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# Intellectual Property & Data Protection 2015:

Legal developments you need to know about



## Welcome

This is a short guide to some of the key legal developments for intellectual property and data protection in 2015.

The developments include a new policy on the transparency of clinical data, a preliminary ruling from the European Court of Justice on internet service provider liability for copyright infringement, a new licensing condition from the Gambling Commission, a new regime for technology transfer agreements, change to the length of copyright protection for industrially manufactured artistic works, the Trade Secrets Directive, the Consumer Rights Bill, an evaluation by the European Court of Justice of the way data is transferred to the US, new measures to combat online piracy, progress towards the ratification of the Unified Patent Court agreement, reform of UK design law, the Payment Services Directive, the enacting of the data protection reforms, an opinion on how to improve intellectual property rights enforcement by the European Commission, and the phasing out of the patent box tax break.

For further information or advice, please contact your usual contact at Mayer Brown or one of the intellectual property and data protection lawyers in our London Office whose details can be found at the end of this guide.





## Transparency of clinical data - the European Medicines Agency's new policy

On 2 October 2014 the European Medicines Agency (EMA) policy on publication of clinical data for medicinal products for human use was approved by the EMA board. As a response to demand for greater transparency in public health and pharmaceutical research and development the policy facilitates the non-commercial use of the data, e.g. for consideration and analysis by academics and healthcare professionals. The document also ensures the protection of personal and commercially confidential information. The policy will be applied in steps from 1 January 2015, starting with the publication of clinical data contained in clinical reports, followed by the publication of individual patient data, which will occur once the EMA has established structures to collect, evaluate and protect individual patient data.



## ISP Liability: *C-484/14 McFadden*

This is a request for a preliminary ruling in a case which concerns liability for copyright infringement where a third party passed a piece of copyright-infringing music over Mr McFadden's unprotected wireless network in his shop. The internet access was deliberately left non-password protected in order to drive internet traffic to his shop's website. The Court of Justice of the European Union will consider the facts in light of the E-Commerce Directive 2001/31/EC, particularly whether or not Mr McFadden could actually be considered an Internet Service Provider (ISP) and, if so, could he be protected by the Directive. The deadline for the UK to lodge observations with the court is 16 February 2015.

March 2015



## Gambling Software

From 31 March 2015 the Gambling Commission will impose the licensing condition that operators can only use gambling software from licensed developers. This places the onus squarely on operators to ensure their suppliers hold the requisite licence, regardless of where the supplier is located.

April 2015



## The revised Technology Transfer Block Exemption Regulation and Technology Transfer Guidelines

The European Commission has adopted a revised block exemption for technology transfer agreements (TT-BER). The new regime reduces the scope of the automatic block exemption for certain types of clauses and opts for a case-by-case assessment instead. Technology transfer agreements that have been concluded up until 30 April 2014, and that are in compliance with the old TT-BER, will remain exempted until 30 April 2015.

April 2015



## Copyright for industrially manufactured artistic works

Section 52 of the Copyright, Designs and Patents Act 1988 states that artistic works that have been industrially manufactured have copyright protection for a lower term - 25 years after their first marketing. However, the Enterprise and Regulatory Reform Act 2013 will repeal the provision so that industrially exploited works will enjoy the full term of copyright protection. Therefore, certain works in which copyright had previously ceased to be enforceable will now effectively come back into copyright once the new law is implemented.

The UK government is currently consulting on the appropriate time frame for implementation of the repeal of section 52, seeking to balance the conflicting interests of those who will be affected by the change. The government's proposal is for a transition period of three years from April 2015, which is a mid-way point between the options of six months and five years from April 2015, proposed by other interested groups.

Mid 2015



## EU Trade Secrets Directive

The EU Trade Secrets Directive is due mid-2015. The Directive will aim to aid international business growth by providing greater certainty in relation to the protection of trade secrets. Another goal is to provide freedom to innovate and exploit this beneficial asset class across Europe. To bring about the EU's goal of creating an innovation friendly environment in Europe by 2020, the Directive will consolidate laws by providing several harmonisation provisions which will include a standard description of what constitutes a trade secret.

October 2015



## Consumer Rights Bill

The Consumer Rights Bill is intended to become law on 1 October 2015. The Bill is of particular interest to retailers as we are set for significant changes to consumer laws. The Bill will clarify the standards a consumer can expect when buying goods, set out what to do when goods, services or digital content do not meet those standards, and clarify when terms and conditions can be considered unfair. The changes to the present unfair terms legislation will affect all contractual relationships with consumers, including those made in-store and formed online.

Additionally, the Bill will simplify enforcement powers, make it easier to deal with rogue traders, and make it easier for small businesses to take legal action against bigger companies who are in contravention of competition law.

Late 2015



## Transfer of data to the US: A re-evaluation of the Safe Harbor regime by the European Court of Justice

At the end of 2015 we may see a judgment from the European Court of Justice that has a substantial impact on the way in which data is transferred to the US. The court will consider whether member state data protection authorities will be able to disregard the 'Safe Harbor' regime and make their own assessment of adequacy of data protection in relation to US companies. This question was submitted to the ECJ on 16th July 2014 by the Irish High Court on the back of a case brought before it by Maximillian Schrems (a Viennese data activist and law student) against Facebook.

In the case heard by the Irish High Court, Schrems argued that Facebook Ireland's transfer of EU citizens' data to the US was in contravention of Data Protection law. It was submitted that Facebook was not able to provide adequate data protection

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in light of the revelations by U.S. National Security Agency (NSA) whistleblower Edward Snowden that Facebook is party to the PRISM data surveillance program. The Irish High Court ruled that the Irish data protection commissioner had correctly dismissed Schrems' complaints because Facebook was a Safe Harbor participant. Notwithstanding, the Irish High Court ruled that it did not have the authority to assess the adequacy of Safe Harbor, and therefore referred the question to the ECJ. This has given rise to an opportunity for the re-evaluation of the Commission's 2000 decision that created Safe Harbor.

Late 2015



## The Digital Economy Act

The Government has confirmed that internet users who are suspected of illegally downloading copyrighted material will be sent warning letters about their behaviour in the second half of 2015. In addition to the court's use of its power under section 97A of the Copyright, Designs and Patents Act 1988 to grant orders blocking access to content streaming websites, new measures will be implemented in order to combat online piracy. The Digital Economy Act 2010 will impose new obligations on Internet Service Providers (ISPs) in 2015, including the introduction of a new statutory notice-and-take-down procedure. ISPs who fail to comply with these obligations could face penalties of up to £250,000 (or more by order of the Secretary of State).



Late 2015



## The United Kingdom takes a significant step towards ratifying the Unified Patent Court agreement

The Intellectual Property Act 2014 will govern the new “unitary patent” in the UK. The idea is that the patent will provide uniform protection in all participating EU states. As part of the implementation process, the Secretary of State is required under Section 17 of the Intellectual Property Act 2014 to ratify the Unified Patent Court Agreement. The Department of Business, Innovation and Skills has issued a press release stating its expectation that all measures will be implemented by late 2015. It is believed that the UK will ratify the Unified Patent Court Agreement by the next General Election.

Late 2015



## Reform of UK Design Law

The Intellectual Property Act 2014 has helped simplify and strengthen the UK designs industry. There are a number of reforms that are not yet in place, but which we can expect to see in the near future:

- **Change of Appeal System for Designs:** The appeal system for designs is to be changed along similar lines to the trade mark system with a choice between the courts and a more informal process. This will facilitate appeals to an ‘Appointed Person’ who will be an expert in intellectual property law appointed by the Lord Chancellor. This may come in Spring 2015 but we should expect a consultation first.
- **Design Opinions Service:** The Design Opinions Service will issue non-binding opinions from the IPO on matters relating to designs.
- **Hague International Designs Registration System:** The UK is to join the Hague international designs registration system in its own right. Currently applicants wanting to use the Hague system and wanting to cover the UK need to go for EU-wide cover. The UK will not join the Hague system before late 2015.
- **Electronic inspection of certain design documents:** The IPO is planning to allow electronic inspection of certain design documents. Again this is not likely to happen before late 2015.

2015



## Payment Services

The recast Payment Services Directive is expected to be adopted at European levels during 2015. By creating a single market standard across the EU, trust and accessibility will be enhanced, while supporting technological innovation. The new legislation will aim to ensure markets are open to the benefits of advancing technology in the payments industry, while concurrently addressing the associated risks.



2015



## Data Protection Regulation

EU member states have now agreed to conclude negotiation regarding the EU Data Protection Draft Regulation. It is now looking like there is a real possibility the Data Protection Regulation will be enacted in 2015 which, on the basis of the currently envisaged two year implementation period, would see it implemented in 2017. Some of the major developments are as follows:

- **The Right to be Forgotten (Article 17):** Data subjects will have the right, under certain conditions, to request that their personal data are deleted.
- **The Right to Data Portability (Article 18):** Data subjects will have the right to obtain a copy of all personal data relating to them in a structured and commonly used electronic format.
- **Privacy by Design and Default (Articles 23 & 33):** Data controllers must implement systems that ensure that data are processed in accordance with the draft legislation.
- **Breach Notification (Articles 31 & 32):** Data Controllers must inform their relevant data protection authority of a personal data breach within 72 hours of their becoming aware of it.

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- **Appointment of data protection officers (Articles 35 & 36):** Organisations will be required to appoint a Data Protection Officer where that organisation: (i) is a public authority or body; (ii) is carrying out the processing of more than 5,000 data subjects; (iii) is conducting processing activities such as regular and systematic monitoring or profiling of data subjects; or (iv) is processing special categories of data as its core activity.
  - **Introduction of the one-stop shop (Articles 54 & 73):** The one-stop shop system will designate a lead data protection authority for data controllers established in more than one member state.
  - **New Penalties (Article 79):** The cap for fines will be increased to €100m or 5% of global annual turnover.



2015



## EU Commission Communication on IPR enforcement

On 1 July 2014, the European Commission adopted two communications aimed at improving the enforcement of intellectual property rights internationally, the actions for which will be carried out in 2015. The Commission will monitor the delivery of the initiatives and consider if any further legislative measures are needed. The first communication is an action plan concerning the enforcement of IPR within the EU. The actions include engaging in a dialogue with stakeholders, increasing training for enforcement authorities in the EU, and focus on SME's that are trying to protect their IPR. The second communication is a strategy for protection and enforcement of IPR outside of the EU, including but not limited to the assistance of SMEs and rights-holders through new projects 'on the ground' such as the use of helpdesks, increased scrutiny of IPR provisions in bilateral trade agreements, and the discussion with partner countries of weaknesses in their IPR systems.

2015



## Intellectual Property Reforms

New measures in the Intellectual Property Act 2014 that came into force on 1 October 2014 will modernise the intellectual property (IP) framework, by modernising copyright law and helping designers and patent holders protect their valuable IP. It is predicted that the government's package of reforms to copyright exceptions will contribute £500 million to the UK economy over the next 10 years. Minister for Intellectual Property, Baroness Neville-Rolfe DBE CMG, said:

“These changes are going to bring our IP laws into the 21st century. They will mean that the UK IP regime will now be responsive to the modern business environment and more flexible for consumers. Not only will these new measures provide a significant boost to the UK's creative industries, they will also better protect a number of sectors, including the protection of the UK's design industry worth more than £15 billion to the economy.”

2015



## IP tax regimes to be abolished and replaced by new “nexus”- based regimes

In late 2014 the UK shared a proposal to close its patent box tax break. The patent box regime came into force on 1 April 2013 and by 2017 will allow a 10% rate of corporation tax to be applied to profits earned from patented innovations and certain other IP rights. The European Commission is investigating whether such an incentive is compliant with the EU rules on state aid. If the proposal is agreed by the Organisation for Economic Cooperation and Development, the patent box will close to new entrants in June 2016 and will cease entirely in June 2021.

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