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EU update

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A B S T R A C T

Keywords:

EU law
Intellectual property
Information technology law
Telecommunications law

This is the latest edition of the DLA Piper column on developments in EU law relating to IP, IT and telecommunications. This news article summarises recent developments that are considered important for practitioners, students and academics in a wide range of information technology, e-commerce, telecommunications and intellectual property areas. It cannot be exhaustive but intends to address the important points. This is a hard copy reference guide, but links to outside web sites are included where possible. No responsibility is assumed for the accuracy of information contained in these links.

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1. Europe: e-privacy regulation; towards stricter rules for online marketing and IOT communications?

Giangiaco Olivi, *Partner, DLA Piper Milan*

The Article 29 Working Party has issued an Opinion on the draft e-privacy regulation proposed by the European Commission on January 10, 2017 (we have previously commented on the draft regulation).

Among other things, the WP 29 appreciated the choice of a regulation rather than a directive, to make it fully complementary with the GDPR. It also appreciated the decision to align Over-the-Top (OTT) providers with telecoms operators with regard to confidentiality of communications, as well as the attempt to update the rules for online tracking. And it welcomed the extension of the regulation to machine-to-machine interaction, although the M2M provisions should be further expanded.

The WP 29 also raised some concerns about the fact that, if not changed, the regulation may in certain instances lower the protections granted by the GDPR. Such concerns may lead to stricter provisions or interpretations on, among other things,

WiFi tracking, content and metadata, tracking walls, and privacy by default for terminal equipment and software.

More in particular, as for **WiFi (and Bluetooth) tracking**, the WP29 calls for the promotion of technical standards for mobile devices so that they can automatically signal an objection to such tracking, as the potential offer of an opt-out would pose an excessive burden on citizens.

Only in a limited number of circumstances are data controllers allowed to track physical movements without the consents of the individuals concerned, for instance when counting customers inside a location for security checks and provided that data is anonymized as soon as the statistical purposes are fulfilled.

In this respect, it should also be noted that the WP29 requires a data protection impact assessment to be carried out even when anonymization measures are applied.

The WP29 prompts that any **content and metadata** should be processed with the consent of all end users (senders and recipients) and be awarded the same level of protection. For instance, sending an email or other kind of personal communication from another service to an end-user who has personally consented to the processing of his or her content

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<http://dx.doi.org/10.1016/j.clsr.2017.06.003>

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and metadata when signed up to a mail service would not constitute valid consent from the sender.

Besides, according to the WP29, metadata are too narrowly defined, as they should include also all data processed for the purposes of transmitting electronic communications content.

The WP29 added that the so-called **tracking walls** (the practice of denying access to a website or a service unless users consent on tracking on other websites or services) should be explicitly prohibited. This because not only Internet access and mobile telephony but also certain OTT are essential services.

Furthermore, there can be no valid consent through non-specific browser settings. A granular consent would be necessary: this means, for instance, that the option to solely “accept (or refuse) all cookies” would be invalid. The WP29 also recommended to make it compulsory to implement technical mechanisms (including the “do not track” standards or other blacklists), also ensuring that when a denial is provided, no further consent requests can be made by the same organization for at least 6 months.

According to WP29 the draft regulation should be interpreted as affording at least the same or higher level of protection than the GDPR. Given that the sanctions provided by the draft regulation are aligned with those set out in the GDPR (although not yet fully harmonized), stricter interpretations affecting M2M, online marketing, geo localization and similar services will no doubt be a source of concern for many sectors, well beyond the electronic communication industry.

2. TV Catchup – CJEU gives little air time to retransmission defence

Alastair Mackichan, *Trainee Solicitor, DLA Piper London*

The Court of Justice of the European Union has put to bed any doubt as to whether Section 73 of the Copyright Designs and Patents Act (“CDPA”) is compatible with the EU Copyright Directive. Section 73 provides a defence against copyright infringement for operators of cable platforms in relation to the retransmission of “qualifying services” (those of the UK public service broadcasters). However, more recently, the Section 73 defence has also been relied upon by the operators of the TV Catchup service to retransmit content via the Internet without the broadcasters’ consent, triggering litigation by ITV and others.

In its ruling in *ITV Broadcasting v TV Catchup*, C-275/15, the CJEU confirmed that the rather opaque reference to “access to cable of broadcasting services” found in Article 9 of the Directive should not be interpreted as permitting national legislation to provide a defence to copyright infringement in the case of the immediate unauthorised retransmission by cable, including via the Internet, of the initial broadcast. The Court also re-confirmed that the original broadcaster has the ability to control how, when and where its content is transmitted or re-transmitted.

The decision will be welcomed by the broadcasting industry, but in light of the amendment provided for in the Digital Economy Bill (which will repeal Section 73 of the CDPA in its entirety), the ruling is unlikely to have a major impact in the UK beyond these proceedings. More broadly, the change in the

law creates the possibility that the public service broadcasters could charge cable operators a retransmission fee if such operators wish to retransmit the broadcasters’ channels via their cable platforms.

3. Smart buildings – not all just bricks and mortar

Synead Lynch, *Senior Foreign Legal Counsel and Claire Kermond*, *Solicitor, DLA Piper Sydney*

Imagine a day where any part of a building can report its own state of health, when a machine can tell you if its feeling unwell and ‘needs a service’, when you can track and prevent, before it happens, a water or gas leakage – all from the convenience of your own smartphone or laptop at home.

3.1. This is no longer imagination – this day is now!

The real estate industry is fast becoming influenced by rapid technological advancements. Technology is a significant source of disruption and opportunity particularly in buildings and modern infrastructure. Buildings are changing; they are no longer just bricks and mortar. While it is not new for technology to form part of the inner workings of a building, sophisticated and advanced technologies are now being integrated into underlying designs and building management systems that underpin most modern building structures. These building management systems are no longer fully segregated from conventional IT networks, such as servers, customer relationship management or online payment systems. Buildings are becoming more mobile, flexible and connected – in effect becoming ‘smart’.

Landlords, tenants and owners are becoming increasingly reliant upon, and are leveraging, sophisticated new technologies in the day to day use of spaces, resulting in greater amounts of data being captured in buildings, office towers and homes around the country. Digital technology is reportedly being used by owners and landlords to assist in brick and mortar sales. For example – in retail centres, with the goal being to guide a customer from the start of their product acquisition right through to purchase, i.e. a customer searches for a product on Google, finds the product at the shopping centre, is digitally guided by the landlord/centre to an open parking space at the property and then to the store to collect the product.

In hotels, cashless payment technologies are used to increase on-site spending patterns. In offices, mobile and wireless technologies support recent trends towards more open and collaborative workspaces. Employee movements around a floor can be recorded – the resulting data can be put to multiple uses – i.e. by staff to work out where may busy or quiet in the office or by organisations to cut cleaning costs, allowing them to focus on cleaning busy areas rather than unused areas. Lighting, humidity and temperature can all be pre-recorded and customised, window coverings can be programmed to block harsh light at certain times of the day, security passes can record movements and time entries, or indeed facial recognition can replace card activation altogether.

It is abundantly clear that such ‘smart’ buildings are invaluable for landlords in automating building management

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