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WHITE PAPER

January 2017

Balancing the Scales — The Emerging European Approach to Tackling IP Issues in the Online World

Two decades of rapid growth in internet activity has led to significant changes in how content is produced and distributed by businesses and how it is acquired by consumers. This in turn has led to unique challenges and issues for intellectual property rights holders endeavoring to protect their interests and rights online. This Jones Day *White Paper* reviews a number of important ways in which intellectual property law and policy in Europe is being reshaped by the evolving online environment.

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Due to the influence of the internet, the last two decades have dramatically reshaped how business is conducted and how content is produced, distributed, and consumed. This has led to some unique challenges for Intellectual Property (“IP”) rights holders in their efforts to enforce their rights online. Consumer demand for instant, and often free, accessibility to digital content has never been greater, and there are increasing calls in the EU for all barriers to online content to be broken down.

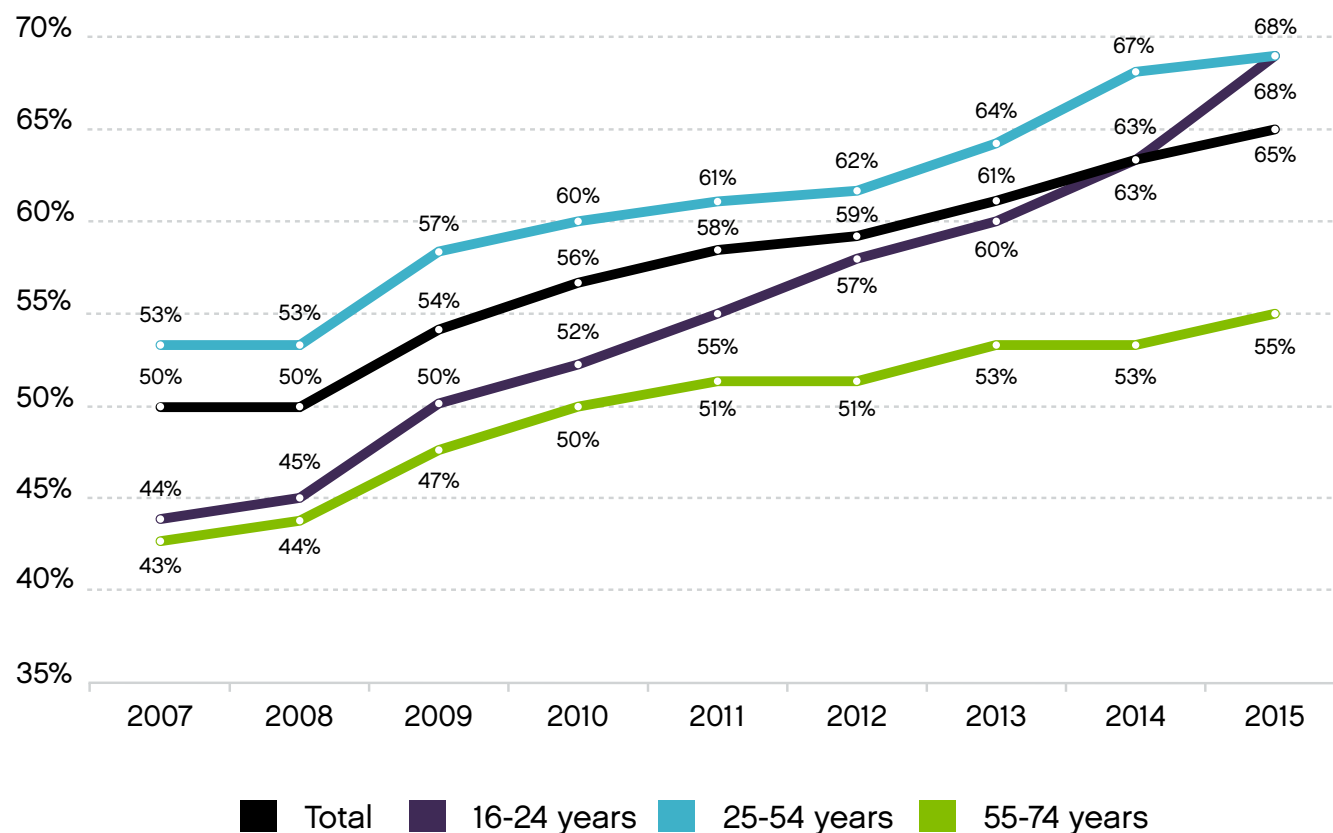
The stakeholders in this rapidly evolving environment—from content generators and distributors to internet intermediaries and retail businesses—are varied, in terms of size as well as interests. Understanding the way European courts and institutions have been trying to balance these competing interests, and how the UK’s decision to leave the EU will impact upon that, is therefore essential to all such stakeholders.

This Jones Day *White Paper* reviews a number of important ways in which intellectual property law and policy in Europe is being reshaped by the rapidly evolving online environment. It also considers the extent to which these developments manage to strike a fair balance between the rights of rights holders, internet users and intermediaries.

THE RISE OF ONLINE MEDIA AND COMMERCE

It is estimated that there are now 3.5 billion people using the internet worldwide, and this number continues to rise rapidly. In the EU, the internet is now the most important channel for content distribution and consumption and the dominant platform for purchasing goods and services. Social media has also transformed traditional distribution portals and in many cases is now the primary means through which digital content is accessed and disseminated.

Figure 1. Share of internet users who bought or ordered goods or services over the internet for private use by age groups in EU-28



Source: Eurostat

These developments have had a profound impact on intellectual property law and policy. In particular, three key trends stand out:

1. The rise of social media and peer-to-peer (“P2P”) sharing means that rights holders have far less control over the dissemination of digital content. This can become problematic where content is made available to others without the appropriate consent of rights holders.
2. The limitless nature of the internet makes it difficult to maintain traditional content distribution models along geographical boundaries, which rely on the territorial nature of existing copyright laws. This difficulty is particularly acute in Europe where EU institutions and policy makers are trying to create a “digital single market”.
3. The internet relies on a vast number of intermediaries that facilitate online commerce and the distribution of digital content. Although these intermediaries are often in a unique position to curb infringing conduct (for instance, by shutting off access), the extent to which it is fair, practical and, indeed, legal to require them to monitor generally and police the conduct of their users is debatable.

Each of these three trends highlights the delicate balancing act of protecting the interests of rights holders without unduly compromising the freedom of the internet or stifling new and emerging business models.

LINKING, FRAMING AND RIGHTS HOLDER CONSENT

Traditionally, copyright owners have been able to control access to their works by actively managing the distribution channels for their content. Online distribution, however, is more difficult to control, as users are able to share content by readily hyperlinking and framing content from a multitude of sources. Such practices are particularly widespread on social media where users regularly post links to creative content from their social media profiles. Content is also shared through various P2P networks such as file-sharing websites and BitTorrent.

The ability to link and frame content online has raised a number of questions over its lawfulness, and has led to key reevaluation of some fundamental concepts of copyright law in an online context. The issue centres on the interpretation

of article 3(1) of the Information Society Directive 2001/29/EC (“InfoSoc Directive”), which stipulates that:

“Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.”

Over the last few years, the Court of Justice of the European Union (“CJEU”) has grappled with this issue in a number of judgments. The case law has distinguished between three scenarios: (i) where content is freely available and is published *with* the copyright owner’s consent, (ii) where content is freely available but is published *without* the copyright owner’s consent, and (iii) where content is made available by the rights holder only to a restricted audience.

Freely available material published with the copyright owner’s consent. The leading case in which the CJEU considered whether links to freely available material published with the copyright owner’s consent constitute communications to the public—and therefore can amount to copyright infringement under article 3(1) of the InfoSoc Directive—is *Svensson, C-466/12*. The case was brought by Swedish newspaper journalists against a media monitoring organisation whose website posted unauthorised links to the journalists’ articles. Those articles were already freely available to internet users on the newspapers’ own websites. The journalists argued that the unauthorised provision of links to their articles by the media monitoring organisation constituted a communication to the public.

The CJEU held in that case that the concept of “communication to the public” includes two cumulative criteria, namely an “act of communication” of a work, and the communication of that work to a “public”. The court held that the hyperlinks in question were “acts of communication”, but did not constitute communication of the work to a “public”. The court reached the latter view based on the principle, first formulated in the earlier case of *SGAE, C-306/05*, that links could only fall within the scope of article 3(1) of the InfoSoc Directive to the extent that they constituted acts of communication to a “new public” i.e., “a public not taken into account by the copyright holders

when they authorised the initial communication to the public". As a result, the CJEU held that a link to freely available material published with the copyright owner's consent did not constitute copyright infringement because the initial communication targeted all potential internet users.

In the case of *BestWater*, C-348/13, the CJEU confirmed that this approach applied equally to framing or embedding of content published with the copyright owner's consent that is freely available online (for instance, framing or embedding of a YouTube video on a website). In such a situation, the insertion of the protected work into another website by means of framing or embedding is, once again, not a communication to a new public because the initial authorised communication targeted all potential internet users—and cannot therefore constitute copyright infringement.

This can be contrasted with the CJEU's approach in *TVCatchup*, C-607/11 which held that the "new public" criterion does not apply where the material is transmitted by different technical means. In that case, TVCatchup captured television broadcasts that were freely available to anyone with a UK television licence, and retransmitted the same content largely to the same people, but over the internet. The CJEU held that, in that situation, the retransmission on the internet *did* constitute a communication to the public—and therefore infringed the rights holder's copyright—because it had been done through different technical means (as opposed to the situation in *Svensson* and *BestWater*, where the articles and videos had always been intended to be viewed online). While the court's finding is understandable given the underlying statutory provisions, the distinction drawn by the CJEU between online and broadcast transmissions nevertheless appears somewhat artificial in the modern world.

Freely available material published without the copyright owner's consent. The recent case of *GS Media v Sanoma*, C-160/15 addressed for the first time the issue of linking to freely available material published *without* the copyright owner's consent. The case was initially referred to the CJEU from a preliminary ruling by the Dutch Supreme Court regarding

a dispute between Sanoma (the Dutch publisher of *Playboy* magazine) and GS Media. Sanoma had objected to the publication by GS Media of hyperlinks to other websites hosting unpublished photographs of Britt Dekker, over which Sanoma had the rights, and GS Media had on multiple occasions refused to remove the links from its website.

In reaching its decision, the CJEU first highlighted the importance of balancing the interests of rights holders and the fun-

The CJEU concluded that linking to a work that is freely available on another website will not constitute an act of communication to the public (and therefore be permissible) where the person doing the linking does not do so for financial gain and does not know and cannot reasonably know that the work has been published on the internet without the copyright owner's consent.

damental rights of internet users, in particular their freedom of expression and information. It also noted the importance of hyperlinking to the sound operation of the internet, and the difficulty that individuals posting links face in ascertaining whether

the website to which the links lead are publishing a copyright protected work and, if so, whether the relevant rights holders have consented to the sharing of this work. The CJEU concluded that linking to a work that is freely available on another website will *not* constitute an act of communication to the public (and therefore be permissible) where the person doing the linking does not do so for financial gain and does not know and cannot reasonably know that the work has been published on the internet without the copyright owner's consent. This reasoning appears to be a departure from the court's approach in *Svensson* whose logical consequence seemed to be that indefinite numbers of users accessing unauthorised works would always constitute a new public and, consequently, linking to such works would always amount to a "communication to the public". The decision also marks a departure from statutory copyright law (in the UK and other EU countries) by introducing a knowledge requirement for an act of primary infringement.

The court also introduced a rebuttable presumption when the posting of links is carried out for profit. This is because the court was of the view that in these cases, "it can be expected that the person who posted such a link carries out the necessary checks to ensure that the work concerned is not illegally published on the website to which those hyperlinks lead, so that it must be presumed that that posting has occurred with the full knowledge of the protected nature of the work and the possible lack of consent to publication on the internet of the copyright

holder". The court's approach appears to be motivated by a desire to strike a fair balance between the interests of ordinary users and the protection of the rights of copyright owners. Nevertheless, whether or not a clear distinction between such commercial and personal activity on the internet can be meaningfully applied in practice, remains to be seen.

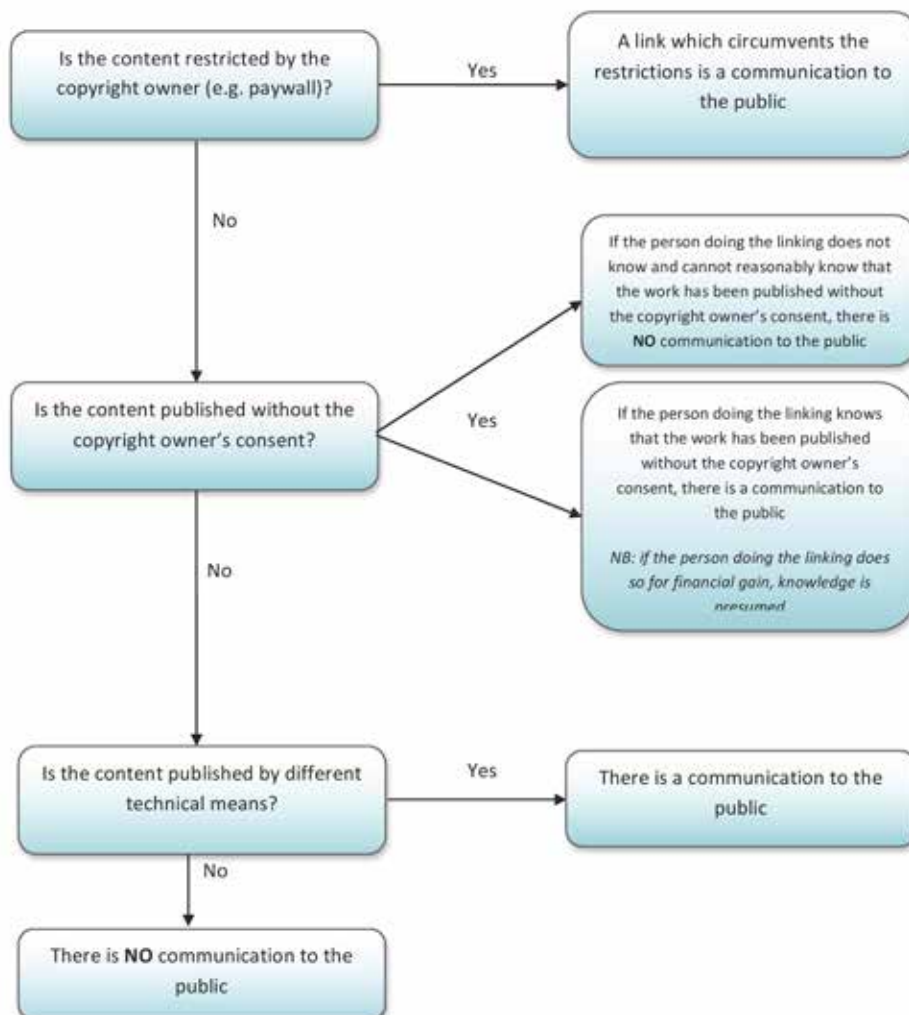
The decision in *GS Media* was first applied in Sweden in October 2016 where a national court held that the defendant had provided the link for profit by doing so on a news website. In December 2016, a German court also considered *GS Media* and held that "profit" does not necessarily mean to gain profit by providing a particular link as, for example, in cases of cost-per-click calculations, but rather, that it is sufficient that the website as such is run with the intention to realise profits, irrespective of the commercial impact of that particular link. These two decisions suggest that national courts may

be willing to interpret the "profit" criterion in *GS Media* fairly broadly, though it is too early at this stage to identify any overarching trends. It also seems likely that further references to the CJEU will be required to clarify the decision's application.

Content made available to a restricted audience. In certain cases, the rights holder may choose to make content available only to a restricted audience. Until recently it was unclear whether linking to or framing restricted access content should be treated differently from freely available content or content that had not been authorised at all for distribution by the rights holder.

The issue arose in *C More Entertainment v Sandberg, C-279/13* where the defendant provided links to streams of sporting events originally placed behind a paywall on the claimant's website. The CJEU held that member states may grant broadcasters the right to prohibit acts of communication to the public of

Figure 2. Sharing of content: communication to the public under article 3(1) of the InfoSoc Directive



their broadcasts, but did not specifically address the legality of hyperlinking to such restricted content. Following *Svensson*, it seemed that such conduct would always be infringing given that the users accessing the works through the defendant's circumvention measures would not have been taken into account by the rights holder and therefore would always constitute a new public.

The position is clearer following *GS Media*, where the CJEU confirmed that a hyperlink that allows users to circumvent the access restrictions on the website where the protected work is posted (e.g. subscriber only/payment) constitutes a "*deliberate intervention without which those users could not benefit from the work broadcast*". In such cases, all those users will be deemed to be a new public, which was not taken into account by the copyright holders when they initially authorised the communication, and the link will accordingly infringe.

EXHAUSTION OF RIGHTS IN AN ONLINE ENVIRONMENT

The "communication to the public" cases reveal some of the inherent problems in applying traditional copyright concepts in an online world. Another important way in which the internet has disrupted traditional content distribution models is by rendering geographical boundaries largely artificial. Traditionally, creative content has been licensed and monetised in different markets because each market has a different value (depending, for instance, on the number of customers in that market, as well as differences in language and consumption preferences). More recently, rights holders have managed to reproduce such territorial restrictions to online content through the process of geoblocking, which is essentially a technical means by which copyright content is restricted based upon the user's geographical location. In a virtually connected world however, consumers have become far less accepting of such restrictions. This is particularly visible in Europe where there is an inherent tension between the territorial nature of member states' copyright laws on the one hand and the EU's single market principle on the other.

It has long been the position that once a tangible copy of a copyright work (e.g. books, DVDs/CDs) has been put on the European market, the rights holder loses authority over the further distribution of that copy of the work. However, until recently, this principle did not apply to distribution of

intangible copyright works, for instance by way of broadcasting or transmission via the internet. This started to change in 2011 where the CJEU held in the joined cases of *FAPL/Murphy, C-403/08 and C-429/08* that the EU free movement of services and competition rules prohibited contractual provisions (and indeed national legislation) that prevent viewers in one EU member state from importing satellite decoder devices from another member state in order to watch the services of a foreign broadcaster. This was followed up in the seminal 2012 ruling in the case of *UsedSoft, C-128/11* where the CJEU held that a software company cannot prevent the further distribution of a copy of a software once that copy was made available to an end user for the payment of a fee and without any time limitations as to the use of the software.

It was therefore only a matter of time before attention would turn to whether the principle of exhaustion should be extended to creative works, such as audio visual content. In May 2015, the European Commission adopted the Digital Single Market Strategy, which *inter alia* was specifically aimed at reforming member states' copyright laws to ensure better functioning of applicable rules across borders and to allow for wider online access to works by users across the EU. This has led to two key legislative movements within the last two years. First, in December 2015, the Commission proposed an EU regulation on cross-border portability of online content services that would allow EU residents to travel with the digital content they have purchased or subscribed to at home. Second, the Commission has indicated that it wants to address "*unjustified geoblocking*" on the basis that it runs counter to the founding principles of the free market by discriminating on the ground of residence or nationality and stifling the free movement of goods and services. This culminated in a further proposal for an EU regulation, published in September 2016, that sets out the rules on the exercise of copyright and related rights applicable to certain online transmissions and retransmissions of television and radio programmes.

The Commission's proposed regulation on cross-border portability of online content is currently before the European Parliament and European Council. If adopted in its current form, the regulation would oblige providers of online content services to enable subscribers to access and use their services while temporarily present in another EU member state. Any contractual provisions between service providers and subscribers, and between service providers and rights holders (who include all

those who hold rights relevant to the use of content services offered online, not just copyright holders) to the contrary would be rendered unenforceable. It is important to note however that these rules will only allow users to access the content they would normally be able to in their home country. It does not go as far as to force service providers and rights holders to offer the same content services in all member states.

The more recent legislative proposal is aimed at reviewing the country of origin principle in the Satellite & Cable Directive 93/83/EEC (“SC Directive”) pursuant to which a satellite broadcast is deemed to originate from the country in which the satellite broadcast originates i.e. from where it is sent and not where it is received. This matters because it means that the broadcaster need only clear the copyright in the country of origin and not in each country where the satellite is received. The proposed regulation would extend the SC Directive’s country of origin principle to certain online transmissions of TV and radio programmes which are ancillary to the initial broadcasts, in particular simulcasting and catch-up services. It would also extend the SC Directive’s mandatory collective management of rights to Internet Protocol Television retransmission services and other digital retransmission services provided over “closed” electronic communications. In broad terms, the Commission’s proposal therefore only addresses the issue of geoblocking in relation to specific segments of the creative market, and leaves other services, such as video-on-demand services not linked to broadcasts, entirely outside its scope. While it proposes to change the way some creative content is made available in the EU, the proposed regulation appears to be a retreat from the wide ranging reforms the Commission appeared to have originally wanted on geoblocking. This perhaps reflects the controversial nature of interfering with copyright licensing in that way, and suggests the Commission was convinced by at least some of the concerns raised by rights holders.

It is worth noting however that the Commission also published in September 2016 a preliminary report setting out the provisional findings of its inquiry into the e-commerce sector. In its report, the Commission warned digital content providers that it may, on a case by case basis, take action against them on competition grounds for restricting access to online content through geoblocking. The report therefore signals that the Commission may seek to take a harder line against at least some geoblocking restrictions on competition law grounds

further down the line. The Commission expects to publish its final report in the first quarter of 2017.

It is currently unclear what approach the EU will ultimately adopt on portability and accessibility of online content and how far it will seek to regulate geoblocking practices. The regulations proposed by the Commission suggest that intervention in this area through copyright reform will be more limited than initially expected, though the recent e-commerce sector enquiry suggests there may be probes on the legitimacy of geoblocking for individual content providers on competition law grounds. Whichever approach the EU ultimately adopts, it is clear however that any change in this area could fundamentally alter the way in which copyright content is transmitted online and how such content is licensed across the continent. It will also be important to monitor how the UK decides to approach this issue as part of its Brexit negotiations with the EU.

THE ROLE OF INTERMEDIARIES IN TACKLING ONLINE INFRINGEMENTS

The issues discussed above with respect to hyperlinking and digital exhaustion are both essentially directed at reevaluating the appropriate balance between the rights of copyright owners and the legitimate interests of the public. However, the ease with which digital files can be copied and shared online, coupled with the anonymity afforded by the internet, has also brought new challenges in combating plainly infringing activity. This is an area fraught with difficulty because of the scale and breadth of such illegal activity. Rather than trying to go after every primary infringer, rights holders have therefore increasingly sought to rely on online intermediaries—as gatekeepers—as a more effective way to curb infringing activities.

The role played by online intermediaries is varied and ranges from mere conduits of information (e.g. providing hosting services) to playing an active role in the conduct of their users (e.g. online marketplaces actively promoting certain goods and services offered for sale on their sites). This raises two distinct but related issues: (i) when should intermediaries be held directly accountable for the conduct of their users, and (ii) to what extent can they be forced to help cease (or mitigate) infringing activities of others even where they themselves are not guilty of any wrongdoing.

In the EU, the rules on intermediary liability are enshrined in the E-Commerce Directive 2000/31/EC (“E-Commerce Directive”), the InfoSoc Directive and the IP Enforcement Directive 2004/48/EC (“IP Enforcement Directive”). These provisions set out various defences to liability for intermediaries and the circumstances when intermediaries will be required to act expeditiously in relation to infringing acts committed by third parties using their services. Article 14 of the E-Commerce Directive in particular provides a defence for hosting sites, and provides that the operator of such a site is not liable for the information stored on it where it (a) does not have actual knowledge of illegal activity or information, or (b) acts expeditiously to remove or to disable access to the information, upon obtaining such knowledge or awareness. Article 15 of the E-Commerce Directive also provides that there is no general obligation on intermediaries to monitor the information which they transmit or store.

In the landmark case of *L’Oréal v eBay*, C-324/09, the CJEU held that online market places, such as eBay, cannot rely on the hosting defence and thereby avoid liability where (i) they have taken an active role in the relationship between the buyers and the sellers (such as optimising the presentation of the offers for sale or promoting these offers), or (ii) they are aware (in particular through notification from the rights holder) of circumstances on the basis of which a diligent economic operator should have identified the illegal activity in question and did not act to remove or disable the infringing information. Importantly, the CJEU also held, under article 11 of the IP Enforcement Directive, that an intermediary, regardless of its own personal liability, can be ordered to take measures, not only to bring to an end infringements brought about by users of its services, but also to prevent further infringements of that kind. Building on this reasoning, the CJEU recently held in *Fadden v Sony Music Entertainment Germany GmbH*, C-484/14 that a provider of an unprotected wireless network would not normally be liable for copyright infringement where a third party used that network to infringe copyright, though could be ordered to password protect the network in order to prevent future infringement.

Actions against internet intermediaries have gained particular currency in the UK where the High Court has repeatedly taken

action through its express statutory powers under section 97(A) of the Copyright, Designs and Patents Act 1988 (“CDPA”), which implements article 8(3) of the InfoSoc Directive. The section provides:

“The High Court (in Scotland, the Court of Session) shall have power to grant an injunction against a service provider, where that service provider has actual knowledge of another person using their service to infringe copyright.”

The provision was first relied upon against ISPs in 2011 in the case of *Twentieth Century Fox v British Telecommunications Plc* [2011] EWHC 1981. Importantly in that case, the court ruled that

the knowledge requirement of section 97A of the CDPA should not be interpreted too restrictively. It was sufficient in that case that BT knew that the users and operators of the infringing website infringed copyright on a large scale, that a large number of the

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website’s users included BT subscribers and that these users used its services to receive infringing copies of copyright works made available to them by the infringing website. Since then, the UK High Court has granted a significant number of section 97A injunctions against ISPs, which have resulted in the blocking of many high profile websites including *The Pirate Bay* (*Dramatico Entertainment v British Sky Broadcasting Ltd* [2012] EWHC 268). The practice of making section 97A orders against ISPs has now become so common that these applications are rarely opposed by ISPs and usually made without any oral hearing (although there are still disputes about the breadth of the orders).

While there are no equivalent provisions to section 97A in relation to other intellectual property rights, the Court of Appeal recently confirmed, in July 2016, that UK courts had similar powers in relation to online trade mark infringements. In its landmark judgment of *Cartier v BSKyB* [2016] EWCA Civ 658, the Court of Appeal upheld the High Court’s judgment of October 2014 which recognised for the first time the court’s power to grant relief against intermediaries in cases other than copyright infringement. In doing so, the court relied on its powers under section 37(1) of the Senior Courts Act 1981 which

states that it may grant an injunction “*in all cases in which it appears to the court to be just and convenient to do so*”. Importantly, the Court of Appeal in *Cartier* confirmed a number of “threshold” conditions before an injunction is granted against ISPs: (i) the ISPs must be intermediaries within the meaning of article 11 of the IP Enforcement Directive, (ii) the users and/or the operators of the website must be engaged in infringing activity, (iii) the users and/or the operators of the website must be infringing the claimant’s trade marks, and (iv) the ISPs must have actual knowledge of this. If these threshold conditions are met, the court will then go on to consider various discretionary factors, which include considering whether the measures will be dissuasive, effective and proportionate.

These recent developments signal a broadening role for internet intermediaries in IP infringement cases which will be welcomed by rights holders. It will be interesting to see how this area continues to evolve going forwards. It is worth noting in particular that the question of who, as between the rights holder and the ISP, should undertake the cost of implementing the blocking order was very much a live issue during the *Cartier* proceedings and gave rise to a dissenting judgment in the Court of Appeal’s final decision. While the majority judgment held that this should be borne by the ISPs as part of the costs for operating in that field, Briggs LJ was of the view that the cost burden attributable to the implementation of a particular blocking order should fall upon the rights holder. This issue – i.e. the extent to which the costs of curbing infringing activity should fall on an intermediary rather than the rights holder – therefore remains contentious.

Finally, it is also worth noting that further developments may take place at a European level as well on intermediary liability as a result of the European Commission’s Digital Single Market Strategy. The European Commission conducted a public consultation from September 2015 to January 2016 on the role of online intermediaries, and considered a number of issues, including the liability regime under the E-Commerce Directive and the creation of further categories of intermediary services besides mere conduit, caching and hosting services. In September 2016, the EU put forward proposals to reform the role of online intermediaries as part of its copyright reform package, which included in particular a proposed obligation for certain online intermediaries (such as video-sharing platforms like Dailymotion) to deploy appropriate technology to automatically

detect copyright content which rights holders have identified and agreed with the intermediaries either to authorise or remove. Intermediaries and rights holders should therefore also follow these developments closely. It will also be important to monitor how Brexit may impact on the hitherto increased harmonisation of any such rules across Europe, as the UK may decide to take an altogether different approach to the role of online intermediaries following a departure from the EU.

CONCLUSION

The growth of the internet as a means for sharing and disseminating information and content is reshaping intellectual property law. The experience in Europe to date suggests that this process will likely take time and will necessarily involve various trade-offs between rights holders, internet users and online intermediaries. In this context, the following recent developments are instructive:

- The EU case law surrounding sharing of content on the internet has developed in a somewhat *ad hoc* and complicated way given the inherent difficulties in trying to balance the interests of various stakeholders involved. While the CJEU’s recent judgment in *GS Media* has added a degree of clarity to this otherwise difficult and uncertain area of law, it is worth noting that there still remains a number of unanswered questions. For instance, it is unclear in particular how the knowledge presumption detailed in *GS Media* will operate for persons posting links for profit and what “necessary checks” such persons will be expected to undertake to protect themselves from liability.
- The European Commission is actively trying to reform copyright law to allow wider and more uniform access to online content across the EU. However, the Commission’s wide ranging sector investigations have revealed the very different views that exist between internet users and rights holders. The former increasingly want removal of all territorial restrictions governing access to content, whereas the latter see this as eroding their ability to service different markets according to different strategies. Finding a solution that is workable as well as politically acceptable will not be easy, particularly in a sector where the technology is changing so fast.

- Internet intermediaries are expected to play a greater role in assisting IP owners to curb online infringement. The key challenge for both courts and legislators is to adopt an approach that is both fair and proportionate. This points to a nuanced approach where the burden imposed on intermediaries will depend on their knowledge and the extent to which they are involved in or in control of any infringing conduct. A practical compromise also needs to be reached between rights holders and intermediaries on the issue of costs.

It is important for businesses operating in Europe to closely monitor these developments as it will fundamentally transform the way in which online content is transmitted, licensed and enforced across the EU.

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