Intellectual Property & Data Protection 2014: 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 2014.

The developments include the increased enforcement of intellectual property rights, proposed changes to copyright law following consultation with the Intellectual Property Office in 2013, proposals to extend copyright limitation periods in artistic works, the progress of the Orphan Works Directive, proposals to harmonise trade mark protection across borders, proposals to reform the groundless threats provisions of intellectual property rights, progress of the Intellectual Property Bill, progress of the EU unitary patent package, ongoing investigations into licensing agreements limiting territorial access to Pay TV services, progress of the proposed new EU Regulation on data protection, the development of the EU cloud computing infrastructure and progress of the Directive on attacks against information systems.

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

On 19 July 2013, a new Regulation seeking to simplify, clarify and increase enforcement of intellectual property rights was introduced. The new Regulation took effect from 1 January 2014. It provides greater procedural clarity for customs authorities to enforce intellectual property rights; extends the existing system of enforcement measures to other intellectual property rights; simplifies the administrative procedures to be met where infringing goods are found and destroyed; and increases the options available to ensure the protection of legitimate traders.

Investigation by the European Commission into cross-border restrictions of Pay TV services

In January 2014, the European Commission launched formal proceedings to investigate licensing agreements between US film studios and the largest European Pay TV broadcasters (including BSkyB and Sky Italia). The investigation has been given priority by the European Commission and centres on whether the licensing agreements prevent broadcasters from providing services across territorial borders. The Commission is concerned that the US film studios grant the European broadcasters “absolute territorial protection”, potentially infringing EU antitrust rules. There is currently no deadline by which the Commission must conclude the investigation but the outcome will affect broadcasting companies and film studios globally.
Directive on Collective Management of Copyright and related rights in musical works for online use

The overarching aim of this proposed Directive is to increase transparency of collecting societies and facilitate the licensing of rights in musical works for online use across borders. The Directive seeks to accelerate payments to composers and lyricists and provide greater clarity of revenue streams deriving from the exploitation of rights via an annual transparency report. The European Parliament is due to vote on the proposed Directive on 3 February 2014 and it is expected to be adopted later in 2014.

European Commission consultation on EU copyright rules

In December 2013, the European Commission launched a consultation into the best ways in which EU copyright law should develop in order to account for the modern digital environment. This consultation falls within a larger consultation on general improvements that should be considered to the cross-border licensing of copyright, copyright in the digital world, and limitations and exceptions to copyright. The consultation into copyright law is due to close on 5 February 2014 in order for the European Commission to complete its larger review of European copyright rules by Spring 2014.
EU Data Protection Regulation

The European Parliament is expected to commence its reading of the EU Data Protection Regulation (replacing the Data Protection Directive 95/46/EC) on 11 March 2014. The Regulation was scheduled for ratification in 2014 but it is now more likely that this will occur in 2015. However, it would be prudent for businesses to consider how they should be preparing for the changes which this Regulation will be introducing. The Regulation will cover data protection issues that are not addressed by the current Directive, including greater internal compliance for all private sector companies with over 250 staff by obliging them to have a data protection officer. It also aims to enable simpler transfers of international data and impose strict sanctions on those in breach of its provisions. Importantly, will apply to data processors as well as data controllers and to data controllers with non-European headquarters.

Regulating Collecting Societies

In September 2013, the Intellectual Property Office ("IPO") consulted on the draft regulations to regulate collecting societies (Copyright (Regulation of relevant licensing bodies) Regulations 2014). The Regulations will provide an overarching power to impose a statutory code of conduct on collecting societies where collecting societies fail to implement or adhere to voluntary codes of conduct. They will come into force on 6 April 2014 and the Government has expressed its opinion that the Regulations are to be treated and used as a last resort.
April 2014 – EU replaces anti-trust rules on technology transfer

The existing “safe harbour” for patent and know-how licences under EU competition law, the Technology Transfer Block Exemption, runs out in April and needs to be replaced. The European Commission has been consulting on a new draft which broadly follows the existing approach. However, the devil is in the detail and some commonly used work-arounds for excluded restrictions are being removed. Specifically, grant-backs of a licensee’s improvements to the technology will have to be non-exclusive (whereas previously, non-severable improvement could be exclusively licensed back to the licensor). Second, the new block exemption will no longer allow licensors to terminate if a licensee challenges the validity of the patent. Where the block exemption is not available, the parties will have to assess the potentially anti-competitive effects of their agreements.

Privacy vs. Innovation: The Vice-President of the European Commission for the Digital Agenda’s views on data

In Spring 2014, the Vice-President of the Commission, Neelie Kroes, plans to commence research and ultimately develop a strategic agenda on data. In December 2013, she highlighted the Commission’s approach to data and the considerations to be had by both businesses and Member States when protecting data. She acknowledged the importance of data as the “engine of the European economy” and an extremely valuable asset of the future but argued that without appropriate safeguards “we cut competitiveness without protecting privacy”. In order to “respect privacy, without the law becoming a strait-jacket to innovation” the Vice-President recommended that companies engaging in big data follow four
simple steps: (1) consider privacy protection at all stages of system development; (2) undertake a “Privacy Impact Assessment” in respect of the potential privacy risks at the start of system development; (3) apply a common sense approach to user consent; and (4) consider the applicability and degree of anonymisation that may be appropriate. In order to ensure the steps are applied appropriately the Vice-President highlighted the importance of company accountability.

It is clear that data protection and privacy considerations are at the forefront of the European Commission’s plans.

Possible reform of law on “groundless threats”
UK intellectual property law contains various provision enabling businesses to “turn the tables” on rights-owners where their customers are threatened with litigation for on-selling their products. For example, in patent law, a patent owner can send a letter threatening action to the entity which is manufacturing the patented product, but needs to take care before writing letters to those who are merely on-selling it. If a reseller’s actions may not be infringing, it can bring its own claim for “groundless threats” of infringement. The Law Commission in the UK has been consulting on reforming the law in this area. It consulted on a range of options, from abolishing the threats provisions altogether to replacing them with a new tort (unlawful act) applying across the board. The Law Commission’s final report will be published in Spring 2014 and it will then be up to the UK Government to decide whether or not to implement its chosen solution.
European Parliament elections

On 22 May 2014 the UK elections to the European Parliament will be taking place. British citizens or EU and Commonwealth citizens resident in the UK may vote in the European Parliamentary elections in respect of the UK. British citizens living abroad may vote at general elections and European elections for 15 years after leaving the country. All EU citizen residents in the UK who have chosen to vote in respect of the UK in the European Parliamentary elections must declare that they have chosen to do so in order to ensure that they do not vote in two countries.

Enterprise and Regulatory Reform Act

On 25 April 2013 the Enterprise and Regulatory Reform Act 2013 (“ERRA”) received Royal Assent. The majority of the copyright and design right provisions came into force immediately. A proposed schedule for implementing the outstanding copyright provisions of the ERRA has been published by the department for Business, Innovation and Skills (“BIS”). It proposes that regulations relating to copyright in certain unpublished works should come into force by April 2014 and that those associated with the licensing of orphan works and voluntary extended collective licensing, and the requirement on collecting societies to adopt a code of practice, should come into force by October 2014.
Confidentiality and passing off

In April 2013, the European Commission published a study on the pros and cons of protecting trade secrets, confirming that the diverse approach adopted in EU Member States hinders business development, exchange and innovation. In November 2013, it adopted a proposal for a Directive on the protection of trade secrets, seeking to harmonise trade secret law and enforcement in the EU. The proposed Directive is yet to be sent to the Council of Ministers and the European Parliament for adoption; however, the draft timeline would have it coming into force as of 31 December 2014.

Orphan Works Directive

The Orphan Works Directive lays down rules for the digitisation and online display of orphan works (copyright-protected works where the rights holders cannot be found). In January 2014, the Government shall be seeking views, via a technical consultation, on how the Orphan Works Directive should operate practically and look specifically for views on the technical aspects of two sets of draft regulations that will implement the Directive in the UK. The Directive is due to be UK law by October 2014.
EU Data Retention Directive

In December 2013, Advocate General Cruz Villalón (“AG”) issued his Opinion on the compatibility of the EU Data Retention Directive with the EU Charter. In the AG’s Opinion, the collection and retention of traffic and location data for a period of between six months and two years for the purposes of investigating and prosecuting serious crimes constituted a serious and unjustifiable interference with an individual’s right to privacy. Furthermore, the data collected under the EU Data Retention Directive could be utilised to determine an individual’s conduct or their identity where insufficient safeguards are in place to protect such data from being accessed by unauthorised individuals. Despite ruling that the Directive is incompatible with the EU Charter, the AG proposed suspending his finding in order to enable the EU legislatures to adopt appropriate remedies to the invalidity. Although the Opinion is not binding on the European Court of Justice, it is likely to be given considerable weight in future case law and therefore raises uncertainty as to the future of the current EU Data Retention Directive.

Lien over electronic data: Your Response Ltd v Datateam Business Media Ltd

In November 2013, the Court of Appeal raised the question of whether a service provider can claim a lien over electronic data which it manages for a client. Lady Justice Arden granted permission to appeal, saying that the issue of whether or not a service provider can claim a lien over electronic data which it manages for a client under a service provision contract should be given further consideration. She said that there is no authority establishing whether a lien is exercisable over intangible property. It is possible that an appeal will be heard in 2014.
Copyright in software: SAS Institute Inc v World Programming Ltd

SAS Institute’s case against WPL, which raises crucial copyright issues for the software industry, may go on appeal to the Supreme Court. SAS has been unsuccessful in the English Courts (and the European Court) on its central claims relating to the protection of functionality, programming languages and data file formats. It is possible, given the importance of the issues for SAS (and others in the sector) that it will appeal against the Court of Appeal’s November 2013 judgement in a last-ditch attempt to establish copyright protection.

Regulation of cloud computing

Cloud computing has significantly evolved in the last five years and concerns have arisen as a result of the ease with which it assists the transfer of EU citizen’s personal data to cloud providers outside the European Economic Area. Consequently, concerns regarding data security and data transfers have become increasingly prevalent especially where cloud providers are located in jurisdictions where data can be easily accessed by local law enforcement whose local laws are non-compliant with the EU framework. In 2014, the European Commission will discuss measures that can be adopted to safeguard personal data in the cloud, further supporting the development of an EU cloud computing infrastructure.
Cybercrime: Directive on attacks against information systems

In August 2013, Directive 2013/40/EU on attacks against information systems was published to counteract the increasing number of complex and global attacks against information systems. Member States are required to bring the laws, regulations and procedures arising from the Directive into force by 4 September 2015. In September 2017, the European Commission will submit a report analysing the extent to which Member States have adopted and adhered to the Directive and, if necessary, legislative proposals to rectify any issues that arise. The report and proposals will subsequently be submitted to the European Parliament and Council.

Reform of the Misleading and Comparative Advertising Directive

The European Commission intends to tabulate and introduce proposals to amend the Misleading and Comparative Advertising Directive, which protects consumers and traders against misleading advertising and its consequences. The Commission proposes to develop the Directive so that it covers misleading cross-border marketing practices and to clarify the scope and definition of comparative advertising in line with the European Court’s case law. The proposed amendments are likely to clarify the rules on the use of competitor’s trade marks; comparisons of products with a designation of origin with those without one; and price comparisons. The European Commission and European Parliament have not provided a timeframe within which they will tabulate or introduce their proposals but discussions on this topic are expected to continue in 2014.
Reform of the Trade Marks Directive and Community Trade Mark Regulation

In November 2013, the General Secretariat of the Council of the EU published a progress report containing consultations regarding the European Commission’s proposals for changes to the Trade Marks Directive and the Community Trade Mark Regulation, the key legislation which harmonises the law on brands across the EU. The report demonstrates Member States’ disagreement with some of the Commission’s proposals, including the extent to which national trade mark procedures should be harmonised and the power to be granted to OHIM (the Community Trade Marks office). These varying positions of the Member States suggest that, although the report states that agreement should be reached soon, the original plan to adopt legislation by Spring 2014 may not be realistic.

UK reform of exceptions to copyright

Copyright law is being examined from various points of view, since both the UK Government and the European Commission are looking at reform. The UK’s hands are tied to a large extent, in that it has to keep within the parameters of European legislation on the subject. However, the UK is free to reform various exemptions (i.e. activities which can be carried out without infringing copyright). Consultation took place in 2013, in particular on data analysis for non-commercial research; education; research, libraries and archives and the extent to which the copyright owner can use contracts to override the exemptions. The latter point is significant; for example, commercial publishers of all kinds frequently restrict what their users can do under licence and those restrictions may be tighter than what copyright law justifies. The Government intends to present draft regulations before Parliament in 2014.
Internet browsing: **Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd and others**

In 2013, the Supreme Court was asked to consider whether simply viewing copyright material on the internet could amount to copyright infringement. It has referred the case to the European Court on the basis that the decision would affect internet users who innocently believed they were legitimately viewing copyright material online but were in fact infringing a copyright owner’s rights. The Supreme Court stated that typical browsing online would benefit from the exemption contained in EU copyright law which covers temporary acts of reproduction. If the European Court rules that internet browsing could result in copyright infringement, other “temporary copying” situations will undoubtedly occur when viewers watch a broadcast on a digital TV and there will be wide-reaching implications for the law as it affects the internet. The Court is expected to reach a decision in 2014.

**Longer protection for mass-produced products**

The UK Government is reforming copyright law in a number of ways. As part of the Enterprise and Regulatory Reform Act, copyright protection for mass-produced designs is effectively being lengthened. Under the old regime, artistic works (which could include designer furniture and ornaments, for example) which have been produced in large number only have 25 years’ copyright protection rather than the usual period of 70 years after the author’s death. That restriction is being abolished so that these products will have the full life-plus-70-years protection. The Government is consulting on when this should come into force and on transitional provisions. In practice, many functional products will fall outside copyright protection in any event (but may have registered design protection of up to 25 years). So this reform will principally affect the designer end of the market. The Government is consulting on the date upon which this change should take effect.
Reform of UK designs law

The Intellectual Property Bill is currently going through the UK parliament and, once in force, will make changes to designs law. The main changes are as follows. The UK-only unregistered design right (“UDR”) will be owned by the designer even if the designer is acting under commission (whereas currently, the commissioner owns that right); design will “qualify” for UK UDR where the designer is habitually resident in a qualifying country or carries on a substantial business activity there (so it will not be enough to be a citizen or subject of a qualifying country without living there); and it will be possible to qualify for the right where the design is first marketed in the EU whether or not that first marketing is carried out by an exclusive licensee. Still on the subject of UK UDR, there are new exceptions for infringement relating to private and non-commercial use, experiments and teaching.

Similar changes relating to ownership of rights in commissioned designs are being made for registered community designs and registered UK designs.

Infringement of registered designs will be made a criminal offence where the infringer knows or should know that a design is registered.

Despite the Government’s profess desire to simplify design laws, most of the changes are minor and, since they will only apply to future designs, will result in quite a complex legislative landscape.
EU patent package

The EU patent package, consisting of a new unitary EU patent covering all EU Member States and a Unified Patent Court, was passed in 2013. The long-awaited unitary EU patent aims to provide a more cost-effective and consistent European patent regime. The Unified Patent Court Agreement was signed by 24 Member States in February 2013 but is yet to be ratified. A final draft of the Unitary Patent Court rules is expected to be published and signed by Member States in early 2014 so that practical arrangements regarding the implementation of the EU patent package can be determined and the Unitary Patent Court can be operational by early 2015. Progress to date has hit numerous obstacles.
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