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FEATURE ARTICLE - DATA PROTECTION

Article 29 Working Party Opinion On The Definition of Consent: An Unambiguous View of The Future

On 13 July 2011, the Article 29 Working Party published Opinion 15/2011 on the definition of consent (WP 187) for the purposes of processing personal data in the European Union. The opinion provides a thorough analysis of the concept of consent as currently used in the Data Protection Directive (95/46/EC) and the amended e-Privacy Directive (2002/58/EC).

The Working Party finds that the concept of consent in the existing framework of the European data protection regime is fit for purpose as a well thought-out means of legitimising data processing. The Working Party notes that it does this by making sure that consent is to be given freely, based on satisfactory information and with an inherent flexibility in the collection process chosen by the data controller. The Working Party also notes, however, that the lack of consistency in implementation across EU Member States has created a situation in which there are different approaches to what constitutes consent and how it can be obtained.

The Opinion concludes with a number of recommendations for consideration as part of the wider review of the European data protection regime currently in process. The Working Party continues to favour a conservative approach to consent, including explicit transparent disclosures by data controllers and the requirement for unambiguous proof of acceptance by the data subject. Some practitioners see the Working Party's approach as impractical, however, as it does not refer to proportionality in consent.

A Timely Review of the Date Protection Regime

In anticipation of the revision of the existing European data protection framework due to be launched by the European Commission in the latter part of 2011, the Commission published a communication in late 2010 on "a comprehensive approach on personal data protection in the European Union". In a speech entitled "Your data, your rights: Safeguarding your privacy in a connected world" delivered in March 2011, Vice-President of the European Commission, EU Justice Commissioner Viviane Reding, expanded on the issues raised in the communication. Commissioner Reding set out four pillars for data protection policy in Europe: i) the right to be forgotten, ii) transparency, iii) privacy by default, and iv) protection regardless of data location. In early July 2011, the European Parliament adopted a resolution calling for stronger rules on personal data protection, echoing Commissioner Reding's position and identifying a number of areas that can be improved in light of changing use of technology and patterns of data sharing.

The Working Party's Opinion is therefore a timely and provocative piece that addresses a fundamental issue underlying the current European regime.

Consent and Personal Data

Although commonly known as the Data Protection Directive, the full title of Directive 95/46/EC is the Directive "on the protection of individuals with regard to the processing of personal data and on the free movement of such data". The full title is indicative of the balance that must be maintained in Europe between the rights of the individual and the rights of those processing data about the individual.

Although consent is not a legal notion specific to data protection, in the Data Protection Directive consent is used both as a general ground for lawfulness of processing (Article 7) and as a specific ground in certain contexts, *e.g.* the possibility of using consent to legitimise the processing of sensitive data (Article 8).

The Data Protection Directive sets out six separate criteria that may be relied on for making data processing legitimate. The first criterion listed is that "the data subject has unambiguously given his consent" (Article 7). The list continues with other grounds, all of which are based on necessity and include contractual requirements, legal obligations and personal safety. Although central to an effective data protection regime, the Working Party does not see the fact that the consent option is listed first in Article 7 as a reason for it to be given any preferential status as the ground for finding lawfulness. In fact, in some instances, it is clear that other grounds would be far more suitable for this purpose.

The Working Party is keen to stress that consent should not be seen as a cure-all for lawful processing. The Working Party's concerns are twofold: what scope for processing does consent provide and how is consent actually achieved? The choice of the most appropriate legal ground for lawful processing is not always obvious. For example, under Article 7(b), the processing must be necessary to perform a contract or take steps at the request of the data subject prior to entering a contract. Therefore, a data controller relying on Article 7(b) as a legal ground to legitimise processing cannot extend it to justify processing beyond what is necessary to conclude the contract. Any additional processing will need to be legitimised with the specific consent to which Article 7(a) applies. If moving from the ground of necessity to that of consent, it will be up to the data controller to show that he had in place the requisite consent prior to undertaking the additional processing.

The Working Party acknowledges that the legal grounds for legitimising processing are not mutually exclusive and that in some transactions a number of legal grounds could apply at the same time. For example, in the scenario of buying a car, a number of different grounds could be applied at different stages to legitimise the data processing: Article 7(b) to process data necessary to buy the car; Article 7(c) to process the car's registration; Article 7(f) for client management services, *e.g.,* having the car serviced by an affiliate; and Article 7(a) to transfer the data to third parties for their own marketing activities.

An individual giving consent to the processing of their personal information does not release the data controller from its obligations to comply with the requirements on fairness, necessity and proportionality (Article 6). Therefore, data controllers must be clear when seeking to obtain consent what the scope of the processing will be. If there is any deviation or expansion of the processing covered by the consent then further consent will be required if no other Article 7 criteria are applicable. In addition, as consent must be given freely, it must remain subject to revocation by the individual concerned at any time and, once revoked, no further processing of the individual's data should be undertaken.

Obtaining Consent

In order to be valid, consent must be informed: the individual must be provided with all necessary information covering the substantive elements of the proposed processing. Consent should be obtained before the related processing begins. In general, consent may be obtained by an "indication" (Article 2(h)); although this needs to be unambiguous and explicit in relation to sensitive personal data. What is not clear from the current legislation is whether or not in a general scenario passive, rather than active, indication is sufficient. As it has previously held (see Working Paper 114), the Working Party believes strongly that a request for consent must imply a need for action indicating consent. This is quite separate from the individual having the additional right to object to any processing once it has begun. The Working Party contends that were a data controller to rely on silence or an absence of behaviour to justify consent, then it will be problematic for the data controller to verify whether the silence or inaction was intended to reflect consent.

It is noted that consent must be "freely given" and that to be able to give consent the individual must have a real, exercisable choice. In some scenarios, such as that of an employment relationship, where an employee is requested to consent to the processing of his data, it is very unlikely that agreement will be valid consent if there is a real or potential relevant prejudice that arises from not consenting.

Be Specific

The Working Party notes that blanket consent is not valid as it does not inform the individual of the exact purpose of the processing. To be valid, consent must set out clearly the scope and consequences of the processing in language that is clear and understandable to the intended audience.

If consent is the ground relied on for legitimising processing then it is critical that the individual be informed in sufficient detail about how his data will be used. This information must be provided in a clearly visible, prominent and comprehensive form. In agreement with the Information Commissioner, which is the United Kingdom's regulator, the Working Party suggests that as communication to the individual is critical, the use of layered notices breaking up the amount of information should be given, so that critical elements are set out in terse bullet points, prominently or proactively communicated, with more detail being provided in longer format documents, which may, in an online example, be linked to by hypertext links.

With regard to scope and communication, it is clear that the Working Party is looking to the data controllers to undertake assessments of their requirements on a risk basis, taking into account the types of data they are processing, any third party sharing, or international transfers. The greater the potential risk arising from the processing, the more specific and prominent the information relating to consent has to be.

Consent does not have to be recordable to be valid. It is, however, to the data controller's advantage if it can show that consent has been given actively.

The E-Privacy Directive

Under the e-Privacy Directive, advance consent from users to the placement of cookies and similar technologies on their computers and other devices is required. In June 2010, in its Opinion on behavioural advertising, the Working Party called for businesses to adopt opt-in mechanisms for cookie placement associated with online advertising. This conservative position is re-iterated in Opinion 15/2011. Member States have struggled, however, with whether an online browser setting would be sufficient to demonstrate such consent. The Working Party's position remains that any browser-based consent solution requires the default setting of the browser to be one of non-acceptance and non-transmission of third party cookies and for the browser to require users to actively change the settings, whether at their own instigation or by way of a wizard at first install or update.

Recommendations and reforms

In addressing the issue of how consent can be obtained, the Working Party proposes including in the revised framework a requirement that consent is not only informed and given freely but also "unambiguous". In this instance, unambiguous means that the data controller needs to use "mechanisms that leave no doubt of the data subject's intention to consent". This means that anyone processing personal data using consent as the grounds for lawful processing will bear the burden of proof in demonstrating that they do so only after effectively obtaining the individual's consent. In an online environment, the easiest method of achieving this would be to have a tick-box requirement, as many other mechanisms, such as notices reached by hypertext link, or default privacy settings that allow data sharing may not meet the requirement of unambiguity for valid consent.

The Working Party does not go as far as seeking a general revision requiring explicit consent as a rule for all types of processing operations. Instead, it notes that unambiguous consent, which encompasses explicit consent, should be the standard. This should provide more flexibility to data controllers in determining how to obtain consent. However, consent resulting from unambiguous actions must also be acceptable. For example, if somebody is told that a film will be shot in a certain location at a certain time and they appear at the location at that time, then their consent to be included in the filming can be ascertained from their actions.

The Opinion also finds that several aspects of the legal framework applying to consent have no basis in current European legislation but have developed through case law and previous Opinions given by the Working Party. The Working Party suggests that, where possible, steps should be made to include drafting in the revised legislation covering three key areas: i) the right of individuals to withdraw consent, ii) the notion that consent must be obtained prior to processing commencing where there is no other legal ground for processing, and iii) explicit requirements setting out the quality and accessibility of language used to obtain consent. The last of these enshrines in legislation the practical consideration that clear and plain language must be used and must be suitable for its intended audience. Failure to comply with any of these requirements will result in consent not being achieved.

In addition, the Working Party addresses the specific issue of enhanced protection for those lacking legal capacity, such as minors and the incapacitated. Legislation should clearly set out the circumstances in which parental or equivalent consent is required, and the ages (if any) at which such consent would be mandatory.

Comment

The Working Party's Opinion does not contain any real surprises. In the past, the Working Party has been criticised for being too conservative on data protection issues and for setting out positions that are commercially impractical. Similar comments are likely to follow this Opinion, especially with regard to the lack of proportionality in the need for active indication of consent. It should, however, be noted that the Opinion does set out clearly what is expected from those seeking to obtain consent, how that may best be evidenced and, more importantly for many, it sets out clear guidance on when consent should be used and when it cannot be used, as a ground for achieving lawful processing.

PATENTS

Ranbaxy v AstraZeneca: Skilled Persons

In *Ranbaxy v AstraZeneca* [2011] EWHC 1831 (Pat), Ranbaxy was granted a declaration for non-infringement with respect to AstraZeneca's patent relating to magnesium esomeprazole. Kitchin J held that the skilled person would have understood the relevant claim to be directed to the use of magnesium esomeprazole to manufacture a medicament containing that active ingredient.

Background

AstraZeneca owned a patent covering its drug, Nexium, which inhibits gastric acid secretion and is used to treat gastric acid-related diseases. The active ingredient was magnesium esomeprazole, the magnesium salt of the S enantiomer of omeprazole. The patent claimed the use of magnesium esomeprazole with a high optical purity, expressed in terms of enantiomeric excess (e.e.), *i.e.,* the fraction of the compound present as the major enantiomer, less the fraction of the compound present as the minor enantiomer. The characteristic of this compound was that the optical purity was 99.8 per cent e.e. Ranbaxy, an importer of generic pharmaceuticals, planned to import a pharmaceutical product, the starting material of which was ≥99.8 per cent e.e. magnesium esomeprazole that would be mixed with omeprazole racemate, so that the final product did not contain 99.8 per cent e.e. magnesium esomeprazole. Ranbaxy sought a declaration of non-infringement so that it could start importing its product. AstraZeneca counterclaimed, alleging infringement.

Decision

Kitchin J started by establishing the construction of Claim 1 of AstraZeneca's patent:

The use of a magnesium salt of (-)-5-methoxy-2[[(4-methoxy-3,5-dimethyl-2-pyridinyl)methyl]sulfinyl]-1H-benzimidazole ((-)-omeprazole) with an optical purity of ≥ 99.8% enantiomeric excess (e.e.) for the manufacture of a medicament for the inhibition of gastric acid secretion.

AstraZeneca contended that Ranbaxy's product was directly obtained by its claimed process and that the claim did not require that the medicament contained magnesium esomeprazole at all. Ranbaxy's purposive construction was that the claimed process was for the manufacture of a medicament containing magnesium esomeprazole with an optical purity of 99.8 per cent e.e., and that its product was therefore outside that claim as it was not formulated using, and did not contain, magnesium esomeprazole with that optical purity.

Kitchin J adopted the purposive construction approach in *Kirin Amgen v Hoechst Marion Roussel* [2005] RPC 9, reinforced in *Virgin Atlantic Airways v Premium Aircraft Interiors* [2010] RPC 8, which says that a patent is not addressed to *inter rusticos* and so the interpretation should be based on what the skilled person would have understood the patentee to be using the language of the claim to mean, in light of his common general knowledge and the purpose of the invention. He also noted that *Monsanto & Company v Merck & Co Inc* [2000] RPC 77 required Swiss claims, or "second medical use" claims, to be subject to the same measure of purposive construction.

The judge said that the specification neither suggested nor provided for the use of any analogue or derivative of magnesium esomeprazole or, indeed, any other active ingredient for the treatment of gastrointestinal disorders or any other condition. Neither did it suggest a new way of making a medicament. In his opinion, the patent merely taught the production of optically pure magnesium esomeprazole and its use in particular therapies. He thus supported Ranbaxy's construction, stating that the skilled person would understand the claim to be directed to the use of magnesium esomeprazole to manufacture a medicament containing that active ingredient. This interpretation was reinforced by the fact that the claims in the specification were grouped in various sets: those drafted as Swiss claims and directed to the use of 99.8 per cent e.e. magnesium esomeprazole for the manufacture of medicaments, and those drafted as conventional product claims directed to optically pure magnesium esomeprazole. Kitchin J rejected AstraZeneca's contention that the skilled person would interpret the word medicament so broadly that it need not contain any magnesium esomeprazole at all, saying that this would be erroneous in light of the specification and the common general knowledge. Accordingly, Ranbaxy was granted a declaration of non-infringement and AstraZeneca's counterclaim for infringement was rejected.

TRADE MARK / INFRINGEMENT

The Money Saving Expert Protects Distinctive Trade Marks

In *Martin Lewis v Client Connection Ltd* [2011] EWHC 1627 (Ch), the High Court of England and Wales awarded summary judgment in respect of infringement of Martin Lewis' UK-registered trade marks. Mr Lewis demonstrated that his MONEY SAVING EXPERT mark was distinctive, thus there was a real prospect of the trial judge finding sufficient confusion.

Background

Martin Lewis, a television and radio advisor on personal finance, owned the MONEY SAVING EXPERT trade marks in relation to "advisory services relating to financial matters provided *via* an internet website", registered in 2008 (but used since 2000). Mr Lewis operated moneysavingexpert.com, which contained advice and template letters enabling users to reclaim monies in relation to, *inter alia*, miss-sold payment protection insurance.

Client Connection operated a telephone-based claims management business, dealing with, *inter alia*, claims arising out of mis-sold payment protection insurance. Until September 2010, it operated under the name MONEY CLAIMING EXPERTS. Mr Lewis claimed that Client Connection made or caused to be made telephone calls whilst holding itself out as MONEY SAVING EXPERT, or was heard to describe itself as such. This, Mr Lewis said, amounted to trade mark infringement under Sections 10(1), 10(2) and 10(3) of the Trade Marks Act 1994. He applied for summary judgment. Client Connection mounted a counterclaim that the marks should not have been registered as they were purely descriptive and not distinctive.

Decision

Section 10(1): Use of Identical Mark

Mr Lewis claimed that the marks were aurally identical, a key issue as Client Connection contacted its potential customers by telephone. Mr Justice Norris refused summary judgment under this head for several reasons.

First, Client Connection did not admit introducing itself as "Money Saving Expert" and denied authorising or promoting the name's use. Second, Mr Lewis claimed that if Client Connection did not use the mark, it used a sign that was aurally identical ("money…a…ing expert") because the differences were so insignificant that they would go unnoticed by consumers. Having heard relevant telephone recordings, Norris J gave the benefit of the argument to Client Connection. Third, Norris J said that Client Connection did not use any sign for services that were identical with those of Mr Lewis since it provided its services over the telephone whereas Mr Lewis provided advisory services *via* a website.

Section 10(2): Likelihood of Confusion

Mr Lewis relied on recordings of unprompted telephone calls made by Client Connection to consumers who heard the callers introduce themselves as being from "Money Saving Expert" (even where callers said "Money Claiming Experts"). Witness statements were adduced from several of these consumers. Client Connection argued that there should be a trial to allow it to prove that the witnesses were not reasonably well informed, observant or circumspect and that a comparison of the witness statements with the telephone hearings would demonstrate that the witnesses were unreliable.

The evidence showed that the customers in question were not actually confused. In the majority of cases, the witnesses who heard the Client Connection callers introduce themselves as "Money Saving Expert" did realise that they were being called by a different company, or express some doubt as to who was calling them.

Norris J found that the evidence was, if unchallenged, sufficient to prove Mr Lewis' case. He had only to show a likelihood of confusion, not actual confusion.

Section 10(3): Reputation

Client Connection submitted that Mr Lewis' marks were descriptive. Norris J agreed, but observed that as Mr Lewis had used the marks over an extensive period, they had acquired distinctiveness, affording them broader protection.

Having succeeded under Section 10(2), it was unnecessary to rule on Section 10(3). However, Norris J said he would have been persuaded that Mr Lewis would succeed under Section 10(3). By using MONEY CLAIMING EXPERTS, Client Connection was riding on the coat tails of Mr Lewis' registered marks, benefiting from its power of attraction, reputation and prestige. Norris J also said that the association of Mr Lewis' website with fee-based claims management procured by cold calling customers would have tarnished his marks.

Comment

Mr Lewis managed to show that his marks had acquired a relatively high level of distinctiveness. By September 2010, the template letters available on the website had been downloaded by users 967,000 times. In addition, it was quite clear from the evidence that there was capacity for confusion to arise, which, once similarity was established, is all that was needed to show infringement under Section 10(2).

TRADE MARK

Fashion Designer Allowed to Prevent Use of Name Despite Selling All Rights

Ruling on the proper interpretation of national legal provisions in invalidity proceedings (Edwin Co Ltd v Elio Fiorucci C-263/09), the Court of Justice of the European Union (CJEU) has held that the holder of a name is entitled to prevent its use as a Community trade mark (CTM) where national law permits. The economic aspects of a right to a name may also be protected.

Background

Fiorucci SpA, an Italian company set up by fashion designer Elio Fiorucci, sold to Japanese clothing company Edwin the entirety of its "creative assets", including all the trade marks it owned (among which were numerous marks containing FIORUCCI), in 1990. In 1999, on application by Edwin, the Office of Harmonization for the Internal Market (OHIM) registered the word mark ELIO FIORUCCI for goods in Classes 3, 18 and 25. In 2003, Mr Fiorucci filed an application for revocation and an application for a declaration of invalidity of the mark under Articles 50(1)(c) and 52(2)(a) of the CTM Regulation (40/94/EEC, now replaced by 2009/207/EC).

Decision

The Cancellation Division of OHIM allowed the application for a declaration of invalidity on the basis that, according to Article 8(3) of the Italian Industrial Property Code (CPI), Mr Fiorucci's consent was required for the registration of his name as a CTM and that no such consent had been given. The Cancellation Division did not rule on the application for revocation. The OHIM Board of Appeal annulled the decision, finding that this situation did not fall within the scope of Article 8(3) CPI because its purpose was to prevent third parties from exploiting for commercial purposes the name of a person who had become famous in a non-commercial sector and that Mr Fiorucci could therefore not rely on this provision. The Appeal Board rejected Mr Fiorucci's application for revocation.

The EU General Court also rejected Mr Fiorucci's revocation action but ruled in his favour in relation to the invalidity action, stating that there was no justification for excluding the provision of the CPI where the name of a well-known person had been registered or used as a trade mark. However, the Court did not grant a declaration of invalidity as to do so would usurp the role of OHIM. Edwin appealed to the CJEU.

Dismissing Edwin's appeal, the CJEU held that the wording and structure of Article 52(2) of the Regulation did not, where a right to a name was claimed, restrict the provision so that it merely protected the personality interests of individuals. The CJEU said that it was clear from the wording of the provision—which provides a non-exhaustive list of four examples on the basis of which a CTM may be declared invalid—that the rights cited were intended to protect interests of different types. The CJEU found that the definition of "right to a name" covered commercial use of a name. It also held that the right to a name may be relied upon to protect a name as an aspect of personality as well as its economic aspects. In doing so, the CJEU upheld the General Court's decision that the holder of a name is entitled to prevent its use as a CTM where he has not given consent to its registration as a trade mark and where national law so permits.

The CJEU also confirmed that the General Court has jurisdiction to review the legality of OHIM's decisions.

Comment

The decision illustrates the complexities and uncertainties that can arise when proceedings are based on rights arising under national law. Having acquired the business and trade marks from Fiorucci SpA in the 1990s, Edwin would probably not have imagined that more than 10 years later Mr Fiorucci would rely on Italian national law to protect his naming rights.

DOMAIN NAMES / TRADEMARK

Geographical Indications Not Automatically Protected under the Uniform Domain Name Dispute Resolution Policy and Rules

In WIPO Case No DCO2011-0026 Comité Interprofessionnel du vin de Champagne *(CIVC) v Steven Vickers*, it was held that although CIVIC had rights in "champagne" as a geographical indication, it failed to show that its rights constituted an unregistered trade mark for the purposes of the Uniform Domain Name Dispute Resolution Policy and Rules (UDRP).

Background

CIVC, which represents Champagne producers, brought a complaint under the UDRP against the Defendant, Steven Vickers. Mr Vickers registered over 100 .co domain names in 2010, including champagne.co, which CIVC sought to have transferred.

CIVC claimed that the domain name was identical or confusingly similar to a trade or service mark in which it had rights, namely "champagne", which, although unregistered, had a worldwide reputation. Moreover, the rights of Champagne producers were protectable in the United Kingdom under the common law of passing off.

Decision

Sole panellist Warwick Smith accepted that the Complainant had rights in the expression "champagne" as an appellation of origin under French law. However, paragraph 4(a)(i) of the UDRP requires the complainant to show that it holds rights in a trade or service mark and the consensus view of World Intellectual Property Organisation panels is that the UDRP does not extend protection to geographical terms unless the complainant can show that "it has rights in a term and that the term is being used as a trade mark for goods or services other than those that are described by or related to the geographical meaning of the term".

Mr Smith was not satisfied that CIVC had shown that its rights in the expression "champagne" constituted an unregistered trade mark for the purposes of paragraph 4(a)(i) of the UDRP. He said it was generally accepted that, to be a trade mark, a sign must be capable of distinguishing the goods or services of an individual undertaking from those of other undertakings. In Mr Smith's view, geographical indications spoke fundamentally of the quality and reputation of the goods produced according to certain standards in a specific geographical area, but not of any particular or individual trade source.

Moreover, it was apparent to Mr Smith that the framers of the UDRP never intended protection to extend to geographical indications or protected designations of origin and the fact that the English courts recognise a trader's right to sue for damage to goodwill from passing off does not necessarily imply that the trader holds an unregistered trade or service mark. Thus, CIVC's claim that it possessed unregistered trade mark rights in the expression "champagne" had not been made out and the complaint was denied.

Comment

This decision is not reflective of all domain name dispute resolution policies. The Nominet appeal panel in *CIVC v Jackson*, following the applicable Nominet policy, permitted CIVIC to rely on rights in a champagne "name" as well as a trade mark in its successful complaint against champagne.co.uk. Interestingly, Mr Smith noted that some policies appear to have gone even further. The .ie policy, for example, permits a complainant to rely on a geographical indication per se. Additionally, the French and Belgian policies applicable in the .fr and .be decisions do not appear to have restricted protection to owners of trade or service marks.

TRADEMARK / INFRINGEMENT AND PASSING OFF

Users and Consumers

In *(1) Schütz (UK) Ltd & (2) Schütz GmbH & Co. KGaA v Delta Containers Ltd & Protechna S.A.* [2011] EWHC 1712, the issue of who is the consumer proved pivotal in deciding whether a trade mark had been infringed.

Background

The dispute between Schütz and Delta concerned the sale of rigid composite intermediate bulk containers (IBCs) used for the transportation and storage of liquid or pourable solids. These containers consist of three components: a plastic bottle that contains the liquid or pourable solid, a metal cage of steel bars into which the plastic bottle could be placed, and a pallet to which the cage is fastened to allow the IBC to be moved by a fork lift tuck and stacked during transportation and storage.

Inherent in the design of the IBC is its ability to be re-used. However, the cage is likely to have a longer lifespan than the plastic bottle because the bottle's capacity for re-use is limited by the properties of the liquids it is filled with. As a result of this mismatch in lifespan, a practice has evolved of "re-bottling". Initially this practice was limited to a like-for-like replacement. However, because the dimensions of the IBC bottles from a number of the main manufacturers are substantially the same, a practice of "cross-bottling" has recently evolved.

Is Cross-Bottling Passing Off?

Schütz manufactures IBCs. The Defendant, Delta, operates a business that is involved in cross-bottling. As part of Delta's business, they would replace a used plastic bottle from a Schütz IBC with a bottle from another manufacturer. The reconditioned IBC would then be supplied to a "filler" who would fill the IBC with the liquid or pourable solid requested by an "end user".

Schütz was the proprietor of six marks relevant to the action: three UK marks and three Community trade marks (CTMs). The UK marks' registration made them apt to cover the overall IBC assembly. The CTMs were registered in respect of the cage and the bottle separately. The metal cage used in the Schütz IBC conspicuously displayed the name "Schütz" and a triangular device. Schütz's case was that when Delta cross-bottled and then sold a Schütz cage with the bottle of another manufacturer, it was infringing its marks in relation to both the bottle and the IBC as a whole; and that Delta was passing off its cross-bottled IBCs as a Schütz IBC. Delta's case was that the customers who bought their cross-bottled IBCs (using a Schütz cage) were well aware that the bottles may originate from a manufacturer other than the maker of the cage. In this regard, the relevant consumer was an important consideration for the outcome of this action.

Having drawn an interesting analogy between the case at hand and a car that had Pirelli-branded tires (there would be no question of the Pirelli mark being thought of as being used in relation to the car) the first question the judge considered was the nature of the test to apply in circumstances where the use of the mark was not so obvious as in his analogy. Following submissions from both parties, the judge broadly adopted the test put forward by Schütz: that the question to address was whether the mark was being used "in a trade mark sense." Answering this question required a consideration of what the average consumer would perceive, and thus required an identification of the relevant average consumer.

Consumer Perception

The judge found that there were two tiers of consumer. The first were the fillers, who dealt directly with Delta and used the IBCs for the delivery of industrial fluids/pourable solids to the second consumer, the end user. The end user would generally purchase the IBC along with its contents, and the IBC would be used by the end user as a convenient means of storage and as a convenient means of dispensing the contents. Importantly, while the judge found that the fillers did not consider that Delta's use of the Schütz marks on the cage to be used in relation to the bottle and to the IBC as a whole, he found that end users did. Schütz relied upon the end user's perception. Delta sought to argue that the end user was not a consumer.
This became the key issue for deciding the case.

Decision

In addressing this issue the judge found that although Delta did not deal directly with end users, and although end users were not likely to request IBCs from a specific manufacturer, the end user still saw the Schütz mark as a badge of origin. The IBC performed a function for the end user. As long as the IBC performed this function well, the role of the Schütz mark was considered by the judge to be of little consequence. However, if the product were to fail, the judge considered that the end user would be likely to blame the proprietor of the trade mark on the IBC cage. The typical end user of a Delta-rebottled IBC with a Schütz cage would therefore think that the Schütz mark was being used in relation to the IBC as a whole, including the bottle. Schütz's case for trade mark infringement was made out.

This finding was despite the fact that Delta had sought to use various disclaimers on the IBC, and that the bottles may well have had marks from other manufacturers on them. On the facts, the end users did not notice these aspects of the IBC, and thus they did not alter the overall impression gained by the average consumer that the mark was being used in relation to the overall IBC.

Schütz was also successful in proving its case on passing off. No challenge was made to goodwill or reputation. On the basis of the findings in relation to trade mark infringement, there was a real risk that in the event of failure (for whatever reason) the end user would blame Schütz. The judge held that this was enough for Schütz's case to succeed.

Comment

The end users in this case are not the classic relevant consumers from a trade mark perspective. In addition, the mark was not being used to draw them to purchase the product, indeed the end user did not care about the origin of the IBC, as long as it was fit for purpose. Yet, the end user was taken to be a relevant consumer for the purposes of assessing infringement.

Arguably, this treatment extends the ambit of infringement actions because the court is not only considering the perception of the purchaser of the goods to the mark, but the perception of additional users of the goods, especially if that user is going to see the mark as a sign of quality.

COPYRIGHT

US Copyright Alert System: A Model for Europe?

The Independent Music Companies Association (IMPALA) and International Federation of the Phonographic Industry (IFPI) have welcomed the recent voluntary agreement in the United States between internet service providers (ISPs) and the creative industries, in particular trade bodies representing the music and film industries, to deal with copyright infringement online. IMPALA and the IFPI have suggested that the agreement is a model for Europe.

The US Agreement

It was announced on 7 July 2011 that a Copyright Alert System had been agreed in the United States between ISPs and the creative industries to try and combat copyright infringement online. The agreement is a commitment to introduce a "three strikes" system to combat illegal file-sharing, although there could be six strikes before "technical measures" are introduced. Essentially, if a user fails five times to respond to warnings that illegal content is being accessed via their internet connection, the ISP will be obliged to instigate a technical measure. Such measures might include "bandwidth throttling", or suspension of access to the internet until such time as the user undertakes to stop downloading or sharing unlicensed music and movies. The agreement does not, however, include total suspension of access or disconnection from the internet and there will be an appeal process for users.

The Copyright Alert System appears to mark a shift in attitude towards the idea that ISPs should be sharing the responsibility of dealing with online infringement. According to IMPALA, this system is an excellent example of constructive co-operation to protect the work of creators. It continues the positive trend in Europe, where several countries have introduced, or are in the process of introducing, measures to tackle copyright infringements and/or block infringing websites. IMPALA also welcomes the move to establish an information centre to educate citizens about the importance of copyright and to promote legal ways to obtain music online.

IFPI's Chief Executive Officer, Frances Moore, noted that the agreement "is the latest mark of recognition that ISP cooperation is the most effective way of addressing online piracy".

The UK and the Digital Economy Act

In the United Kingdom, at the annual general meeting of the British Phonographic Industry, the Minister for Culture, Communications and the Creative Industries, Ed Vaizey, recognised the immense difficulties faced by the industry as a result of online copyright infringement and unlawful downloading and file-sharing. He said it was encouraging that ISPs, search engines and others were showing "clear signs" that they recognised the central role that music has in driving other business. However, he stressed that "it also cuts both ways", and that the music industry must embrace a "state of continuous change that can be uncomfortable".

Mr Vaizey recognised that revenues of UK record labels had fallen by a third since 2004 and that help was needed to ensure that it can evolve into an industry for the future. In relation to the Digital Economy Act (DEA), Mr Vaizey stressed that to ensure that the "initial obligations" on ISPs (designed to reduce unlawful file sharing) under the DEA are up and running as quickly as possible, Ofcom— the independent regulator and competition authority for the UK communications industries— must have all necessary information, including rights holders' budgets. Mr Vaizey also said that the Government wants to give the industry more support to grow and prosper overseas. However, the industry itself must grasp all the business opportunities currently emerging.

Comment

The US agreement appears to signal a slight shift towards agreement with the collecting societies and other bodies that ISPs should take on more responsibility when it comes to online copyright infringement. In France and the United Kingdom, because the relevant parties were unable to reach any consensus on how to deal with the problem, legislation was introduced.

As for whether the rest of Europe will be inspired by the US model, the Synthesis Report published in March following the European Commission's Stakeholders' Dialogue on illegal uploading and downloading and recently the responses to the Commission's consultation on the IP Enforcement Directive (2004/48 EC) indicate that there is still distance between rights holders and ISPs who remain reluctant to accept responsibility for their subscribers' actions or to bear any significant proportion of the cost of combating copyright infringement over their networks.

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Digital Copyright Exchange

A Digital Copyright Exchange was one of the more radical recommendations made by Professor Ian Hargreaves in his May 2011 report Digital Opportunity: A review of intellectual property and growth, but in its Response to the Hargreaves Review published on 3 August 2011, the UK Government appears to have welcomed the proposal.

Background

The review was commissioned by David Cameron in November 2010 to look at whether the current intellectual property framework is sufficient to promote, or is hindering, innovation and growth in the UK economy. Professor Hargreaves' answer was that the current IP system is hindering growth and "the United Kingdom's intellectual property framework, especially with regard to copyright, is falling behind what is needed".

The system is currently built around the needs of the creator or innovator and is having the effect of preventing further research and development in industrial processes and in the internet-based service economy. In Professor Hargreaves' view, "The United Kingdom cannot afford to let a legal framework designed around artists impede vigorous participation in these emerging business sectors". The review discussed IP and economic growth and sets out recommendations, which if followed, according to Professor Hargreaves, will result in more innovation and economic growth.

Digital Copyright Exchange

Of particular interest is the Government's reaction to Professor Hargreaves' recommendation that a "digital copyright exchange will facilitate copyright licensing and realise the growth potential of creative industries". According to the review it could add up to £2.2 billion a year to the UK economy by 2020.

Clearly keen to discover whether that is indeed the case, the Government says that it "wants to see a Digital Copyright Exchange (DCE), or something like it, that enables a functioning digital market in rights clearance and acts as a source of information about rights ownership". It also sees a DCE potentially as a powerful tool against infringement, there being "no excuse for not checking a single, publicly accessible register".

The Government nevertheless acknowledges that the success of the DCE will depend on its attractiveness commercially. That in turn would depend first on attracting "a 'critical mass' of material that is available, and readily licensable, through the exchange". To start the ball rolling, the Government says that it "will work to ensure that Crown copyright materials are available via the exchange from day one, or as soon as possible thereafter, and will encourage public bodies to do likewise".

Although potentially a "compelling proposition to rights holders" the DCE will not be compulsory, not least because that could be contrary to the Berne Convention. Subject to competition law, prices will be set or negotiated by the rights holder and the exchange will be a "genuine marketplace", rather than "simply being an aggregated rights database". Access to the DCE will be free at the point of use, open to all users and self-funding, "fees being charged on licensing transactions through the exchange rather than the upload of rights data or search of the database".

Besides sorting out any competition issues, the challenges identified by the Government include: coming up with a viable financial model for the exchange, bringing together industry stakeholders to create a framework for an exchange and the necessary supporting systems "to allow a functioning licensing system by the end of 2012", and assessing "the need and scope for incentives to participate in a DCE".

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Green Paper on Online Distribution of Audiovisual Works

The European Commission has published a Green Paper on the online distribution of audiovisual works in the European Union: opportunities and challenges towards a digital single market. The Green Paper launches a debate on how best to tackle the challenges the internet revolution poses whilst seizing the opportunities a move towards a digital single market will offer creators, industry and consumers.

The Digital Single Market for Audiovisual Media Services

Digital technology and the internet, as compared to traditional distribution networks, are rapidly changing the way audiovisual works are produced, marketed, and distributed. As a result, the Commission considers that the issue of territorial licensing practices needs to be addressed.

The Commission also asks for further thoughts on the main legal obstacles that impede the development of the digital single market for the cross-border distribution of audiovisual works. It also asks for ideas on what conditions should be in place to stimulate a dynamic digital single market and facilitate multi-territorial licensing.

Rights Clearance

Until recently, broadcasters' activities consisted mainly of linear broadcasting, involving the clearance only of rights reproduction and broadcasting to the public. However, the advent of video-on-demand services means that a different set of rights—the reproduction right and the making available right—also need to be cleared.

There are also additional rights clearance processes involved in the retransmission of broadcasts. Furthermore, retransmission may involve multiple transactions with different representative organisations, leading to uncertainty as to who has the mandate to license which rights.

Accordingly, the Commission asks: i) what are the practical problems arising for audiovisual media services providers in clearing rights either in a single territory or across multiple territories, ii) whether clearance problems can be solved by improving the licensing framework, and iii) whether a copyright system based on territoriality in the European Union is appropriate for the online environment.

Policy Approaches

The Green Paper notes the Commission's commitment to creating a European framework for online copyright licensing of multi-territorial and pan-European services, including the creation of a comprehensive unitary European copyright code, as set out in the Commission Communication, A Single Market for Intellectual Property Rights (IPR Strategy). Essentially, the Commission will be presenting a legislative proposal in early 2012 to improve the collective management of copyright, including better governance of collecting societies to facilitate multi-territorial licensing.

The Paper also considers that the exceptions and limitations of copyright under the Copyright Directive are worth examining. The feasibility of creating an optional unitary copyright title, available on a voluntary basis, which would co-exist with national copyrights, should also be considered.

The Paper asks for views on the possible advantages and disadvantages of harmonising copyright in the European Union via a comprehensive copyright code.

Rights Holders' Remuneration for Online Exploitation of Audiovisual Works

The Paper asks whether additional measures should be taken at EU level to ensure the adequate remuneration of authors and performers and whether such measures should be managed collectively.

The majority of Member States do not provide a framework for audiovisual authors to receive a "per use" payment for the online exploitation of their works. To remedy this, one option could be the introduction of a right to remuneration for their "making available" right. Arguably, the Paper says, audiovisual performers should also be entitled to a harmonised right to remuneration, even after they have transferred their exclusive rights to a producer by law or under contract. Again, this right could be collected compulsorily by collective management societies.

However, the creation of another layer of remuneration rights might increase uncertainty concerning which licences need to be cleared and require users to administer and reconcile multiple remuneration claims for each audiovisual work, which in turn may lead to an increase in transaction costs and legal ambiguity.

Special Uses and Beneficiaries

Film heritage institutions that hold archives of audiovisual works in digital format have expressed concern that clearing the rights for these works is time-consuming and costly. As for accessibility of online audiovisual works, arguably there are too few subtitles and audio-described programmes available.

The Paper asks whether legislative changes are required to help film heritage institutions fulfil their public interest role.

Comment

Increasingly familiar themes feature in the Paper, not least the suggestion that the licensing framework may need revising, as discussed in the Hargreaves Review.

The Commission also notably promises a formal legislative proposal on collective licensing once the consultation process finishes on 18 November 2011. The comments should make for interesting reading considering the lack of consensus over the viability of a one-stop-shop model for pan-European music rights clearance involving agency relationships between national collecting societies.

ENFORCEMENT

Commission Publishes Responses to Consultation on Enforcement of IP Rights

The European Commission has published the responses to its consultation on the enforcement of intellectual property rights. On the key question of the suitability of Directive 2004/48/EC to deal with the challenges of the digital environment, views differed greatly. Many criticised the current regime's shortcomings, although internet service providers (ISPs) stressed that there was no need to change the Directive.

Background

At the same time as adopting a report on the application of Directive 2004/48/EC on the enforcement of intellectual property rights in December 2010, the European Commission also published a public consultation with a view to informing the Commission's decisions on any possible future measures.

In the digital context, the consultation also covered the right of information and privacy laws, data retention, and more generally the role of the courts and damages. The consultation expired on 31 March 2011.

Contributions were received from organisations such as trade and business associations, consumer organisations, ISPs, academics, collecting societies and public authorities and individuals.

Summay of Responses

Intellectual property right holders and collecting societies were critical of the current system, particularly the role of intermediaries and the supposed failure to stop the increase in online copyright infringement. However, ISPs, telecommunication operators and individual citizens were less critical of the system, saying that change was not required, suggesting instead that change would create legal uncertainty by altering the current balance of interests of right holders, users and intermediaries. Some ISPs said that there was insufficient evidence to prove that the internet causes serious problems in terms of counterfeit goods. Additionally, individual citizens expressed anxiety that revising the current regime would lead to stricter rules that would interfere with net neutrality and freedom of speech.

ISPs and telecommunication operators were against assuming a stronger role in enforcement, saying that this was a task for public authorities. They also said that any measure jeopardising the limited liability regime of ISPs would run against the intention of the European legislature to create an efficient and competitive information, communications and technology market. Many ISPs agreed that a court should be able to order a hosting provider to take down specific material for which the illegal nature and location was clearly identified, but they opposed measures requiring an online intermediary to actively to search its systems for any such material.

Right holders emphasised the importance of guaranteeing privacy to citizens. Many take the view that users can "hide behind anonymity in the online world, thus rendering it impossible for right holders to enforce their rights". Right holders also stressed that data often are not retained long enough by ISPs to allow right holders to obtain the information they need to enforce their rights. In this respect some respondents called for an obligation in the Directive to store data at least on a temporary basis or alternatively, that storage of data upon request—a "quick freeze"—could be considered.

On the question of damages, certain respondents suggested that damages currently awarded are an insufficient deterrent. Furthermore, it was suggested that the Directive should include measures to enable right holders to recover the full extent of their loss, including lawyers' fees, expert costs and all costs incurred in establishing infringement. It was also suggested that damages awards should be such that infringers are deprived of any economic benefit deriving from their infringement even, some argued, to the extent that there should be a legal presumption that the damage suffered by the right holder is at least equal to the profits made by the infringer. Member States, however, unanimously opposed the introduction of the concept of punitive damages into the Directive.

Comment

All eyes are now on the Commission to see how it reacts to the responses to its consultation and which, if any, of the stakeholder's recommendations it decides to take forward.

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All the individual responses are available on the website of the Directorate General Internal Market and Services, other than those for which confidentiality was explicitly requested.

DATA PROTECTION

The Information Commissioner's Office Draft Guidance on Monetary Penalties

Background

The Data Protection Act (DPA) empowers the Information Commissioner to issue monetary penalty notices. Additionally, the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 empowered the Information Commissioner to use monetary penalty notices for breaches of the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the Regulations). The ICO is therefore consulting on revisions to its guidance on monetary penalties first published in 2010.

Circumstances Where a Penalty is Appropriate

Under the DPA and Regulations, the Information Commissioner may issue a monetary penalty notice up to a maximum value of £500,000 if

- There has been a serious contravention of the DPA by the data controller or of the Regulations by a person.
- The contravention was likely to cause substantial damage or substantial distress and either
  - Was deliberate, or
  - The data controller or person knew, or ought to have known, that there was a risk that the contravention would occur, and that it would be of a kind likely to cause substantial damage or substantial distress, but failed to take reasonable steps to prevent it.

The draft guidance includes amongst other things examples of circumstances where the Information Commissioner may consider it appropriate to issue a monetary penalty notice.

For a serious contravention of the DPA these include:

- The failure by a data controller to take adequate security measures, resulting in the loss of a disk holding personal data
- The loss of medical records containing sensitive personal data, following a security breach by a data controller during an office move.

For a serious contravention of the 2003 Regulations, examples include: i) making a large number of automated marketing cold calls causing distress and anxiety to recipients, ii) systematic failings to record and respect marketing objections that lead to an organisation persistently sending marketing faxes to recipients who have objected, and iii) a person covertly tracking an individual's whereabouts using mobile phone location data.

Reasonable Steps

The Commissioner is more likely to consider that a person has taken reasonable steps to prevent the contravention if any of the following apply:

- A risk assessment was carried out
- There were good governance and/or audit arrangements in place to establish clear lines of responsibility
- Relevant policies/procedures are established
- Relevant guidance or codes of practice are implemented

Substantial Damage or Substantial Distress

The Commissioner will assess the likelihood and extent of damage or distress objectively, considering whether it is "merely perceived or of real substance". Note that the totality of the damage or distress suffered by a number of individuals can be substantial, even if individually it isn't. Thus distress and anxiety caused to a large number of individuals who receive repeated automated marketing calls, particularly where the identity of the caller is concealed so complaining is difficult, would be substantial.

Deliberate Contravention

An example of a deliberate serious contravention under the Regulations would include a company sending marketing text messages to subscribers who have not consented to receiving them, in order to encourage them to send opt-out requests to a premium rate short code.

Knew or Ought to Have Known

The test is objective and the guidance says that the Commissioner will expect the standard of care of a reasonably prudent person. This would include where a company that makes numerous marketing telephone calls is aware that the system it uses for blocking calls to numbers registered with the Telephone Preference Service may develop a fault but continues to make calls without assessing the likelihood of the fault occurring and the implications if it does.

Appropriate Penalty

Broadly, the Commissioner will seek to ensure that the financial penalty notice is appropriate and that the amount of the penalty is reasonable and proportionate given all the facts of the case and the underlying objective (deterrence and sanction). In deciding, the Commissioner will take into account the facts of the contravention and any representations made.

CONSUMER LAW

Prize-Draw Competitions Referred to The Court of Justice of The European Union

In relation to Purely Creative Ltd v The Office of Fair Trading (OFT) [2011] *EWCA Civ 920*, the Court of Appeal of England and Wales has referred the OFT's unfair commercial practices case against promoters of prize draw competitions to the Court of Justice of the European Union.

Background

The OFT sought injunctions for alleged breaches by Purely Creative of the Consumer Protection from Unfair Trading Regulations 2008 (CPUTRs) in relation to five promotions. To claim a prize, the consumer had to call a premium rate number. The consumer was told the cost per minute and the maximum duration of the call, but not that the minimum time within which he would obtain the information was seconds short of the maximum. Nor was he told that from the cost per minute of £1.50 the promoter took £1.21.

At first instance, Briggs J accepted undertakings in lieu, one of which addressed the prohibition in the CPUTRs based on paragraph 31 of the Annex of the Unfair Commercial Practices Directive (2005/29/EC) against creating the "false impression" that the consumer has won a prize when in fact he has to incur a cost to claim it.

Questions to the CJEU

Before the Court of Appeal, the promoters challenged that undertaking insofar as it prohibited requiring payment from the consumer which was "a substantial proportion of the unit cost to the [promoter]" of providing the prize. The OFT cross-appealed to the effect that the undertaking was not broad enough and should be replaced with an undertaking that stipulated that the consumer should not incur any cost whatsoever, or at most a de minimis cost.

The Court of Appeal considered that the OFT's cross-appeal raised an important issue upon which divergence of approach by EU Member States in implementing Paragraph 31 was "indicative of doubt". The Court therefore decided to refer this and related issues to the CJEU.

The questions referred are summarised below:

1. Does the banned practice prohibit traders from informing consumers that they have won a prize or equivalent benefit when in fact the consumer is invited to incur any cost, including a de minimis cost, in relation to claiming the prize or equivalent benefit?
2. If the trader offers the consumer a variety of possible methods of claiming the prize or equivalent benefit, is Paragraph 31 of Annex 1 breached if taking any action in relation to any of the methods of claiming is subject to the consumer incurring a cost, including a de minimis cost?
3. If Paragraph 31 of Annex 1 is not breached where the method of claiming involves the consumer in incurring de minimis costs only, how is the national court to judge whether such costs are de minimis? In particular, must such costs be wholly necessary
   - In order for the promoter to identify the consumer as the winner of the prize, and/or
   - For the consumer to take possession of the prize, and/or
   - For the consumer to enjoy the experience described as the prize?
4. Does the use of the words "false impression" in Paragraph 31 impose some requirement additional to the requirement that the consumer pays money or incurs a cost in relation to claiming the prize, in order for the national court to find that the provisions of Paragraph 31 have been contravened?
5. If so, how is the national court to determine whether such a "false impression" has been created? In particular, is the national court required to consider the relative value of the prize as compared with the cost of claiming it in deciding whether a "false impression" has been created? If so, should that "relative value" be assessed by reference to
   - The unit cost to the promoter in acquiring the prize?
   - Or to the unit cost to the promoter in providing the prize to the consumer?
   - Or to the value that the consumer may attribute to the prize by reference to an assessment of the "market value" of an equivalent item for purchase?

Comment

There is real potential now for an important clarification in this area of law.

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