Corporate NEWSLETTER

Winter 2016/17

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INTELLECTUAL PROPERTY LAW

Dynamic (IP address) decision from the CJEU

Nick Phillips, Partner

The European Court of Justice (CJEU) has decided that dynamic IP addresses held by a website operator may constitute personal data for the purposes of the EU's Data Protection Directive.

Website operators and mobile app providers therefore need to be alive to the possibility that dynamic IP addresses that they collect and store will be construed as personal data.

In practice, this potentially exposes the website operator or mobile app provider to liability as the data controller of this personal data and therefore is likely to impact in a number of areas

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Editor's Note

Welcome to the Winter 2016/17 edition of our Corporate Newsletter. This latest edition contains a variety of useful articles covering intellectual property, employment, property, trade mark, property litigation and corporate & commercial law.

We continuously strive to provide the most relevant and latest topics across numerous industries. If there are any particular areas of interest that you would like us to consider in the next edition, please do get in touch.

This edition comes to you just after Edwin Coe's victory in the High Court which ruled that the UK Government has no power to invoke Article 50 without Parliamentary approval. This case has now been heard at the Supreme Court and the judgment is expected to come early in the New Year. Please visit the **Brexit Implications** area within our website for the latest developments. If you do have any concerns in the meantime, please do not hesitate to contact me.

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including privacy policies and notices, data security policies and measures, and the transfer of dynamic IP addresses outside of the European Economic Area (EEA).

Internet Protocol (IP) addresses are the unique identifiers that computers, mobile phones, tablets and, the many other devices that can now connect to the internet, are assigned to enable them to be identified and communicate with each other. IP addresses will typically be displayed as four numbers between 0 and 255 e.g. 85.114.52.203 although more sophisticated versions are increasingly in use driven by the growth in the number of devices connecting to the internet. When a device connects to the internet it can either be with the same IP address each time (a static IP address) or with a different number each time (a dynamic IP address). Whether you connect to the internet with a dynamic or a static address will depend on the Internet Service Provider (ISP) that you use to connect to the internet.

In *Patrick Breyer v Bundesrepublik Deutschland*, C-582/14, 19 October 2016 the CJEU was faced with two questions from the German Federal Court of Justice. One of these questions concerned the extent to which dynamic IP addresses retained by German government websites, with the aim of preventing cyberattacks and prosecuting cyberattackers, could be considered personal data. The CJEU decided that a dynamic IP address is, for a website operator, personal data to the extent that a third party internet access provider has additional data which, linked to the IP address, facilitates identification of the website user. Key to that decision appears to have been the fact that not only did the German government have the legal means to access this additional data (by applying for a court order) they were also reasonably likely to avail themselves of those means by applying for such an order.

In Breyer, the CJEU recognised that this was a question that needed to be decided on a case by case basis taking into account, for example, how readily available under the local law this additional data would be. To illustrate this point the CJEU said that dynamic IP addresses would not be personal data;

"if the identification of the data subject was prohibited by law or practically impossible on account of the fact that it requires a disproportionate effort in terms of time, cost and man-power, so that the risk of identification appears in reality to be insignificant."

Previously it had been argued by some that the fact that the means to identify the data subject existed and it was theoretically or objectively available to the website operator or mobile app provider was enough to make the IP addresses personal data. This looks to be a step away from that view towards more of a subjective test. It also moves the law on from the case of *Scarlet Extended SA v Société belges des auteurs, compositeurs et editeurs SCRL*, (case C-70/10), 24 November 2011 which required an Internet Service Provider (ISP) to filter and block infringing files and held that static IP addresses were personal data in the hands of an ISP (not a website operator). It also did not deal with the question of what happens where the ISP does not have the additional data required to identify the data subject but has to get it from elsewhere.

"Website operators and mobile app providers need to be alive to the possibility that dynamic IP addresses that they collect and store will be construed as personal data."

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PROPERTY LAW

Chancel repair liability

Susan Johnson, Senior Associate

Since the House of Lords decision in *Parochial Church Council of the Parish of Aston Cantlow and Wilmcote with Billesley v Wallbank* (2003), chancel repair liability has earned notoriety and received press coverage. In this case, the Parochial Church Council (PCC) brought an action against Mr and Mrs Wallbank for payment of £95,000 towards the cost of repairing the chancel. After a prolonged legal battle, the House of Lords overturned the Court of Appeal decision and held in favour of the PCC, leaving the Wallbanks with a £350,000 bill to pay.

"Where CRL applies, it can adversely affect the land's value and marketability, and could lead to substantial financial liability should the CRL be enforced..."

Despite changes in the law in 2013 that were intended to gradually release land from chancel repair liability, the subject continues to be a source of concern for property owners and property lawyers.

What is Chancel Repair Liability?

Chancel Repair Liability (CRL) is a liability dating back to medieval times which requires a landowner to pay for the repair of a parish church's chancel. Under medieval canon law, the rector of a parish church was responsible for the repair of the church chancel, which was funded from the rectorial tithes collected by the rector. This liability was absorbed into common law and has continued until the present day. One of the difficulties with CRL is that the land to which it attaches will not necessarily be close to the church to which the liability relates, and the problems are further compounded by the fact that often there are no records or inadequate records. It can accordingly be difficult, if not impossible, to identify whether the liability exists or not. In 1982, the General Synod of the Church of England gave support to the phased abolition of the liability, and in 1985 the Law Commission endorsed phased abolition, saying that the law was *"anomalous, uncertain and obscure"* and *"capable of creating financial hardship, and unsuited to modern day society"*.

Where CRL applies, it can adversely affect the land's value and marketability, and could lead to substantial financial liability should the CRL be enforced, as in the Wallbank case.

Land Registry changes October 2013

Prior to 13 October 2013, the right to enforce CRL was classified as an *"overriding interest"*, which meant that the CRL was enforceable even if the landowner was unaware of it and the liability was not registered at the Land Registry.

Since 13 October 2013, the Land Registration Act 2002 changed the position so that CRL no longer has overriding interest status, and the right to demand repair costs is now only enforceable if the CRL has been protected by a notice against the registered title (and against unregistered land by a caution against first registration).

In anticipation of the October 2003 changes, there was activity regarding registrations of notices at the Land Registry to protect CRL, as the Church Commissioners advised all Parochial Church Council's to check whether CRL could be registered against properties in their parish, and then consider registration of notices if appropriate.

Effect of October 2013 changes

It was widely anticipated that the October 2013 changes meant that if a property is transferred for value after that date, and the CRL has not been registered by notice at the Land Registry, then the new owner who purchases that property for value would take the property free from the CRL. However, the Land Registry has cast doubt on this assumption, as it has said that it will continue to register a notice at any point, even following a transfer for valuable consideration.

The result is that, effectively, the potential for CRL has not changed

Leasehold land

Although CRL is generally associated with freehold land, it is unclear whether owners of leasehold land are directly liable towards the cost of chancel repair.

Indemnity insurance

Reform of the law is clearly needed here, but it is unlikely to happen in the near future. In the meantime, where a Chancel Repair Liability search reveals that a property is potentially subject to CRL, and given the uncertainty over the effect of changes to the law, there continues to be reliance on indemnity insurance, even where there is no notice of CRL on the title.

"Although CRL is generally associated with freehold land, it is unclear whether owners of leasehold land are directly liable towards the cost of chancel repair."

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EMPLOYMENT LAW

How to calculate Holiday Pay: recent decision – so that's clear then?

Rachel Harrap, Head of Employment

The Court of Appeal delivered its decision on 7 October 2016 in the case of *British Gas Trading Limited v Lock & Another*.

"Under English law, employees are entitled to a minimum of 5.6 weeks' holiday (including 8 days public holidays), which is more than the 4 weeks required by the WTR."

Decision

The decision in this case was that contractual results-based commission should be included in the calculation of holiday pay for the 4 week statutory holiday entitlement under the European Working Time Directive (WTR).

Legal requirement

Under English law, employees are entitled to a minimum of 5.6 weeks' holiday (including 8 days public holidays), which is more than the 4 weeks required by the WTR.

Facts

Mr Lock was employed as an energy trader with normal working hours, whose remuneration did not vary with the amount of work done. Commission earned on sales was a particularly important part of Mr Lock's remuneration package, representing around 60% of his basic pay. When he took holiday he was entitled to basic pay only but continued to receive commission based on his earlier sales. However, his commission payments were lower during the months following his holiday because he had been unable to generate sales whilst on holiday.

This was consistent with case law and statute (s.221 Employment Rights Act 1996 (ERA)) that where there were *"normal working hours"* and pay did not vary with the amount of work done then a week's pay was calculated by reference to the contractual rate of pay in the employment contract.

Mr Lock argued that since the European Court of Justice had held in *British Airways plc v Williams* that holiday pay should reflect normal remuneration, his pay should be enhanced to reflect the commission that he would otherwise have earned during annual leave. Whilst there was an academic argument as to the wording of English domestic law and the WTR, the outcome was that in this situation Mr Lock's normal remuneration should include his commission.

What was not decided

The Court of Appeal declined to speculate on the position of employees who receive annual results-based bonuses or those who receive commission when particular levels of turnover or profit are achieved. These circumstances therefore remain an open question.

What do we know now given the current case law?
Given the test laid down in the European Court of Justice's case law, holiday pay should be based on *"pay that is normally received"* and must include:

- payments linked intrinsically to the performance of the task which the employee is required to carry out under his or her contract of employment;
- payments which relate to the employee's professional and personal status.

English case law has taken this further and seems to introduce two types of case:

- ***"Cases where there is a settled pattern of work"***

  In such cases, normal remuneration is easily identified as it is pay which is normally received. Payment has to be made for a sufficient period of time to justify the label *"normal"*. No period of time has been specified that would be regarded as *"sufficient"* as yet.

- ***"Cases where there is no settled pattern of work"***

  In such cases, average remuneration should be calculated over an appropriate reference period determined by national legislation. Whilst there is no case law to say that this is a 12 week reference period set down by s.221 of the Employment Rights Act 1996, this is the best guidance that can be given.

What should be included in the calculation?

- ***Commission?***
  Yes, where the commission is intrinsically linked to the performance of tasks under the employee's contract. In Mr Lock's case, pay during holiday periods generally included commission earned on previous sales (which was paid in arrears) but he suffered a financial disadvantage after the holiday as a result of not having earned commission during that time. The position is that holiday pay must include an element to offset this disadvantage. Whilst the calculation is left up to the national courts to determine under national law, it must be based on an average commission earned *"over a reference period which is considered to be representative"*.

- ***Overtime Pay?***
  Overtime has been identified by courts as being broken down into three categories of overtime:
  - **Guaranteed (compulsory) overtime**: where even if the employee is not called on to work the employer is liable to pay him or her for it;
  - **Voluntary overtime**: where an employee cannot be required to work it and the employee does not have to provide it;
  - **A *"halfway house"* (sometimes called non-guaranteed overtime**): where the employee is obliged to work overtime if required but the employer is not obliged to provide overtime or pay in lieu.

Guaranteed compulsory overtime is covered by *"normal working hours"* and is therefore included in holiday pay in respect of the full 5.6 weeks' leave entitlement.

Non-guaranteed overtime should be included in the calculation, as it is required by the employer and therefore intrinsically or directly linked to the employee's work but only for the 4 weeks under the WTR.

With regards to voluntary overtime on 10 August 2016 in the case of *Brettle v Dudley Metropolitan Borough Council* the Employment Tribunal concluded there was no basis for implying a term that the additional elements of pay were as a matter of contract *"normal pay"*. However, having regard to the principle that an employee should not be deterred from taking leave and the test that what an employee regularly and consistently receives as pay constitutes *"normal pay"* the additional elements should be included in the calculation of holiday pay. This was further justified on the basis that whilst rotas may be voluntary, once an employee's name is on a relevant rota they are then required to attend the workplace or be available, so payments are intrinsically linked to the work required to be done under the contract. However, where overtime is worked on a rare or occasional basis, then to be consistent this would not be included in normal pay. Payments for voluntary overtime would only be calculated on the 4 week WTR holiday entitlement.

"Non-guaranteed overtime should be included in the calculation, as it is required by the employer and therefore intrinsically or directly linked to the employee's work but only for the 4 weeks under the WTR."

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CORPORATE & COMMERCIAL LAW

Electronic signature practice note

Eoin Broderick, Associate

We have previously written in December 2015 (See page 4 of the Corporate Newsletter – Winter 2016) about the law surrounding the use of electronic signatures and advised that until the law surrounding their use in executing a deed had been resolved, it was safer to continue to execute deeds on paper using a traditional *"wet-ink"* signature.

"The practice note confirms that simple contracts may be executed by electronic signature"

Since that article was published, the Law Society and the City of London Law Society have released a practice note on the subject which has been approved by leading counsel and sets out the position under English law. The Law Society previously published a guidance document in 2009 setting out procedures to be followed in the event of virtual signings. This more recent practice note focuses on the execution of documents using electronic signatures. It concentrates on contracts entered into in a business context and therefore not those to which consumers or other individuals are parties.

The legal framework for electronic signatures in the EU is set out in Electronic Identification and Signature Regulation 910/2014 which provides that an electronic signature shall not be denied legal effect and admissibility as evidence in legal proceedings solely on the grounds that it is in electronic form. The Electronic Communications Act 2000 provides a statutory framework for the admissibility of electronic signatures in England and Wales but does not address their validity. The conclusions set out in the practice note are based on wider principles of English common law.

The practice note confirms that simple contracts may be executed by electronic signature and also that for companies incorporated under the Companies Act 2006, subject to any restrictions in their articles, minutes of directors or shareholders meetings and written resolutions may be executed electronically.

When considering the evidential weight of electronic signatures, leading counsel has advised that if the authenticity of a document executed electronically were challenged, it would be reviewed using the same principles that an English court would use in connection with a wet-ink signature and that the insertion of an electronic signature would be enough to meet these requirements.

The most interesting aspect of the practice note is the opinion it provides on the execution of deeds by electronic signatures. As we have previously written, a deed must be in writing, executed as a deed and delivered. The practice note confirms the following:

- The requirement for a deed to be executed by two directors or one director and the company secretary may all be met by the use of electronic signatures.
- Subject to agreement between the parties as to when delivery occurs, delivery may be achieved through electronic signature.

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- In the case of deeds executed by individuals in the presence of a witness or a director signing on behalf of a company in the presence of a witness, they may be executed by electronic signature where the witness genuinely observes the signature of the document and affixes their signature (whether electronic or otherwise) to the deed. This may present logistical issues which will be considered on a case-by-case basis depending on the particular circumstances involved.

Whilst this practice note essentially gives the green light to the use of electronic signatures for the execution of English law documents, it also raises a few further questions/issues of which to be aware:

- **Conflicts of law** – the note sets out the position under English law but may not be the case in other jurisdictions. If a document is to be executed by a foreign company, or a UK company is to execute a foreign law agreement, the laws of the relevant territory or jurisdiction will need to be reviewed to confirm the validity of execution by electronic signature.
- **Does the document need to be filed anywhere?** The Land Registry and Land Charges Registry will not accept a document signed electronically and HMRC will expect a stock transfer form to be filed that had been signed with a wet-ink signature.
- In some instances (often for taxation reasons) **the location in which the document has been executed will be important.** Where a document has been executed electronically, the location may be up for debate: is it where the signatory was physically located or perhaps where the server which stored the document is located?

PROPERTY LITIGATION LAW

Vacant possession: importance of identifying what is a fixture and what is a chattel

Joanna Osborne, Head of Property Litigation

A reminder for tenants and landlords of the importance of ensuring vacant possession at the end of a lease following a recent High Court decision and in particular, to be attentive to fixtures and fittings.

In *Riverside Park Ltd v NHS Property Services Ltd [2016 EWHC 131 (CH)*, the High Court held that the tenant had failed to yield up the premises with vacant possession due to the continued existence of the tenant's partitioning after the break date. The tenant therefore failed to activate the break and remained liable to comply with its obligations under the lease.

This case has significant implications for landlords and tenants.

Facts

The tenant obtained a licence to alter and fitted out the premises with partitioning. The licence to alter required the tenant to reinstate the premises to their original condition at the end of the lease or sooner if required by the landlord. The tenant exercised its right to break in the fifth year of the term. A pre-condition of the break notice was that the tenant had to hand back the premises with vacant possession. The landlord did not serve notice of reinstatement.

The tenant vacated the premises in accordance with the break notice, but left behind the partitioning.

The landlord contended that the break notice was invalid as the tenant had not handed back the property with vacant possession, due to the partitioning. The landlord also argued that the partitioning made the property a *"rabbit warren"* and a substantial impediment to re-letting. The partitioning was not fixed to the structure (contrary to the licence to alter) and was only fixed by screws to the surfaces of the floor and ceiling. The tenant argued that the partitioning fell within the tenant's fixtures and fittings which had been incorporated into or annexed to the premises by operation of law, and that the presence of the partitioning was therefore no impediment to vacant possession. The tenant also argued that the landlord had not provided notice to reinstate.

A reminder of fixtures and chattels

It is a question of fact in each case whether an item is a fixture or a chattel. A fixture is an item that has been fixed to the land or premises and therefore become part of it. In contrast a chattel is a moveable asset which does not attach to the land. Ownership of a fixture passes with the land and after lease termination belongs to the landlord, whereas a chattel belongs to the tenant. It is necessary to consider the purpose and amount of annexation to the premises when deciding if an item is a fixture or a chattel. Where items are fixtures, the tenant has a right, but no obligation, to remove them because they form part of the premises.

> "A fixture is an item that has been fixed to the land or premises and therefore become part of it. In contrast a chattel is a moveable asset which does not attach to the land."

The decision

The High Court held that as the partitions were chattels, the tenant had failed to give back the premises with vacant possession. This was because the court held that the object of the partitioning was not to afford lasting improvement to the premises, but to be for the particular benefit of the tenant. Additionally, the partitions deprived the landlord of the physical enjoyment of the premises. There was no requirement of evidence by the landlord to show that it could not re-let the premises due to the partitioning.

This case highlights the significance of paying close attention to identifying and removing chattels when handing back premises with vacant possession. It also confirms that there is no hard and fast rule for defining fixtures and chattels: each case will turn on its own facts.

Tenants therefore need to err on the side of caution when vacating premises and make sure they do not leave behind any easily removable items that could be considered chattels. On the other hand, the decision is a welcome one for landlords, as (i) it helps them press for the premises to be left clear of unwanted items, including partitioning, even if notice to reinstate has not been given; and (ii) it improves the prospects for landlords of challenging break notices.

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If you have questions about how Edwin Coe and Ally Law can address your global business and legal needs, please contact Russel Shear, Head of Corporate & Commercial at Edwin Coe. Alternatively, please email team@ally-law.com.

INTELLECTUAL PROPERTY LAW

Brexit implications for UK trademarks

Simon Miles, Head of Intellectual Property

If the UK is to officially leave the EU it has to notify the EU Council of its intention to do so and trigger Article 50.2 of the EU Treaty, which provides for a maximum of two years for the withdrawal negotiations.

At the Conservative Party Conference in October 2016 the Prime Minister assuredly stated that *"Brexit means Brexit"*. This is a statement of pure party politics. Nobody who voted in the EU referendum knew what they were ultimately voting for – it was guesswork. So, it may be open for the UK to remain an European Econmic Area (EEA) and European Free Trade Association (EFTA) Member State (like Norway) with access to the single market and no tariffs, or at the other end of the spectrum there might be no new negotiated agreements with the EU and instead the UK could comply with the WTO's (World Trade Organization) rules – the hardest of the hard Brexit outcomes.

Theresa May also stated that Article 50 will be triggered in the first quarter of 2017. She cannot be sure that this will be the case. Edwin Coe acted for one of the parties who challenged the Government's belief that it has the power under royal prerogative or otherwise to give notification under Article 50 without a prior decision of Parliament. Brexit might not necessarily mean Brexit if Parliament has the right to vote.

A vast amount of intellectual property legislation in the UK is derived from EU law and the ultimate impact of Brexit will not be known until we understand where the UK ends up in its relationship with EU countries once the negotiations are complete. All UK IP rights will be affected in some way but the law of trade marks highlights typical issues.

Brexit will have no impact on national UK trade marks. EU Trade Mark (EUTM) rights will continue to exist and UK entities will continue to be entitled to own EUTM's. Unless there is an agreement to extend EUTM's to the UK (*"EU Plus"*) the difference will be that EUTM's will cover 27 countries instead of 28. It could be that EUTM's would effectively shrink in scope leaving owners with no legal protection within the United Kingdom unless they also owned UK trademark rights – either via UK trademark registrations or based on use in the United Kingdom.

However, there should be a mechanism by which EUTM's can be separated or extended to ensure that coverage in the UK is continued. The owners of EUTM's which are predominantly used in the UK do need to be aware that those rights could become vulnerable to challenge for non-use after five years because any use of the trade mark in the UK, at least after Brexit, might no longer be relevant.

"Britain's vote to leave the EU could have huge implications for IP, including trademarks, but there is still much uncertainty and many unanswered questions."

For the moment, owners of EUTM's can continue to enforce those rights in the UK and they can continue to use the local rights to prevent the registration of a EUTM (because of its unitary character). However post Brexit, this may no longer be possible.

Those planning their filing strategy at present will need to give careful consideration to any conversion process for the UK and the filing of separate UK trade marks.

Currently, a brand owner cannot object to the further dealing with trade-marked goods it has placed on the market within the EEA (unless there are legitimate reasons to do so), as the trade mark rights in those goods will have been exhausted. A brand owner can object to imports into the EEA from outside of the EEA. So if the UK was treated as being outside the EEA, EUTM rights could be used to prevent exports from the UK into the EU because exhaustion rules would no longer apply to goods placed on the market in the UK. However if the UK Government applied the principle of international exhaustion of trademark rights, UK traders might find that not only is it more difficult to sell goods in the EU but they might not be able to prevent goods they have sold outside the UK being sold back into the territory by a reseller if there is a margin to be made on the sales in the UK.

Simon heads up the Intellectual Property team at Edwin Coe. He is a solicitor and a UK and European trade mark attorney. He advises on all aspects of intellectual property. On the contentious side he has acted on a number of well-known reported intellectual property cases.

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Brexit Implications

To view our response to the outcome of the UK Brexit Referendum, please visit our website - Brexit Implications

We will be publishing legal commentary as our journey evolves.

We hope you find this newsletter useful and interesting, and we would welcome your comments. For further information and additional copies please contact the editor: Russel Shear on t: +44 (0)20 7691 4082 e: russel.shear@edwincoe.com

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