Legal Update

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ABSTRACT This section covers developments in the law in respect of IT, data protection and, most significant at present, various debates happening over intellectual property rights and copyright, now focused on the question of the international Anti-Counterfeiting Trade Agreement treaty and whether or not that will receive ratification worldwide. Two other issues noted in this update is a focus in the United Kingdom on the tightening of regulation in respect of marketing where there is any scope for that marketing to be 'harmful' to children and a growing debate on the nature of online privacy, as exemplified by recent rule changes proposed by Google and Facebook – but actually representative of a much wider sea change in consumer attitudes to how their information should be shared.

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One of this year's biggest stories, in legislative terms, is likely to be the Anti-Counterfeiting Trade Agreement (ACTA). The big question: Will it eventually achieve widespread recognition in Europe and worldwide, becoming in time the gold standard by which intellectual property rights are governed the world over; or will the wave of protest now taking place across the globe make enough governments sufficiently wary of signing up to ACTA to ensure that it never achieves more than token status?

On the surface, ACTA is something to be widely welcomed: it is an international treaty designed to standardize copyright protection measures across the globe, and will seek to curb trade both in counterfeit physical goods and in copyrighted material online. Possible sanctions may be severe, with fines and possible imprisonment for offenders being proposed.

Since the advent of the Internet, there has been broad agreement that something of this

type is needed. Otherwise, just as some countries now act as tax havens, by virtue of maintaining a tax regime that is significantly advantageous to companies and individuals that choose to base their businesses in them, so there is the very real prospect of some nations in future becoming 'pirate harbors'.

Those who wish to ignore copyright established in countries that apply more rigid rules to the protection of intellectual property would simply rebase their operations in that area.

It is easy to locate debate on this issue along lines well understood when it comes to discussing the Internet: on the one hand, an old guard that is very much wedded to things being done the way they always have been – which in Internet terms tends to mean a 'Wild West frontier' with little formal control in place and the right to say and do pretty much as one pleases. That position has been whittled away over the years, but it still forms a major element not just in protests against ACTA, but also the

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more recent attempts to pass anti-piracy legislation in the United States – in the form of the Stop Online Piracy Act (SOPA).

It is easy to locate debate in that way, but also, perhaps, quite misleading, for on the issue of ACTA, as on so many other matters that have recently been thrown up by the net, it is not just a simple question of big business versus libertarian protesters. In fact, the debate is far more nuanced with – yes – traditional established business models on one side and on the other a mix of Internet enthusiasts and also quite significant advocates of new business models, who have argued, quite powerfully, that attempting to restrict the Internet to patterns of behavior – and law – that have been developed in the off-line world is missing the point.

In terms of where ACTA has got to so far, there have been lengthy negotiations over the last few years, culminating in an agreed text signed on 1 October 2011 by Australia, Canada, Japan, Morocco, New Zealand, Singapore, South Korea and the United States. This was followed in January 2012 by the European Union and 22 of its 27 member states. In theory, this brings the total number of signatories to 31, but there are problems with this calculation.

One element of ACTA (criminal sanctions) falls outside the scope of EU law (the ‘*acquis communautaire*’), and this part needs to be approved individually by each member state. That part that lies within the scope of EU law can be decided and ratified at EU level – but only as a whole, and simply ratifying ACTA says little about how the guidelines will be implemented in practice.

In other words, the fact that so many countries have signed to ACTA so far simply signifies an agreement in principle to work to bring the concepts within ACTA into being in national law. Given the strong opposition that lies behind the refusal of the six remaining EU states to sign up so far, it

cannot be taken for granted that the European Union as a whole will ratify this treaty.

And if the European Union fails to ratify, there is more than a passing possibility that the entire agreement could begin to unravel across Europe. So far, resistance and refusal to sign has come from Cyprus, Germany, Estonia, Slovakia and the Netherlands.

However, a petition requesting governments to think again has now attracted c. 2 million signatures worldwide. There have been dozens of demonstrations in countries across Europe, including major street protests in Poland; hackers have taken revenge, with attacks on government sites in Sweden and Greece reported; and several governments that initially bought into ACTA are now having second thoughts.

In January 2012, the European Parliament’s rapporteur for ACTA, Kader Arif, resigned, after describing negotiations as a ‘masquerade’. A similar reaction came from the Slovenian ambassador to Japan, who issued a public apology for signing the treaty and called for public protests to fight its ratification.

In February, Polish Prime Minister Donald Tusk agreed to hold off plans to ratify the agreement, claiming that the negotiation process ‘did not involve sufficient consultation’. In Romania, too, a change of government could well lead to a reversal in respect of ACTA.

So why is ACTA problematic? In many ways, it mirrors difficulties that have come to light in respect of SOPA: traditional companies see the sharing of material on the Internet as absolutely wrong, and are prepared to put in place measures that could potentially criminalize the least infringement of copyright. Small-scale file-sharing for personal use would be treated in much the same way as large-scale organized criminal piracy.

In order to police such measures, governments would need to put in place

significant structural mechanisms for monitoring what individuals do online; it also opens up the possibility of major intrusions at border crossings, with increased searches of laptops and seizure on far more tenuous grounds than at present. Meanwhile, critics argue, organized crime would continue to flout copyright with impunity, and therefore a large legal framework would be created that would impinge directly on individual civil liberties while doing little to achieve the objectives it is intended to achieve.

Separately, it is argued that ACTA – and SOPA – fails to recognize how Internet business works. According to Raegan MacDonald, Senior Policy Analyst at advocacy group Access, ‘This is a fight between a dying industry, desperate to hold onto its power, and the internet community’. It is an argument that perhaps boils down to a definition of ‘fair use’, originating in the United States, and now having influence in many legislatures. This is an exemption from copyright laws, to the effect that so long as an individual’s extractions from copyright material are of minor consequence, attributed and for specific purposes such as commentary, academic study and similar, there is no requirement to invoke copyright law to govern such actions.

While some opponents of ACTA remain resolutely opposed to restriction in any form, there is also a newer, more nuanced, business view: this recognizes that the very nature of the Internet, with its tendency to link and embed content between sites, means that in traditional terms, copyright is being breached on a regular basis.

That, too, is at the heart of opposition to SOPA, which would enable law enforcement agencies to block access to entire Internet domains where infringing content has been posted on a single blog or Webpage. Library associations have expressed concerns that the legislation’s emphasis on stronger copyright enforcement

would expose libraries to prosecution. And companies spearheading the opposition, such as Microsoft and Google – new-wave, but not otherwise known for their lack of hard-headedness where business is concerned – are worried that requiring search engines to delete domain names would be the beginning of the end of the Internet in its current form.

Opponents have also highlighted issues in the detail of ACTA. It is not clear whether it is in line with existing EU laws – for instance, almost limitless damages can be imposed under ACTA on the basis of retail price rather than the actual damage incurred. Moreover, many of the provisions in ACTA, such as access to personal data, come from the Intellectual Property Enforcement Directive (IPRED).

These provisions have been the cause of serious problems in some European countries – including the United Kingdom – and the working of IPRED is now due to be formally reviewed. Unfortunately, the review of IPRED does not begin until after ACTA is ratified (if the current timetable is adhered to).

Last, but by no means insignificant, is the question of whether ACTA actually does create a ‘level playing field’ internationally. This is challenged by those who look at the European Union’s history of implementing laws – as opposed to the theory. The fear is that ACTA will, in the end, simply add 27 different versions of criminal sanctions to the EU market – thereby destroying any hope of a ‘fit for purpose’ legal system developing in Europe.

Will this give the United States, where the system is already more flexible and harmonized, significant added advantage? So, far from helping innovation in Europe, ACTA will have a chilling effect on innovation in the European Union and will benefit the United States, which already has an innovation-friendly single market.

ACTA may thus have moved forward – and may be at the point where ratification

internationally is finally possible. Yet, as with SOPA, as the world wakes up to the consequences of what it means in practice, it is by no means certain that it will be ratified. Developments in this area are likely to have serious consequences for every business that trades online – and these look like they will come to a head, one way or another, this year.

Text of the ACTA document may be found at trade.ec.europa.eu/doclib/docs/2011/may/tradoc_147937.pdf.

PRIVACY ISSUES ONLINE TAKE A NEW TURN

A speech by Sheryl Sandberg, Chief Operating Officer at Facebook, in early 2012 identified three trends that are now under way on the Internet. First, she spoke of a trend ‘from anonymity to real identity’. Second, there is a trend ‘from wisdom of crowds to wisdom of friends’. Third, there is a trend ‘from being receivers of information to broadcasters of information’.

This speech, according to George Teare, Co-founder of online publication TechCrunch, is not simply self-serving by a corporate executive: it was a thoughtful attempt to address the new online landscape and to communicate the view that as far as Facebook is concerned, the Internet as a pure information retrieval mechanism – the ‘readwrite’ Web based on cheap Website hosting – is dead. The identifiable author has replaced the anonymous one, and the entire world is now broadcasting and identifiable.

This has major consequences for information and privacy. In general terms, it takes the debate forward from privacy as simply a policy issue, debated by policy professionals, to privacy as a structural imperative for companies wishing to do business on the Internet, and especially for those wishing to make use of social networking as the channel through which to engage with customers.

Consumers are beginning to have strong opinions about the use of their data. This can be seen in a growing demand, which began to be taken seriously by the European Union in early 2012, for the introduction of a ‘right to be forgotten’ on the Internet.

In practical terms, what consumers increasingly want is flexibility, combined with security. As George Teare puts it, ‘What it seems consumers are asking for is a world in which we all know what we are sharing and who with – but where we don’t have to do a huge amount of work to achieve that’.

This is a growing problem for companies whose structure and available tools permit centralized policy-setting and ‘one size fits all’ approaches because this is now increasingly a structural problem and one that major service providers are having difficulty in solving.

Both Google and Facebook are in the process of carrying out a much heralded revamp to their rules on privacy and information-sharing: Google Circles and Facebook’s groups are both partial answers to identified problems – but only a very small part. New privacy rules by Google and new approaches to sharing data by Facebook have attracted widespread criticism – and may well have lost both organizations significant numbers of users – even though the intention in both cases was at least partly based on meeting customer demand for clarity around these issues.

This is a tendency that many companies will recognize: as long as an issue remains off-radar, there is a chance that customers will not notice that it is being ignored, whereas the moment a company tries to engage with and solve a particular issue is also a moment of maximum difficulty in respect of the customer relationship.

In practical terms, developments begun with Facebook and Google will soon percolate down to begin to affect decisions

and solutions implemented by all companies, requiring a major rethink by management about the assumptions built into their products and how they ensure that their policies are genuinely delivering what consumers want (as opposed to simply claiming that they do).

Consumers are no longer prepared to tolerate all-inclusive policy decisions by service providers that impact who sees their stuff: it is possible that for some online players, the cost of achieving such an outcome will prove prohibitive – and lead to a much wider evaluation of what they are doing online – and why.

RESPECTING CHILDREN: THE SHAPE OF THINGS TO COME

In February 2012, Captive Interactive Systems Limited (CISL) was fined £20 000 by regulator PhonePayPlus for failing to protect online users from marketing material ‘likely to result in harm to children’. The case came about after two sisters, aged 11 and 12, spent a total of £2548 texting support for their preferred candidate for ‘Miss Teen Queen UK’, after this individual had ‘encouraged them to do so through Facebook’.

Unfortunately for the children – and for their mother, who eventually made the complaint – this was achieved by means of a ‘children’s’ premium line service that enabled the public to vote for their favored candidates for ‘Miss Teen Queen UK’, which was the reason why the children succeeded in running up such a large bill.

According to the PhonepayPlus Code of Practice, promotional material targeted at children must:

- state clearly the usual cost of the service;
- warn children that they should only use the service with the permission of the person responsible for paying the bill.

In addition, services must not:

- include anything ‘likely to result in harm to children or others or which exploits their credulity, lack of experience or sense of loyalty’;
- ‘encourage children to use other premium rate services or the same service again’.

CISL further received a formal reprimand and were ordered to repay the sums collected from the children’s mother.

The significance of this case is the growing concern that both politicians and industry bodies in the United Kingdom are showing in respect of the impact of the Internet on children. This has found its most public expression through condemnation of what is widely referred to as the ‘sexualization’ of children through inappropriate online comment, which in turn is likely to result over the next 12 months or so in a growing raft of regulations that will address issues of the tone and content of marketing directed at children. There has also been a parliamentary inquiry set up under the chairmanship of Conservative MP Claire Perry to look at these issues.

However, although the headline story is often couched in terms of sex and sexuality, the real issue that many companies whose business includes some appeal for an under-age audience may need to take account of is effectively the commercialization of young people’s lives.

At present, this debate is giving rise to statement, recommendation and guidelines; however, such is the head of steam behind it that businesses should expect further regulation to come, quite possibly backed by legislation in future.

With thanks to European Digital Rights in respect of information about Internet and privacy issues. Further information can be found on their Website: www.edri.org/.