Intellectual Property, Technology & Data Protection 2016:
Legal developments you need to know about
Welcome

This is a short guide to some of the key legal developments for intellectual property, technology and data protection in 2016.

There are a number of likely important developments at the EU level affecting patent disputes, trade secrets, the EU digital market agenda and trade marks (in fact, virtually the entire intellectual property universe). Incredibly, for those who have followed the tortuous interplay between key words and trade mark rights, 2016 may see a re-run of the dispute between Interflora and Marks & Spencer.

We expect to see important developments in the area of data privacy, as the EU General Data Protection Regulation is approved and the complications for transferring personal data from the EU to the US following the invalidity of safe harbor are ironed out. In the UK, we anticipate interesting developments in the technology space particularly for the financial services sector, as the Financial Conduct Authority finalises its guidance on the use of cloud computing and as blockchain technologies become more appealing to businesses operating in markets with many interdependent players.

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

The final draft of the new European General Data Protection Regulation (GDPR) was agreed in December 2015. Once approved by the European Parliament in early 2016, it is expected to take effect in early 2018. The GDPR aims to update data protection law to address the challenges of the digital age while simultaneously protecting the rights of individuals and enabling businesses to utilise personal data in a more consistent manner across the European Union. The GDPR will be directly applicable in the same form in all EU Member States.

Safe Harbor 2.0

The European Commissioner and the US Department of Commerce will fail to put in place “safe harbor 2.0” within any realistic timetable as an alternative to the now invalidated safe harbor route for the movement of personal data by EU based data controllers to US based data importers. In place of safe harbor, European data exporters will rely on the EU standard contractual clauses to be put in place between a data exporter and a data importer. If necessary, the European Commission will offer revised standard contractual clauses in response to any challenge from national Information Commissioners as to the validity of the standard contractual clauses.

Please note that, as the replacement for safe harbor is under discussion at the time of writing, further developments in this area are expected imminently. We will provide further updates and analysis following any announcements from the European and US authorities. Please check our website for information or contact a member of our data privacy team or your usual Mayer Brown contact, for an update on the latest news.
EU Cybersecurity Directive

In December 2015, the Permanent Representatives Committee endorsed an informal deal struck with the European Parliament on the first rules to strengthen the security of network and information systems across the EU. Once the agreed text has undergone technical finalisation, it will be submitted for formal approval by the Council of Ministers, and then by the European Parliament (expected in the first half of 2016). The rules are intended to improve cybersecurity capabilities in Member States as well as their cooperation. Requirements include, “operators of essential services in the energy, transport, banking and healthcare sectors, and providers of key digital services like search engines and cloud computing, to take appropriate security measures and report incidents to national authorities”. There is likely to be further debate about the extent to which national infrastructures fall within the scope of EU competence.

FCA Consultation on Proposed Guidance for Cloud Services

The Financial Conduct Authority (FCA) consultation on its proposed cloud guidance closes on 12 February 2016. The proposed guidance was published in November 2015 and once formalised will supplement existing guidance on the use of third party (off the shelf) banking solutions. Critical issues for firms contemplating cloud-based outsourcing include effective access to customer data, data security, audit and access rights and the inclusion of resolution provisions. Whilst non-binding, we expect the FCA guidance will emerge as an important standard that cloud service providers will need to meet in order to help satisfy the requirements of their regulated clients.
Cybersecurity Public-Private Partnership

The European Commission has launched a consultation on establishing a public-private partnership on cybersecurity which is due to be set up in the first half of 2016 as part of its Digital Single Market Strategy. The consultation is published together with a roadmap outlining different policy options that should help the European cybersecurity industry grow. By bringing together industrial and public resources, the plan will focus on innovation following a jointly-agreed strategic research and innovation proposal. It promises to optimise the use of available funds through better coordination with Member States.

EU Trade Secrets Directive

In December 2015, the Council of Ministers and the European Parliament reached a provisional agreement for a Trade Secrets Directive (the “Draft Directive”) with the intention of improving the protection of information that is fundamental to the success of many businesses. The Draft Directive introduces provisions intended to harmonise the measures on unlawful acquisition, use and disclosure of trade secrets. It includes a basic description of what will constitute a trade secret. Presently, there exists a range of definitions and legal frameworks in Member States in relation to the protection of trade secrets. The creation of a common European right to protect trade secrets, which already plays a pivotal role across many industries, could result in a major shift in the way intangible assets are valued. We expect that the final form of the Directive will not materially differ from the Draft Directive. It is anticipated that the Draft Directive will come into force during the first half of 2016, following which Member States will have up to two years to implement the new provisions into national law.
The Development of Data Sharing and Open Data in Banking

The Open Banking Working Group was formed in 2015 to develop a framework for the design of an open API standard in UK banking focussing on personal and business current accounts. This Group is made up of experts representing a wide range of private and public sectors which should provide a diverse range of views. It is thought that having an open standard and open data in the UK will help improve the innovation and competition in financial services. This initiative interacts with the trend of banks and financial institutions exploring utility models for the delivery of relatively standard services required in their industry from a single, shared provider. We expect open data standards to gain greater exposure over the course of 2016.

EU Digital Single Market Strategy

As part of its Digital Single Market Strategy, the European Commission has published a proposed Regulation on ensuring the cross-border portability of online content services in the EU. The Regulation is intended to enable consumers who have bought or rented content online in their country of residence to continue having access to such content when travelling in the EU, something that they may be prevented from doing owing to the territorial nature in which rights are sometimes licensed. The Commission has said that the proposed Regulation aims to remove barriers to cross-border portability while maintaining a high level of protection for right holders. The proposed Regulation will require providers of online content to enable a subscriber to access online content whilst they are temporarily present in a Member State. The provider will not have to meet the same quality requirements they may offer to subscribers receiving the service in the Member State of residence (unless they otherwise agree).
Communication on the Modernisation of the EU Copyright Framework

At the end of 2015, the European Commission published a Communication, *Towards a modern, more European copyright framework*, on the modernisation of the European copyright framework. The Communication sets out the Commission’s short, medium and long-term proposals for an updated European copyright law. The Communication covers four main areas:

1. ensuring wider access to content across the EU (a first step towards this is the proposed Regulation on the portability of online content but further legislative proposals are expected in 2016) (see above);

2. adapting exceptions to digital and cross-border environments (national laws on copyright exceptions, for example, relating to education, research and access to knowledge, which vary between Member States and which the Commission wishes harmonised; legislative proposals relating to access for those who are blind, visually impaired or otherwise print disabled and to research and educational purposes are expected in 2016);

3. achieving a well-functioning marketplace for copyright (the results of the Commission’s consultation on how to share value created by new forms of online distribution of copyright-protected works are expected in the first half of 2016; the Commission will consider whether action is needed on the definitions of the rights of ‘communication to the public’ and of ‘making available’ and specifically relating to news aggregation services); and

4. providing an effective and balanced IP enforcement system (the Commission has already launched a consultation on potential modernisation of the legal framework regarding the enforcement of IP rights online and will consider by autumn 2016 whether any amendments are required to deal with commercial-scale infringements; discussions are also underway for a self-regulatory approach to be finalised in the first half of 2016).
Blockchain Technologies Move further into the Mainstream

The authentication technologies underpinning bitcoin – known as distributed ledger infrastructures – enable multiple instances of data to be synchronised and updated. The attractions of this technology for documenting and accounting for transactions looks set to move further into the mainstream of commerce. In January 2016, the UK government published a report setting out how this technology could transform the delivery of public services and boost productivity. A number of banks have already been exploring the possible uses of blockchain in the financial services market with several of them investing in companies developing the technology. The Australian Stock Exchange recently announced that it is looking at using distributed ledger technology for clearing and settlement services in the cash equities market. We also expect application of this technology in the healthcare industry to be developed further in 2016.

Unitary Patent Update

In December of last year, the EPO Select Committee announced that it is now “legally, technically and operationally ready” to deliver the unitary patent. The only remaining step is the opening of the Unified Patent Court and the finalisation of the ratification process at national level. The Unified Patent Court is currently selecting judges and the process is likely to be completed in the latter half of 2016. Radical new options for the resolution of patent disputes in Europe will become available.
Implementation of the Collective Rights Management Directive

In October 2015, the UK Intellectual Property Office published a technical review of the draft UK regulations for collective rights management in the digital single market. This is to implement the EU Directive on the collective management of copyright and multi-territorial licensing of online music rights in the internal market. This intends to facilitate the development of legal offers across EU borders of online products and services, thereby strengthening the Digital Single Market. The EU Directive entered into force in April 2014, and each Member State needs to have it transposed into national law by 10 April 2016. The finalised UK Regulation is expected to be released in early 2016.

Trade Mark Law Reform

In December 2015, the new Trade Marks Directive and amendment to Regulation 207/2009 on the Community trade mark were published, which between them contain a package of reforms to European trade mark law. The changes are intended to modernise proceedings, increase legal certainty and reflect European case law. Member States will have until January 2019 to transpose the new Directive into national law. Baroness Neville-Rolfe, UK Minister for IP, has already indicated that a consultation process will begin in early 2016 to seek views on how the Directive should be implemented in the UK. The legislation amending Regulation 207/2009 comes into effect on 23 March 2016. However, a number of the amendments will only apply from 1 October 2017.
Trade Marks and Keywords Advertising; Re-Trial of Interflora v Marks and Spencer

The English High Court may re-hear the Interflora v Marks and Spencer keyword advertising dispute in 2016. This follows the decision of the Court of Appeal to allow a retrial of the case following an appeal that the trial judge had wrongly adopted the doctrine of initial interest confusion and a reverse burden of proof test, and made procedural errors and incorrectly interpreted evidence.

EU Consultation on Enforcement of IP Rights

The European Commission has launched a public consultation on potential modernisation of the legal framework regarding the enforcement of IP rights. The consultation is part of the commitment given by the Commission in its Digital Single Market Strategy to look at commercial-scale infringements online. The consultation in particular seeks to assess whether Directive 2004/48/EC on the enforcement of intellectual property rights requires reform in order to be effective in the online environment. When the European Commission conducted its 2011 official evaluation of the Directive following its implementation by Member States in 2006, a number of respondents to the consultation, including some Member States, questioned its ability to tackle the issue of online IP infringement. This consultation also aims to gather experience and opinions about the use and impact of so-called “follow the money” initiatives in the area of IP enforcement (i.e. indirectly reducing access to infringing material by restricting their access to revenue, for example, from advertising or payment processing services). The consultation closes on 15 April 2016.
Patent Box Reform – modification of tax incentives

The UK government has announced changes to the design of the UK Patent Box so that it complies with a new international framework for preferential tax regimes for intellectual property. The new framework has been set by the Organisation for Economic Co-operation and Development and aims to prevent tax planning by multinational enterprises that exploits gaps and mismatches in tax rules to artificially shift profits to low tax locations where there is little or no economic activity. Additionally, the present Patent Box scheme will be closed to new entrants on 30 June 2016, so only those who elect into the present Patent Box scheme before 1 July 2016 will continue to be taxed under the more favourable rules.

Online Dispute Resolution For Consumer Disputes

From 15 February 2016, all online traders and operators of online marketplaces will have to include a link to the new online dispute resolution platform (ODR Platform) being established by the European Commission in accordance with Regulation 524/2013 on online dispute resolution for consumer disputes. In some cases, online traders will have to make sure that their contractual terms include information about the ODR Platform and its availability for resolving disputes arising from online sales or services. The ODR Platform was due to launch early January 2016 but has been delayed until 15 February 2016 by the European Commission.
E-signature

The e-ID Regulation will, with some exceptions, apply from 1 July 2016, repealing the Directive on Electronic Signatures (1999/93/EC). Importantly, the Regulation will introduce a new rule, meaning Member States will be obliged to recognise electronic identification means that are issued in other Member States. Also, the new “advanced electronic signature” (as opposed to the basic electronic signature that is in place under the current Directive), will allow for unique identification and authentication of the signer of a document and will enable the signed data to be verified more effectively.
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