

FAST Legal Update

Member Bulletin June 2016

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Every month I update you on key legal developments affecting our sector. But I am not going to focus solely on IP law. It is clear from the business activities that many of our members are involved in that there are several legal developments that will have an impact on everything that we in the industry are engaged in at the moment.

I aim therefore to bring you each month the legal headlines on issues for you to be aware of plus an update on Legislation, Case Law and Consultations. I will also be including a monthly book recommendation touching upon the themes we will be exploring each month. If you have any questions please contact me directly at FAST. I look forward to hearing from you.

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Introduction

The political class in Europe and London are as busy as ever creating more and more laws for us all to comply with. Whatever happens following the referendum this month we should not underestimate the willingness of either to introduce new legislation, much of which will have an impact in practice on your business. In May the European Commission released their latest proposals for the Digital Single Market. These include a draft Regulation on Geo Blocking, and amendments to the AVMS obliging OTT TV providers such as Netflix to include minimum quotas of European content in their offerings. The European Council has approved a new Cybersecurity Directive.

Meanwhile in Westminster the Queen's Speech promised a new Digital Economy Bill and major changes to the Investigatory Powers Bill.

But just to make sure that the Legislators are not alone the Regulators are getting in on the Act also. The CMA in England has written an open letter to cloud storage providers on unfair contract terms and the CNIL in France is trying to force Google to globalise the right to be forgotten. And in the USA a court in San Francisco may find that APIs attract copyright! But there is good news to with steps being taken by the IPO to make it easier to enforce your intellectual property rights when they are breached. As ever it has been a very busy month and I hope you find the round up useful.

Headline Stories

Cloud Storage: The CMA is clamping down on Cloud Storage providers. The CMA has written an open letter to cloud storage providers suggesting that many of their consumer terms are unfair and threatening to take enforcement action against them. The CMA is particularly aggrieved by terms in consumer facing contracts that give storage providers the right to increase prices unilaterally without giving the consumer any right to leave. You can see a copy of the CMA report [here](#) and a copy of the open letter [here](#). But in fairness to the CMA they have also set out very clearly some "at a glance" guidance on unilateral variation terms in consumer contracts and how to make them fair. This Guidance is very straightforward to follow. But for those of you who want to read up on the subject in detail their very comprehensive and exhaustive guidance can be found [here](#) (not for the faint hearted).

Google v France, Liberty, Equality, Anonymity? Google has made clear its intention to fight against the French privacy regulator's decision to globalise the right to be forgotten. In a heartfelt editorial Google has made clear its intention to appeal against the decision handed down by CNIL obliging Google to, in effect, offer up the right to be forgotten to citizens resident outside of the EU. Google advances an argument in defence of the rule of law by suggesting that CNIL has no right to deprive citizens in countries outside of the EU of information that would otherwise be available to them, but for Google choosing to apply the "right to be forgotten" decision on a global basis. Google's argument is eloquently put and, while self-serving, sounds a warning bell for us all to be aware of:

"The CNIL's latest order, however, requires us to go even further, applying the CNIL's interpretation of French law to every version of Google Search globally. This would mean removing links to content - which may be perfectly legal locally - from Australia (google.com.au) to Zambia (google.co.zm) and everywhere in between, including google.com. As a matter of both law and principle, we disagree with this demand. We comply with the laws of the countries in which we operate. But if French law applies globally, how long will it be until other countries - perhaps less open and democratic - start demanding that their laws regulating information likewise have global reach? This order could lead to a global race to the bottom, harming access to information that is perfectly lawful to view in one's own country." See here for the full statement from Google.

Data Protection: What now for the EU-US Privacy Shield? The European Data Protection Supervisor (EDPS), Giovanni Buttarelli, has now published his Opinion on the EU-US Privacy Shield draft adequacy decision. He considers that the EU-US Privacy Shield is a step in the right direction but that it still does not contain within it sufficient safeguards for EU Citizens for when their data rights are breached by US public authorities. He argues that the Privacy shield needs to offer up greater protection in certain areas including indiscriminate surveillance, judicial oversight, transparency, legal redress and protection rights for data subjects. Until "significant improvements" are made along these lines he is advising against the European Commission adopting the draft adequacy decision. His opinion has been welcomed by the European Parliament.

We are still waiting to find out what will be the outcome of the decision made by the Irish Data Protection Commissioner to refer the standard clauses to the CJEU. The outcome of that decision may have an impact on the future of those clauses. But absent a decision being made it is more important than ever that the issues around the EU/US privacy shield are addressed, so that businesses can process data outside of the EEA without fear of legal reprisals.

Copyright: The IPO has issued plans to help rights holders enforce their intellectual property rights Under the "IP enforcement strategy 2020" the government has set out how it plans to deliver on its manifesto pledge to: "protect IP rights by continuing to require internet service providers to block sites that carry large amounts of illegal content; and build on voluntary anti-piracy projects to warn internet users when they are breaching copyright." To this end the IP enforcement strategy 2020 gives much clearer guidance to rights holders on the evidence they need to obtain in order to apply to court to get web blocking injunctions against ISPs who are allowing access to websites with infringing content.

The report makes clear that the government will "work to ensure that EU level changes do not restrict UK courts use of injunctive relief against a range of intermediaries, including ISPs, search engines and platforms".

Legislation Update

Cybersecurity Directive. The Council of the EU has adopted the Cybersecurity Directive, or the “network and information security (NIS) directive” to give it its full name. The Directive must now be adopted by the European Parliament. Once in force this Directive aims to improve cooperation different countries in the EU on cybersecurity issues. The Directive also imposes security requirements on “operators of essential services” in important areas such as transport, health, energy, finance, to make sure they are robust enough to resist cyber-attacks. Equally providers of digital services such as online marketplaces, search engines and cloud storage services will also be obliged to comply with these requirements. Once in force EU countries will have 21 months to implement the NISD into national law. Businesses that might be affected by the NISD would be well advised to start preparing now. If your business provides critical services in the sectors above you may want to consider assessing your current security protocols against cyber-attack, to see if they are sufficiently robust? And equally review how robust your associated management procedures are for managing security breaches.

EU: Digital Single Market Proposals. The European Commission has published a proposed Regulation on Geo-Blocking to stop “unjustified” geo-blocking. The Regulation aims to stop consumers who buy products and services in another Member State from being not discriminated against when it comes to access to prices, sales or payment conditions. There are several exclusions, for where the retailer can objectively justify the reasons for geographical discrimination. The proposed Regulation also will not force retailers to actually deliver Goods and services in other Member states. But under the Regulation businesses online will not be allowed to re-route customers back to a country-specific website, or require payment to be made with a debit or credit card from a certain country. It is too early in the legislative process to advise today on what you may need to do in practice. But whatever happens based on the current drafting in the Regulation, you will not be legally obliged to actually supply services in these other countries if you don’t want to.

They have also proposed some amendments to the Audio Visual Media Services Directive. The Directive is being amended to give a boost to the European creative industries by obliging OTT TV providers such as Netflix to have a minimum quote of European produced content within their TV offering. The suggested minimum quota based on what is happening in the market at the moment is 20%. What impact this will have on these OTT TV providers. But one has to question whether or not this measure will really lead to an increase in the quality of content produced by the European creative industries and to what extent consumers will therefore benefit? As with the proposed regulation on Geo Blocking it is early days yet but we will keep you up to date on developments as they occur in the DSM.

Westminster: Digital Economy Bill. The Queen’s speech revealed plans for a new Digital Economy Bill. The Bill will aim improve broadband speed and give Ofcom new powers. But more importantly it will contain provisions to improve the protection of intellectual property through support for digital industries by addressing differences in online/offline copyright laws, and by having provisions to enable registered design owners to give notice of their rights more cheaply and flexibly.

Westminster: Investigatory Powers Bill. The Queen’s speech also highlighted the latest Government plans for the Investigatory Powers Bill. You can find out all the latest information about the Bill here. As you may recall the previous version of the Bill did not survive as it was deemed to not to have enough safeguards within to respect human rights. The Parliamentary Human Rights Committee has given the new Bill a seal of approval in its current form. The Human Rights Committee said so-called bulk data gathering was “capable of being justified”. It welcomed the Investigatory Powers Bill as a “significant step forward” in human rights terms

but said more safeguards were needed. The Bill gives a firmer legal footing to the security services to collect vast quantities of internet data in the UK, which is justified on the basis that such activities have helped prevent several major terrorist attacks in the last few years. But there are still real concerns that the Bill does not do enough to respect individual's rights to privacy. The new Bill is a massive improvement from a human rights perspective on the original proposals. In the words of the Human Rights Committee the Bill gives "a clear and transparent legal basis" for investigatory powers being exercised by the security agencies. But you may wish to consider what it might mean for your business when if the security agencies starts asking you to collate this data. As the Bill progresses through Parliament we will look out for the commercial implications it may have for our membership. Watch this space.

Case Law Update

Copyright: It is legal to Hyperlink? Whether or not hyperlinking can leave you in breach of copyright is of interest to all who rely on the internet. Two years ago in *Svensson (C-466/12)* the ECJ called into question the legality of hyperlinking from a copyright perspective. Now the Advocate General (AG) has delivered its opinion in *GS Media BV v Sanoma Media (C-160/15)*. His opinion analyses the question of whether or not copyright applies when a hyperlink to copyright works is placed on a website without the permission of the original copyright owner. The AG has decided that where copyright works are put online and are freely available without the rights holder's consent, via third-party websites with unrestricted access, then hyperlinks to those works cannot be considered a "communication to the public" under Article 3(1) of the Copyright Directive (2001/29/EC). Therefore hyperlinks as a rule do not infringe copyright. This opinion should go a long way towards creating a more certain legal environment for the use of hyperlinks after the original confusion and lack of certainty caused by *Svensson (C-466/12)*. Specifically the AG states that Article 3(1) of the Copyright Directive "must be interpreted as meaning that the posting on a website of a hyperlink to another website on which works protected by copyright are freely accessible to the public without the authorisation of the copyright holder does not constitute an act of communication to the public, as referred to in that provision".

Oracle v Google and whether or not APIs can be copyright protected? At the time of writing in the latest round of a case stretching back to 2010, a jury in San Francisco is now considering whether or not Google's use of APIs written by Oracle falls within what is known as the "fair use" exemption in US copyright law. If they find that Google's use of the APIs does not fall within the "fair use" exemption, not only will Oracle be entitled to pursue a claim in damages for up to \$9 billion against Google, but the decision will also have a major impact on how the software industry has worked up until now. In a previous round U.S. District Court of Northern California judge William Alsup threw out Oracle's case and said that an API cannot attract copyright protection as it is merely "a long hierarchy of over 6000 commands to carry out pre-assigned functions". But his decision was overturned on appeal. Up until now the open use of APIs has facilitated interoperability and with it great innovation in software coding. But if APIs are found to be protected by copyright in this case, albeit in an American context, then this decision will potentially have a far reaching impact on the software writing industry. APIs will no longer be freely available to use and incorporate as required to facilitate interoperability and user experience, if doing so cannot be considered to fall within the fair use exemption to Copyright law. How this will work out in a European context is still an open question.

Consultations

Unambiguous consent to process cookies? A quick reminder that as part of the DSM the European Commission has launched a consultation on the ePrivacy Directive. The consultation closes on July 6th 2016: <https://ec.europa.eu/eusurvey/runner/EPRIVACYReview2016>. There is a danger it may be amended to introduce the unambiguous standard of consent required under the GDPR in relation to cookies. This consultation offers industry the chance to let the European Commission know how difficult if not impossible this would be in practice.

Monthly Book Recommendation

I would like to recommend two books this month in praise of innovators, not legislators!

The Innovators by Walter Isaacson. A fascinating history of the how computers and the internet came into existence from the Countess of Lovelace in the 1830s to the Tim Berners Lee era and the world wide web. The book focuses on the work of 60 innovators who were not only geniuses but were also team players. I recommend reading it while contemplating what the European Commission is trying to achieve with the Digital Single Market. A fantastic read. (2014, Simon & Shuster, ISBN-13: 978-1476708690)

Pax Technica by Philip N. Howard: When it comes to the Internet of Things (IoT) if you don't agree with the vision of the future involving Skynet and Terminator Two then I recommend this as the perfect anecdote. It sets out an optimistic view on the IoT and how it will evolve in the future. The author explores what it could mean for politics and democracy and his argument is that the IoT is about much more than just connecting machines. It will also have a major impact on the distribution and exercise of power. (2015, Yale, ISBN 978-0300199475).