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MUNICH OFFICE IP/IT & MEDIA NEWSLETTER

A Look at the Developments in the area of IP, IT and Media

In this issue:

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Advocate General Believes the Data Retention Directive to be Inconsistent with the EU Charter of Fundamental Rights

The Advocate General of the Court of Justice of the European Union (CJEU), Pedro Cruz Villalón, issued an opinion relating to several proceedings involving cases from Ireland and Austria that deal with the national implementation of Directive 2006/24/EC. In his view, the Directive does not provide adequate privacy protections as required by the EU Charter of Fundamental Rights, in particular the protection that every limitation on the exercise of a fundamental right must be provided for by law. The Directive itself needs to contain the guiding principles for access to the data, retention and use of the data. These guarantees, and their establishment, application and review of compliance, require regulation in the Directive itself. Further, the Advocate General deems the Directive not proportionate because it obligates the member states to data retention for a maximum period of two years. The Advocate General fails to see a justification for data retention for longer than one year.

Surprisingly, Advocate General Cruz Villalón does not recommend a finding of immediate invalidity to the CJEU. Rather, the effects of such finding should be suspended pending the adoption of measures that remedy the invalidity by European legislature, within a reasonable time frame. The objectives of the Directive itself are not illegitimate, but the measures required to reach these objectives are incompatible with the fundamental rights of the citizens. Thus instead of striking this Directive down, the Advocate General vouches for giving the legislature time to fix it.

In Germany, the Federal Constitutional Court has already struck down the national implementation as being contrary to the German Constitution. While the potential parties to the great coalition have already committed to a re-implementation of the Directive in the draft coalition agreement, it remains to be seen whether they will step back from such plan after the opinion of the Advocate General and at least wait for the decision of the CJEU, which usually follows the opinion of the Advocate General.

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Cookies – Guidance on "How To" From the Article 29 Working Party

Since the adoption of the amendments to the e-Privacy Directive 2002/58/EC, website operators have started to use a variety of mechanisms to obtain the newly required consent from website users for the placement and reading of cookies (and other similar technologies, hereafter referred to jointly as "cookies").

The measures range from an immediately visible text box that makes the user aware that various types of cookies are being used and that also provides links to further information; an immediately visible text box informing the user that by using the website, the user agrees to the placement and use of cookies by the website; a mechanism by which the user can actually choose which cookies to accept and which to refuse; an option for the user to subsequently change preferences regarding cookies; and a multitude of other solutions.

While all these measures are certainly better than ignoring the issue, they might not be sufficient to be compliant, in the Article 29 Working Party's view in its guidance on obtaining consent for cookies (WP 208, adopted on October 2, 2013).

In order to determine what is sufficient for obtaining consent, the Article 29 Working Party refers to Article 2(f) of the Directive which defines the notion of consent in line with Directive 95/46/EC – "consent of the individual should be a freely given specific and informed indication of the individual's wishes which must be unambiguous." To satisfy to the Directive's consent requirements, all the following elements must be present in the mechanism employed by the website operator:

- Specific and appropriate information must be given, including the types of cookies, their purpose(s), potential recipients of data, measures of processing carried out, details of third-party cookies, retention periods, etc. The users must also be informed about how to express their wishes regarding cookies, i.e., how they can accept just one cookie, several cookies, or no cookies; and how to change such preferences. The information must be clear, comprehensible and easily visible.

  Implementation: When accessing the website, users must be able to access all information that they need to decide whether or not to permit cookies. This could be achieved by placing a prominent link on the landing page, leading to comprehensive information about cookies. A pop-up window could of course also be a valid alternative but as it can deter users from accessing the website, it might be a more burdensome approach.

- Time-wise, it is clear that consent must, as a general rule, be obtained before any processing start, i.e., prior to the placing of cookies.

  Implementation: This is rather hard to achieve in practice, as it means that cookies must not be placed on a machine before the user has expressed his or her wishes. As many websites automatically place cookies when a user visits the site, alternative solutions must be found, e.g., cookies should

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Cookies – Guidance on "How To" From the Article 29 Working Party

only be placed once the user has clicked on the link that provides further information.

- The user must consent by some form of active behavior. This means that website operators must provide users with information as to how they can express their wishes regarding cookies, which includes positive action and active behavior, but always provided that the user has been fully informed about the consequences of his or her action or behavior. The website operator must be able to evidence the user's consent to cookies being placed on his/her machine.

  Implementation: Tools for validly obtaining consent could be splash-banners, modal dialog boxes, banners, or browser settings (although the latter is difficult because the website operator cannot always be confident that a browser setting accurately reflects the user's wishes, or the browser is still configured in the base settings). All of these tools would then require an active behavior, for example, ticking a box, clicking on a link, or similar action. To ensure that the user is fully informed when he or she clicks on the link (or similar mechanism) the link or box (or similar mechanism) needs to be close to where the information is provided. The information also needs to be present on the website, and not disappear until the user has expressed his or her wishes.

  Note that where a user enters a website and is provided with the information, but does not show active behavior, and instead just continues to browse the website (as is very common), it is difficult to argue unambiguously that consent has been given.

- In order for the consent to be freely given, the user must have a real choice whether to accept any, all, or no cookie(s). This means that the user must be allowed to browse the website even if he or she has declined all cookies.

  Implementation: While restriction to access certain pages of the website can be permitted (for legitimate purposes), if the user does not accept the placing of cookies, "general access" to a website must not be made conditional upon the acceptance of cookies.

Knowing that these requirements may be difficult to meet, and in consideration of the fact that some cookies are simply necessary for the proper use and functioning of a website, the Directive contains an exemption for those cookies that are necessary to provide the service that the user requested. No consent is required for these cookies. A classic example is the cookie required to "remember" a shopping cart on an e-commerce website.

It is clear that website operators that wish to use cookies need to provide in-depth information about their use of cookies, and to ask for the user's consent. Website operators can increase the chances of the users agreeing to the use of cookies by being transparency about their practices, and thereby engendering trust. The implementation guidelines outlined above provide a good basis for using cookies in compliance with the Directive, but every website operator should individually review what fits its website and its purposes best.

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Is the "free to play" Business Model for Online Computer Games in Danger in Germany?

Under the "free to play" business model, playing certain online games is free of charge. Money is made by the games company selling so-called "in-game objects", i.e., supplementary equipment for the respective game character. However, the "free to play" business model of most of the online games may be in danger. This seems to be the case as the German Federal Supreme Court (FSC) held in its decision on July 17, 2013 (file number I ZR 34/12) that advertising the "free to play" online game "Runes of Magic" with the sentence, "Seize the good opportunity and give your armour and weapons that certain 'something'", is an anti-commercial practice and therefore violates the German Unfair Competition Act. The German Act against Unfair Competition (no. 28 in the annex to S. 3 (3)) prohibits the direct request, addressed to children in advertising, to purchase the products advertised therein.

The lower courts had been of the opinion that, in the case at issue, the invitation to buy the "in-game objects" was not integrated "directly" into the advertisement, and that the play instinct of the children had also not been taken advantage of. However, the German FSC came to the conclusion that the sentence, "Seize the good opportunity and give your armour and weapons that certain 'something'" that was connected to the link to the offer of digital supplementary play equipment, was clearly addressed at children because of the wording and the option to pay via SMS/text message on a mobile phone. The German FSC said that, due to the link, the advertisement and the direct possibility to purchase were close to each other, and would encourage children to purchase the digital supplementary play equipment. Further, the court held that the objective of no. 28 of the annex to Section 3 (3) of the German Unfair Competition Act (the relevant provision in the case at issue) is to protect the children from direct invitations to purchase. Therefore, the German FSC enjoined the video game company *Gameforge* from using such a sentence for its online game "Runes of Magic".

It is unclear how the German FSC's decision will affect the online games industry and similar business models, for example, apps for smart phones. We need to wait for the reasoning of the decision to be able to judge the extent of the decision in its entirety. Five months since the decision, and the opinion has yet to be published. Moreover, this is a judgment by default against which *Gameforge* may appeal within a period of two weeks from service of the written decision. If *Gameforge* takes the chance to appeal, the court would need to deal with the case once more. However, as the German FSC has already dealt with this issue extensively, it is questionable whether it would change its legal opinion when hearing the case again.

Furthermore, no. 28 of the annex to Section 3 (3) of the German Unfair Competition Act only prohibits the direct invitation to purchase directed at children. In case the advertisement does not contain an invitation to purchase directed at children, but only contains a presentation of products, the advertisement should not be prohibited – pursuant to the wording of no. 28 of the annex to Section 3 (3) of the German Unfair Competition Act, and should therefore not be held to be anti-competitive.

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UsedSoft Continued – What's next for the Alleged Right to Resell Digital Copies of Works?

On July 3, 2012 the Court of Justice of the European Union (CJEU) decided the matter referred to it by the German Federal Supreme Court in *UsedSoft* (case No. C-128/11), and held that the right of distribution can be subject to exhaustion in cases of pure software, even with respect to digital copies that are not sold on a physical carrier such as a DVD or CD ROM. Subsequent to the CJEU's decision, the German Federal Supreme Court continued the *UsedSoft* litigation, and handed down its decision on July 17, 2013. Unfortunately, the only document the Federal Supreme Court has issued to date is the press release of July 18, 2013, which indicates that the Federal Supreme Court reversed the appeals decision and remanded the matter to the Munich Court of Appeals. As the opinion by the Federal Supreme Court has still not been published, it remains to be seen which considerations the Federal Supreme Court took into account and in what way it applied the CJEU's decision to the facts at issue. Even once the opinion has been published the matter will therefore not have been finally decided because the Munich Court of Appeals will have to deal with the matter again now. A further decision by the Munich Court of Appeals is not to be expected before the second half of 2014.

Since the CJEU's decision has been issued, several German courts of first instance have had the opportunity to answer the question – in other cases – as to whether specific types of digital works give the initial purchaser the right to resell the digital copy obtained or not. The Civil Court in Bielefeld held, on March 5, 2013 (file No. 4 O 191/11), that a prohibition on the resale of so-called audio books and e books in general terms and conditions is permitted. Such a clause did not unreasonably disadvantage the customer in the sense of section 307 of the German Civil Code. Even if the terminology used sounds like a purchase agreement this does not change. In Bielefeld, the court distinguished between the interpretation of the European Software Directive 2009/24/EC by the CJEU in *UsedSoft* and the interpretation of the Directive on Copyright in the Information Society 2001/29/EC required for section 17(2) of the German Copyright Act, where the Directive on Copyright in the Information Society specifically rejects the application of the principle of exhaustion to non physical copies.

In another decision, the Hamburg Civil Court decided on October 25, 2013 (file No. 315 O 449/12) that provisions in general terms and conditions that require the written consent of the right holder for resale of a digital copy of software are not permitted with respect to business software. In this case, the Hamburg Civil Court took the view that such provisions violate section 307 of the German Civil Code because they put the contractual partner at an unreasonable disadvantage, as they deviate from section 69c No. 3 second sentence of the German Copyright Act. In this context, the Hamburg Civil Court refers expressly to the decision by the CJEU in *UsedSoft*.

It will be interesting to see how this lower instance case law published in the meantime will continue to develop once the opinion in the most recent Federal Supreme Court case has been published, and also how the *UsedSoft* litigation will progress in the Munich Court of Appeals.

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Hard Rock Café in Heidelberg without Hard Rock Café Merchandising Products

The German Federal Supreme Court (FSC) ruled (file no. I ZR 188/11), on August 15 2013, that the "Hard Rock Café Heidelberg" can continue to operate the café under this name. However, the café may no longer sell any articles marked with the internationally known "Hard Rock Café" logo. This case is a true lesson on the application of estoppel in German trademark law.

Plaintiff no. 1 operates Hard Rock Cafés in Berlin, Munich, and Cologne. Plaintiff no. 2 is the owner of several "Hard Rock Café" word-marks and "Hard Rock Café" word and figurative-marks. Defendant no. 1 has operated a restaurant in Heidelberg under the designation "Hard Rock Café Heidelberg" for more than 35 years; and, since the restaurant's opening, has adhered closely to the products and internal décor and furnishings of the famous "Hard Rock Café" – opened in London in 1971. Since at least 1978, defendant no. 1 has also used the well-known circular "Hard Rock" logo of plaintiff no. 2, in menus as well as on glasses. Furthermore, defendant no. 1 uses the wording "Hard Rock Café" as well as the circular logo as the entrance sign, and on the entrance door and in the windows of the restaurant. Defendant no. 1 also sells merchandise marked with the logo. In 1986 the plaintiffs filed the "Hard Rock Café" logo as a trademark for protection in Germany; the first German "Hard Rock Café" was then opened in 1992, in Berlin. Shortly after this first opening, the plaintiffs obtained a preliminary injunction against defendant no. 1. However, they withdrew the application after the defendant had filed a motion to lift the injunction.

In the matter decided by the FSC, the plaintiffs wanted to enjoin the defendants from operating and advertising a restaurant under the designation "Hard Rock", and from using the logos "Hard Rock Café Heidelberg", as well as prohibiting them from distributing merchandise with the "Hard Rock Café" logo and wording. Furthermore, the plaintiffs argued that the defendants should abstain from owning registered domain names with the wording "Hard Rock Café". Finally, they argued that the defendants should be ordered to deliver information about the "Hard Rock Café" merchandise and to destroy those , as well to pay damages.

The action was neither successful before the Civil Court nor before the Court of Appeals. The German FSC affirmed the opinion of the Court of Appeals, that any claims against the operation of the Heidelberg restaurant under the designation "Hard Rock" were estopped, as the plaintiffs had tolerated the name of the company for more than 14 years after the withdrawal of their application for a preliminary injunction. On other aspects, the German FSC reversed the judgment by the Court of Appeals, finding in favour of the claimants in their claim to prohibit the defendants from distributing the clearly specified "Hard Rock Café" merchandise, and remanded the proceedings to the Court of Appeals.

The German FSC stated that the consequence of estoppel in trademark and unfair competition law is that the trademark owner cannot enforce its rights concerning past or continuing infringements.

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Hard Rock Café in Heidelberg without Hard Rock Café Merchandising Products

In cases of repeatedly similar infringements, each infringement results in a new claim. Therefore, no legitimate expectation could be justified by the fact that the trademark owner delayed any action, and therefore tolerated the infringing behaviour. Each offer and each sale of "Hard Rock Café" merchandise, each new advertisement using the trademark and logo, and each new internet presence, had to be separately considered by the court for the question of estoppel.

According to the German FSC's opinion, the distribution of "Hard Rock Café" merchandise by the defendants infringed the trademark rights of plaintiff no. 2. The distribution also violated the prohibition of misleading statements, under unfair competition law. The fact that the defendants were already distributing the merchandise before the claimants began distribution of Hard Rock Café products was not decisive. The defendants' restaurant is in a prime tourist location in Heidelberg. A large number of customers are non-local guests, who know the Hard Rock Cafés of the plaintiff group, and do not know that the defendants' does not belong to that group. The court held that this misleading behavior of the defendants had to stop.

The German FSC could not decide on the other claims of the plaintiffs. An important question left unanswered by the court, is whether the defendants had already gained protection as a company name in the area of Heidelberg for the designation "Hard Rock Café Heidelberg" before plaintiff no. 2 applied for trademark protection in Germany. The decision means that the defendants can only use the "Hard Rock Café" logos where elements are added to the logos, so that their use would not cause confusion for customers in distinguishing between the defendants' restaurant and the "original" Hard Rock Café.

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European Court of Justice Again Decides on the Definition of "Genuine Use"

Within the EU, a registered trademark needs to be put to genuine use within a period of five years in the form in which it was registered to prevent any claims for non use. Despite the Court of Justice of the European Union (CJEU)'s decision in *PROTI* (case C-553/11) – that under certain circumstances the use of the trademark in a slightly different version may be sufficient for genuine use – on July 18, 2013 the CJEU decided once more on the definition of genuine use of trademarks, and specified its previous case law with respect to logos (case C-252/12).

Background to the case

The Specsavers Group, which is the biggest chain of opticians in the UK, sued the supermarket chain Asda, for trademark infringement. In one of its advertising campaigns, Asda had used the advertising slogan, "Be a real spec saver at Asda", and "Spec savings at ASDA" as well as the following logo:

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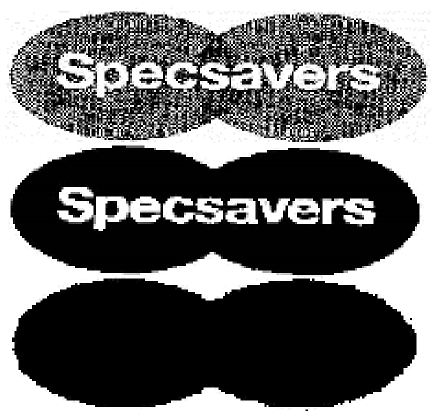
European Court of Justice Again Decides on the Definition of “Genuine Use”

Further, the Specsavers Group claimed that these logos (two oval shapes, nearly overlapping) infringed its registered logo marks (two overlapping oval shapes – in which the word “Specsavers” is written; and the two overlapping oval shapes alone – without any written words):



During the proceedings there were doubts with respect to the logo without word element being put to genuine use and the national British court asked itself whether the use of the logo with an additional word element can also be regarded as a use of the logo without a word element.

In its decision the CJEU found the use of the logo which is combined of a graphical element and a word element as genuine use of the same logo without the additional word element. In the opinion of the CJEU it is only relevant that the difference between the logo used and the registered logo without a word element is not substantial and does not change the distinctive character of the logo mark. The use of the wordless logo with the superimposed word sign “Specsavers” can be regarded as a serious use of the wordless logo as such if the wordless logo still refers to the goods of the Specsavers Group covered by the registration which is to be determined by the referring court. The CJEU also takes the view that it is irrelevant in this regard that both logos (logo with word element and logo without word element) are each registered as a trademark.

The Specsavers Group used the logo in a certain colour, but the logo was only registered in black and white. The CJEU also had to decide whether one needs to take into account the fact that a trademark is registered in black and white but used in a certain colour when assessing the risk of confusion. In this respect the CJEU pointed out that in general all factors relevant to the circumstances of the case need to be taken into account. The colour in which the trademark is actually used affects the question of how the average consumer perceives the trademark and may therefore increase the risk of confusion.

The statements by the CJEU on genuine use as well as on the effect of the use of a trademark registered in black and white but used extensively in colour have a significant practical relevance. Quite often companies register a wordless logo mark as well as a logo mark with a word element, and only use the latter. The CJEU ruling means that trademark owners have wider parameters in which to make variations to a logo mark, as long as its distinctive character remains intact. This enables the trademark owner to better adapt a logo mark to the marketing and promotion requirements of the goods concerned. Moreover, it makes it easier for trademark owners to take actions against possible trademark infringers based on the wordless logo mark. It is not uncommon, after all, for trademark infringers to only use the wordless logo mark of the trademark owner and add their own company/brand name.

U.S.-EU Safe Harbor Still under Fire

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As part of an ongoing debate on the European data protection reform, doubts were cast over the adequacy of the safe harbor arrangements with the United States. Viviane Reding, the European Commissioner for Justice, Fundamental Rights and Citizenship, called the 13-year-old data-sharing agreement between the EU and the United States a potential "loophole for data transfers" that does not provide adequate protection. There was a growing concern among EU data protection authorities about the very general formulation of the principles and the high reliance on self-certification and self-regulation.

Under the U.S.-EU Safe Harbor program, data transfers from the EU are permitted on the basis that U.S. companies self-certify their agreement to abide by the Safe Harbor framework, which includes seven privacy principles similar to those found in the 1995 EU Data Protection Directive (95/46/EC).

Article 3 of the U.S.-EU Safe Harbor program allows the European Commission to reverse or suspend the agreement. Referring to this provision, the European Parliament requested that the European Commission conduct a full review of the Safe Harbor program. In August 2013, Ms. Reding confirmed that she plans to present a comprehensive assessment of Safe Harbor before the end of 2013.

On November 27, 2013, the European Commission released a comprehensive package of communications, reports and papers that sets out actions which the Commission believes can restore trust in transatlantic data flows between the European Union and the United States, following recent concerns over access to data by intelligence agencies. In particular, the Commission put forward 13 recommendations for the improvement of Safe Harbor.

The Commission's 13 recommendations to shore up Safe Harbor relate to greater transparency on the part of adhering companies, a right of redress for data subjects, stricter enforcement, and the inclusion in corporate privacy policies of disclaimers relating to the possibility that mandatory disclosure of data to law-enforcement bodies might be required.

On enforcement, the Commission said that a proportion of companies participating in Safe Harbor should be inspected for effective compliance with the rules, rather than only for compliance with formal requirements.

In case of doubts about compliance, the U.S. administrator of the scheme, the Department of Commerce, should inform the relevant EU data protection authority, the Commission said.

The Commission will now engage with the U.S. authorities to discuss how to strengthen Safe Harbor, with amendments to be identified by summer 2014 and, according to the Commission, implemented as soon as possible. At the same time, the Commission will be undertaking a more detailed review of Safe Harbor. U.S. authorities should implement the recommendations, or the Commission could decide to suspend Safe Harbor, Viviane Reding said. The latter possibility is the "Damocles sword that the commission has taken out and is hanging over Safe Harbor," she added.

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U.S.-EU Safe Harbor Still under Fire

For companies that are currently self-certified under Safe Harbor, or in the process of becoming self-certified, it will be a relief to know that the Commission is not currently intending to suspend Safe Harbor, however, it is likely that a number of measures will be looked at to strengthen it. The position should be closely monitored with other international data-transfer solutions.

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The Internet of Things – A Brief Report from the IAPP Europe Data Protection Congress 2013

Imagine a world in which your child's toothbrush contains a chip that connects it to the Internet. Why would you do that? So that your child's dentist can monitor how your child brushes its teeth, and recommend improvements. And your child can play the online tooth fairy game with its friends, taking turns in brushing longer and better and more frequently. Sounds like music of the future? It might be closer than you think. And it is not such a bad thing because it can help your child improve its tooth-brushing habits.

However, if your child, when it signed up for the tooth fairy game, gave not only the dentist permission to look at the information, but also "interested third parties" or similar candidates, that might make the information available to quite a few more people, including health insurers. And the next time you, or your child, apply for health insurance related to dental care, the health insurer might actually get back to you saying that unfortunately your child has not passed level 3 of the tooth fairy game and, therefore, the monthly premiums will be higher than anticipated. This does not sound so positive anymore…

The "Internet of Things" is already here, with medical devices communicating via telephone lines, Google Glass per default uploading all pictures taken with it to the cloud, and mobile devices constantly sending geo-location data to the service providers, manufacturers, app developers, and anybody we do not hinder from accessing our information.

This was among the topics discussed at the IAPP Europe Data Protection Congress in Brussels, along with the status quo of the draft Data Protection Regulation, Bring Your Own Device, the APAC version of Binding Corporate Rules (which are Corporate-Border Privacy Rules, or CBPR), and the future of Safe Harbor. This space is too small for an elaborate discussion of the topics, but please be in touch if you want to hear more about these ideas, or how it feels to wear Google Glass!

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