Legal Update

Jane Fae Ozimek

is a writer and researcher in the areas of IT, business and the law. She is currently the Editor of the *Journal of Database Marketing* and has previously published works on the use of statistics in business and marketing resource management.

ABSTRACT This section covers developments in the law in respect of IT, data protection and, most significant at present, debates taking place over intellectual property rights and copyright. The latter are key issues in Europe, likely to have a knock-on effect in terms of how businesses operate in that region, as well as how they interact with their customers.

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EHRC RECOMMENDS INCREASE IN UK PRIVACY REGULATION

A report carried out on behalf of the UK's Equality and Human Rights Commission concluded, this August, that current privacy laws and regulation do not adequately uphold human rights, and that there needs to be fundamental reform. The two principal areas of concern that authors Charles Raab and Benjamin Goold highlighted were the state's handling of personal data, and the use of surveillance by public bodies.

They make three key recommendations, including:

- *the development of a coherent legal framework for the protection and promotion of individual privacy, founded within a clear set of uniform principles, and an overarching commitment to fundamental human rights;*
- *reinforcement of the existing right to privacy, ensuring that any new legislation enhances rather than undermines the existing provisions of the Human Rights Act;*
- *overall greater regulatory coherence: a comprehensive review of the DPA, RIPA*

and other surveillance laws needs to be undertaken to ensure that the regulatory regime governing state surveillance is fair, coherent, accountable and accessible. In addition, all government databases that hold personal information should be placed on a statutory footing, with specific provisions regulating their remit, oversight and the provision of individual remedies.

- *improved technological and organisational means of protection* through encouraging the design and use of privacy-protective technologies, assessing the impact of new information systems on privacy, encouraging stronger accountability practices in organisations, and involving NGOs in the protection and promotion of privacy. (http://www.equalityhumanrights.com/uploaded_files/research/rr69.pdf)

NET NEUTRALITY IN THE NEWS

Over the summer of 2011, the issue of net neutrality has been very much to the fore within the EU.

Net neutrality is the principle that there should be no restrictions by Internet service providers or governments on consumer

Correspondence:

Jane Fae Ozimek
Basix, 39 Church Street,
Deeping St James, nr
Peterborough, Lincs,
PE6 8HF, UK
E-mail: jane@ozimek.co.uk

access to networks that participate in the Internet. This has come under fire for a number of reasons over the last few years – not least as a result of criminal activity and piracy/copyright breaches.

In June, the Dutch Parliament voted in favour of a legislative proposal to safeguard an open Internet in the Netherlands. This would prohibit Internet access providers from restricting or charging end-users for specific services.

In addition, Internet service providers may not hinder or block different kinds of applications and content online.

Although the Dutch may have been committing themselves to a more open Internet, moves were afoot in the United Kingdom to close it down. Leaked reports suggest that in the same month copyright holders proposed plans at a roundtable attended by representatives from Government, ISPs and others that could lead to the blocking of websites that allegedly host copyright infringing material.

These plans include a voluntary website-blocking scheme that would involve 'expedited court procedures', allowing an 'expert body' to decide whether websites that host copyright-infringing material should be blocked, meaning that lobby groups might decide on website content.

In July, the issue moved a little further forward, as the Council of the EU Member States published Draft 'Conclusions' on Net Neutrality. These underlined the need to preserve the open and neutral character of the Internet and established net neutrality as 'a policy objective'.

Critics, however, remain sceptical that the Council has thought through its intentions: the Council appears willing to embrace the concept of 'net neutrality' in further regulatory activities; however, it has failed to make clear the status this 'policy objective' has in the hierarchy of its communications policy.

Nonetheless, there is clear recognition of the importance of net neutrality for

the economy – and a clear and positive difference is now emerging as compared with the position of 'civilising' the Internet or, in a US context, experimenting with the fundamental building blocks of the Internet in order to protect the perceived needs of a narrow range of stakeholders.

AGREEMENT ON INTERNET BLOCKING REMAINS IN DOUBT

The EU also looked at the issue of Internet blocking and, after some months of negotiation, appears to have come up with some degree of unanimity – although critics again have suggested that the result is sufficiently ambiguous to allow member states to do much as they please.

The provisional text removes a proposed obligation on EU Member States to introduce web blocking and also removes wording, which proposed encouragement and 'stimulation' of Internet providers to introduce blocking outside the rule of law.

At the same time, an accompanying explanatory 'recital' gives the green light to those who wish to ignore the European Charter and European Convention on Human Rights, stating that these provisions 'are without prejudice to (unspecified) voluntary action taken by the internet industry' – without explaining further what is meant by 'voluntary' or even 'action'.

Whether this text will be adopted depends on a full vote of the European Parliament's plenary in September 2011.

While the EU deliberates, individual states have moved on. In July 2011, in the United Kingdom, the copyright industry obtained a court injunction against British Telecom (BT), requiring it to block website News2bin 2. This is a site searches Usenet and provides links to lots of films, books and music – most of which infringe copyright.

The case was brought to court by six major film studios, including Warner Brothers, Disney and Fox: this result means

that BT will have to use in this case the technology it has developed to block access to websites featuring images of child abuse.

This UK development was echoed in a July speech by culture minister Ed Vaizey, who announced that a movement in the States towards voluntary filtering by ISPs would probably bring up changes in the United Kingdom as well.

He said: 'A voluntary agreement may come out of the US and if that does happen it could be a game-changer'.

'If people are streaming live football without permission we should look at ways we can stop them. People have the right to earn money from content they create'.

As some countries move ever closer to implementing blocking policies of doubtful legality, an analysis of these measures was carried out over the summer by Professor Yaman Akdeniz (Istanbul Bilgi University, Turkey). His report on Freedom of Expression on the Internet for the Organisation for Security and Cooperation in Europe (OSCE) looked at legal provisions and practices related to freedom of expression, the free flow of information and media pluralism on the Internet in OSCE participating States.

The study observed that blocking measures in the OSCE region are not always provided for by law nor were they always subject to due process principles. In particular, blocking decisions were not necessarily taken by the courts of law, but by administrative bodies or Internet hotlines run by the private sector.

These decided which content, website or platform should be blocked. In many cases, such 'voluntary' blocking procedures lacked transparency and accountability. In addition, the appeals in such procedures were either not in place or, where they were in place, they were often not efficient: it is likely that blocking is not compatible with the fundamental right of freedom of expression must be questioned.

In particular, in the absence of a legal basis for blocking access to online content, the compatibility of 'voluntary' blocking agreements and systems with OSCE commitments, Article 19 of the Universal Declaration and Article 10 of the European Convention on Human Rights was problematic.

Meanwhile, in Italy, the sharp reaction by civil liberties activists, including Reporters Without Borders, has led Italian telecommunication agency AGCOM to review its plans to pass a resolution giving it the power to block websites and remove online content allegedly violating copyright, without referring to a judge. However, with the plans now out in the open, it is more than possible that they may return at some point in the not too distant future.

Yaman A.: Report on Freedom of Expression on the Internet, <http://www.osce.org/fom/80723>

US GIVES A GO-AHEAD TO COOKIES

An attempt to prevent companies from planting cookies on an individual's computer in order to 'sniff out' their web use history failed in August 2011, as the plaintiff – Sonal Bose – was unable to demonstrate quantifiable loss or show sufficient harm from the cookies' function.

Ms Bose initially claimed that a third-party advertiser had violated the Computer Fraud and Abuse Act by sniffing her browser history and using flash cookies; however, this claim was rejected by a Federal court in New York.

While agreeing that these activities may have 'impaired the functioning and diminished the value of [her] computer in a general fashion', the United States District Court for the Southern District of New York eventually struck down Ms Bose's suit because of her failure to quantify the cost of any repairs or

investigations into the alleged damages to her computer.

This was a class-action suit brought against a number of companies, including Interclick – a third-party advertiser – McDonald's, Mazda, CBS and Microsoft. The claim stated that Interclick and Interclick's co-defendants invaded the privacy of those affected, misappropriated personal information and interfered with the operation of their computers.

While further legal challenges to the use of cookies in the United States are to be expected, this, for the time being, appears to give the green light to cookie use in that country – a situation now very different from the corresponding situation in Europe (see article in this issue of the *Journal of Database Marketing*).

FUTURE CONFERENCES

11 October 2011, Brussels, Belgium
ePractice Workshop: Addressing evolving needs for cross-border eGovernment services, <http://www.epractice.eu/en/events/epractice-workshop-cross-border-services>

13–14 October 2011, Lisbon, Portugal
2nd International Graduate Conference in Communication and Culture: The Culture of Remix, http://blogs.nyu.edu/projects/materialworld/2011/05/cfp_the_culture_of_remix.html

20–21 October 2011, Warsaw, Poland
Open Government Data Camp, <http://opengovernmentdata.org/camp2011/>

27 October 2011, London, UK
Games for Brands conference and exhibition, www.gamesforbrands.com

27–30 October 2011, Barcelona, Spain
Free Culture Forum 2011, <http://fcforum.net/>

9 November 2011, Bucharest, Romania
INET Conference: Access, Trust and Freedom: Coordinates for future Internet, <http://www.isoc.org/isoc/conferences/inet/11/bucharest-agenda.shtml>

11–13 November 2011, Gothenburg, Sweden
FSCONS is the Nordic countries' largest gathering for free culture, free software and a free society. <http://fscons.org/>

25–27 January 2012, Brussels, Belgium
Computers, Privacy and Data Protection 2012, <http://www.cpdpconferences.org/>

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