stakeholder engagement and public affairs, to manage communications with policymakers and advocates.

The companies that see the risks, understand them and work to change will be the leaders of this century. They will establish consumer trust, avoid monetary losses and be ahead of regulations, which will give them the licence to lead in the data economy. Building greater trust as a company that respects privacy can allow it to leverage better the data they collect without raising concerns with their stakeholders, as well as help inoculate companies from reputation loss if an incident occurs.

Online benchmarking tool

The ePRI calculator

To help businesses improve their stance on data security and privacy, Edelman developed an online benchmarking tool to accompany the ePRI — The ePRI calculator (<http://www.edelman.com/privacy-risks/>). The tool enables businesses to quickly benchmark their own privacy risk against the survey data and provides a Privacy Risk Index score, with a high score indicating a company is more likely to suffer reputational damage or economic losses from a privacy-related incident.

The ePRI calculator benchmarks privacy risk against organizations of similar size, geographic footprint and industry sector. This propriety assessment method rates an organization's ability to prevent and quickly recover from loss, theft or misuse of personal information.

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Osborne Clarke is one of Europe's most respected law firms and a UK leader in advising marketers on the legal issues affecting them. The firm's Marketing Law.co.uk website has provided marketers with authoritative legal insights for over 10 years. Please send any queries regarding this column to Stephen Groom (stephen.groom@osborneclarke.com)

What happened

Did assignment of rights 'arising from the performance of the services' work?

Stephen Groom

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Topic: Intellectual property

Who: Susan Wilkinson vs London Strategic Health Authority

Where: Patents County Court

When: November 2012

Law stated as at: 5 December 2012

Susan Wilkinson sued her former client London Strategic Health Authority ('LSHA') for copyright infringement.

Background

She had previously supplied communication skills training services and materials to LSHA. The supply contract ('Agreement') included the following provision:

All intellectual property rights associated with any intellectual property arising from the performance of the services and the documents, and other work prepared by [Susan] pursuant to the Agreement shall belong to [LSHA].

The services were duly performed. They included synthesizing three existing training programmes for different types of health professional, one of which had been developed by Susan before she contracted with LSHA ('Original Work').

These were adapted by Susan for LSHA to form a broad programme for training the various types of health professional catered for in the three original programmes.

LSHA publishes the original work externally

Later, and without Susan's consent, LSHA published externally and for third party use two sets of training materials, a Facilitator's Manual and a Learner Pack ('Pack and Manual'). Both included significant extracts from the Original Work.

Susan sued LSHA for copyright infringement, saying that the assignment wording in the Agreement did not extend to the use of the Original Work outside the National Health Service (NHS), and therefore LSHA had no right to use it in the Pack and Manual.

The Original Work had pre-dated the Agreement, she argued, and therefore did not 'arise from the performance of the Services and the documents and other work prepared by [Susan] pursuant to the Agreement.'

LSHA claims an implied licence

LSHA rejected Susan's demands, saying that whether or not the wording actually transferred the copyright in the Original Work to LSHA, the effect of the Agreement was to grant them an implied licence to use and exploit the Original Work in whatever way they wished.

The essence of the project, LSHA said, was the synthesizing of three existing training programmes including Susan's, thus the Agreement must be regarded as impliedly giving the LSHA rights to use the Original Work.

Therefore, LSHA submitted, the external publication of the Pack and Manual was within the terms of that licence and did not infringe Susan's copyright.

No assignment of copyright

After hearing the evidence and argument, Judge Birss QC of the Patents County Court held that the Intellectual Property (IP) rights assignment wording in the Agreement did not extend to any pre-existing materials.

Therefore, Susan's copyright in the Original Work had not been assigned to LSHA. Clearer wording would be needed to effect a transfer of the copyright in works in existence before the Agreement was concluded.

The court implies a licence

However, the good news ended there for Susan.

The Judge agreed with LSHA that based on the wording of the IP provision and what was clearly in the contemplation of the parties, a licence had to be implied in favour of LSHA.

As for the terms of that licence, the agreement between LSHA and Susan did not limit LSHA's ability to exploit the deliverables, and gave Susan no right to control or veto their use.

Therefore, the implied licence effectively conferred on LSHA the full benefit of Susan's copyright in the Original Works and was not limited in such a way as to prevent LSHA exploiting the Original Works in the form of the Pack and Manual.

Why this matters

This judgment underlines the need to take extreme care with the drafting of intellectual property provisions in all agreements involving the supply of copyright works, such as agreements for the provision of creative advertising services.

In this case, LSHA's submissions on the implication of a licence were successful; however, it cannot be best practice to leave such key aspects to the vagaries of judicial interpretation, and the parties here could have saved themselves considerable cost and time if the IP rights disposition and usage provisions had been crafted with more care.

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New ASA 'do-not-track' regime

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Topic: Online advertising

Who: Advertising Standards Authority

When: November 2012 — new rules in force from 4 February 2013

Where: The United Kingdom

Law stated as at: 8 December 2012

What happened?

The United Kingdom's national advertising watchdog has announced a new third party cookie control regime featuring compulsory links to a 'do-not-track' mechanism, an obligation to cooperate imposed on advertisers benefiting from third party behavioural targeting and 'explicit consent' for the most intrusive forms of behavioural tracking. In launching this scheme, the Advertising Standards Authority (ASA) has gone further than the current legal regime and created more regulatory hurdles for the online advertising ecosystem.

Background

The ASA's groundbreaking 'Transparency and choice rules for Online Behavioural Advertising' (OBA Rules) apply to third-party cookies and come into effect on 4 February 2013. Third-party cookies come into play if a user visits a website, and a separate company from the one operating the site sets a cookie on that user's computer.