rated** *****
Low prices on **Lush** Soap
Free UK Delivery on **Amazon** Orders.

This was infringing as "*the average consumer seeing the ad ..would expect to find Lush soap available on the Amazon site and would expect to find it at a competitive price."* The second ad omitted the mark:

Bomb Bath at **Amazon** .co.uk
*www. **amazon** .co.uk/bomb+bath*
amazon .co.uk is **rated** *****
Low prices on Bomb Bath
Free UK Delivery on **Amazon** Orders.

The court seemed to find this infringing although the mark is not used and Lush had no rights to Bomb Bath. The third usage included 'suggested search terms' and 'related search terms'

and drop down menu/lists on Amazon. It was held that as none of the products offered on Amazon bore the Lush mark Amazon was infringing. The court cited *Google France Sàrl v Louis Vuitton Malletier SA* (C-236/08 to C-238/08) (the public must be able to tell whether the goods or services originate from the mark owner or a third party) and *L'Oreal v eBay* Case C-324/09 (operator of an online marketplace will be treated like a search engine which does not itself use the marks). The decision was not fully reasoned and is unclear on a number of key points. We cannot see why Amazon is liable for the second ad. As it is clear who the advertiser is, the consumer understands it is being offered *alternatives*—per *Interflora v Marks & Spencer* (C-323/09). The ruling in *eBay* should protect it as to goods in category (3) and some of (2) —where Amazon is acting as an online market place and advertising those services. As to the search term use and drop down menu/lists —some will be algorithm generated based on the fact Amazon sold Lush until recently (automated conduct Google was not liable for). We understand there will be an appeal and await it with interest. Those using keywords should take care and expect more litigation as trade mark owners seek to chip away further at the decision in *Google*. See *Cosmetic Warriors Ltd and Lush Ltd v Amazon.co.uk Ltd and Amazon EU Sarl* [2014] EWHC 181 (Ch).

Second hand software

Microsoft announced it had settled a copyright infringement claim against Discount-Licensing Limited, a UK-based reseller of second-hand software, arising from Discount-Licensing's resale of second-hand licences of Microsoft software. No details are yet to hand.

Readers will remember that the ECJ found electronic copies of second hand software can be legitimately resold in Case C-128/11, *UsedSoft GmbH v Oracle International Corp* (Oracle's exclusive distribution right in such software was exhausted after the first sale of such software where there had effectively been a sale (no-matter how described) even in the face of contractual restrictions provided the re-seller deletes or renders unusable his own copy when he sells it (otherwise the reproduction right would be infringed, a right not subject to exhaustion)).

It is not yet clear whether trade mark infringement was also claimed as in MTech in *Oracle America Inc v M- Tech Data Ltd* [2012] UKSC 27 (independent trader in second hand Oracle goods failed in infringement case as Oracle could enforce its right to control first sale by withholding information on serial numbers and whether they had already been sold in the EEA/and its rights exhausted).

Passing off & Yogurt

In an 'extended passing-off' claim, the respondent's use of the term "Greek Yoghurt" for artificially thickened US produced yoghurt was enjoined and this was upheld on appeal. "Greek Yoghurt" was a term the claimant and others in the UK used only for strained yoghurt made in Greece (as opposed to "Greek style" yoghurt) and which commanded a premium in the market. The parties agreed it had acquired a secondary meaning (and so was not descriptive). The court cited the "Spanish champagne" case, *J Bollinger & Ors v Costa Brava Wine Co Ltd* (No 2)[1961] 1 WLR 277 and upheld the finding below that there was a perception there was something special about Greek yoghurt, (although less than in the Champagne cases) held by a substantial proportion of the yoghurt eating population, running into hundreds of thousands of adults. *See Fage UK Ltd & Another v Chobani UK Ltd & Another* [2014] EWCA Civ 5.

Internet Governance

The European Commission called for an end to ICANN and US dominance of internet governance –in part in reaction to the NSA scandal. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2014:0072:FIN:EN:PDF . Some insiders however fear the alternatives are worse.
In a similar vein, and for the same reason, renewed calls were made for an end to the Data Protection Safe Harbour with the US, whereby data can be transferred from the EU to countries meeting similar standards of protection for personal data. See http://ec.europa.eu/justice/data-protection/files/com_2013_847_en.pdf .

Privacy

The Prime Minister of Finland is a public figure but his ex-girlfriend was entitled to publish a book on their relationship and only 7 extracts (on his children's views and intimate/sexual details) infringed his privacy. His right to privacy had to be balanced against her freedom of expression but there was a lack of a sufficient public interest justification for publication of the intimate material. See Ruusuuen v Finland (Application no. 73579/10).

Rehabilitation of Offenders

Certain time periods for a conviction to become 'spent' so that it cannot be the subject of questions in or out of court have been extended. For custodial sentences from 6 months to 2.5 years, the period is 4 years after the end of the sentence and for longer terms, it is 7 years. These do not apply where there is a subsequent conviction. A prohibition on employers and insurers forcing subject access disclosure of police records has also come into effect.