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Antitrust

United States

Apple and Qualcomm Proceeding

By Nicole Daniel

In January 2017 Apple filed suit against Qualcomm over its allegedly abusive licensing practices regarding wireless patents.

Apple filed patent, antitrust and breach of contract claims against Qualcomm; this could result in damages of billions of dollars. Apple's suit comes after recent legal challenges against Qualcomm filed by the U.S. Federal Trade Commission in federal court and a class action by smartphone buyers. Furthermore, Korean authorities levied their own \$854 million penalty and China's National Development and Reform Commission extracted a penalty amounting to nearly \$1 billion in 2015. Also in 2015 the European Commission sent statements of objections to Qualcomm.

Apple alleges that Qualcomm abused its monopoly in baseband processors that power both the iPad and the iPhone and broke its promise to license its standard essential patents at FRAND, i.e. fair, reasonable and non-discriminatory, rates.

Qualcomm breached its FRAND obligations by selling chipsets powering smartphones and tablets and separately licensing standard-essential patents. Apple further alleges that Qualcomm refused to sell chipsets to customers unless they first licensed their standard-essential patents. This allegation is central to the Federal Trade Commission's case too as well as Apple's allegation that Qualcomm does not license its standard-essential patents to competing chipset manufacturers. Tying the chipsets and licenses to cellular technology illegally strengthened Qualcomm's monopoly and eliminated competition. Another allegation by Apple is that Qualcomm threatened customers who purchased chipsets from competitors with less favorable license and royalty terms.

Not only did Qualcomm charge inflated royalties for its patents but it also engaged in allegedly intimidating business practices. For example, Qualcomm allegedly tried to force Apple to lie to the South Korean antitrust enforcer in exchange for \$1 billion which Qualcomm was obliged to pay anyway. Apple further states that because it provided evidence in antitrust investigations against Qualcomm in the U.S. and Korea, Qualcomm, as retribution, withheld \$1 billion that it owed to Apple. Apple now wants damages for having been overcharged billions of dollars, enjoin Qualcomm from engaging in further violations of the law and declaratory relief holding that Apple does not infringe on a number of patents owned by Qualcomm. Apple also asks the court to determine the

proper FRAND rates.

Qualcomm countered by calling Apple's allegations "baseless" and accusing its opponent of encouraging the regulatory "attacks" on Qualcomm. Also the antitrust claims are driven by commercial disputes and Qualcomm will continue to defend its business model.

Furthermore, Qualcomm learned in January 2017 that an Apple subsidiary filed two complaints against Qualcomm in the Chinese intellectual property court. The first complaint regards inter alia violations of Chinese anti-monopoly law by offering excessive royalty terms on patents and chipsets whereas the second complaint regards a refusal to provide to Apple a royalty offer for cellular standard essential patents consistent with FRAND terms.

In April 2017 Qualcomm filed an answer and counterclaims in California federal court. In its filing Qualcomm detailed the value of the technologies it has invented and alleged that Apple failed to engage in good faith negotiations for licensing 3G and 4G essential patents on FRAND terms. The filing further outlines that Apple allegedly breached and mischaracterized both agreements and negotiations. Apple further encouraged regulatory attacks in various jurisdictions and did not utilize the full performance of Qualcomm's modern chips in the iPhone 7. Apple allegedly also misrepresented the disparity in performance between iPhones using competitor-supplied modems and Qualcomm modems. Qualcomm was even threatened by Apple to prevent it from making any public comparisons about the

superior performance of iPhones powered by Qualcomm.

Also in April 2017 Apple published a written statement stating that it has chosen to withhold patent royalties owed to Qualcomm by its contract manufacturers because over the course of the last five years Qualcomm has refused to negotiate fair terms.

It remains to be seen how the proceedings in this case continue.

Antitrust

European Union

Dow/DuPont Merger Cleared by EU Commission

By Maria E. Sturm

On March 27, 2017 the EU Commission cleared the [merger](#) of two U.S. chemical companies – The Dow Chemical Company (Dow) and E.I. du Pont de Nemours and Company (DuPont) according to the EU Merger Regulation. The Commission opened the investigation already in [August 2016](#). The reason for the merger being cleared only now, were strong concerns of the EU Commission, which is the highest antitrust regulating authority in the EU. The EU Commission has the competence and duty to control mergers that exceed the thresholds laid down in Article 1 of the [Council Regulation \(EC\) No 139/2004 on the control of concentrations between undertakings \(EU Merger Regulation\)](#). The merger creates the largest crop protection and seed company in an already highly concentrated market. The field of business of Dow and DuPont is particularly sensitive, as farmers strongly depend on seeds and crop protection at affordable prices.

There were three main issues of concern: The EU Commission expected (1) higher prices, (2) less choice for consumers and

(3) substantially less innovation.

Both companies operate in two areas: pesticides and petrochemical products.

Pesticides

Concerns:

Pesticides comprise herbicides, insecticides and fungicides. Due to the very **high market share** of Dow and DuPont, after their merger hardly any competitors would be left on the market. This development would most probably lead to higher prices and less choice for consumers. Furthermore, the merger would have detrimental effects on the **innovation** efforts in the pesticide branch. Globally, only five enterprises (BASF, Bayer, Syngenta, Dow and DuPont) participate in the research and development activity with regard to pesticides, because only those enterprises have the capacity to do large scale research on all three fields of pesticides. Other competitors in this area have no or only very limited research and development capacities and therefore cannot trigger innovation activity on the market. However, innovation is essential to develop pesticides that are less nocuous, more effective or can help when vermin have developed resistances.

Solutions:

Dow and DuPont agreed on selling the worldwide herbicide and insecticide production of DuPont, the worldwide research and development capacities of

DuPont and the exclusive license for a DuPont fungicide for rice crop for the European market.

Petrochemical products

Concerns:

Dow and DuPont are both in the acid copolymers business. Their merger would reduce the number of competitors in this business from four to three. Furthermore, DuPont has a dominant position in the ionomers business.

Solutions:

Dow sells both its production facilities in Spain and the United States. Furthermore, it terminates its contract with a ionomer provider from whom Dow received the ionomers it sold to its customers.

Dow and DuPont were able to clear initial concerns of the EU Commission about nematicides and seeds. These areas are therefore not affected by the merger decision.

Further mergers are planned in the agro-chemical sector. However, due to the "priority rule" the commission assesses every merger in the order of its notification according to the current market situation. It will be interesting to see, how later mergers will be affected by the Dow/DuPont decision.

Intellectual property

United States

Samsung Wants New Trial in the Wake of the Recent Supreme Court Decision on Design Patents

Nicole Daniel

In April 2017 Samsung filed an opening brief asking to vacate a design-patent judgment for \$399 million and order a new trial on damages regarding their eleven smartphone models which have been found to infringe an Apple design patent.

According to Samsung the recent Supreme Court's decision on design patents invalidates the legal premise on which the damages were tried in the earlier trials and further eliminates the legal basis for the \$399 million award amounting to the total profit Samsung made on its phones.

This development comes after an unanimous Supreme Court decision made in December 2016. The Supreme Court ruled that the term "article of manufacture" in Section 289 of the Patent Act could apply to a component of a finished and not just the whole product.

Section 289 entitles a design patent holder to all profits derived from the "article of manufacture" that infringed the patent. The

Supreme Court remanded a \$399 million judgment against Samsung on three iPhone design patents back to the U.S. Court of Appeals for the Federal Circuit. According to the Supreme Court ruling interpreting Section 289 to only cover the end product sold to a consumer is a too narrow meaning of the phrase. "Article of manufacture" is broad enough to cover the final product as well as a component of that product. This decision follows the oral arguments held in October 2016 where Apple, Samsung and the U.S. Department of Justice (participated as amicus in the case) agreed that it was incorrect by the Federal Circuit to hold that the term "article of manufacture" always has to be synonymous with the final product sold to the consumers.

From the ruling it follows that a single component of a device featuring multiple components, such as a smartphone, could be the basis for determining damages for infringing a design patent.

Samsung therefore argued that this Supreme Court ruling requires vacating the \$399 million award and scheduling another trial for damages. In February 2017, the U.S. Court of Appeals remanded the case back to U.S. District Judge Lucy Koh, saying that the district court was in the best position to decide on the arguments of Apple and Samsung over the need for further trials.

In contrast to Samsung, Apple is of the opinion that no additional proceedings are necessary after the Supreme Court ruling. Apple argues that the Supreme Court's decision did not identify any problems with

the jury verdicts in 2012 and 2013 in the patent trials. Also Samsung never presented evidence or even argued that “article of manufacture” applied to anything other than the entire phone. Accordingly, no further proceedings are necessary as the ruling did not serve to question any aspect of the Court’s prior decisions. Further, the Supreme Court merely resolved a narrow question on the interpretation of the term “article of manufacture” which arose out of the Federal Circuit’s reading of this term in its original opinion. The Federal Circuit had interpreted the term in question as relating only to a finished product.

It also has to be noted that in March 2016 Judge Koh decided to delay a scheduled third trial in the case dealing with damages for Samsung’s smartphones found to infringe Apple’s trade dress. This decision by Judge Koh was made after the Supreme Court agreed to hear Samsung’s appeal on design patents. Therefore, a third trial in this case will take place anyway. For now the stay remains in place.

Judge Koh now scheduled a hearing for June 15 on the need for a further trial in the wake of the Supreme Court ruling and ordered a case management conference for July 5.

Intellectual property

United States

Ninth Circuit: Using a Trademark as a Verb Is Not Automatically Generic Use

By Marie-Andrée Weiss

The United States Court of Appeals for the Ninth Circuit [ruled](#) on 16 May 2016 that 'google' is not a generic term for a search engine, and thus the famous California company did not suffer the costly indignity of having its trademarks cancelled through genericide. The case is *Elliott v. Google*, 2:12-cv-01072.

Plaintiffs had registered [763 domain names](#), each incorporating the word 'google' along with the name of another brand ([googledisney.com](#)), of a person ([googlebarackobama.net](#)) or a place ([googlemexicocity.com](#)). This business plan did not fare well with the famous search engine company, which [successfully](#) asked the National Arbitration Forum to transfer all these domain names to Google.

Plaintiffs then [filed a suit](#) in the United States District of Arizona claiming that 'Google' "is, or has become, a generic term universally used to describe the action of internet searching with any search engines" (Complaint, p. 2), and asked the

court to cancel Google's trademarks. Indeed, the Lanham Act, [15 U.S.C. § 1064\(3\)](#), provides the right to petition for the cancellation of mark if it "becomes the generic name for the goods or services, or a portion thereof, for which it is registered."

The parties filed cross-motions for summary judgment on the issue of whether the GOOGLE marks were generic: while Plaintiffs claimed that Google is a generic term because a majority of the public use it as a verb, Google argued that use of a trademark as a verb use is not automatically generic use. On 11 September 2014, the United States District of Arizona [granted](#) summary judgment for Google. Plaintiffs appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed.

The Google trademarks

As mentioned in the original complaint, 'Google' comes from the term '[googol](#),' meaning a 1 followed by 100 zeros. Google holds a [trademark registration for GOOGLE in class 9](#) for "computer hardware; computer software for creating indexes of information, indexes of web sites and indexes of other information resources" and [another one in class 38](#) for "[p]roviding electronic mail and workgroup communications services over computer networks; providing multiple user access to proprietary collections of information by means of global computer information networks."

Generic trademark and genericide

Needless to say, if a mark becomes generic, it is quite costly for the company that invested a lot in developing goodwill towards its brand. A generic term cannot serve as a trademark because it cannot serve as identifying the source of a product or service. Several famous marks, among them [aspirin](#), [cellophane](#), and [thermos](#), fell victim of their success and became generic because they were used by the general public to designate the genus of their product, not just a particular brand. This is 'genericide'.

The primary significance test

Plaintiffs had the burden of proving the genericide since they applied for the cancellation of the GOOGLE trademarks, and a registered trademark is presumed to be valid. They argued on appeal that the district court had misapplied the primary significance test, which was coined by the Supreme Court in its 1938 [Kellog Co. v. National Biscuit Co.](#) case: a mark is not generic if "the primary significance of the term in the minds of the consuming public is not the product but the producer." As noted by the Ninth Circuit, quoting [Ty Inc. v. Sofbelly's Inc.](#), "a trademark only becomes generic when the "primary significance of the registered mark to the relevant public" is as the name for a particular type of good or service irrespective of its source."

Plaintiffs argued that the district court had framed the inquiry as to whether the

primary significance of 'google' to the consuming public is a generic name for search engines, whereas it should have inquired whether the public primarily uses 'google' as a verb. The Ninth Circuit disagreed with this argument for two reasons: genericide always relates to a particular good or service and using a trademark as a verb is not automatically generic use.

Genericide always relates to a particular good or service

For the Ninth Circuit, the District Court "properly recognized the necessary and inherent link between a claim of genericide and a particular good or service" (p. 9). The Court reasoned that failing to consider this would prevent some arbitrary marks to be protectable, giving as example IVORY which is arbitrary as applied to soaps, but would not be so for product made from the tusks of elephants.

The Ninth Circuit found that Plaintiffs' "evidence was "largely inapposite to the relevant inquiry under the primary significance test because [the Plaintiffs] ignor[e] the fact that a claim of genericide must relate to a particular type of goods or service" (p. 13).

Using a trademark as a verb is not automatically generic use

Also, "verb use does not automatically constitute generic use" (p. 10). Plaintiffs had argued that a word can only be used

as a trademark if it is used as an adjective. The Ninth Circuit disagreed, noting that it had found in [Coca-Cola Co. v. Overland, Inc.](#) that the mere fact that customers ordered “a coke” did not prove what they were thinking, a mark or a cola beverage, and more evidence was required about the customer’s inner thought process. Therefore, the use of a trademark as a noun may or may not be using it as a trademark (p. 11).

The primary significance test directed plaintiffs to provide evidence that that the primary significance of the GOOGLE trademarks is a general name for search engines, not a trademark identifying a particular search engine. The Ninth Circuit agreed with the district court which had found that, while the verb ‘google’ is indeed used to refer to searching on the internet, regardless of the search engine used, this fact alone cannot support a jury finding of genericide under the primary significance test, as it does not prove “how the public primarily understands the word itself, irrespective of its grammatical function, with regard to internet search engines” (p. 14).

How to prove that a mark has become generic

Plaintiffs also argued on appeal that the district court impermissibly weighted the evidence presented by Plaintiffs when granting summary judgment to Google. The Ninth Circuit disagreed, because, while Plaintiffs’ had presented admissible evidence that the majority of the public

used ‘google’ as a verb, this was not enough to survive summary judgment, as it cannot alone prove genericide.

Plaintiffs had presented three surveys as evidence. Two were excluded by the district court because they had been conducted by Plaintiffs’ counsel, and “a valid survey design typically requires graduate training or professional experience in survey research” (p. 15). The third survey was a “Thermos survey,” that is a survey using open-ended questions, in our case, asking respondents how they would ask a friend to search something on the internet. The majority answered by using ‘google’ as a verb, and the survey was admitted as evidence that a majority of the public uses google as a verb meaning searching the internet.

Plaintiffs also gave examples of alleged generic use of ‘google’ by media and consumers, but they failed to convince both the district court and the Ninth Circuit, because Plaintiffs did not provide evidence that the use was indeed generic in the mind of the media and the consumers.

Plaintiffs had also offered expert testimony by three experts who all were of the opinion that ‘google’ is generic when used as a verb. However, this finding alone is not enough to prove genericide. Plaintiffs’ dictionary evidence did not prove either that ‘google’ is a generic name for internet search engines, only proving it is generic when used as a verb.

Plaintiffs also tried to prove that Google itself was using ‘google’ in a generic sense, presenting as evidence an email from

Google cofounder Larry Page encouraging its recipients to “keep googling!” Generic use of a mark by its holder can support a finding a genericide, but the email was found by the court to be yet another example of the use of ‘google’ as a verb and did not prove that Larry Page had a particular search engine in mind (p. 19).

Finally, Plaintiff claimed that there was no efficient alternative for ‘google’ as a name for the act of searching the internet, but the Ninth Circuit drily noted that Google’s competitors do not use ‘google’ to refer to their own services (p.20).

‘Google’ may have become a verb, but this alone does not prove that GOOGLE is a generic mark. Keep googling.

Intellectual property

United States

Athletes' Right of Publicity Claim Preempted by Copyright Act

By Marie-Andrée Weiss

The U.S. Court of Appeals for the Ninth Circuit [ruled](#) on 5 April 2017 that the Copyright Act preempted the California right of publicity claims of Plaintiffs, former college athletes whose photographs are part of the National Collegiate Athletic Association (NCAA) library of images license online by Defendant. The case is *Maloney v. T3Media*, 15-55630.

Plaintiffs played on the Catholic University basketball team from 1997 to 2001, which won the 2001 Men's Division III NCAA championship game. Defendant T3Media entered into an agreement with NCAA in 2012 to store, host and license the images in the NCAA photo library. The [NCAA runs 90 championships in 24 sports across 3 divisions](#), and its library contains thousands of photographs of championship games, including some taken during the 2001 Men's Division III championship game in which Plaintiffs participated.

T3Media sold non-exclusive licenses online for two years that allowed users to download copies of the NCAA photographs

for personal use. Plaintiffs contended that such action was a violation of their California statutory right of publicity, California Civil Code § 3344, California common law right of publicity, and a violation of California Unfair Competition Law.

They filed a putative class action suit in June 2014 in the U.S. Central District Court of California on behalf of current and former NCAA athletes whose names, images and likeness had been used without their consent by Defendant for purpose of advertising, selling, or soliciting the purchase of these photographs.

The two-steps of an anti-SLAPP analysis

Defendant moved for a special motion to strike under [California anti-SLAPP statute](#), Cal. Code Civ. Proc. § 425.16, which aims to prevent strategic lawsuits against public participation (SLAPP). Courts follow two-steps when assessing an anti-SLAPP motion to strike: first the moving defendant must show that plaintiff's suit arises from an act in furtherance of defendant's right to free speech, as protected by the First Amendment. The second part of the assessment shifts the burden to plaintiff who must demonstrate a probability of prevailing on any of her claims.

T3Media had argued that the photographs at stake, and their captions, had been published in a public forum in connection with a matter of public interest. The district court [agreed](#), finding that the photographs

“fell within the realm of an issue of public interest” (District Court, at 1134).

This shifted the burden to Plaintiffs to demonstrate a reasonable probability of prevailing on any of their claims. Defendant claimed three affirmative defenses: (1) Plaintiffs’ claims were preempted by federal copyright law, (2) were barred under the First Amendment, and (3) California right of publicity law exempts from liability use of likeness in connection with any news, public affairs, or sports broadcast or account.

The district court did not address the last two defenses as it found that Plaintiffs’ claims were preempted by the Copyright Act, because Plaintiffs asserted rights that fell within the subject matter of copyright, and granted Defendant special motion to strike. Plaintiffs appealed to the Ninth Circuit, which affirmed.

As Plaintiffs had conceded that their suit arose from acts in furtherance of T3Media’s right to free speech, the Ninth Circuit only examined whether Plaintiffs indeed had demonstrated a reasonable probability of prevailing on their claims, and found they had not met that burden, as the Copyright Act preempted their claims.

The copyright preemption two-part test

[Section 301 of the Copyright Act](#) provides that common law or statutory state laws are preempted by rights “equivalent to any of the exclusive rights within the general scope of copyright.” Courts in the Ninth Circuit use a two-part test to determine

whether a state law claim is preempted the Copyright Act: the courts first decide if the subject matter of the state law is within the subject matter of copyright, and then determine if the rights asserted under state law are equivalent to the exclusive rights of the copyright holders, as determined by [Section 106 of the Copyright Act](#). Parties only argued about the first part of the test.

The right of publicity claim is not preempted if its basis is the use of a likeness

Plaintiffs argued that their right of publicity claim was not preempted by the Copyright Act because publicity right claims protect the persona of an individual, which cannot be fixed in a tangible medium of expression (p. 12). They relied on [Downing v. Abercrombie & Fitch](#), where the Ninth Circuit held that “the content of the protected right must fall within the subject matter of copyright” for the Copyright Act to preempt the state claim (*Downing* at 1003). Plaintiffs reasoned that their likeness is not with the subject matter of copyright and thus their state claim cannot be preempted by the Copyright Act.

Defendants argued that Plaintiffs’ likeness had been captured in an artistic work and had not been used on merchandise or in advertising. Indeed, the Ninth Circuit noted that “the “core” of the publicity right is the right not to have one’s identity used in advertising” (p. 13). The court of appeals concluded “that a publicity-right claim is not preempted when it targets non-consensual use of one’s name or likeness on

merchandise or in advertising. But when a likeness had been captured in a copyrighted artistic visual work and the work itself is being distributed for personal use, a publicity-right claim interferes with the exclusive rights of the copyright holder, as is preempted by section 301 of the Copyright Act“ (p. 13)(emphasis of the Court).

The Ninth Circuit distinguished its *Downing* case from the case at stake, as the right of publicity claim in *Downing* is not about the publication of the photograph, but its use: Abercrombie used the surfer’s likeness in the catalog and had also sold reproductions of the tee-shirts worn by them in the photograph. The Ninth Circuit concluded that If the basis of the right of publicity claim is the use of a likeness in a photograph, the right of publicity claim is not preempted by copyright (p. 17).

When is a likeness misused in a work protected by copyright?

Therefore, the “crux of the issue” was whether the basis of the publicity-right claim was indeed to defend Plaintiff against a misuse of their likeness by Defendant. The court reasoned that Section 301 does not distinguish among different types of work protected by copyright, and that the pertinent issue was the way the likeness was used, not the type of the copyrighted work. In *Downing*, the basis of the publicity-right claim was not the publication of the photograph, but its use to advertise Abercrombie’s products and the creation of tee-shirts similar to those worn by Plaintiffs

in the photograph, which were commercial exploitation of Plaintiff’s likeness (p. 19).

The Ninth Circuit noted further that it held in 2006, in [Laws v. Sony Music Entertainment, Inc.](#), that “federal copyright law preempts a claim alleging misappropriation of one’s voice when the entirety of the allegedly misappropriated vocal performance is contained within a copyrighted medium” (*Laws* at 1141). The Ninth Circuit also cited its [Jules Jordan Video, Inc. v. 144942 Canada Inc.](#) 2010 case, where it ruled that federal copyright law preempts a claim alleging misappropriation of one’s name and persona based entirely on the misappropriation of DVDs of movies in which plaintiff performed and of which he owned the copyright. Plaintiff had objected to the use of his likeness on the covers of counterfeit DVDs, which the Ninth Circuit found to be “still shots” of the performance protected by copyright. The Ninth Circuit reasoned that Plaintiff claim was a copyright claim, not a claim that his likeness has been used on an unrelated product or in advertising. For the Ninth Circuit, a likeness embodied in a work protected by copyright is misused if it is used on an unrelated product or in advertising.

Why did Plaintiffs’ claim fail

Plaintiffs’ attorney argued at the hearing that Defendant was selling the photographs “as poster art, as desktop backgrounds, as digital goods” ([video](#) at 11:36). This is an interesting argument, as the Ninth Circuit attaches great importance

to the type of use of the likeness. However, it is the consumers who are choosing how to use the images, within the rights provided to them by the license, not the Defendant.

The District Court explained that ruling in favor of Plaintiffs “would destroy copyright holders' ability to exercise their exclusive rights under the Copyright Act, effectively giving the subject of every photograph veto power over the artist's rights under the Copyright Act and destroying the exclusivity of rights the Copyright Act aims to protect” (District Court at 1138).

Plaintiff's attorney recognized during the hearing that non-commercial use of the photos would be acceptable ([video](#) at 13:36). When asked by the judges to give an example of non-commercial use, he suggested editorial use, in a student newspaper or a national newspaper. While the Court did thus not address the issue of free speech, several media organizations filed an [amici curiae brief](#) in support of Defendant, to ensure that “the right of publicity is not transformed into a right of censorship—one that can be used to prevent the dissemination of matters of public importance” (amici curiae brief p. 9).

Intellectual property

European Union

Streaming by Using a Multimedia Player: ECJ Rules in Favor of Copyright Holders

By Martin Miernicki

Following the opinion of the [Advocate General](#), the ECJ gave its opinion in [Stichting Brein v. Wullems \(C-527/15\)](#) on 26 April 2017.¹ The court had to deal with a multimedia player (“filmspeler”), a device which allowed end users to easily stream content from online sources. Pre-installed add-ons – freely available on the internet – to the “filmspeler” contained links which connected to third-party websites which in turn made available protected works without the right holders’ consent; the multimedia player was specifically marketed for this function and sold for profit.

Background

Articles 2(a) and 3(1) of the so-called [Copyright Directive](#) reserve the exclusive rights to reproduction as well as communication to the public in respect of their works for authors. Article 5(1) exempts certain temporary acts of reproduction from the scope of the authors’

exclusive rights, subject to the “three-step test” contained in article 5(5). *Stichting Brein v. Wullems* marks a further important addition to the case law involving the construction of these provisions, especially in the online environment. Relevant prior judgements include *Nils Svensson v. Retriever Sverige (C-466/12)*, *C More Entertainment v. Linus Sandberg (C-279/13)*, *BestWater International v. Michael Mebes (C-348/13)*, and *GS Media v. Sanoma Media Netherlands (C-160/15)*² (on **hyperlinks**) as well as *Infopaq Int’l v. Danske Dagblades Forening (C-5/08*, “Infopaq I”), *Football Association Premier League v. Media Protection Services (C-403/08 & C-429/08)*, *Infopaq Int’l v. Danske Dagblades Forening (C-302/10*, “Infopaq II”), and *Public Relations Consultants Ass’n v. Newspaper Licensing Agency (C-360/13)* (on **temporary reproductions**).

The questions referred

The questions referred to the ECJ by the national (Dutch) court related to the perspective of both commercial and end users. It asked, first, whether the sale of a multimedia player as described above constituted a communication to the public within the meaning of the Copyright Directive’s article 3(1); and, second, whether the streaming of unauthorized content by end users with the aid of such multimedia player was covered by article 5(1) and compatible with article 5(5) of the directive.

¹ See already Transatlantic Antitrust and IPR Developments [Issue 1-2016](#).

² See for more details Transatlantic Antitrust and IPR Developments [Issue 2-2016](#) and [Issue 3-4/2016](#).

Selling the multimedia player constitutes a communication to the public

In reference to its prior case law, the court held that the defendant's conduct constituted an "act of communication" (para 42), directed to a "public" (para 46). Moreover, it reaffirmed its concept of the "new public". In line with its ruling in *GS Media*, the court attributed significant importance to the fact that the multimedia player was sold for profit and with the full knowledge that the links provided connected to works made available without the consent of the right holders (para 49 et seq).

Streaming by using the media player is not exempted from the scope of the reproduction right

The actual question was whether the acts at hand carried out by end users could be considered "lawful use" within the meaning of the Copyright Directive. In this respect, the court distinguished the present case from its prior decisions and ruled that the temporary reproductions made while streaming unauthorized content through the media player did not satisfy the conditions set forth by article 5(1). Again, the court emphasized that this function was the "main attraction" of the multimedia player (para 69). Finally, the court noted that the streaming would "adversely affect the normal exploitation" of the copyrighted content and thus conflict with the "three-step test" (para 70).

What does the judgement mean?

The first of part of the judgement is line with the prior case law. As pointed out by the Advocate General, exempting the sale of a media player like that at issue would be too "reductionist" (para 49). Indeed, there is no significant difference between posting a hyperlink on a website and integrating that link in a multimedia player (para 51). However, some questions concerning the court's concept of the "new public" remain. It is not clear, for instance, under what circumstances a person "ought to know" that a hyperlink provides access to infringing content; it is even more difficult to define the scope of the "for profit" criterion. In both *GS Media* and the present case, the situation was rather clear; yet, demarcation problems might arise, especially, if the communication does not occur as a core part of the activities carried out for profit, but is of a rather complementary nature (e.g., a lawyer posting hyperlinks on his or her law firm's blog). Nevertheless, it seems that the (subjective) approach taken by the court in both cases towards the communication to the public of protected works strikes a reasonable balance between the protection of right holders and the interests of internet users.

This also applies, in principle, to the ECJ's ruling in respect of streaming by end users. In this context, it should be noted that the court merely gave its opinion on article 5(1). Other exemptions or limitations may apply for the benefit of consumers, especially the "private copying exemption" contained in article 5(2)(b) of the Copyright

Directive (cf. para 70). Furthermore, as the GA noted, the question whether an end user knew (or should have known) that he or she was streaming illegal content can be taken into account when dealing with personal liability (para 71). Lastly, although the decision will clearly have strong implications for the streaming of copyrighted works in general, the ECJ limited its decision to the streaming of protected works via the “filmspeler”, so that the possibility of flexible approaches in future cases is not excluded.

Intellectual property

European Union

CJEU: EU-Directive 2001/29/EC Does Not Permit National Legislation to Provide a Special Defense to Copyright Infringement for Retransmission of Television Broadcasts via the Internet

By Katharina Erler

The Fourth Chamber of the Court of Justice of the European Union (CJEU) ruled on 1 of March 2017 that Article 9 of [EU InfoSoc Directive \(2001/29/EC\)](#) does not cover national legislation, which provides a special defense to copyright infringement by retransmission of works broadcast on television channels by cable or via the internet. In particular, Article 9 must be interpreted as not permitting national legislation which allows the immediate retransmission of free-to-air broadcasts by cable and via the internet, if it is done within the area of the initial broadcast. The case is [ITV Broadcasting Limited v. TVCatchup Limited, C-275/15](#).

The appellants in the main proceedings,

commercial television broadcasters ITV, Channel 4 and Channel 5, own copyrights under national law in their television broadcasts and included films. TVCatchup (TVC) offered an internet television broadcasting service, permitting its users to receive streams of TV shows, including those transmitted by ITV, Channel 4, and 5.

It is important to note that the CJEU has dealt with this case before: In its judgement of 7 March 2013, [ITV Broadcasting and Others \(C-607/11\)](#), the CJEU held that the retransmission of protected works and broadcasts by means of an internet stream, such as the service of TVCatchup, constitutes a communication to the public under Article 3 of Directive 2001/29/EC (InfoSoc Directive) and therefore must be authorized by the authors concerned.

The High Court of Justice (England & Wales) followed this judgement and found that TVC had infringed the copyright of television broadcasters. It, however, found that TVCatchup could rely on a defense under [Section 73 \(2\) \(b\) and \(3\) of the United Kingdom's Copyright, Designs and Patent Act \(CDPA\)](#).

The broadcasters filed an appeal against this High Court decision. The Court of Appeal (England & Wales) took the view that the national defense provisions in Section 73 (2) (b) and (3) must be interpreted in light of Article 9 of Directive 2001/29 and consequently referred a number of questions concerning the interpretation of Article 9 to the CJEU for a preliminary ruling.

Legal context

Article 9 (“Continued application of other legal provisions”) of Directive 2001/29/EC of the European Parliament and of the Council on the harmonization of certain aspects of copyright and related rights in the information society (InfoSoc Directive) states that the Directive shall be without prejudice to provisions concerning in particular [...] access to cable of broadcasting services [...].

Article 1 of the InfoSoc Directive (2001/29/EC) with regard to the scope of the Directive stipulates that this Directive shall leave intact and shall in no way affect existing Community provisions relating to [...] (c) copyright and related rights applicable to broadcasting of programs by satellite and cable retransmission.

Section 73 (2) (b) and (3) of the United Kingdom’s Copyright, Designs and Patent Act (CDPA), which implemented Directive 2001/29/EC, that copyright is not infringed “if and to the extent that the broadcast is made for reception in the area in which it is re-transmitted by cable and forms part of a qualifying service”.

Consideration of the questions referred to the CJEU

Of five questions referred to the CJEU by the Court of Appeal, the CJEU explicitly only responded to one, which referred to the phrase “access to cable of broadcasting services” under Article 9 of Directive

2001/29/EC, and asked whether it applies to (1) national provisions which require cable networks to retransmit certain broadcasts or (2) national provisions which permit the retransmission by cable of broadcasts (a) where the retransmissions are simultaneous and limited to areas in which the broadcasts were made for reception and/or (b) where the retransmissions are of broadcasts on channels which are subject to certain public service obligations.

In essence, the CJEU answered the question whether Article 9 of Directive 2001/29/EC might be interpreted as permitting national legislation to provide a separate general defense to retransmission of broadcasting services via cable—including the internet—without the authors consent.

By emphasizing that the concept of “access to cable broadcasting services” must be given an autonomous and uniform interpretation throughout the European Union, the CJEU—in line with [the opinion of the Advocate General from 8 September 2016](#)—found that the term “access to cable” is different from that of “retransmission of cable” under Article 1 (c), because only the latter notion designates the transmission of audio-visual content. Therefore, taking into account the wording, Article concerns not the transmission of content and the public access to this content, but rather the access to a network.

Setting Article 9 in the context of the whole Directive, the CJEU clearly states that the exclusion of EU provisions on “cable retransmission” from the scope of Directive

2001/29/EC, in this instance, refers to [EU Directive 93/83 concerning copyrights applicable to satellite broadcasting and cable retransmission](#). Since, however, the case at hand concerns the retransmission within one Member State, the provisions of Directive 93/83, which solely apply to cross-border retransmissions, are irrelevant.

Highlighting that the principal objective of the InfoSoc Directive (2001/29/EC) is to establish a high level of protection for authors, the CJEU referred to its earlier ruling from the previous referral by the UK High Court in the same case (ITV Broadcasting and Others, C-607/11). As ruled in that decision, the retransmission by means of an internet stream, such as the one at issue, constitutes a “communication to the public” under Article 3 (1) of Directive 2001/29/EC and, therefore, results in copyright infringement unless it falls within the scope of Article 5, which sets out an exhaustive list of exceptions and limitations to the right of communication to the public. In the view of the CJEU, it is common ground that the retransmission at issue does not fall within the scope of any of the exceptions and limitations set out in Article 5 of Directive 2001/29/EC.

Most importantly, the CJEU ruled – referring to the opinion of the Advocate General from 8 September 2016 – that Article 9 of Directive 2001/29/EC may not be interpreted to mean that it independently permits exceptions to the right of communication to the public in Article 3. The objective pursued by Article 9 is, indeed, to maintain the effect of provisions in areas other than the area harmonized in

Directive 2001/29/EC. Keeping the general objective of the Directive, especially the high level protection of authors and the exhaustive nature of Article 5 in mind, the CJEU found that Article 9 may not be interpreted as covering retransmissions.

The Court noted furthermore, that the InfoSoc Directive contains no legal basis that would justify affording less protection to television channels subject to public service obligations.

As a result of the CJEU’s decision, the national exception to copyright under Section 73 of UK’s CDPA with regard to retransmissions shall be considered as not compatible with the EU legal framework. This decision seems to be consistent with the objective of the InfoSoc Directive, which is to set harmonized rules on copyrights and especially to ensure a high level of protection for the authors.

It is worth mentioning that the question of whether national rules can regulate retransmission and introduce exceptions of copyright was again raised in a case, decided by the CJEU shortly thereafter. On 16 March 2017, in [AKM v. Zürsnet \(C-138/16\)](#), the CJEU, in contrast to the earlier case *ITV Broadcasting v. Others* (C-607/11), found that the transmission of television and radio broadcasts by a cable network installation does not constitute a communication to a new public under Article 3 of the InfoSoc Directive. In that Case, the CJEU held that due to the fact that the persons who receive the transmission of the protected works have been taken into account by the rightsholders when they granted the

original authorization for the national broadcaster, the transmission does not infringe copyright under the InfoSoc Directive. The CJEU did not take into account its broad interpretation of “communication to the public” as referred to in its earlier decision *ITV Broadcasting and Others* (C-607/11). This decision, however, might cause confusion as to the requirements of “communication to the public” in Article 3 of the InfoSoc Directive and the question of whether national legislation may introduce exceptions of copyright for retransmissions of broadcasts.

Other developments

European Union

Elite Taxi vs UBER – Opinion of the Advocate General on UBER’s Activity in Spain

By Maria E. Sturm

On 11 May 2017, the Advocate General Szpunar, issued his opinion on the case “Asociación Profesional Elite Taxi vs Uber Systems Spain SL” ([C – 434/15](#)) which gives some interesting insights in UBER’s business activity in Spain and the EU.

The role of the Advocate General

According to Art. 252 [TFEU](#), eight Advocate-Generals assist the Court of Justice. They are impartial and independent. In cases which require their involvement according to the statute of the Court of Justice, they issue a reasoned submission. Their arguments prepare the Court’s decision. And while the Court is not bound, it still often follows them.

Szpunar’s Opinion

UBER and its completely new business model raise a lot of legal questions. Case

C – 434/15 offers the ECJ the possibility, to answer a least a few of them for the European Union. As the case is a preliminary ruling according to Art. 267 TFEU, the ECJ can only answer the questions posed by the Commercial Court No 3 of Barcelona, Spain. Therefore, the advocate-general does not reason e.g. on antitrust or labor law issues.

The questions were (summarized):

1. What kind of service does UBER offer: a transport service, an electronic intermediary service or an information society service as defined in Art. 1(2) of Directive 98/34?
2. If it is an information society service, does it profit from the freedom of services according to Art. 56 TFEU and Directives [2006/123](#) and [2000/31](#)?
3. Does the Spanish Law on Unfair competition infringe the freedom of establishment?
4. Are the requirements of authorization or license valid measures to regulate the freedom to provide electronic intermediary services?

First, the Advocate-General explains which kind of service UBER offers. This is important as the type of service affects the Member State’s competences to regulate it. Szpunar starts with the definition of the term “information society service” which requires three criteria: it must be provided for remuneration, upon individual request and by electronic means. While the first

two do not pose any problems, the third one needs further clarification in this case. Of course, UBER as a smartphone application works electronically. However, the actual ride the customer receives, is not electronic. The service does not have to be completely electronic to fulfill the criterion of Art. 1(2) of [Directive 98/34](#) but if it is a composite service, one needs to examine where the emphasis lies. Szpunar bases his argument on the unity of the electronic and the non-electronic part. If both can be offered independently, an information society service can be confirmed for the electronic part. As example, he mentions online platforms for booking hotels: the consumer can use the platform to compare prices and book the hotel. However, she could also book the hotel directly without using the platform. Thus, the electronic service of the platform and the analog product of the hotel room are independent and the service the platform offers is an information society service. With UBER, in contrary, no independent service exists. UBER only acts as intermediary for a service which itself creates. It is not a platform that just combines driving services offered by different companies, but the platform makes the service. Furthermore, according to Szpunar, UBER exercises decisive influence over the conditions under which the service is provided. It decides who can be a driver, how drivers must behave, and conducts quality control via its rating function. This means, it offers not mainly an electronic, but a transport service.

The result of Szpunar's argument is:

1. UBER is no information society service.

Therefore, Art. 56 TFEU and Directives 2006/123 and 2000/31 are not applicable.

2. Questions three and four of the Commercial Court No 3 of Barcelona do not need to be answered as they only refer to the freedoms of service and establishment which do not protect UBER.

3. UBER offers a transport service according to Art. 90-100 TFEU. This means, it can be submitted to authorization or license requirements by the Member States as any other transport service, too.

Prospects

Now we have to wait, if the ECJ follows Szpunar's arguments which seems quite probable. However, the next question is: does the current legal framework – on the local, state and European level – fit to the sharing economy? The European Commission already addressed the problem in its 2015 communication "[A Digital Single Market Strategy for Europe](#)" where it announced a comprehensive assessment of the role of platforms, including the sharing economy. In 2016, the EU Commission issued a [communication on the European agenda for the collaborative economy](#). This communication provides legal guidance to public authorities, market operators and citizens on how to apply existing EU law on legal problems emerging from the sharing economy. However, these guidelines are not binding and the Commission announces further investigation and legal action in this field.

Other developments

European Union

Big Data: Italian Authorities Launch Inquiries on Competition, Consumer Protection and Data Privacy Issues

By Gabriele Accardo

On 30 May 2017, the Italian Competition Authority, the Italian Data Protection Authority and the Communications Authority opened a [joint inquiry](#) on “Big Data”.

Sector Inquiry

The joint sector inquiry by the Italian Competition Authority, the Italian Data Protection Authority and the Communications Authority will focus, respectively, on [potential competition and consumer protection concerns](#), [data privacy](#), as well as on [information pluralism](#) within the digital ecosystem.

First, based on the assumption that the collection of information and its use through complex algorithms have a strategic role for firms, especially for those

offering online platforms, which use the collected data to create new forms of value, the inquiry will thus assess whether, and under which circumstances, access to “Big Data” might constitute a barrier to entry, or in any case facilitate anticompetitive practices that could possibly hinder development and technological progress.

Secondly, the use of such large amounts of information may create specific risks for users’ privacy given that new technologies and new forms of data analysis in many cases allow companies to “re-identify” an individual through apparently anonymous data, and may even allow them to carry out new forms of discrimination, and, more generally, to possibly restrict freedom.

A further risk for the digital ecosystem is linked to how online news is now commonly accessed. In fact, digital intermediaries employ users’ information forms of profiling and the definition of algorithms, which in turn, are able to affect both the preservation of the net neutrality principle, and the plurality of the representations of facts and opinions.

It may be expected that while the inquiry will focus on certain specific businesses (typically platforms-related), the authorities may send requests for information to all businesses that collect and make significant use of customer/user data.

Relatedly, on 10 May 2016, French and German Competition Authorities published their [joint report](#) on competition law and Big Data. Separately, the French Competition Authority [announced](#) the launch of a full-blown sector inquiry into data-related

markets and strategies.

In recent months, data-related issues have been at the core of specific investigations by the Italian Competition Authority (against [Enel, A2A and ACEA](#) for an alleged abuse of dominance, and against [Samsung](#) and [WhatsApp](#) for unfair commercial practices), and the Italian Data Protection Authority (against [WhatsApp](#)), showing that Italian authorities are getting ready for the challenges that the data-driven economy brings.

Enel, A2A, and ACEA, ongoing investigations on alleged abuse of dominance

On 11 May 2017, following a complaint by the association of energy wholesalers, the Italian competition Authority (“ICA”) raided the business premises of [Enel, A2A and ACEA](#) in order to ascertain whether the energy operators may have abused their dominant positions in the electricity market in order to induce their respective customers (private individuals and small businesses) to switch to their market-based electricity contracts.

In particular, according to the ICA, each energy operator may have used “privileged” commercial information (e.g., contact details and invoicing data) about customers eligible for regulated electricity tariffs (so-called *Servizio di maggior tutela*), which was held in the capacity as incumbent operator(s) (at national level for Enel, and in the Milan and Rome areas for A2A and ACEA, respectively), as well as its

dedicated business infrastructure to sell its market-price electricity supply contracts to private individuals and small business customers.

Enel may have also misled consumers by stating that it would be able to guarantee a more secure energy supply than Green Network in order to win-back “former” customers, and thus induce them to choose its contracts.

The investigation is similar to the one recently [concluded](#) by the French Competition Authority against energy operator Engie, which resulted in a fine of Euro 100 Million.

Interestingly, both investigations in Italy and France raise issues similar to those addressed in September 2015 by the Belgian Competition Authority against the [Belgian National Lottery](#). The Belgian Authority held that the Belgian National Lottery used personal data acquired as a public monopoly to the market its new product *Scoore!* on the adjacent sports betting market. The Belgian Competition Authority found that such conduct constituted an abuse of dominance insofar as the information used by the infringer could not be replicated by its competitors in a timely and cost-effective manner.

Samsung – unfair commercial practices

On 25 January 2017, the Italian Competition Authority (“ICA”) levied a 3.1 Million Euro fine on [Samsung](#) in relation to two unfair commercial practices related to the marketing of its products, one of which

concerned the forced transfer of personal information for marketing purposes.

In essence, Samsung promoted the sale of its electronic products by promising prizes and bonuses (e.g. discounts, bonus on the electricity bill, and free subscription to a TV content provider) to consumers. However, contrary to what the advertising promised, consumers could not get the prize or bonus when buying the product, but could only receive it at a later stage, following a complex procedure that was not advertised, but was only made available in the Terms and Conditions and to consumers who registered on Samsung People online. Besides, consumers were repeatedly requested to provide documents over and over again.

The ICA also found the practice of making discounts conditional upon registering with the company's digital platform and giving consent to the processing of their data unfair and aggressive, insofar as consumers could not get the promised prize or bonus without giving their consent to the commercial use of their personal data, which were used by Samsung for purposes unrelated with the promotional offer of the product itself. The ICA thus found that the data requested by Samsung were irrelevant and unrelated to the specific promotion in question.

WhatsApp – unfair commercial practices and privacy issues

On 11 May 2017, the Italian Competition Authority (“ICA”) levied a 3 Million Euro fine

against [WhatsApp](#) for having illegally forced its users to accept its new Terms of Use, and ultimately to share their personal data with Facebook.

This is yet another case concerning the forced transfer of personal information for marketing purposes, which followed the same lines of the Samsung case.

Preliminarily, the ICA held that data is a form of information asset, and that an economic value can be attached to it (e.g., Facebook would in fact be able to improve its advertising activity with more data). The ICA further found that a commercial relationship exists in all instances where a business offers a “free” service to consumers in order to acquire their data.

On that premise, according the ICA, WhatsApp induced users of its WhatsApp Messenger service to believe that without granting consent to share their personal data with Facebook, they would have no longer been able to use the service, in breach of the Italian rules on unfair commercial practices. In particular, the ICA held that users were actually forced *de facto* to accept in full the new Terms of Use of WhatsApp insofar as:

- an in-app procedure for obtaining the acceptance of the new Terms of Use emphasized the need to subscribe to the new conditions within the following 30 days or lose the opportunity to use the service;
- users were not provided with adequate information on the possibility of denying consent to share with Facebook their

personal data on WhatsApp account;

- the option to share the data was pre-selected (opt-in) so that, while users could in fact have chosen not to give their assent to the data sharing and still continue to use the service, such a possibility was not readily clear and in any event users should have removed the pre-selected choice;
- finally, once the Terms of Use were accepted in full, it was extremely difficult to effectively opt-out option.

During the investigation, WhatsApp offered a set of remedies, but this offer was rejected by the ICA, based on the fact that, as a result of the methods used by WhatsApp to obtain customers' consent to transfer their data to Facebook, the practice could be characterized as overtly unfair and aggressive, and as such deserved a fine (in any case WhatsApp halted the practice of sharing data with Facebook in light of ongoing discussions with national data protection agencies in Europe).

Interestingly, while the ICA decision is based on consumer protection grounds, last year the German Federal Cartel (FCO) Bundeskartellamt launched an [investigation](#) into similar conducts by Facebook, WhatsApp's mother company, based on competition law grounds. Specifically, the investigation was based on suspicions that with its specific terms of service on the use of user data, Facebook may have abused its alleged dominant position in the market for social networks. In particular, the presence of excessive trading conditions is

the underlying theory of harm for the investigation launched by the FCO. In particular, the FCO is assessing whether Facebook's position allows it to impose contractual terms that would otherwise not be accepted by its users.

Yet, consumer, competition law, and privacy considerations appear entangled in such cases, as shown by the investigation that Italian Data Protection Authority launched against WhatsApp in parallel with the ICA.

In fact, on 27 September 2016 the [Italian Data Protection Authority](#) took issue with the changes introduced by WhatsApp, this time in its Privacy Policy, which would have allowed WhatsApp to pass on to Facebook information on WhatsApp users' accounts also for marketing purposes.

It is understood that while the investigation is still ongoing, the Italian Data Protection Authority requested WhatsApp and Facebook to provide information in order to assess the case thoroughly. In particular, the two companies were asked detailed information on:

- data categories that WhatsApp would like to make available to Facebook;
- arrangements that are in place to obtain users' consent to disclose their data;
- measures that have been taken to enable exercise of users' rights under Italy's privacy legislation, since the notice given to users on their devices would appear to only allow withdrawing consent and objecting to data disclo-

sure for a limited period.

ability to take informed and free decisions.

In addition, the Italian Data Protection Authority is seeking to clarify whether the data of WhatsApp users that do not use Facebook will be also disclosed to that company, insofar as no reference to marketing purposes was in the information notice provided initially to WhatsApp users.

Conclusion

Businesses are moving fast to figure out how to best harness the wealth of consumer's data and make good commercial use of it. Authorities around the globe are putting together their toolkits to address emerging issues in the data-driven economy.

In this cops and robbers game, it appears clear that businesses are struggling to understand which set of rules may apply to their business models, either because there are multiple laws that could potentially apply or because the rules are indeed not readily foreseeable or clear. Obviously, if the same conduct can be caught from many angles, then there is something wrong that need to be addressed, if that can stifle innovation.

That said, the message for businesses sent by these mushrooming initiatives in Europe and around the world is clear: consumers' freedom to choose whether or not to allow their data to be transferred to parties intending to use this information in order to generate a profit from it should be and will be protected. Enforcers will tackle conduct that unduly influences consumers'

Other developments

United States

Consumers on Fyre: Influencer Marketing and Recent Reactions of the United States Federal Trade Commission

By Catalina Goanta

Social media disruptions

Silicon Valley continues to change our world. Technology-driven innovations that are disseminated with the help of the Internet have met with great success. This success translates into heaps of followers, as one can see in the case of platforms such as Facebook and Instagram. However, it is the followers themselves who continually affect the purposes of these platforms. A good example in this sense is Youtube; what started out as an alternative channel for the sharing of low-resolution home videos soon became a place where users could actually create their own content professionally. If well-received, this content leads to real Internet phenomena, and eventually become monetized, via direct or indirect advertising. Individuals around the world now have access to their own TV-stations where they can attract funders and actually make a good living out of running their

channels.

Online content creation raises issues that are similar to those in the sharing economy (e.g. Uber, Airbnb, etc.). On the one hand, online platforms connect individual content providers with viewers, in the same peer-to-peer fashion that AirBnB connects an apartment owner and a tourist. Given the service-orientation of both activities, provided they are monetized, a clear issue emerges: when does an individual stop being a peer? In other words, what does it mean to be a consumer in this environment? Relatedly, what legal standards apply to the process of creating such content?

The Fyre Fiasco

The [Fyre Festival](#) was supposed to be a luxury music festival scheduled for April and May 2017 in the Bahamas, organized by rapper Ja Rule and young entrepreneur Billy McFarland. The latter has made other business models catering to the rich, such as [Magnises](#), a members-only benefits card programme aimed at wealthy millennials. However, instead of promised luxury and exclusivity, the Fyre Festival organizers could not provide its guests even with the most basic of amenities, ranging from accommodation to food and transport. This led to a massive social media fury, with tens of thousands of reposts on Facebook, Instagram and Twitter, showcasing the disastrous conditions that were far removed from the luxury advertisements and the matching price tags (participants paid up to \$

100,000 to attend the festival). Apart from criminal [allegations](#) of mail, wire and securities fraud, Fyre Media - Ja Rule and McFarland's company – is already facing a \$ 100,000,000 class action. In its Introduction, the [complaint](#) emphasizes that “[t]he festival’s lack of adequate food, water, shelter, and medical care created a dangerous and panicked situation among attendees—suddenly finding themselves stranded on a remote island without basic provisions—that was closer to ‘The Hunger Games’ or ‘Lord of the Flies’ than Coachella.” Because of the trust-building social media campaign Fyre Media had launched to promote the event, festival-goers had no suspicion of fraud before they arrived at the event. Influencers such as Kendall Jenner, Bella Hadid, and Emily Ratajkowski were involved in making Instagram posts about the festival (without any proof of concept), and thereby endorsing the event and communicating to their millions of followers their trust in the Fyre Festival.

The Federal Trade Commission takes action

Influencer marketing is a grey area of consumer advertising. It entails companies reaching out to celebrities who benefit from a faithful following of individuals who they can easily sway to buy certain products. Monetizing a Youtube channel is a process requiring sustained effort, as channel owners will have to strike a balance between keeping their followers entertained and generating enough revenue for their activity. Popularity is

[correlated](#) with the amount of earnings celebrities can make out of sponsored content.

What makes this into a great marketing technique is also what may hurt consumers the most. The trust-based relation between a celebrity and its fan-base appeals to marketers; it creates a more genuine story for their products or services. But trust is a fine line, and if a celebrity only endorses material things for money, it means they are not being honest with their audience, who might go and buy those products under mistaken assumptions.

The Federal Trade Commission labels these actions as endorsements, and is very [clear](#) that since such advertising tools can persuade consumers to engage in commercial transactions, endorsements must be truthful and not misleading. For this reason, the FTA created the [Guides Concerning the Use of Endorsements and Testimonials in Advertising](#), soft rules designed to address the application of [Section 5](#) of the Federal Trade Commission Act on unfair or deceptive acts or practices.

In the light of its guides and the Fyre fiasco, on 19 April the [FTC notified](#) more than 90 online influencers about the need for them to disclose their relations to the brands endorsed on social media. According to the Guides, if there is a “material connection” between an influencer and an advertiser which can influence the credibility of the messages posted on social media, the endorser must make this connection clear. In practice, that means adding different hashtags such as

the hashtag #ad, by which the public understands that the celebrity in question has been paid to sing the praises of specific products. Still, not many celebrities seem to be bothered by this existing guideline, as only one post relating to Fyre Festival was actually tagged in a clear and conspicuous way to reveal the commercial interest behind the post itself.

Prior to the Fyre Festival debacle, in 2016 the FTC had filed a complaint against retailer Lord & Taylor, who paid more than 50 fashion influencers up to \$4,000 to post photos of themselves in Instagram styling a specific dress and using the hashtag #DesignLab, without the disclosure of the material connection. The consumer deceit charges were eventually [settled](#).

Are the guides enough to tackle the issue of endorsement? Perhaps there might be a deterrent effect with respect to aligning celebrities with legal standards, but the problem is wider if we consider the fact that it is not only celebrities advertising products on social media.

Professional Youtubers

Just like Instagram, Youtube is a huge market for reviews on products or services relating to technology, games, clothing or make-up, just to name a few. Ordinary people become channel owners and post regular videos focusing on a particular theme. With time, some of these people reach quasi-stardom and become known names on the Internet. To take an example, [NikkieTutorials](#), a successful

make-up vlogger based in the Netherlands, has gained a total of 6,998,037 followers since joining Youtube in 2008, and her videos have been viewed 537,159,106 times so far. And while that might look like a lot, these numbers really fade into oblivion when compared to one of the most famous Youtubers of all time, the Swedish game vlogger PewDiePie. With a total following of around 55,538,695 individuals, his videos have collected an overwhelming total of 15,449,755,042 views ever since he joined Youtube in 2010 and [earned](#) approximately \$7,400,000 in 2014 on the basis of this following. But these are only examples of very well established Youtubers; thousands if not hundreds of thousands of people are currently turning to Youtube to make a living, and in doing so, they seek to earn money from potential collaborators.

Youtube monetization often entails two main streams of revenue: AdSense and sponsorships. AdSense is a Youtube feature that allows channel owners to play ads in various formats before their own content, and their remuneration depends on the number of views their videos will score. Sponsorships are separate from the Youtube channel, in that external companies can contact a popular Youtuber and offer to pay that Youtuber for a sponsorship agreement. These agreements are likely to entail that the Youtuber endorses specific companies or products. As one of the most important features of Youtubers is that of being relatable, namely the feeling that Youtubers are normal people, just like their followers, channel owners will likely not want to openly disclose sponsorships. This creates

a conflict of interests where the channel owner's main activity is that of generating consumer opinions and reviews, while at the same time being secretive about the products that he or she is being paid to advertise.

On the basis of Section 5 of the FTC Act, such practices could be deemed to be [unfair](#) if they "cause or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." However, this seems to be a test that is not applicable to the mundane low-value objects normally advertised online, which begs the question – should the FTC do something more to align social media advertisers with the public interests it upholds? If that is the case, it most certainly cannot do so alone and will need the willingness of the platforms enabling these new practices to properly address this growing problem.

Other developments

International

China's New Cybersecurity Law: A Different Type Of Dragon

By Nikolaos Theodorakis

China's new cybersecurity law ("Cybersecurity Law"), which came into force on 1 June 2017, is a milestone. Unlike the EU that has adopted the General Data Protection Regulation, China does not have an *omnibus* data protection law. It instead regulates issues of privacy and cybersecurity over a number of industry-specific laws, like health and education sectors. The cybersecurity law is somewhat different since it has a wide scope and contains provisions relevant both to data privacy and cybersecurity.

What is the new law about?

The Cybersecurity Law focuses on the protection of personal information and privacy. It regulates the collection and use of personal information. Companies based in or doing business with China will now be required to introduce data protection measures and certain data must be stored locally on domestic servers. Depending their activity, companies may need to undergo a security clearance prior to

moving data out of China.

The Cybersecurity Law defines personal information as any information that, on its own or in combination with other information, can determine the identity of a natural person (e.g. name, DOB, address, telephone number, etc.). It mainly regulates two types of organizations, network operators and Critical Information Infrastructure (CII) providers.

Network operators must:

- Acquire the user's consent when collecting their personal information (it is yet unclear whether consent must be express or not);
- State the purpose, method and scope of data collection;
- Keep the information secure and private (e.g. use back up and encryption methods);
- In the event of a data breach or likely data breach, take remedial actions, inform users and report to competent authorities;
- Erase personal information in case of an illegal or unauthorized collection, and correct inaccurate information;
- Keep log-files of cybersecurity incidents and implement cybersecurity incident plans.

CII providers are required to observe the same cybersecurity practices as network operators, along with additional requirements such as conducting annual

cybersecurity reviews. Furthermore, they are required to store personal information and “important data” within China, as discussed below.

What does this mean for businesses?

If your company is doing business in China, or has a physical presence in China, you will need to conduct a gap assessment to determine whether you must undertake changes to be fully compliant with the cybersecurity law.

Failure to comply with the new law comes with significant consequences: a monetary fine up to 1 million yuan (about \$150,000) and potential criminal charges. Individuals (e.g. company directors/ managers) may be subject to personal, albeit lesser, fines as well. In determining the applicable sanction, elements taken into account include the degree of harm and the amount of illegal gains. Fines could go up to ten times the amount of ill-gotten gains, potentially skyrocketing the amount. The law also gives the Chinese government the ability to issue warnings, confiscate companies’ illegal income, suspend a violator’s business operations, or shut down a violator’s website.

Not every aspect of the Cybersecurity Law applies to all companies, however. Many of the law’s provisions only apply to the two types of companies mentioned above, network operators and critical information infrastructure providers. However, these categories are defined quite broadly. Even companies that would not ordinarily

consider themselves as network operators or CII providers could see the law applying to them.

In fact, network operators include network owners, administrators and service providers. Networks are “systems consisting of computers or other data terminal equipment and relevant devices that collect, store, transmit, exchange, and process information according to certain rules and procedures” (Article 76 of the new Cybersecurity Law). The Cybersecurity Law does not differentiate between internal and external networks; the Law is broad enough to include any company that owns an internal network. The Cybersecurity Law therefore suggests that any company that maintains a computer network, even within its own office, could qualify as a network operator. Companies that are based outside of China that use networks to do business within China could also fall under this definition (e.g. an EU based company that uses networks in China to process data for its operations).

Critical Information Infrastructure providers are defined more narrowly: those that if lost or destroyed would damage Chinese national security or the public interest. This includes information services, transportation, water resources and public services. The law also includes more generally-applicable requirements that relate to cybersecurity and contains provisions that apply to other types of entities, like suppliers of network products and services.

Current and upcoming data localization

requirements

The new cybersecurity law also requires critical information infrastructure providers to store personal information and important data within China and conduct annual security risk assessments. Important data is not defined in the Cybersecurity Law, yet it likely refers to non-personal information that is critical.

Apart from CII, it is anticipated that several foreign companies doing business in China will be required to make significant changes on how they handle data. The draft version of the “Measures for Security Assessment”, published by the Cyberspace Administration of China, suggests expanding the data localization requirements to all network operators. If adopted, this measure will mean that practically all personal information that network operators collect within China must not leave the country other than for a genuine business need and after a security assessment. In anticipation of this development, there is a trend for foreign companies to set up data centers in China to be able to store data locally.

The Draft Implementation Rules also suggest that individuals and entities seeking to export data from China- even if they are not network operators and based outside China- must conduct security assessments of their data exports. This development, if applied, will significantly increase the cybersecurity law’s data localization requirements.

Over the coming months, the Chinese government will continue to issue

implementing legislation and official guidance clarifying the scope of the law.

Other developments

International

G20 Policy Developments in 2017

By Bart Kolodziejczyk

This year's Group of Twenty (G20) is hosted by Germany. The 2017 annual G20 Summit of the heads of state and government will be the twelfth meeting of the G20, and it will be held on 7–8 July 2017 in the city of Hamburg. However, the hosts prepared a myriad of events, workshops and policy forums throughout the year.

The G20 host focused their G20 presidency on healthcare issues. In addition to issues related to global economic growth and financial market regulation, health is also an important focus of the G20 Summit. For the first time, the science and research community is included in this dialogue as "Science20 Dialogue Forum". Under the leadership of the German National Academy of Sciences Leopoldina, the science academies of the G20 countries have elaborated science-based recommendations on improving health globally.

At the Science20 Dialogue Forum on Improving Global Health held on 22 March 2017 in Halle (Saale), national and international experts discussed strategies and tools to combat communicable and

non-communicable diseases. Moreover, the [Science20 Statement](#) was officially handed over to German Federal Chancellor Dr. Angela Merkel. The document provides a basis for the upcoming G20 Summit consultations.

Global health, specifically the management of infectious and non-infectious diseases, causes ongoing and unaddressed issues worldwide for individuals, health systems, and entire economies. The experts gathered at the Science20 Dialogue Forum called for strong short- and long-term data-based strategies to address these health issues. In a nutshell, the [Science 20 Statement](#) calls for (a) ensuring strong healthcare and public health systems, (b) apply existing knowledge to prevent diseases, (c) addressing the social, environmental, and economic determinants of health, (d) ensuring access to healthcare and related resources globally, and (e) improving and enhancing the extending strategies for surveillance and data sharing in health.

In addition to Science20, [Think20](#) held another summit called "Global Solutions." The Think20 or T20 is a network of think tanks and research institutes based in the G20 countries. The role of T20 is to provide evidence-based policy advice to the G20, facilitate interaction among its members and the policy community, and to communicate with the broader public about issues of global importance. This year, the Think20 Engagement Group has come up with a new initiative: the [G20 Insights Platform](#). The policy briefs produced by Task Forces from the Think20 Group, as well as other sources, are clustered in

several different policy areas and describe either recommendations or visions.

The number of high-quality contributions in the areas of [2030 Agenda for Sustainable Development](#) and [Climate Policy and Finance](#) are of specific importance given the U.S. withdrawal from the Paris Agreement. It is very likely that the climate change and the U.S. position on it will be discussed at the Summit in July. The largest number of briefs contributions have been made in the area of [Digitalization](#), which covers areas such as the opportunities and challenges of the Fourth Industrial Revolution, future of jobs, and blockchain technologies, among others.

Two of the briefs co-authored by the author; [Consolidated G20 synthetic biology policies and their role in the 2030 Agenda for Sustainable Development](#) and [Nanowaste: Need for Disposal and Recycling Standards](#) have been presented at the Think20 Summit – Global Solutions in Berlin on 29-30 May 2017. While opportunities of both nanotechnology and synthetic biology are widely heralded, issues such as nanowaste and biohacking are often underestimated. The two above briefs urge G20 members to develop consolidated policy frameworks to regulate both fields.

All of the above events are only an introduction to the forthcoming G20 Summit where heads of state or heads of government of 20 major economies will work together and based on the outcomes of the above mentioned forums will develop new consolidated policy approaches and regulations to some of the

most urging global issues.

The next G20 Summit and Science20 Dialogue Forum will be held under the G20 Presidency of Argentina in Buenos Aires in 2018.

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