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News from Around the World

ARGENTINA

Telecommunications

Argentina's Regulators Reject Grupo Clarín's Request to Keep Some Assets

Argentina's telecommunications watchdog on Aug. 13 said it has rejected a request by the country's largest media group, Grupo Clarín, to modify a previous divestment commitment and keep eight TV channels it was supposed to sell off in order to comply with new legal requirements.

The Federal Authority on Audiovisual Communications Services (AFSCA, after its Spanish initials), in February 2014 accepted a plan presented by the US$2.2 billion revenue, 7,000 employees group to split the company into six separate units and divest many assets (see "Argentina's Regulators Approve Grupo Clarín's Divestment Plan" [9 WCRR 3, 3/15/2014]).

AFSCA said Clarín later asked to be allowed to keep eight TV channels initially included in the sell-off plan. However, at a board meeting held on Aug. 12, AFSCA rejected the request and served notice that if the conglomerate does not follow the original plan, it will seize those assets and sell them off itself.

It also gave Clarín 10 working days to "proceed to ratify its willingness to comply, with no modifications whatsoever, with the formally declared conforming proposal."

The group's 250-plus units include its flagship asset, the morning newspaper Clarín — Latin America's largest circulation daily, as well as Argentina's two top cable TV companies (Cablevisión and Multicanal), leading cable news channel Todo Noticias, and major internet service provider Fibertel as well as radios, TV stations, internet services, and newspapers around the country.

The group presented its plan to the AFSCA after Argentina's Supreme Court in October 2013 ruled that the controversial Law No. 26522 on Audiovisual Communication Services — setting strict limits on cable licenses and free-to-air radio and television licenses that can be held by a single company — is legal and satisfies the constitution (see "Supreme Court Upholds Divisive Law Dismantling Argentina's Largest Media Group Clarín" [08 WCRR 3, 11/15/13]).

AFCA's decisions are a major victory for President Cristina Fernández de Kirchner's left-of-center administration, which has been waging a protracted battle against Clarín. At one point, she accused the group — traditionally critical of her government — of plotting with other major corporations to push her out of power.

Grupo Clarín had challenged the divestment decision in court, saying it was conceived to cause it harm. It also complained that the 12-month divestment period it contemplated was too short and would cause it substantial financial injury. The law was enacted in 2009, but was held up by courts until the Supreme Court gave it the green light.

By David Haskel

ARGENTINA

Telemarketing

Argentina Do Not Call Registry Statute Finalized, Awaits Implementing Rules

Argentina's new do not call statute (Law No. 26951), which was enacted to protect landline and mobile phone users from unsolicited telemarketing calls, was finalized on Aug. 5 upon its publication in the Official Gazette.

The bill, which creates a no call system for consumers to register telephone numbers, adds new regulatory compliance obligations for telemarketers making calls to individuals in Argentina.

The bill was introduced in the Senate in 2011. The upper chamber of the National Congress approved the measure in 2012. The bill was approved on July 3 by the Chamber of Deputies (see "Argentina Lawmakers Clear Legislation That Would Authorize No Call Registry" [09 WCRR 3, 8/15/14]).

The statute provides that adding a number to the no call registry is free of charge and must "be implemented through efficient and simple means."

As introduced, the law would have allowed numbers to be automatically removed from the list after two years unless individuals re-registered the number, but that provision was dropped. Now the statute provides that numbers stay on the list permanently, and only the person who registered a number on the list may ask to have the number removed.

Regulations Forthcoming?

The publication of the law starts a 90-day period for the country's data protection authority, the National Directorate of Personal Data Protection (NDPDP), to issue implementing regulations.

Enforcement sanctions for violation of the new law are not spelled out in the statute; the NDPDP is charged with spelling them out through implementing regulations.

Ensuring that the new statute is effective through the promulgation of implementing regulations can be tricky, a Congress official speaking on condition of anonymity told Bloomberg BNA in July, when the law cleared the National Congress. In the past the government has failed to issue regulations for several enacted laws, the official said.

If a new law is sufficiently detailed, the lack of implementing regulations may not be severe, but here a failure to release implementing regulations would constitute a de facto veto of the legislation, the official said.

Single National Standard

The Direct and Interactive Marketing Association of Argentina, the country's telemarketing industry group, has supported the legislation.

Juan Pablo Tricarico, the group's executive vice president, told Bloomberg News on July 8 after the law cleared Congress that three local jurisdictions, including Buenos Aires, have their own do not call laws with implementing regulations in place. Additionally, some 20 other local jurisdictions were at different stages of adopting their own rules, he said.

A uniform national standard was needed to escape the legislative maze of disparate local laws that was hard for telemarketers to navigate, Tricarico added.

By David Haskel

BRAZIL

Mergers & Acquisitions

Telefonica Guarantees Top Spot in Brazil's Telecom Market

France's Vivendi on Aug. 28 picked Spain's Telefonica for exclusive talks on the sale of Vivendi's Brazilian subsidiary, GVT.

Telefonica won against Telecom Italia in the battle for GVT, a company that has been successful in offering broadband and satellite television services in Latin America's largest market. With this, Telefonica in Brazil will assume the leadership in the broadband sector, moving up from third place, and will climb from fifth place to third for pay TV.

Telefonica already held the mobile phone market leadership through its cellular phone operator Vivo. Altogether, this will make Telefonica Brazil's largest telecom group with annual revenues of US$18 billion.

Telefonica outwit Telecom Italia with an offer of EU€7.45 billion (US$9.8 billion) from which EU€4.66 billion (US$6.1 billion) will be paid in cash and the remainder in a 12% stake in Telefonica Brazil. The offer also included a proposal to exchange 4% of Telefonica's Brazilian shares for 5.7% of Telecom Italia capital.

This would allow Telefonica to meet demands set by Brazil's antitrust agency, Cade, after Telefonica announced in September 2013 that it had reached an agreement that would give it control of Telecom Italia. Cade on Dec. 11 stated that Telefonica must either find a partner for Vivo or sell its stake in the Brazilian mobile unit of Telecom Italia, TIM. Telefonica's proposal to Vivendi would eliminate the Spanish company's stake in TIM Brazil.

What remains unclear at the moment is the fate of TIM. It was speculated in Brazil that TIM, Brazil's second largest mobile phone operator, would now be open to a takeover by Brazil's Oi, together with Mexico's America Movil and Telefonica.

By Ed Taylor

BRAZIL

Spectrum

Brazil Telecom Regulator Schedules 4G Auction for September

Brazil's National Telecommunications Agency (Anatel) on Aug. 21 released the terms for the country's next auction of 4G cellular phone licenses to be held on Sept. 30, 2014. Bids for the auction must be submitted by Sept. 23.

Four national 15-year licenses will be sold for the 700MHz spectrum, which are currently used exclusively for analog television services. Three of the licenses will have a minimum price of US$840 million. The minimum price for the fourth license was set at US$837 million because it will not include 90 cities served by two small local operators and for which separate licenses will be sold with a total minimum of US$3 million.

The country's mobile phone operators currently offer 4G service using the 2.5GHz frequency through licenses purchased in a 2012 auction. Those licenses set coverage requirements and the operators are expected to use the new 700MHz licenses to help them meet those needs.

Because of this, the operators already offering 4G service will be required to pay an additional US$248 million, raising the total minimum payment to US$3.6 billion.

Auction Winners

The auction winners will also have to spend US$1.6 billion to resolve interference issues relating to television channel transmissions currently operating on the 700MHz frequency.

Brazil's top four mobile phone operators are all expected to take part in the auction. The 700MHz frequency will permit them to use fewer antennas and allow them to reach rural areas at a lower cost.

Telecom Italia Mobile (TIM) reacted favorably to the minimum prices set by Anatel and confirmed that it will submit a bid. The other three firms — Brazil's Oi, Vivo, owned by Spain's Telefonica and Claro, a subsidiary of Mexico's America Movil — did not issue statements, but had previously expressed their interest in participating as did US-based Nextel, which is also present in Brazil.

"I doubt that any of these operators will not submit a bid," said Juarez Quadros, a telecommunications consultant with the firm Orion.

The government is counting on the funds from the sale of these licenses to help it meet its fiscal target for the year. The auction terms allow the winning bidders to make an immediate payment of 10% with the remainder divided into six annual payments.

The financing will come from the government's national development bank, but the interest rates will be higher than normal, seen by sector analysts as an attempt to pressure the operators to make full cash payments for the licenses.

Directives

At present, some 114 cities have 4G service, according to the telecommunications consultancy Teleco. Brazil's communications ministry on June 23 issued a series of directives requiring the transition from analog to digital television be completed by the end of 2018.

The final transition from analog to digital will start in 2016 in five of Brazil's most populous cities, including Sao Paulo, Rio de Janeiro and Brasilia. It will continue until it reaches all of the country's 400 largest urban centers, home to 60% of the nation's population, by 2018. The process will be concluded by the end of November 2018 for the remainder of the country.

Brazil's 4G service celebrated its first year in operation in June, but the results have thus far been disappointing with only a 2.28% market share. Expansion of the service has been hampered by the high costs of smartphones in Brazil, averaging US$900. The limited reach of the service and often poor quality has also handicapped 4G expansion.

By Ed Taylor

CANADA

Spectrum

Industry Canada Offers New Plan to Licensing 3500MHz Spectrum

The Canadian Government has published a proposal for public comment to adopt a fast-track process for allocating spectrum licenses in the 3500MHz band to fixed wireless broadband services in rural areas.

The proposal for a first-come, first-served process to allocate 3500MHz licenses for rural broadband use follows on the government's November 2013 release of a "use-it-or-lose-it" policy for spectrum license holders, which opened up spectrum in the 3500MHz range, Industry Minister James Moore said on Aug. 20.

The new approach would balance the capacity for mobile services in urban areas and the need for fixed wireless broadband access in rural areas, making it easier for rural broadband providers to better deliver timely, high-quality services, Moore said in a statement.

"Our government committed to putting unused spectrum licenses to use, and today we are following through on that pledge. Today's announcement also means that rural communities will benefit from enhanced access to high-speed internet services," he said. "We will continue to put the interests of consumers first to ensure that Canadians have more choice and better services."

The proposal would provide an opportunity to quickly reissue licenses in the 3500MHz band, issued between 2004 and 2009 and which started expiring in March 2014, Industry Canada said on Aug. 20.

The new approach would allocate to rural providers the licenses that have not been renewed or for which the holders have not met the license condition of putting the spectrum to use, the department said in a background document.

"In addition, in order to meet the increased demand for mobile spectrum in urban areas while continuing to allow fixed services in rural areas, the consultation proposes to designate 3500MHz license areas as either 'urban' or 'rural' to support the differing requirements of these areas."

Rural licenses issued under the proposed first-come, first-served approach would specify a coverage area and spectrum required to service it, permitting more communities to be served and help meet the government's commitment to extend and enhance rural broadband internet services, it said. The repurposing of 3500MHz licenses in urban areas would permit their use for mobile services, as they had previously been restricted to fixed services, and a consultation will be held in the future to determine the appropriate licensing framework for those licenses, the department said.

The proposal would define urban areas as those with a population of 30,000 or more. The consultation paper proposes two options for potential displacement of existing urban 3500MHz license holders if the government decides to fully reallocate the spectrum — displacement of all existing licensees within 12 months of the release of the final licensing framework or displacement of existing licensees if, and as required, after new commercial licenses are issued.

Criticism of Plan

The proposal drew immediate criticism from major rural high-speed internet provider Xplornet Communications Inc., which said it is "deeply concerned" by the proposal because it would have a detrimental impact on provision of high-speed services in rural areas.

"At this point, we are reaching out to Industry Canada officials to make them aware of the implications of this proposed change," the Woodstock, New Brunswick-based firm said in a statement. The proposal would take spectrum away from providers like Xplornet that currently deliver service to rural customers and give it to telecommunications firms for cellular telephone services, it said. It would permit Industry Canada to declare large areas of rural Canada to be "urban" and redesignate the spectrum currently being used for fixed wireless high-speed internet in those areas as mobile wireless spectrum, it said.

Meanwhile, the Public Interest Advocacy Centre on Aug. 20 welcomed the Industry Canada proposals as a positive development for rural internet users.

Deployment of services using the 3500MHz spectrum has generally been low, and broadband internet in rural areas is either unavailable or available, but unaffordable, John Lawford, executive director of the Ottawa-based public interest group, said in a statement. "It is important the government is taking steps to get licensees to actually provide service or clear the way for other willing service providers," according to Lawford, who noted that his group will participate in the consultation and advocate for availability of affordable internet access for all Canadians, regardless of their location.

By Peter Menyasz

CANADA

Mergers and Acquisitions

Canadian Bureau's Concerns Over Deal Prompt Telecom Firms to Abandon Merger

Bragg Communications Inc. has withdrawn its CA$26.5 million (US$24.4 million) proposal to acquire Bruce Telecom after a review of the proposed merger raised anti-competitive concerns, Canada's Competition Bureau reported on Aug. 15.

The bureau staff's review concluded that the acquisition by Bragg Communications, operating as Eastlink, would likely have led to a substantial lessening or prevention of competition in providing wireline telecommunications services, Competition Commissioner John Pecman disclosed in a statement.

"Eastlink's acquisition of Bruce Telecom would have likely resulted in higher prices and fewer choices," Pecman concluded.

"Customers would also have been deprived of the benefits of innovation in their telecommunications services," he added.

However, the Ontario municipality of Kincardine, which owns Bruce Telecom, said on Aug. 15 that the Competition Bureau's notice was inaccurate as Eastlink and Bruce Telecom had not terminated the purchase/sale agreement.

"It is not true that the Municipality of Kincardine has decided to abandon the proposed transaction," the municipal government said in a statement. "Counsel for the municipality has not received nor had an opportunity to consider the subject matter of the bureau's press release. The Municipality of Kincardine is seeking a correction from the bureau."

The bureau issued its announcement after being advised by Eastlink that it had decided not to proceed with the transaction, bureau spokesman Phil Norris told Bloomberg BNA on Aug. 18.

Eastlink confirmed on Aug. 18 that it withdrew from the transaction because it did not receive the bureau's approval.

"We are very disappointed, as our plans were to begin investing immediately to provide improved products and services to the customers of Bruce Telecom," the company said in a statement emailed to Bloomberg BNA. "We remain fully committed to our Eastlink customers and operations in this region."

Eastlink, based in Halifax, Nova Scotia, owns and operates more than 500 cable systems across Canada, including competing directly with Bruce Telecom on wireline telephone, television, and broadband internet services.

Bruce Telecom, owned by the Ontario municipality of Kincardine, has been in business for more than 100 years.

By Peter Menyasz

CANADA

Broadband

Canadian Regulator Penalizes Telco for Missing Broadband Rollout Deadline

Canada's federal telecommunications regulator on Aug. 7 ruled that Telus Communications Co. must provide free internet access if it fails to meet an extended deadline for providing broadband internet access to remote communities in Alberta and British Columbia, as part of a program using funds originally set aside to promote competition in local telephone services.

The Canadian Radio-television and Telecommunications Commission (CRTC) approved an application by Telus for an extended deadline to provide broadband service to the communities from Aug. 31, 2014 to Dec. 31, 2015. However, the CRTC ordered that Telus must compensate residential subscribers in those communities with one month's free broadband service for each month after the end of 2014 that service is not available.

"The Commission is very concerned about [Telus Communications Co.'s] failure to meet the Aug. 31, 2014 deadline and, in particular, by the very late notice given by [Telus] that it would require up to another 17 months to complete its broadband rollout," the regulator said in Telecom Decision CRTC 2014-419. In most cases, the CRTC noted, the communities have been promised broadband service for more than four years.

The compensation would apply to any residential customer who subscribes to Telus internet service within two years of its availability; in any community where Telus is not the retail internet service provider, it is to indemnify the appropriate service provider for the foregone revenues from providing service at no charge to their subscribers to compensate them for the delay, the CRTC held.

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The ruling warned that, if Telus is unable to provide broadband services to the communities by Dec. 31, 2015, the CRTC will consider imposing additional regulatory measures, including rebates to telecommunications service subscribers and/or administrative monetary penalties. To ensure more precise monitoring, it directed Telus to file quarterly update reports, rather than annually as previously required.

The CRTC in 2010, in a series of regulatory rulings, approved a major broadband rollout for 287 rural communities across Canada by Telus, Bell Canada and MTS Allstream Inc. The rulings, which followed initial decisions in 2006 to launch the program, permitted the telecommunications firms to pay for the rollout with funds accumulated in special deferral accounts, which were originally established to promote competition in local phone services.

The CRTC had allowed in 2002 the incumbent telephone companies to charge rates above their normally regulated price caps to allow new market entrants, primarily cable companies, to gain market share by undercutting the incumbents. The extra charges were assigned to the deferral accounts, which at one time held more than CA$1.6 billion (US$1.46 billion).

Telus Highlights Weather Challenges

Telus contended that unique combinations of circumstances had delayed its implementation of the broadband rollout for some communities, including force majeure events such as an earlier-than-normal and prolonged 2013-2014 winter season and flooding in Alberta in June 2013, as well as withdrawal of a partner service provider and the need to develop custom technological solutions.

Telus also argued that the communities are some of the most remote and logistically challenging locations in Canada and that, as many of them are aboriginal communities, permits are required under the federal Indian Act or other delegated land management legislation to secure land and access rights, as well as consultations and negotiations with First Nations and their tribal affiliations, it said.

However, the program was initiated in 2006, and the incumbent firms had enough time to prepare for the challenges they might face, the CRTC ruled. Telus also failed to notify the CRTC in a timely manner of the delay in its broadband service expansion, allowing the regulator little or no time to take corrective action, it said.

The incumbent local exchange carriers (ILECs) were given wide latitude to conduct the broadband expansion in the most efficient and effective way and have benefited since 2010 from accrued interest on the unused amounts in their deferral accounts, the CRTC observed. "The Commission finds that regulatory measures are required to address situations in which ILECs fail to comply with established deadlines."

The ruling noted that the Bell Canada companies and MTS have indicated that they will meet the deadline and did not comment on the proposed regulatory measures and that MTS has since confirmed completion of its portion of the broadband rollout in the province of Manitoba. If the Bell companies fail to meet the deadline, the CRTC will consider what regulatory measures, if any, should apply, the CRTC said.

The Public Interest Advocacy Centre (PIAC), which intervened in the case, argued that Telus' failure to complete the broadband rollout on time was a serious issue for potential competitors and it argued against any extension of the Aug. 31, 2014 deadline.

"[PIAC] submitted that the ILECs' proposals to use deferral account funds to subsidize broadband service expansion were approved approximately eight years ago," the CRTC noted. "In PIAC's view, the ILECs had had ample time to research, develop and implement their proposals."

The CRTC also rejected a suggestion by satellite-based competitor firm Xplornet Communications Inc. that subsidizing the broadband expansion was a waste of public funds. Telus has already started to invest in facilities in many of the communities affected, and those investments should be finalized, the ruling said.

By Peter Menyasz

INDIA

Internet

India Announces National Internet Connectivity Plan

India's Cabinet of Ministers approved an elaborate "Digital India" program on Aug. 20 that will aim to connect all village-level governments by broadband internet and mobile telephony and promote e-governance across the country.

The program will be implemented in phases until 2019 at an estimated cost of INR113,000 crore (US$18 billion), including the cost of measures already being implemented by the Department of Telecommunications and the Department of Electronics and Information Technology.

The information and communications technology sector has welcomed the announcement. Businesses including mobile technology, internet networking, cloud computing, e-payment facilitation and manufacturing are expected to benefit. An Aug. 20 government statement said that public private partnerships would be the preferred mode of deploying the program, and local manufacturing capacity would be created so that net imports are zero by 2020.

According to the statement, high speed internet will be made available as a core utility across India's 250,000 villages, where citizens will be able to access government services, with their information stored on a public cloud. Departments and jurisdictions will be seamlessly integrated to provide easy, single-window access to each citizen in real time from online and mobile platforms.

Government services themselves will be digitally transformed for improving ease of doing business through "scope enhancement, process reengineering, use of integrated and interoperable systems and deployment of emerging technologies like cloud and mobile." It will be possible to make financial transactions above a given threshold electronically and cashlessly. There will be an enhanced focus on universal digital literacy, as well as provisions of digital resources and services in regional languages.

The National Association of Software and Services Companies (NASSCOM) has said the program will enhance public service delivery, productivity, job creation and economic activity. However, some information technology experts remain skeptical about the government's ability to deliver on such an ambitious plan, given that existing efforts along these lines have fallen short. Crucially, an Electronic Delivery of Services Bill, introduced in parliament in 2011 with the intention of ensuring electronic, time-bound delivery of public services, has not yet been passed.

Pranesh Prakash, policy director with the Centre for Internet and Society, told Bloomberg BNA via email Aug. 21 that although the announcement includes some ideas of how the plan will be rolled out — encouraging public-private partnership and creating the positions of Chief Information Officers in at least 10 key ministries to design, develop and implement e-governance projects, for instance — sound more like marketing phrases bereft of any real meaning.

Also, the document does not mention existing policies like the use of open standards, including policy initiatives such as promotion of free/open source software that the ruling Bharatiya Janata Party had supported in their election manifesto, he added. "The Electronic Delivery of Services Bill, which would have added firm accountability to e-governance which is currently done as policy and lacks statutory accountability, is seemingly stuck," Prakash said.

At the same time, experts point out, the infrastructure to enable such a massive undertaking simply does not exist. UNESCO's State of Broadband Report 2013 found India to rank 122 in the world in terms of fixed broadband penetration, with only 1.1 individuals for every 100 being connected. A report by cloud computing technology provider Akamai Technologies found average broadband speed in India to be 1Mbps — the lowest in the Asia-Pacific region.

The government has been working on a INR20,000 crore (US$3.3 billion) National Optical Fibre Network since 2011, which aims to bring broadband connectivity to villages across the country (see "Broadband Internet, a Basic Right in India: Converting Dream into Reality" [09 WCRR 37, 9/15/14]). However, the project has faced repeated delays, and the latest deadline extension aims to complete the job by September 2015. Telecom Regulatory Authority of India Chairman Rahul Khullar told a business gathering at industry chamber ASSOCHAM in New Delhi Aug. 20 that with regard to broadband, "our progress has been disappointing."

Although the plan includes an early-harvest program, no timelines have been prescribed and it is not clear when tenders may be issued for various products and services.

By Madhur Singh

IRAN

ICANN

Iran Urges ITU Plenipotentiary Members to Grant Decision-Making Power to GAC

ICANN's Governmental Advisory Committee's (GAC) advisory role should be changed into a decision-making one, the government of Iran proposed on Aug. 19 in a suggested revision to Resolution 102, an important International Telecommunication Union document.

Despite recognition in the 2005 World Summit on the Information Society's Tunis Agenda that international internet-related public policy issues are for governments to decide, the role of nation states in internet governance issues still remains merely advisory, Iran said.

That is a mistake, it wrote. "[I]n a multistakeholder approach for internet governance, there is a need for active inclusion of governments in matters related to internet governance."

Iran also suggested that internet content-related issues should be added to the ITU's responsibilities (Resolution 101).

The suggestions from Iran appear in red-lined revisions to ITU plenipotentiary Resolutions 101, 102, and 133 recently obtained by Bloomberg BNA.

Negative Reactions to a GAC Veto

Giving the GAC veto power should "absolutely not" happen, "it's just a nonstarter," ICANN board chair Steve Crocker said on Aug. 19 at the Aspen Forum 2014. "That would completely transform our operation and the whole idea of a multistakeholder model into a government controlled operation, and that is precisely what is antithetical to the environment that has led to the innovation and expansion and enormous positive changes that have taken place across the world for the internet," he added.

US Ambassador Daniel Sepulveda, speaking at the same event, characterized Iran's suggested change concerning the GAC's authority as a "fairly extreme proposal." .Sepulveda, the US coordinator for international communications and information policy at the State Department, told Bloomberg BNA that a change in ITU documents regarding the GAC in this context is "non-germane" because the ITU has no authority over ICANN.

Sepulveda said he was not hopeful that US differences with some countries on internet governance topics could be ironed out at the ITU meeting. "We're not going to get to 'yes' with Russia, China, and Middle east countries relative to content issues on the internet," he said.

Deja Vu Proposals

Disagreement over the ITU's role in internet governance was a principal factor why member states at the

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2012 World Conference on International Telecommunications were unable to reach consensus, a usual hallmark of ITU deliberations.

With Iran's draft plenipotentiary proposals, it now appears that internet governance issues are likely to feature prominently in the ITU's quadrennial meeting of all members states. Plenipotentiary 2014 is scheduled to take place from Oct. 20 to Nov. 7 in Busan, South Korea.

There is one important difference between preparations leading up to the coming plenipotentiary and those that led up to WCIT: an intensive global debate is currently raging over the shape of internet governance, driven in part by the US Commerce Department's March announcement that it will transition oversight of key domain name functions to the global multistakeholder community, and by revelations last year of massive electronic surveillance by the US National Security Agency.

Hands Off ccTLDs

In another suggestion in Resolution 102, Iran appeared to take note of litigation in the US that threatens to entangle Iran's .ir country-code top-level domain (ccTLD). It asked for formal ITU recognition that nation states are free to manage their ccTLDs, "according to national requirements," and that other member states should not be able to interfere in those decisions.

Plaintiffs are attempting to collect on a civil judgment against Iran by subpoenaing ICANN for .ir details on the assumption that a ccTLD is property of value that can be attached to satisfy a judgment. ICANN has moved to quash a related writ of attachment (*Weinstein v. The Islamic Republic of Iran, et al.*, D.D.C., Nos. 1:00-cv-02601-RCL etc., *motion to quash*, 7/29/14).

In Resolution 133, Iran offers draft changes to provisions dealing with internationalized domain names. In the resolutions, Iran says that the changes it is proposing are consistent with the multistakeholder model of internet governance.

By David McAuley

ISRAEL

Wi-Fi

Israeli Communications Ministry Relaxes Restrictions on Wi-Fi Hotspots

A decision by the Israel Ministry of Communications to eliminate licensing requirements for Wi-Fi hotspots will make it possible for anyone in that country to operate a Wi-Fi hotspot from Sept. 7. The directive covers indoor and outdoor locations, with the condition that the service must be provided free of charge.

"In light of new technologies that have appeared in recent years, the ministry has decided to remove limitations on the use of Wi-Fi, which until now had been restricted to indoor venues. Internet services can now be offered anywhere in Israel," the ministry wrote in a statement.

The decision, which also marks the ministry's first use of a 2005 amendment to Israel's Communications Law allowing the minister to make "exceptional" regulatory exclusions, "will enable Israelis to remain connected and up to date, and enjoy free internet surfing," Communications Minister Gilad Erdan said.

The change follows discussions with telecommunications companies within Israel. Public Wi-Fi is expected to be a boon for tourists, social media applications and e-commerce, but a drawback for existing internet service providers, whose paid roaming services could suffer as the free Wi-Fi system grows.

"The truth is that we're correcting the regulatory situation for what some Israeli municipalities are already doing," a senior Communications Ministry official told Bloomberg BNA on Aug. 17, noting that Tel Aviv and Raanana are already providing some outdoor Wi-Fi coverage.

Wi-Fi Goes Public

Because, in the past, hotspots could only be set up in "confined premises" — meaning inside buildings — Wi-Fi coverage tended to be weak or intermittent in many public spaces. Neither did the system work in hotels or airports, many of which instead offered private internet services.

Under the rule change, any private or public entity can now set up routers anywhere, including in parks, on beaches and college campuses.

Existing telecom operators will need the ministry's consent to integrate Wi-Fi into their networks, because doing so requires a change in their existing licenses. The only requirement, the ministry said, will be that the additional service be offered to all subscribers for free, as part of existing packages.

"The companies may not charge subscribers separately or additionally" for the service, "the use of Wi-Fi hotspots may not be deducted from the subscribers' surfing package capacity," and "customers may not be charged for data use within pricing programs," the directive states.

Only Bezeq Communications, Israel's largest and oldest telecommunications company, currently provides Wi-Fi service to its internet infrastructure subscribers. Bezeq allows subscribers to connect to the web using another Bezeq customer's Wi-Fi router in return for agreeing and dedicating a portion of their own bandwidth to the shared system.

Mobile operators, meanwhile, "are more focused on the fight for 4G service," the ministry official said. "We just want to make sure they don't take over the Wi-Fi market by putting antennas on every rooftop, and then charging for it. We want the service to be open to everyone, no matter how it is reached," he added.

The directive does not relate to privacy, passwords or any other identification issues. "Our goal is to get the service out there, but if other government authorities feel the action needs to be narrowed, we'll comply," he said.

Israel's Law, Information and Technology Authority (ILITA) confirmed that it is examining "some aspects of the new directive" in an Aug. 18 response to Bloomberg BNA, adding that it therefore cannot comment on the issue.

By Jenny David

ISRAEL

Broadcasting

Israeli Committee Proposes Replacement of Existing Communications Regulators

A government committee has recommended that Israel's three existing telecom regulators — the Communications Ministry, the Second Broadcasting Authority and the Council for Cable TV and Satellite Broadcasting — be replaced with a national communications authority that would oversee commercial broadcasting, the multichannel TV market and possibly public broadcasting in Israel.

The committee included the proposal in an interim report it submitted on Aug. 13, after six months of hearings.

Headed by Dr. Amit Shechter, a former professor of telecommunications at Penn State University and now a senior lecturer at Israel's Ben-Gurion University, the committee also proposed that:

- No licensing requirements be imposed on new players in the web-based TV market, but rather their regulation be gradually increased as their market share grows. Cellcom Israel and Partner Communications (Orange) have already announced new multi-channel TV ventures;
- Regulation of Hot Cable Communications and DBS (Yes) Satellite Services be relaxed in parallel if they lose market share;
- Gradual standards be set for providers of audio-visual content over the internet;
- Funding sources for original Israeli content be diversified, and include companies that currently own communications infrastructures;
- Current regulations on advertising remain in place for all multi-channel TV broadcasters.
- Ethical standards on content and advertising, as well as rules on handicapped accessibility also be maintained; and
- Sweeping arrangements be adopted to prevent harmful content from reaching minors, including rating and filtering systems.

"We are in a transition period whose duration and pace cannot be predicted due to the large number of technological, economic, social and other variables," the report stated.

The shift began with "changes in supply and use of current services, and is continuing as the public changes its content consumption habits," the committee said, adding that "ultimately, a communications environment will stabilize around a new model, which may also be dynamic and changing."

The proposals were made both possible and necessary by previous reforms that required Hot and Bezeq Communications to lease their infrastructure to other providers at wholesale prices (see "Israel's Communications Ministry Adds Passive Infrastructure to Sharing Requirements" [09 WCRR 10, 3/15/14]), as well as the deployment of a high-speed fiber-optic network by Unlimited, a joint venture of the Israel Electric Corporation (IEC) and a consortium led by Sweden's ViaEuropa (see "Israel Launches First Fiber Optic Network" [09 WCRR 14, 6/15/14]), the Communications Ministry said in a statement.

"Television, viewing habits and the way we consume content are changing all the time," added Communications Minister Gilad Erdan. "Existing regulations must be examined and updated in order to enable new players to enter the broadcast market and create competition," he said, predicting that "a parallel increase in the strength of public broadcasting and the entry of new internet-based content providers will allow us to reduce regulatory involvement in commercial broadcasting."

For regulatory purposes, the report said, an audio-visual service provider should be defined as a for-profit entity which:

(a) Primarily delivers audio-visual content on multiple or single channels;

(b) Is viewable on electronic infrastructure;

(c) Includes a system for content organization or a broadcast schedule; and

(d) Is designed primarily for the Israeli public.

The committee also urged that regulation and enforcement of anti-competitive behavior, both economic and technological, be increased in order to ensure "network neutrality" and the entry of new players to the broadcasting market.

The committee is expected to issue a final report in November 2014.

By Jenny David

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ROMANIA

Mobile

Romania's Competition Council Issues Guidelines on Co-Investment Agreements for Mobile Electronic Networks

By Alina Lacatus and Sandra Moga; DLA Piper, Bucharest; Email: alina.lacatus@dlapiper.com; sandra.moga@dlapiper.com.

The Romanian Competition Council (RCC) recently published its guidelines setting forth the specific conditions in which co-investment agreements for the joint utilisation of mobile electronic networks may be concluded.

The RCC Guidelines arise from a first-time competitive assessment of cooperation agreements in the telecommunication sector. Their issuance shows the RCC's increased interest in scrutinizing the telecommunication sector, especially as regards to mobile telecommunications.

The Triggering Factor for the Issuance of the RCC Guidelines

In 2013, Orange and Vodafone, the two most important players on the mobile telecommunications market in Romania, announced the conclusion of an agreement for the joint utilisation of their network infrastructure, which would allow both companies to continue their investments in the development of technologies at the national level.

The RCC decided to publish its guidelines in order to allow companies active in the telecommunications market to gain a general knowledge of the RCC's approach regarding such cooperation agreements.

General Framework of the Assessment

The RCC Guidelines note that horizontal agreements regarding the joint utilisation of mobile electronic networks ("Networks Agreements") may have the following objects:

- The joint utilisation of passive infrastructure (such as utilities and buildings), which — in the RCC's view — is unlikely to raise competition concerns given the operators' large degree of independence;
- The joint utilisation of active infrastructure, respectively:
  - (i) Joint utilisation of radio access network (including joint utilisation of the spectrum);
  - (ii) Profound joint utilisation (i.e. joint utilisation of a transportation network); and
  - (iii) National roaming.

In RCC's view, these Networks Agreements may facilitate collusion and raise competition concerns, given the significant degree of cost commonalities and network sharing between the parties.

The RCC Guidelines indicate that Networks Agreements do not fall under the scope of Art. 5(1) of the Romanian Competition Law (respectively of Art. 101(1) of the Treaty on the Functioning of the European Union), provided that such agreements cumulatively meet the criteria set forth by Art. 5(2) of the Romanian Competition Law (Art. 101(3) TFEU), as follows:

- Efficiency gains: Networks Agreements should lead to:
  - (i) The avoidance of certain costs;
  - (ii) The reduction of entry barriers for limited resources companies;
  - (iii) The limitation of the environment impact; or
  - (iv) The creation of new technologies (e.g. LTE – 4G technology).
- Indispensability: Networks Agreements may generate restrictions regarding the:
  - (i) Management and utilisation of the shared networks' capacity; and
  - (ii) Refusal to renew collocation agreements or artificial limitation of the interconnection links' capacity.
- Pass-on to consumers: the RCC will analyse the degree and nature of competition between the parties (the efficiencies will not be presumed only because the agreement does not lead to the elimination of competition on the relevant market). It will also analyse the nature and degree of efficiency gains, the elasticity of demand, and the creation of new or improved goods/services. The RCC mentioned that the arguments regarding non-price efficiency gains (i.e. the increase of network coverage) should be cumulative with the arguments regarding quantitative (price) efficiency gains.
- No elimination of competition: the RCC will assess the creation of the competition at infrastructure level.

The RCC highlighted the fact that the Networks Agreement may raise competition concerns only if the parties intend to change the structure of the market through such agreements (i.e. the agreement is, in fact, a disguised economic concentration).

Potential Anti-competitive Concerns Raised by the Networks Agreements

The RCC Guidelines identify the following anti-competitive concerns regarding the Networks Agreements:

- A significant decrease of competition between the parties as a result of:
  - (i) The reduction of competition between the networks triggered by the existence of the same cov-

erage and quality of the service, as well as by the joint utilisation of hardware and software;

(ii) The increased costs communalities and the limited level of differentiation between services; and

(iii) The potential exchange of confidential information.

- Refusal of access to physical infrastructure or unlawful refusal to supply call origination/termination services; and
- Exchange of confidential information.

In the RCC's view, the exchange of information regarding the functioning of shared network elements does not raise concerns, given the technical nature and purpose of such information. However, one of the most problematic risks is that related to a potential exchange of information regarding the future capacity of the networks, because this allows the parties to align their service offerings. The RCC indicates that it is necessary to establish measures to restrict the exchange of information between the parties only to the information necessary for the functioning or the management of the shared networks; the measures should be even more efficient as the usage of the shared networks increases.

The RCC will also take into consideration the following factors:

(i) The characteristics and competitive structure of the relevant markets;

(ii) The parties' ability to differentiate the supplied services;

(iii) The economic context; and

(iv) The nature of the agreement.

Implications for the Telecommunications Market

Following the issuance of the RCC Guidelines, it is expected that future cooperation agreements on the telecommunications market will be subject to a closer inspection by the RCC.

Moreover, companies intending to conclude a cooperation agreement in the telecommunication market should ensure that their agreement is in harmony with the conditions set forth by the RCC.

RUSSIA

Wi-Fi

Russia to Require User ID for Access to Some Wireless Internet Networks

Businesses may provide public access to wireless internet networks in Russia, under a new government order, but only if they obtain — and retain — personal identification authenticating the user and the user's device.

It is unclear whether the new law, signed by Prime Minister Dmitry Medvedev on Aug. 8, applies to all publicly available wireless networks or to a group of networks known as "collective access points."

User registration and authentication requirements under the order includes a user's full name and details of an identity document, such as a driver's license or passport.

Operators of universal data transmission services and providers of shared internet access will be required to provide the service only after user authentication. Service providers must store for a period of at least six months information about the user, including registration details, point of access, time of service delivery, and volume of data transferred. The operator also must assign a unique identifier to the device used to access the internet.

The order amends the federal information security law, which was previously amended in May to increase requirements on internet service providers to store user data, in the name of anti-terrorist efforts.

Confusion Over Application of Law

Because the order does not explicitly state to which kinds of Wi-Fi networks the new rules will apply, officials and experts disagree about its extent.

According to officials within the Ministry of Communication and some State Duma deputies, the new rules are limited to internet networks deployed at so-called "collective access points," of which there are nearly 21,000 in Russia. Rostelecom is the main provider of such services, which are available in post offices and other places.

The officials said identification will not be required to access Wi-Fi in public places, such as at parks, cafes, public transport, or hospitals. The law also does not concern Wi-Fi networks set up by private individuals.

However, other government officials and legal experts say the law will apply to publicly available internet connections, such as at cafes, as it is currently written, and an official explanatory text may be required to clarify the intended extent of the law.

The government of St. Petersburg announced on Aug. 10 that it will begin requiring user identification by passport or driver's license for access to Wi-Fi in all public zones — including in the city center, museums, the airport and on public transport — in accordance with the government order. However, the city government said it does not interpret the new law to apply to private businesses or individuals.

The new law came into force on Aug. 13.

By Jenny Johnson

RUSSIA

Legislation

Russia Releases New Telecom Rules

The Russian authorities released a series of new regulations to introduce requirements applicable to telecommunication businesses following recent legislative amendments effective from Aug. 1, 2014.

The Russian Government adopted Decree No. 741 that allows the Russian Ministry of Communications to approve requirements applicable to equipment and software products used for the purposes of distributing content over the internet. The decree stipulates that the ministry must approve these requirements in coordination with the Russian law enforcement and security agencies. Decree No. 741, dated July 31, came into force on Aug. 5, 2014 when it was published in the Official Gazette.

Decree No. 742 allows the Federal Service for Oversight of Communications, Information Technology and Mass Media, also known under its Russian acronym Roscomnadzor, to control businesses distributing content over the internet. The decree stipulates that Roscomnadzor must register websites that receive more than 3,000 visits per day, monitor these websites and approve methodologies aimed to determine the number of visits per day. These websites and web pages became subject to the same Russian laws that apply to the mass media. Internet businesses are also required to maintain six months of data on its users, and allow the Russian authorities full access to users' information. The information must also be stored on servers based in Russia. The new law means internet businesses, including social networks, can be blocked if they fail to comply with the new requirements.

The new regulations followed recent legislative amendments that took effect on Aug. 1, 2014:

- Decree No. 743, which sets rules on interaction between internet businesses and the Russian law enforcement and security agencies;
- Decree No. 744, which approved procedures to notify users about limited or blocked access to web-based information services;
- Decree No. 745, which sets rules of interaction between internet businesses and Roscomnadzor;
- Decree No. 746, which requires internet businesses that start distributing digital content over the internet to notify Roscomnadzor;
- Decree No. 747, which approved a list of personal needs to access web-based digital content that are exempt from the new legislative requirements; and
- Decree No. 759, which approved rules applicable to internet businesses required to maintain data on its users, and allow the Russian law enforcement and security agencies full access to users' information.

By Sergei Blagov

TURKEY

Internet

Constitutional Court Overturns Statutory Basis for Data Protection Regulation

By Hakki Can Yildiz and Can Sözer, of Esin Attorney Partnership, Istanbul, a member firm of Baker & McKenzie International; Email: can.yildiz@esin.av.tr and can.sozer@esin.av.tr

In the summer of 2012, Turkey's Information and Communications Technologies Authority (ICTA) adopted a controversial data protection regulation so contentious that the regulation was amended and its entry into force postponed twice.

The regulation finally entered into force on July 24, 2013, covering, among other things, data retention and the processing and transfer of personal data (see "Turkey Postpones Implementation of New E-Privacy Regulation" [08 WCRR 20, 3/15/13]).

The regulation's validity recently was thrown into in doubt, as the Turkish Constitutional Court, on April 9, 2014, annulled Article 51 of the Electronic Communications Act (ECA), the main provision empowering the ICTA to regulate data protection and data retention issues in the electronic communications sector. However, as the annulment decision had not yet been published in the Official Gazette as of July 22, 2014, the six months' time period before the decision becomes effective has not yet started.

Specifically, Article 51 authorized the ICTA to establish the procedures and principles for processing and protecting personal data in the electronic communications sector. The ICTA then promulgated the regulation.

While Article 51 was the main provision empowering the ICTA to issue the regulation, three other articles, which the Constitutional Court apparently did not address in its decision, also grant certain powers to the ICTA regarding personal data. As the Constitutional Court's reasoned decision has yet to be published, it is not clear whether the Constitutional Court was asked to review these other articles, or if its decision makes any reference to them.

According to news reports, the request to annul Article 51 was made by the Turkish Council of State, the nation's highest administrative court for judicial review, because of inconsistencies between Article 51 of the ECA and Article 20 of the Turkish Constitution.

Article 20 of the Constitution, part of a constitutional amendment in 2010, defines data protection as a personal right and restricts its processing, storage and transfer. Under Turkish law, personal rights can be restricted only by parliamentary acts. However, Article 51 of the ECA empowers an administrative body, namely the ICTA, to adopt regulations concerning the processing or protection of personal data.

The decision, therefore, suggests that the Constitutional Court annulled the regulation as a means to encourage the parliament to enact a data protection law, or amend the ECA to address data protection and privacy on a parliamentary level.

Implications for the Electronic Communications Sector

In its public announcement, the Constitutional Court stated that the decision will become effective six months after its publication in the Official Gazette. There is limited information on the matter, as neither the initial request for annulment of Article 51 nor the Constitutional Court's reasoned decision is available as yet.

It is also not yet clear if the parliament will amend the ECA before the Constitutional Court's decision enters into force, in order to render the ICTA competent to regulate personal data in the electronic communications sector. While neither the ICTA nor the Constitutional Court has made any definitive statements, it is likely that the regulation will be revoked when the decision enters into force, as Article 51 was its underlying statutory basis.

The Constitutional Court's ruling means that the ICTA will no longer be entitled to adopt rules and procedures for processing or protecting personal data in the electronic communications sector, unless the parliament takes legislative action to ensure the ECA's conformity with the Turkish Constitution.

It is also not yet clear how this decision will impact operators in the sector. The ICTA's stance, as well as the future of the regulation, will become known only after the reasoned decision is published.

For the time being, operators will most likely wait and see, and remain reluctant to engage in activities that do not comply with the regulation until the decision enters into force or the parliament takes legislative action to remedy the legal uncertainty.

UNITED ARAB EMIRATES

Telephony

Emirates Integrated Telecommunications Company Announces UAE's First VoLTE Network Service

The Emirates Integrated Telecommunications Company, known as "du," announced on Aug. 4 that it has successfully installed and tested a Voice Over LTE (VoLTE) network, which will allow users to make clear voice calls as they simultaneously access internet at 4G speeds.

The step makes du the first operator in the Middle East to offer VoLTE services.

Du also claims to have rolled out a VoLTE network faster than any other operator in the world, having prepared the network in 80 days.

VoLTE technology allows 4G operators to transfer voice traffic over their LTE networks, rather than on older 2G and 3G systems. From the customer's perspective, it delivers high definition voice clarity, together with multimedia services such as video calls and sharing, multimedia messaging, chat, file transferring and more. The system also reduces call set-up time to just 1-2 seconds, the company said.

"With VoLTE, we will be exploiting the full potential of 4G LTE," Saleem Al Balooshi, du's executive vice-president for network development and operations, said in a statement. "Our commitment to our customers has been reconfirmed with this fastest installation and testing of VoLTE on a live network. VoLTE will significantly enhance the call experience for customers using our 4G LTE network, adding more value through the use of the latest technology innovations."

Du has been providing free HD voice quality on its mobile service since 2012, though only on its 3G and fixed-line networks. In the last six months, voice traffic on the network increased by 200%, the company said.

According to a 2013 survey by the UAE Telecommunications Regulatory Authority (TRA), du's mobile network marginally leads other local providers on a number indicators related to voice quality and call success rates.

The company, which says it has 7.5 million individual and 80,000 business subscribers, is 39.5% owned by the Emirates Investment Authority, 20.08% by Mubadala Development Company PJSC and 19.5% by Emirates Communications and Technology, with the remaining stake held publicly.

By Jenny David

UNITED KINGDOM

Privacy

UK Parliament Report: Right to be Forgotten Principle Is "Unworkable"

The UK Government should continue to push for excluding the right-to-be-forgotten principle in the proposed European Union data protection regulation, because it is "misguided in principle and unworkable in practice," according to a report by the UK House of Lords' Home Affairs, Health and Education EU Subcommittee.

The subcommittee also expressed its disagreement on July 30 with a recent EU court ruling that supported the right-to-be-forgotten principle. Attorneys told Bloomberg BNA that the ruling may affect non-EU-owned social media companies within the EU.

Proposed Data Protection Regulation

"The expression, 'right to be forgotten' is misleading," Subcommittee Chairman Baroness Usha Prashar said in statement announcing the report's release on July 30. "Information can be made more difficult to access, but it does not just disappear," she said.

It is important that any future EU regulation "does not attempt to give individuals rights, which are unenforceable," she said.

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The subcommittee published its report after a hearing with testimony from the Information Commissioner's Office, Google Inc., privacy attorneys and the UK Justice and Civil Liberties Minister Simon Hughes.

At the hearing, Hughes testified that the UK Government is against the inclusion of a right-to-be-forgotten principle in the proposed EU data protection regulation, which was approved by the European Parliament on March 12.

The amended version of the regulation approved by the European Parliament changed the right to be forgotten to a "right to erasure" of personal data. That language is cited in the subcommittee report.

There is debate among the 28 EU Member States represented on the European Council that is reviewing the proposed regulation about whether it should even contain the right-to-be-forgotten principle.

Disagreement with EU Court Ruling

The subcommittee also said it disagreed with the European Court of Justice (ECJ) May 13 ruling that EU data subjects have the right to require Google Inc. and other internet search engines to remove results linking to websites containing personal information about them (see "Data Subjects Can Compel Google to Delete Site Links From Search Results" [09 WCRR 10, 6/15/14]).

The subcommittee said the assumption by EU officials that the ruling by the ECJ, the EU's top court, required inclusion of the right-to-be-forgotten principle in the data protection regulation was a "profound error."

Although it is the task of the ECJ to interpret the law, the responsibility "to make the law" for the future is in the hands of the European Council and the European Parliament, the report said.

"If, as we believe, the current law as interpreted by the Court is a bad law, it is for the legislators to replace it with a better law," the report said.

The UK Government, along with other EU Member States, must "insist on text which does away with any right allowing a data subject to remove links to information which is accurate and lawfully available," it said.

By Ali Qassim

Domain Name Briefs

The following items were submitted by the Hogan Lovells Anchovy News, c/o Hogan Lovells LLP, Paris. For further information, contact David Taylor, Partner, on +33 1 53 67 4735 or Jane Seager, Counsel, Avocat a la Cour, on +33 1 53 67 4838; Email: david.taylor@hoganlovells.com; jane.seager@hoganlovells.com; Web: www.hoganlovells.com © Hogan Lovells LLP 2014

Nominet Cancels Cancellation Policy

Nominet, the .uk domain name registry, announced on July 30, 2014 that it was abandoning its plans to automatically cancel .uk domain names that could not be validated pursuant to its Data Quality Policy, which was introduced in April 2014 and came into force the following month. The automatic cancellation policy was due to commence from September 22, 2014. However, under the amended policy, domain names that do not meet the validation procedure will now remain suspended until the data is corrected or they expire.

Nominet's Data Quality Policy is aimed primarily at obliging registrars to ensure that a "reasonable, minimum proportion" of the data they submit can be validated by the registry. The policy also stipulates that registrars must suspend .uk domain names within 30 days where they are unable to validate data. Nominet warns that it will keep track of registrar compliance with the policy via data quality audits of registrars and the regular data quality reports that registrars must submit to Nominet.

The policy issued a stern warning to registrars that Nominet may validate any registrant data submitted. Where Nominet determines that data submitted cannot be validated, registrars will be required to take steps to resolve the issue. One of the key data elements that the policy is concerned with is the email address associated with a domain name and the onus is again placed on registrars to "ensure that the email address for the registrant is a reliable means by which to contact the registrant."

The original policy comprised of the planned automatic cancellation of domain names that did not meet the necessary validation checks after 30 days, with an initial "data quality transition period" from May 7 to September 22 during which domain names were not automatically cancelled where validation could not be completed. This programmed automatic cancellation has been scrapped under the policy change and domain names not meeting the validation requirements will now remain suspended using the so-called "Data Quality Lock" until the data is corrected or they expire.

Nominet stated in its announcement regarding the softening of its policy that it was in response to feedback received following the introduction of the Data Quality Policy in May, which Nominet recognises "was a significant change for both registrants and registrars". The statement also said that it was Nominet's view that suspension "may be more effective overall in improving data quality by giving more time for registrants and registrars to make corrections."

The Nominet Data Quality Policy reflects an international tightening up in relation to WHOIS data accuracy, notably as embodied in the WHOIS validation procedures applicable to gTLDs as imposed under ICANN's 2013 Registrar Accreditation Agreement. The requirement for registrants to respond to automated WHOIS data checks under this policy has caused websites to go down and has raised the ire of registrar and registrant groups.

Whilst enhanced WHOIS data accuracy can only be a good thing, there is clearly a delicate balancing act involved when it comes to weeding out those domain name registrants who are deliberately seeking to deceive and those that simply may not be in a position to meet validation requirements within a specified time frame where this is not due to bad faith.

Two Character .PT Domains Set to Arrive

DNS.PT, the organisation responsible for operating the .pt country code Top Level Domain (ccTLD) for Portugal, recently announced that as of November 1, 2014, it will be possible to register two-character .pt domain names. Domain names under .pt may be registered by all individual or corporate entities but presently only domain name registrations that have between 3 and 63 characters are accepted.

It is not currently possible to pre-register two character .pt domain names prior to their release on November 1 and the terms and conditions applicable shall be disclosed in advance no less than 30 days prior to the release date at www.dns.pt.

The availability of two character domain names across ccTLDs is commonplace now with 8 of the top 10 country codes offering such registrations, namely .de (Germany), .tk (Tokelau), .uk (United Kingdom), .nl (Netherlands), .eu (European Union), .ru (Russia), .br (Brazil), .ar (Argentina).

Registrations Under .AU on the Rise

The Australian domain name registry, AusRegistry, in conjunction with .au domain administration, auDA, recently published a survey concerning Australian domain name use and ownership.

The survey of more than 3,000 Australians showed that the number of .au domain name registrations is increasing, with 76% of all domain name holders preferring to register under the .au domain name extension.

According to the survey the two primary reasons for Australians choosing a .au domain name were due to .au being the most "popular" domain in Australia and because .au was seen as best representing Australian organisations.

The survey also found that while a majority of individuals do not fully understand the technicalities of online threats, it did find that Australian internet users are becoming more security conscious, with 61% of respondents concerned that a website they were visiting was secure and 64% concerned that the organisation was one that they trusted. George Pongas, General Manager of Naming Services at AusRegistry, said that "[t]wo-thirds of survey respondents are more likely to trust a .au website compared with only one-third for a .com."

According to AusRegistry, the fact that Australians chose .au as their preferred domain name extension demonstrates that .au domain names are "are a symbol of online trust and security for Internet users in Australia". This apparent level of trust has possibly been helped by the introduction of the world-first Registrar Information Security Standard (ISS) by auDA and AusRegistry's domain name security service, .auLockdown.

The .au Registrar ISS is a set of mandatory protocols which aims to help .au registrars manage and improve the security of their businesses. These protocols were put in place following a serious security incident involving one accredited registrar in 2011. The .auLockdown is a security measure which allows .au domain name holders to lock their name server delegations and in turn prevent unauthorised changes to their DNS. Where domain name servers have .auLockdown in place, changes can only be made by pre-authorised registrars with authenticated access keys.

The annual report also found that there was an increase in the number of females holding .au domain names, with the number increasing from 16% in 2013 to 22% in 2014.

The .au domain name extension is now one of the top 10 ccTLDs in the world, which by any standards is impressive. It will be interesting to see what progress and developments are reported in AusRegistry's next annual survey.

ICANN Propose Changes to Strengthen GAC Standing

The Internet Corporation for Assigned Names and Numbers has recently published a proposed amendment to its bylaws that can be interpreted as giving the world's governments a stronger voice in matters concerning ICANN's actions, such as the introduction of new gTLDs. This proposed change will make it harder for the ICANN Board to reject advice from its Government Advisory Committee (GAC).

As matters currently stand, the ICANN bylaws allow the ICANN Board to reject GAC advice on a simple majority vote of the Board, that is to say, 50% + 1.

Under the new proposals to the ICANN Bylaws new wording has been added to Article XI, Section 2.1(k) which states "A final decision by the ICANN Board to not follow the advice of the Governmental Advisory Committee must be supported by a two-thirds vote of all members of the Board that are eligible to vote on the matter."

The rationale behind the change to the ICANN Bylaws stems from the first Accountability and Transparency Review Teams recommendations. This resulted in the creation of the Board-GAC Recommendations Implementation Working Group out of which came the proposal to require a two-thirds majority in the event that the ICANN Board choose to reject GAC advice.

The announcement by ICANN to implement this change comes at a time when many questions are being posed to the organisation with regard to ICANN's accountability mechanisms and the role that governments currently play and will play in the future in light of the US government's National Telecommunications and Information Administration (NTIA) recent announcement regarding its intentions to transition "key Internet domain name functions to the global multistakeholder community." This is essentially a largely symbolic move on the part of the NTIA as ICANN is already responsible for deciding what changes should be made to the root zone due to ICANN's role in the Internet Assigned Numbers Authority (IANA) functions.

In any event the recent proposal by ICANN can either be seen as an essential and long overdue piece of housekeeping or an astute political move to ensure that governments can be assured that ICANN will listen to their positions and be more likely to accept GAC advice as and when it is issued.

Appeal Court Holds Domain Names May Infringe French ''Copyright''

In a ruling of May 28, 2014, the Lyons Court of Appeal confirmed a first instance decision which found that the registration and use of a domain name constituted not only trade mark infringement but also infringement of French copyright law, known as *droit d'auteur*. *Droit d'auteur* is roughly equivalent to copyright in English, although there are some important differences.

In this instance, the claimant was the Tourist Office of Val Thorens, a well-known French ski resort. The defendant was a French individual, specialised in the provision of IT services such as web hosting and advertising.

The domain names <val-thorens.net> and <val-thorens.org> were registered by the defendant in 1998 and 2000 respectively. The two domain names directed to real estate websites for properties in the vicinity of the Val Thorens ski resort.

On April 1, 2004, the claimant filed a French trade mark application for the term VAL THORENS for goods and services in Nice Classes 1 to 45, including temporary housing services (namely, holiday rentals). In addition, the claimant apparently produced evidence that it registered the <val-thorens.com> domain name and started using it as early as April 1997.

The claimant filed court proceedings in Lyons against the defendant, claiming that the domain names owned by the defendant had been registered in violation of the VAL THORENS French trade mark, as well as *droit d'auteur* in the term VAL THORENS, and that the unauthorised use of the term VAL THORENS on the defendant's websites was in itself unfair competition.

The Lyons Tribunal of First Instance did not find that there was unfair competition, but granted the claimant's other requests and ordered all uses of the term VAL THORENS, both in itself and as domain names, to cease on the grounds of both trade mark infringement and infringement of *droit d'auteur*.

The defendant appealed and claimed that no *droit d'auteur* could be held in the term VAL THORENS and that the trade mark of the same name was null and void due to the registration of the two domain names nearly 6 and 4 years prior to the trade mark registration.

The defendant based its claim on Articles L.711-4 and L.714-3 of the French Intellectual Property Code which provide respectively that "It is not possible to register as a trade mark a sign which infringes a prior right, including, inter alia: a) A registered trade mark. . .; b) A company name if there is a likelihood of confusion in the mind of the public; c) A trade name that is known nationwide and if there is a likelihood of confusion in the mind of the public" and "a trade mark registered in violation of Articles L.711-1 to L.711-4 will be declared null and void by courts".

The Court of Appeal considered that, whilst the domain names were indeed registered prior to the VAL THORENS trade mark, such registration was obtained in violation of the existing *droit d'auteur* held by the claimant in the term VAL THORENS. In this regard, the court found that, in addition to its use as the name of a ski resort, the term VAL THORENS was used as a title in several leaflets, websites and other original works and was therefore protected as such under *droit d'auteur*.

Since the defendant could not provide evidence of use of the two domain names predating the claimant's website, the court found that he was not in a position to rely on the domain name registrations as prior rights to request the cancellation of the VAL THORENS trade mark.

Furthermore, and despite the defendant's claim that the two activities should be distinguished, the sale of real estate displayed on the defendant's websites was deemed likely to cause confusion in the mind of the public with the holiday rentals covered by the VAL THORENS trade mark and showcased on the claimant's website.

Whilst no doubt in conformity with French law, this decision will seem strange to those more familiar with notion of copyright law in common law jurisdictions. Titles are not usually protected under copyright because they are not considered unique enough, and are too short to contain the necessary degree of creative authorship. Thus it seems quite unlikely that a US or UK court would have made a similar finding, even more so in respect of what could be argued to be a geographical location. In this regard the French court also seemed to avoid this issue by finding that VAL THORENS was a new expression which had been specially created to describe a particular skiing area and was used as a title on brochures and other works in a new and original way.

In addition, it is not certain that a panel under the Uniform Domain Name Dispute Resolution Policy (UDRP) would have found for the claimant under similar circumstances, which may have been the reason why the claimant decided to address the issue of defendant's domain names using the French courts instead. The UDRP is an alternative dispute resolution procedure that is designed primarily for obvious cases of cybersquatting, and complainants have to prove the all of the following three circumstances:

(i) The domain name registered by the respondent is identical or confusingly similar to a trade mark or service mark in which the complainant has rights; and

(ii) The respondent has no rights or legitimate interests in respect of the domain name; and

(iii) The domain name has been registered and is being used in bad faith.

Whilst the claimant would have succeeded in meeting the requirements under the first limb, having a registered trade mark for numerous services (simply asserting a geographical name would not be enough), it may have had trouble with the second and third elements, given the length of time that the defendant had been using the domain names for a seemingly legitimate business selling real estate in Val Thorens, and the fact that he was doing this a number of years before the claimant registered its own word (non-figurative) trade mark covering such services (although this in itself also seems rather strange as in theory it may seemingly prevent anyone else from using the term VAL TORENS in relation to the sale or rental of real estate property *in* Val Thorens).

See for example *Kur- und Verkehrsverein St. Moritz v. St-Moritz.com* (WIPO Case No. D2000-0617), where the panel denied the transfer of <stmoritz.com>, and *Commune of Zermatt and Zermatt Tourismus v. Activelifestyle Travel Network* (WIPO Case No. D2007-1318), where the panel denied the transfer of <zermatt.com>. In both cases the complainants were able to assert trade mark rights for goods or services other than those described by or related to the geographical meaning of the term in question, but the panel found that the registrants nevertheless had a legitimate interest in respect of the domain names as they were using them to provide informational websites about the resorts in question.

Win-Lose for Segway in Domain Name Dispute With Former Distributor

In a domain name dispute under the UDRP before the World Intellectual Property Organisation, a US company obtained the transfer of a domain name incorporating its trade mark and lost its complaint with respect to four others.

The complainant was Segway Inc, a world-renowned innovator in personal mobility devices that owned a number of US and European Community Trade Marks in the term SEGWAY. In addition, the complainant used the terms "segsolutions" and "segcessories" to promote diverse products and accessories.

The respondent was Chappell McPherson, an authorized distributor for the complainant in Costa Rica from 2007 to 2010, operating under the name Segway Costa Rica SA.

The disputed domain names were <segwaycostarica.com>, <segwaysantacruz.com>, <segwayxperience.com>, <segs4kids.com> and <segs4kids.org>.

The domain name <segwaycostarica.com> was registered by the respondent in her own name, but in compliance with a distributor agreement between the parties. The respondent's distributor agreement expired on December 30, 2010 and she was notified in February 2011 that she no longer had permission to make use of "any Segway Trademark material" as of January 1 of the same year, and should remove SEGWAY from her trade and/or legal name.

In early 2011, the respondent began operating a guided tour business in Santa Cruz, California, under the trade name "Segway Santa Cruz". The domain name <segwaysantacruz.com> was registered in April 2011 and resolved to the website at www.segwaysantacruztours.com, the respondent's business home page. The domain names <segwayxperience.com>, <segs4kids.com>, and <segs4kids.org> were registered at the same time but did not resolve to active websites.

The complainant sent a cease and desist letter to the respondent on November 21, 2013. The respondent did not respond. The complainant therefore filed a UDRP complaint on April 23, 2014 in order to request transfer of the domain names.

Confusing similarity under the first prong of the UDRP was easily found by the panel given the incorporation in full of the complainant's SEGWAY trade mark in the domain names <segwaycostarica.com>, <segwaysantacruz.com>, and <segwayxperience.com>.

However, the panel declined to discuss the potential application of the UDRP to <segs4kids.com>, and <segs4kids.org> as the simple use of the terms "segsolutions" and "segcessories" by the complainant was deemed insufficient to establish a common law trade mark in the term "seg" or the existence of a "seg" family of marks. Failure to prove trade mark rights thus meant that the complaint was denied for these two domain names, and the panel did not need to go on to consider them further.

Turning to the second requirement of the UDRP and its application to the three remaining domain names, the panel found that the respondent did not have any legitimate interests in the domain name <segwaycostarica.com>, one of the reasons being that the complainant's cease and desist letter had requested transfer of any domain name incorporating the term "Segway", in accordance with the distributor agreement, even though it did not specifically mention transfer of that particular domain name (and even though the original notice of termination did not refer to domain names at all).

The panel faced a greater dilemma upon examination of the use by the respondent of the <segwaysantacruz.com> domain name. Yelp listings, newspapers and other evidence was provided showing that the respondent widely advertised her business under the names "Segway Santa Cruz" and "Segway Santa Cruz Tours" and that she was referred to by such names in the media. The issue was whether general knowledge of the complainant's will to safeguard its trade mark rights due to prior business relations between the parties should bar the respondent from asserting any rights or legitimate interests in the domain name.

Under para 4(c)(ii) of the UDRP, rights and legitimate interests may be demonstrated when the respondent (as an individual, business, or other organization) has been commonly known by the domain name, even if the respondent has acquired no trade mark or service mark rights. The panel held that the parties' previous relationship did not preclude the respondent from successfully asserting that she and/or her business was commonly known by the domain name <segwaysantacruz.com>, and thus found that the respondent did have rights and legitimate interest in <segwaysantacruz.com>.

However, the domain name <segwayxperience.com> had not been used and so the panel found that, given that the respondent had no connection or affiliation to the complainant any more, she had thus lost the right to use the SEGWAY marks in domain names or in any other manner. The fact that the respondent was considering future uses of the domain name for the development of an adventure-based attraction using the complainant's devices was therefore not deemed sufficient to establish rights or legitimate interests <segwayxperience.com>.

Turning to the third requirement of the UDRP, a complainant must demonstrate that the respondent registered and used the disputed domain name in bad faith. In this regard, the threshold is set high as both of requirements must be met under the UDRP to establish bad faith.

The panel did not need to consider <segwaysantacruz-.com> and bad faith as it had already found that the respondent did have rights and legitimate interests in this domain name. Given that the three requirements of the UDRP are cumulative, this meant that the complaint had failed for <segwaysantacruz.com>.

Going on to consider the two remaining domain names where a transfer order was still possible, the panel found that <segwaycostarica.com> had not been registered in bad faith as it had been registered in compliance with the distributor agreement. Somewhat oddly there was a mystery surrounding this domain name as, at the time of the complaint, it was still owned by the respondent but the content of the website it resolved to belonged to the complainant's current authorised distributor in Costa Rica, who claimed that he thought it belonged to him and that he had paid the respondent US$1,500 for it four years ago.

The respondent also claimed not to have paid any hosting or renewal fees for this domain name for a number of years. In view of its findings on lack of bad faith (which was quite unusual, given that the panel had found that that the respondent had no rights or legitimate interests in the domain name), the panel declined to make a transfer order.

In this regard however, the panel did note that that the respondent had agreed to a transfer if the complainant made a specific request for <segwaycostarica.com> in accordance with the distributor agreement.

The panel finally found that <segwayxperience.com> had been both registered and used in bad faith. Given the strength of the SEGWAY mark and the parties' prior relationship, the respondent's knowledge of the complainant's contractual right to control the use of the SEGWAY mark and the passive holding of the domain name were sufficient to establish bad faith.

The panel therefore ordered the transfer of <segwayxperience.com> but denied transfer for the other four domain names.

As the panel underlined, this decision shows how the UDRP was designed to address a certain limited category of trademark-abusive domain name registrations, and not to address all manner of trademark-based domain name disputes. It also shows that, even though the UDRP is intended to be a quick, relatively straightforward procedure, most panels are very thorough and review each domain name individually, based on the specific facts and circumstances surrounding its registration and use.

In this instance the panel denied the complaint for four domain names but for very different reasons, two for the complainant's lack of trade mark rights under the first limb of the UDRP, one as a result of the respondent's rights and legitimate interests under the second and one for the respondent's lack of bad faith under the third. In this instance only one of the five domain names at issue was able to satisfy all three of the cumulative requirements of the UDRP and allow the panel to make a transfer order.

New gTLD Dispute Highlights Need for Vigilance for Trade Mark Owners

In another case under the UDRP before WIPO, an internationally renowned jeweller recently obtained the transfer of two domain names identically reproducing its well-known trade mark under the new gTLD .diamonds.

The .diamonds gTLD has no eligibility restrictions and may be registered by any individual or business. It is supposedly aimed at diamond sellers and resellers and merchandisers that stock and value diamonds, given that sales of diamonds account for billions of dollars a year in the global market. It became open for general registration in February 2014, after a sunrise period for trade mark holders.

The complainant was De Beers Intangibles Limited, a company based in the United Kingdom, which is part of the De Beers group of companies. De Beers is one of the world's leading diamond companies and its DE BEERS trade marks have been used for more than 100 years in numerous jurisdictions throughout the world in connection with diamonds and jewellery.

The respondent was Wing Chee Chin, an individual residing in Hong Kong, who appeared to work in the field of information technology.

The disputed domain names <debeers.diamonds> and <de-beers.diamonds> were registered in February 2014 by the respondent only 5 days apart and were being used to resolve to a registrar parking page displaying various commercial links, including to third party websites offering products in direct competition with those of the complainant.

The complainant filed a UDRP seeking to obtain the transfer of the domain names.

The first test under the UDRP is two-fold and requires the panel to assess, first, whether the complainant has established trade mark rights, regardless of when or where the trade mark was registered (although these elements may be relevant for the purpose of the third limb of the UDRP, namely registration and use of the domain name in bad faith) and, second, whether the domain name is identical or confusingly similar to the complainant's trade mark.

In the case at hand, the panel found that that the complainant had established trade mark rights in the DE BEERS mark and noted that this trade mark was particularly strong. The panel also found that the domain names were identical or confusingly similar to the complainant's trade mark. The panel however did not state whether the gTLD .diamonds was relevant in its assessment of this second component of the first limb of the UDRP, although it is clear that the gTLD, which referred to precisely the goods for which the complainant's trade marks were registered, reinforced the confusion created by the identical reproduction of the complainant's trade mark at the second level.

The panel therefore found that the domain names were identical or confusingly similar to the complainant's trade mark in accordance with para 4(a)(i) of the UDRP.

Turning to the second requirement under the UDRP, a complainant must establish that a respondent does not have any rights or legitimate interests in the disputed domain name. In this regard, para 4(c) of the UDRP sets out a non-exhaustive list of circumstances which may suggest that a respondent has rights or legitimate interests in a domain name, as follows:

(i) Before any notice of the dispute, the respondent's use of, or demonstrable preparations to use, the domain name was in connection with a *bona fide* offering of goods or services; or

(ii) The respondent has been commonly known by the domain name, even if it has acquired no trade mark rights; or

(iii) The respondent is making a legitimate noncommercial or fair use of the domain name, without intent for commercial gain, to misleadingly divert consumers or to tarnish the trade mark at issue.

The complainant naturally argued that the respondent had no rights or legitimate interests in the domain names, particularly given the well-known status of the DE BEERS trade mark. The respondent however claimed to have registered the domain names as part of a plan to surprise his girlfriend with a romantic marriage proposal. According to the respondent, his girlfriend was very fond of diamonds and particularly DE BEERS diamonds, and he was planning to "maximize his chances at a positive response" by setting up a romantic proposal website. The respondent argued that he had not yet set up the website as he was planning to propose to his girlfriend in December 2014 to justify why the domain names were pointing to a registrar parking page.

Unsurprisingly, the panel did not give any credibility to the respondent's claim, particularly given the fact that the respondent (who had legal representation) had not submitted any evidence to support his allegations. Furthermore, in the panel's view, the respondent's explanation that he had registered the second domain name in order to "protect the uniqueness of his proposal website", only served to further undermine the respondent's credibility.

The panel therefore found that para 4(a)(ii) of the UDRP had been satisfied by the complainant.

Turning to the third requirement under the UDRP, a complainant must demonstrate that the respondent both registered and used the disputed domain name in bad faith.

In this regard, the respondent did not deny being aware of the DE BEERS trade mark. On the contrary, the respondent explained that he had registered the domain names because his girlfriend was very fond of DE BEERS diamonds. Furthermore, the respondent argued that internet users searching for DE BEERS diamonds and visiting the websites associated with the domain names would immediately realize that these were not official DE BEERS websites and move on.

However, the panel found that the fact that the complainant's trade marks were well-known was a strong indication of the respondent's bad faith. In addition, it should be noted that the fact that the respondent claimed that that he was "surprised" to learn that the complainant had not registered the domain names clearly demonstrated the respondent's awareness of the complainant's trade mark rights at the time of registration (although this point was only raised in the factual section of the decision and not in the panel's findings).

As far as bad faith use was concerned, the panel found that the respondent's use of the domain names to mislead internet users to a parking page displaying commercial links created "initial interest confusion" and that even if the confusion was dispelled upon arriving at the website "it does not follow that the holder of a strong and well-known mark like DE BEERS has to tolerate occasional, even if relatively small, losses of business through initial interest confusion". Furthermore, the panel did not attach any credibility to the respondent's purported plan to use the domain names for a romantic proposal website and these unsupported allegations only served to further undermine the respondent's credibility.

The panel concluded that the complainant had met the requirements under para 4(a)(iii) of the UDRP.

The panel therefore ordered the transfer of the domain names to the complainant and, in view of this finding, dismissed the respondent's request for a finding of reverse domain name hijacking (although, interestingly, the respondent had also explicitly consented in his response to the remedy requested by the complainant, meaning that strictly speaking the panel could simply have made a transfer order without setting out his detailed reasoning).

This decision highlights the impact that the introduction of almost 1,400 new gTLDs will have for brand owners across the globe and so trade mark holders are well advised to seek assistance to define a suitable strategy to protect their brands from cybersquatters at the second level across all new gTLDs. The decision also confirms that, whilst there are other rights protection mechanisms, such as the Uniform Rapid Suspension System, that have been put in place specifically to assist brand owners to protect their online brands under the new gTLDs, the UDRP is often a more appropriate mechanism, particularly for trade mark owners seeking to obtain the transfer of a domain name (as its name suggests, the URS may only lead to suspension, as opposed to transfer).

Intellectual Property

BRAZIL

Piracy

Pirated Pay-TV Transmissions Account for 18.5 Percent Use in Brazil

Brazil's pay-TV association (ABTA) on Aug. 7 released a survey showing that 18.5% of Brazilians with cable and satellite TV services are using pirated transmissions with illegal hookups.

These users are paying either nothing or only a fraction of what normal subscribers are paying. The loss to the industry was put at US$3 billion a year.

A total of 4.2 million households are receiving pirated TV compared with 18.5 million normal subscribers, according to the survey. In addition to the impact on the industry, the survey estimated that the government is losing US$1.3 billion a year in tax collections.

The survey found that a majority of the cases of pirated TV signals occur among persons aged between 40-50 who are either in the low income or lower middle class bracket. Out of the persons surveyed who admitted using pirated signals, only 38% felt they were doing something wrong.

"There is a risk that this behavior, thinking piracy is normal, will grow unless vigorous measures are adopted by the government," said Antonio Salles Neto, head of the anti-fraud nucleus of the association of pay-TV companies.

Joint Actions

The association has participated in joint actions by police forces and local prosecutors to seize equipment used to transmit signals illegally. These operations have been based on existing legislation prohibiting clandestine telecommunications services. Another law is currently before Brazil's Congress that would make intercepting and transmitting pay-TV signals a crime in itself with a penalty of two years in prison.

Salles Neto said his association will use the survey's results to pressure for approval of the law. He added that a major problem facing the sector is the ease with which equipment used to capture pay-TV signals enters Brazil through the country's massive borders. He stated that the tax department has agreed to step up its policing of Brazil's borders with Argentina and Paraguay to seize this equipment.

Michael Hartman, Senior Vice President of Legal and Regulatory Affairs and Director of DIRECTV Latin America, warned that the theft of transmission signals could prove as deadly for pay-TV as illegal downloads have for the music industry.

"Piracy is not the end of the world but we have to recognize it could kill the sector. If we see what happened to the music industry, this could happen to our sector too. It is important to recognize the size of the problem and how we organize to alert the public and the authorities to combat this unfair competitor," he said.

According to the survey, the 4.2 million households receiving pirated TV signals amount to the third largest group in Brazil, trailing pay-TV market leader Net cable with 6.1 million subscribers, and Sky satellite service with 5.1 million.

By Ed Taylor

EUROPEAN UNION

Copyrights

EU Plans for Digital Era Copyright Reform Stalls Over Licensing, Compensation

Efforts to reform European Union copyright legislation in order allow for an EU single digital market that accommodates easy cross-border consumer movie and music downloads as well as a range of other changes has hit a roadblock because of differences over licensing and compensation for right holders.

After overseeing dramatic banking and financial service reforms, European Internal Market Commissioner Michel Barnier had expressed hope that his final contribution to single market legislation would be a framework for copyright reform before he is scheduled to leave office on Nov. 1, 2014.

However, European Digital Agenda Commissioner Neelie Kroes has a similar ambition, but the two commissioners have significantly different viewpoints as the former Dutch government minister wants a far more flexible and less onerous licensing system for online providers and consumers.

As a result of the differences, plans for a European Commission White Paper outlining a way forward for reform, previously scheduled for July, and pushed back to September is in jeopardy, according to European Commission officials.

"This comes down to political ideology where Barnier, a Frenchman, is a fierce defender of copyright holders, while Kroes is a pro-market enthusiast who sees relaxed licensing rules as a must," said a Commission official, who spoke to Bloomberg BNA on the condition of anonymity. "Barnier is willing to accept some relaxation of rules for copyright holders, but he is not willing to go to the degree that Kroes is in favor of."

"Kroes insists that relaxed rules will result in such an increase in sales, especially in movies and music, that copyright holders will only win in the end," the official said.

Cross-Border Access Issues

Indeed there was plenty of support for Kroes' position expressed in a public consultation that took place over the first half of 2014 and the summary of which was drawn up in July.

"The vast majority of end user/consumer respondents report facing problems when trying to access online services in another EU country," the European Commission stated in the summary report. "They state that they are regularly confronted with access restrictions depending on the geographic location of their IP address."

"Many report seeking to view a video online via YouTube, but being blocked by a national collective management organization for copyrighted content," the Commission report said. "Others signalled the lack of access to popular video-on-demand services such as Netflix and the BBC iPlayer, which are currently only available to the residents of some EU Member States."

The feedback from consumers to the European Commission consultation also indicated that similar problems related to using Apple Inc's iTunes and the rapidly growing Swedish online music service Spotify AB.

Libraries throughout the EU also reported that it is very difficult to negotiate licenses and manage subscriptions for multiple EU Member States.

"Universities point to problems that students face in accessing online education resources when they are not resident in the country of the university," the report said.

Indicative of the divide within the European Commission was the different viewpoints between consumer groups and authors and performers as well as publishers and broadcasters. Authors said the problems of cross-border sales were not due to licensing issues, but were related to cultural and language differences across the EU.

Record producers insisted that they grant EU-wide cross-border licenses and therefore there is no "clear evidence that problems with cross-border access exist in the music sector." Broadcasters said there is a need to restrict rights on a "territorial basis and to guarantee full exclusivity to distributors who are pre-financing productions to enable them to make a return on their investment."

Copyright Levy on Equipment, Media

In another highly controversial issue related to copyright reform — this one involving copyright levies currently imposed on hardware such as computers, photocopying machines, MP3 players and others — the leading IT producers in the EU, including numerous US multinationals such as Apple and Microsoft Corp, played a role in blocking Barnier's plans for July.

"The White Paper's lack of conviction to challenge the status quo regarding copyright levies ignores the conclusions of the European Commission's own impact assessment on the modernization of the EU copyright rules," said Digital Europe, a trade association representing the IT companies, in a letter to Barnier, a copy of which was obtained by Bloomberg BNA. "This impact assessment identified the phasing out of levies as the best policy option for the private copying exception."

The divisions over the copyright reform have not only thrown Barnier's plans off schedule, but they have raised questions about whether the pending White Paper will not be put off until the next European Commission takes office in November.

"This is a very serious issue that we feel should be addressed in the next European Commission," said a member of the transition team for incoming European Commission President Jean-Claude Juncker, who is expected to take office with a new 28-member European Commission as from Nov. 1. "The issue will be one of our priorities."

The same official also said there was a possibility that the issue would be moved from the portfolio of whoever takes over from Barnier and into the remit of whoever takes over for Kroes.

By Joe Kirwin

GERMANY

Copyrights

German Antitrust Authority Rejects Case to Make Google Pay Copyright Fees

The German Federal Cartel Office (Bundeskartellamt) dismissed an antitrust complaint against Google Inc. and Google Germany GmbH brought to compel the online giant to pay copyright fees for content it aggregates, ruling that the complainants — copyright collection society VG Media and 12 German media publishers — failed to present sufficient grounds for reasonable suspicion of antitrust violations, according to the decision dated Aug. 11 and released by VG Media Aug. 22.

The decision was termed "a victory for Google" according to attorneys interviewed by Bloomberg BNA about the case, but who also warned that the internet company could still face trouble with the antitrust authorities in Germany in this matter.

"VG Media didn't have enough proof," Ulrich Wuermeling of Latham & Watkins in Frankfurt told Bloomberg BNA of the decision. "Still, there is a warning shot in there — the Cartel Office will continue watching to see if Google behaves in an appropriate way. I don't think in spite of this decision it is really over."

Watching Google

In its decision, the Federal Cartel Office wrote it would consider action if Google excludes from its listing every publisher who does not waive the right to collect copyright fees.

"The resolution department reserves the right to investigate, related to the previous issue, the cooperation of the publishers that comprise VG Media with regard to the assertion of Ancillary Copyright law according to paragraph 87 of the German Copyright Law against Google, and if the assertion is compatible with Art. 101

of the Treaty on the Functioning of the European Union, if this proves to be of importance in further proceedings."

In other words, the office is watching Google's reaction following the demand for fees — exclusion of one or more German press publishers from the search listings in reaction to the concrete assertion for ancillary repayment would qualify as antitrust relevant behavior, the office said.

Attempt to Collect Fees

What the office is referring to is pending action by VG Media to determine adequate license fees for the utilization of the publishers' ancillary copyrights, filed against Google on June 11 (see "German Publishers Seek Copyright Fees From Google Using Copyright, Competition Law" [09 WCRR 26, 8/15/14]), and against German internet services provider 1-1 and Yahoo! on July 1, with the Chamber for Copyright Arbitration at the German Patent and Trademark Office in Munich — a specialist body for determining the applicability and adequacy of license fees charged by collecting societies for the utilization of copyrights and neighboring rights.

The claims were filed against Google, Yahoo! and 1-1 to collect remuneration for the snippets of content that the internet companies aggregate and publish online in accordance with the German Act on Copyright and Related Rights (German Copyright Act, or UrhG).

Under the Aug. 1, 2013, amendment to the Ancillary Copyright Law (Leitungsschutzrecht) news aggregators are permitted to republish a few individual words and snippets of content from articles originally hosted on media outlets' websites, but the amendment leaves vague the size and number of snippets allowable.

On June 13, VG Media published a tariff in the Federal Gazette as required by the German Act on Collecting Societies (Urheberrechtswahrnehmungsgesetz) of up to 11% of the revenue made from using work from the copyright holders as well as the owners of ancillary rights they represent, when it is 100% of those represented. In Google's case, VG Media has claimed 6% of revenues presumably made by the use of the publishers' snippets, representing the content from the respective portion of the press publishers that were represented by VG Media.

Yahoo! is challenging the law, and filed a complaint on July 31 with the Federal Constitutional Court in the first test case against the amendment — ancillary copyright for press publishers, a provision which came into force as §§ 87f, 87g of the German Copyright Law, saying it creates "legal uncertainty," Yahoo! Germany officials told Bloomberg BNA (see "Yahoo! Germany Challenges Ancillary Copyright Law in Test Case" [09 WCRR 23, 9/15/14]).

Competitive Disadvantage

In the antitrust complaint, the collection society contended that owing to Google's more than 90% market share, press publishers — including heavyweight Axel Springer — were compelled to agree to have their content hosted by Google News without payment, or suffer significant losses in readership and be put at a competitive disadvantage.

"In the eyes of VG Media, Google's threat to not list VG Media publishers in the search listings, because of the assertion of ancillary copyright, already constitutes an antitrust violation, because many publisher have chosen not to assert their rights for fear of being excluded from the search listings," said VG Media officials in a statement. "VG Media believes that an antitrust violation is not only committed after the exclusion of a publisher has actually occurred."

However, some said the office has already warned in its decision that VG Media might also come under anticompetition scrutiny.

"The decision is a complete victory for Google," a source close to the case who asked not to be identified, told Bloomberg BNA. "It is particularly interesting that the cartel authority points out that VG Media might be investigated as a cartel prohibited by Art. 101 of the Treaty on the Functioning of the European Union."

By Jabeen Bhatti

GERMANY

Copyrights

Yahoo! Germany Challenges Ancillary Copyright Law in Test Case

Yahoo! Germany has filed a complaint with the German Federal Constitutional Court challenging provisions in the Act on Copyright and Related Rights being used by a German collection society representing national press publishers as the basis of claims to force search engines to pay for snippets of content, Yahoo! officials confirmed to Bloomberg BNA on Aug. 5.

In the first test case against the law, Yahoo! Germany filed its complaint on July 31 against the ancillary copyright for press publishers — a provision which came into force as sections 87f, 87g of the German Copyright Law on Aug. 1, 2013, and which was intended to pave the way for publishers to collect royalties from news aggregators. Yahoo! argues that this provision creates "legal uncertainty," which it deems unconstitutional.

Yahoo! Germany officials also said the provision violates a number of sections of the German Constitution, while also being redundant, and that the company should also be considered a press publisher, and therefore be granted the same protections and rights under that provision.

"We believe that the Ancillary Copyright Law fundamentally violates our constitutional rights as a search engine operating in Germany and we hope the Court will find in our favor, and ensure that German users can benefit from the same breadth of information online as others around the world," Verena Knaak, public relations manager for Yahoo! in the company's Munich office, told Bloomberg BNA in an email on Aug. 5.

"Yahoo! has had long standing good relationships with local publishing houses and media companies in Germany and we respect intellectual property rights and expect reciprocal treatment from others in the marketplace," she added. "However, we consider the legislation at stake not only unconstitutional, but also redundant.

Publishers' intellectual property is sufficiently protected by existing copyright law in Germany."

Publishers Say Search Engines Must Pay

Collection society VG Media filed a claim to determine adequate license fees for the utilization of the publishers' ancillary copyrights against Yahoo! and German internet services provider 1-1 on July 1, and against Google on June 11 with the Chamber for Copyright Arbitration at the German Patent and Trademark Office in Munich — a specialist body for determining the applicability and adequacy of license fees charged by collecting societies for the utilization of copyrights and neighboring rights (see "German Publishers Seek Copyright Fees From Google Using Copyright, Competition Law" [09 WCRR 26, 8/15/14]).

In the claim, the society argues that the three companies should pay for the press publishers' content posted online, as mandated by the German Act on Copyright and Related Rights, Bernd Delventhal, head of communication at VG Media, told Bloomberg BNA in an email shortly after the society filed its claim against Yahoo!.

The claim is a mandatory prerequisite for further civil proceedings, which will be initiated to enforce the publishers' ancillary copyrights, he said.

Yahoo! Germany officials said its present complaint is not in response to VG Media's claim.

Amended Law Vague

On Aug. 1, 2013, the ancillary copyright law (*Leistungsschutzrecht*) — revised and watered down by the lower house of parliament (*Bundestag*) following a public furor over internet freedoms and unhindered access to content — went into force to become part of the German Copyright Act.

The new provisions granted publishers their own rights instead of them having rely on the rights of their authors — making it easier for the publishers to challenge copyright infringements across their publications in general rather than just specific articles.

The amendment aimed to force news aggregators such as Google News and Yahoo! to pay for using headlines and excerpts already published on German media outlets' websites.

Before the measure came into force, aggregators were forbidden from publishing entire articles, but could print the headline and the first few sentences. The revised law allows for the publishing of small snippets and individual words, meaning that aggregators would still be able to publish "small" excerpts even though "small" was left undefined in the amended law.

Law Violates Numerous Rights, Yahoo! Claims

Yahoo! Germany officials say that the provisions create such legal uncertainty that the company was forced to change the layout of its webpage.

"The law forces search engine providers and news aggregators in Germany to pay license fees for using more than "individual words" or "smallest text excerpts" of press content without a publisher's consent — in response, we felt forced to change our News Search results in Germany to accommodate the law," said Knaak.

In its complaint, Yahoo! is arguing that the ancillary copyright provision restricts freedom of information as guaranteed by Article 5 of the German Constitution by restricting the mechanisms providing for this freedom, in this case search engines, according to an attorney representing the company, Alexander Blankenagel — also a professor at Humboldt University in Berlin — in an outline of the complaint provided to Bloomberg BNA.

The company added that the provision violates the "proportionality" principle in German law, and is incompatible with Article 3 of the Constitution, which guarantees equality before the law because other internet companies are not being forced to pay such fees.

Finally, Yahoo! argues that the ancillary copyright provisions violate the Constitution's protections regarding freedom of the press. They say only a "general law" as opposed to a specific law governing copyright can legally limit those protections.

Attorneys Say Case Could Go Either Way

Attorneys familiar with the matter told Bloomberg BNA that they believed the publishers are trying to go after fees the courts have in the past denied them, and that will continue to be the outcome. They added that the Constitutional Court complaint is interesting because it is the first test case in a higher court regarding the ancillary copyright provisions.

Others say they do not believe Yahoo!'s Constitutional Court challenge will be successful, on the basis that the argument regarding freedom of information is irrelevant because the information would be available on the publishers' websites and that the dispute over proportionality is moot as the law allows for negotiation between publishers and aggregators, and so allowing for arrangements that could be deemed proportional.

Still others say the internet giant is using the complaint to kickstart a discussion about the terms that have yet to be clarified as part of the law.

"What they are arguing is that what falls within the *Leistungsschutzrecht* is not clearly defined, in this case, what is the length of a snippet," Sebastian Meyer, an attorney specializing in internet law at Brandi law firm in Bielefeld, Germany, told Bloomberg BNA on Aug. 5, referring to the ancillary copyright provisions. "But this is a typical problem with all copyright law — you cannot claim that it is unconstitutional because you don't know how to define the words within that rule, you have to wait and see what the courts decide."

Meyer, a supporter of the ancillary copyright legislation, says the new law merely enables publishers to apply rules regulating copyrighted material offline also to be used online.

"If you copy a chapter from a book, you have to pay compensation and this is done through the fees the producers of the copying machine have to pay and the same is now true for the online world if someone copies something you have written, which is copyrighted," he added. "Why shouldn't you receive compensation if somebody publishes it on the internet?"

Google Welcomes Case

In response to Yahoo!'s complaint, VG Media officials said they could not comment because the contents of the claim had not been made available to them, the collection society told Bloomberg BNA in a statement. "Constitutional concerns were raised again and again during the legislative process," they added.

Google officials said they welcomed Yahoo!'s complaint.

"The [ancillary copyright] threatens the open web and the principles of access to information and freedom of expression for everyone, principles safeguarded by the German Constitution," Ralf Bremer, Google spokesman in Berlin told Bloomberg BNA. "We support Yahoo!'s step and hope that the German Constitutional Court will carefully examine this law and its consequences for the German web."

By Jabeen Bhatti

ISRAEL

Copyrights

Court Holds Partial Posting of Newspaper Interview on Website "Fair Use" in Israel

By Dr Michael Factor, IP Factor, Rosh HaAyin, Israel; Email: mfactor@ipfactor.co.il

In *Danon PR Telecommunications v. Shelly Yachimovich* (Civil Ruling 57588-05-12), Judge Ronit FinShuk Alt held in a July 3, 2014 decision that the republication of a portion of a newspaper interview on a website constituted a "fair use" of copyright.

Background

The plaintiff Danon PR Telecommunications publishes a local newspaper in the city of Modiin in Israel.

The defendant Shelly Yachimovich is a member of the Knesset (Israeli legislature), a former journalist, and during the incidents in question, the Head of Israel's Labour Party.

On October 6, 2011, the local paper published an interview of a worker in Yachimovich' headquarters, that was written by Channa Stern. Yachimovich posted this on her website and in response, the paper asked for it to be removed and sought ILS40,000 (US$11,700) compensation for copyright infringement. When this tactic was unsuccessful, the paper sued Yachimovich under sections 11 and 34 of Israel's Copyright Act 2007 and under section 1 of the Law Against Unjust Enrichment, claiming statutory damages of ILS100,000 (US$29,200) and legal costs.

Yachimovich claimed that the article was posted under a section of the website devoted to newspaper articles and that the source was clearly marked. The article was posted by a volunteer, and, on the newspaper complaining, it was removed. Nevertheless, no guilt was admitted.

In her defense, Yachimovich claimed that the interview was in a question-and-answer format, and thus the copyright belonged to the interviewee and not to the interviewer. Furthermore, she claimed fair use under section 19 of the Copyright Act. She argued that the article had no inherent value, no potential for resale and no way of monetizing, and that the reposting on her website only provided further publicity for the article and for the local paper to a fresh audience who would otherwise not have been aware of it.

It was also raised that the paper had used a publicity photo of Yachimovich without her permission. Although this was a PR picture, it had cost money. It was submitted that this raised equal and opposite copyright issues. To the extent that there were grounds for copyright compensation in the publication of the article, Yachimovich was entitled to equal compensation in the use of her picture and the two payments should be offset. Attempts to reach a compromise failed, and the court was authorized to rule on the basis of the evidence submitted without cross-examination.

Court Decision

The first issue that the court grappled with was whether an interview is considered copyright of the interviewer, or if it is a list of answers attributed to the interviewee.

The court accepted that there was copyright in interviews if there was at least a minimum of creativity in the wording of the questions or their arrangement and editing. The amount of creativity was at least that of tables and anthologies, and on the basis of the work-product definition, there was copyright in the publication.

Posting the article on the Yachimovich's website, where some 20% of the interview was posted, was considered republication by the court.

The interviewer is more than merely a technician and has rights in the interview. The question of joint ownership of interviewer and interviewee was discussed at length, and the understanding developed was that of use of jointly owned real estate by one party.

Fair Use

Various decisions relating to summaries of newspapers has established that merely relating to copyright materials as being a review is not sufficient to create a fair use presumption. One paper cannot simply quote large chunks of another and claim fair use. On the other hand, there are no simple tests of quantity or quality, and the issue is one of context. In this instance, Yachimovich had created an anthology of newspaper articles and sources were accredited. The use was non-commercial. There was no compelling reason for reproduction under the public's right to know, but review purposes are also considered fair use. The article was not reproduced in its totality, but rather a selection was made. The reproduction neither damaged the circulation of the original paper, nor boosted Yachimovich's website's circulation. Yachimovich claimed that reproducing such articles was common practice, but did not provide evidence of this. Nevertheless, the claim of fair use was upheld.

Moral Rights

Although moral rights create separate grounds for claiming damages, in this instance, the source was attributed, so moral rights were not compromised.

Unjust Enrichment

Since Yachimovich did nothing underhand, did not profit herself, or prevent the plaintiff from profiting from the publication, it was considered unfitting to consider unjust enrichment beyond the copyright issue.

Statutory Damages

Having established fair use, the question of statutory damages was moot. Nevertheless, the judge saw fit to expand on the point.

The plaintiff claimed that Yachimovich had made "political gains" and since she was an ex-journalist herself and a member of the Knesset, she should be an example to the public. The plaintiff further argued that with statutory damages, there was no requirement to estimate the actual damages. However the defendant argued that ILS100,000 (US$29,200) was exaggerated and baseless in this case.

The court accepted that the plaintiff could save itself the trouble of estimating and proving exact damages, but the court had the prerogative to rule less than maximum damages if it saw fit. In this case, the defendant had immediately removed the offending article, there was no damages and no claims of inequitable behaviour.

Saggai v. Estate of Abraham Ninio (Civil Appeal No. 592/88), was cited, the court noting that when ruling on damages, one has to look at the damages caused and the warning effect.

In this instance, the article was taken down quickly. The creative piece was an interview of low inherent worth, and the plaintiff had not suffered any damages as the website was not a competitor to the local paper. The defendant's profit was indirect and minor. The article was posted by a junior and there was nothing inequitable in the defendant's behaviour. While the bottom line was that there *was* copyright infringement, it was covered by the fair use exception and the damages were zero.

Regarding usage of the photo of Shelly Yachimovich, the copyright claim was only made by way of offset and not in its own right, so once the damages to be offset were determined to be zero, the issue became moot. Nevertheless, the picture is a PR photo that is supplied for use by papers. It is a creative work and is owned by Yachimovich as it was work for hire, created for her. The paper, despite claiming to be a local non-profit publication had intentionally used this creative work.

The picture was used to add colour to the article and this is generally an accepted use of publicity photos. Although the paper is given away free, it is a profit generating paper that lives off advertisements. Nevertheless, the article had newsworthiness and furthers free speech and other values leading to a conclusion of fair use. The photo was attributed to "Yachimovich PR" which indicates that there was no attempt to profit by it. The photo was a PR photo that was used for PR purposes, and this is fair use. Thus there was no grounds to grant damages to Yachimovich for using this photograph in this manner.

Since the defendant had raised counterclaims, both parties had conducted themselves fairly, and related to the issues raised, the judge did not see fit to rule costs.

INDIA

Patents

Indian Draft Policy to Set Time Limit on Essential Telecom IP Licensing Talks

The Telecommunications Standards Development Society, India (TSDSI) has recommended that negotiations for licensing of patents considered essential to meet established standards and obligations must be time-bound so as to reduce the risk to businesses and bring down instances of litigation.

The proposed TSDSI Intellectual Property Rights Policy suggests a "reasonable" time limit to such negotiations of 6–12 months, and said negotiations must be held on fair, reasonable and non-discriminatory (FRAND) terms. During this period, none of the parties involved is to resort to any legal recourse such as injunctions.

In case parties fail to reach an agreement, they will inform the TSDSI, which may decide to amend its standards or technical specifications so that the patent in question is no longer essential, a draft of the policy said. The draft has been sent out to TSDSI members for comments, but has not yet been made available to the public. It was discussed at a meeting on July 17, officials said, but it is not yet clear when the final policy may be announced.

The TSDSI is a public-private organization that establishes and implements standards for the telecommunications industry in India.

The draft said the aim is to reduce litigation and thereby risk for businesses, so that their investment in the preparation, adoption and application of standards is not wasted when an essential IPR is not available.

There have been several high-profile IPR related cases in India's expansive telecommunications space. Global rivals ZTE and Vringo are currently battling in the Delhi High Court, which on Aug. 5 vacated an injunction against ZTE Telecom India Pvt Ltd and distributor Indiamart Intermesh Ltd in a patent infringement suit filed by Vringo Infrastructure Inc (see "Indian Court Lifts Injunction Against ZTE in Patent Dispute with Vringo" [09 WCRR 27, 9/15/14]).

The Competition Commission of India is currently investigating charges made by two Indian technology companies, Micromax Informatics and Intex Technologies that Swedish multinational Telefonaktiebolaget LM Ericsson is charging exorbitant royalties and using discriminatory pricing for patents it holds on technologies used widely in mobile handsets and other IT and communications devices (see "Delhi High Court Orders Antitrust Agency to Stay Judgment in Ericsson Probe" [09 WCRR 30, 2/15/14]).

Ericsson has taken the case to the Delhi High Court, which ordered in January 2014 that the Competition Commission of India may not pronounce its order until an earlier patent infringement case filed by Ericsson against Micromax is decided. Ericsson's counsel has argued in court that Micromax deliberately prolonged its

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negotiations for IP rights with Ericsson and is using other delaying tactics with an intent to gain advantage.

Companies such as Ericsson would, therefore, be keen to see a time limit by when negotiations for essential patents must be completed. However, critics of the proposal said it may force companies to agree to unfair terms and thereby encourage anti-competitive behavior.

By Madhur Singh

INDIA

Patents

Indian Court Lifts Injunction Against ZTE in Patent Dispute with Vringo

The Delhi High Court on Aug. 5 vacated an injunction against ZTE Telecom India Pvt Ltd and distributor Indiamart Intermesh Ltd in a patent infringement suit filed by Vringo Infrastructure Inc. The ruling is significant because it indicates who might be called in as an expert in science and technology-related matters, and also reiterates that the onus for proving infringement lies with the plaintiff and cannot be presumed prima facie.

ZTE welcomed the ruling in a statement on Aug. 11, saying it is committed to investment in intellectual property and compliance management to safeguard its business operations and commercial interests. ZTE is embroiled in patent disputes with Vringo in over half a dozen jurisdictions.

Background

Licensing firm Vringo, which holds a bank of 600 technology patents and applications including a set bought from Nokia in December 2012, has filed two patent infringement suits against the Indian arm of Chinese multinational ZTE.

The present case (CS (OS) 314 of 2014 and CC 25 of 2014) involves Vringo's Indian patent 200572 ("the '572 patent"), which pertains to handover decision in a mobile communication system. Vringo filed an infringement suit in the Delhi High Court in January 2014 accusing ZTE of infringing its patent in the latter's base stations.

In February, the court granted an ex parte preliminary injunction restraining ZTE and its distributors from importing, selling, advertising, installing or operating any infringing devices. On March 15, ZTE appealed against the injunction.

Vringo's Claims

Vringo had accused ZTE of infringing not only the '572 patent, but also other patents. It had submitted in court that it had obtained injunctions against ZTE in various countries including Australia, France, Germany, Netherlands, Romania, the UK and the US.

The company included an expert affidavit comparing the technologies in ZTE's base stations and those disclosed in Vringo's patents. It further alleged that the balance of convenience was in its favor, and said ZTE's actions was causing it irreparable loss.

ZTE's Rebuttal and Counter Argument

ZTE asserted that the technology used in its base stations was different from that disclosed in Vringo's patents — it said Vringo's technology functioned by attempting to find a mobile phone in a particular micro cell, whereas ZTE's locates a phone by its average use at a given place during a specified period of time in order to allow it to make a handover.

In mobile telephony, a handover takes place when a network node changes the type of connectivity it uses, for instance, when a tablet computer shifts between wireless LAN and cellular technology to access the internet.

ZTE also argued that the cause of action accrued to Vringo in December 2012 when it bought the patent from Nokia. Since Nokia was already aware that ZTE had been using its patent since at least 2002 and had not taken any action, Vringo's case would be barred under limitation, ZTE said.

Under the Indian Limitations Act, the period for lodging a case against patent infringement is 3 years from the date of the infringing action.

ZTE also alleged that Vringo's purchase of an entire bouquet of patents at US$10 grossly undervalued the patents, and since Vringo had paid much lower stamp duty than it would have to under the patents' purported real values, the assignment document was inadmissible as evidence in court. The company also made the counter argument that Vringo had not filed a statement of working under section 146 of the Indian Patents Act.

Finally, ZTE said Vringo's expert had a management degree and could not be relied upon in a matter based entirely on science.

Court Ruling

Justice V.K. Shali dismissed Vringo's contention that it had a prima facie case against ZTE, saying the comparison between Vringo's patents and ZTE's allegedly infringing base stations was a matter of science and would involve scientific evidence, which the court did not have at the present stage.

He did not accept Vringo's expert affidavit, and pointed out that the Patents Act lays out clear conditions for a "scientific advisor" — one who holds a degree in science, engineering, technology or equivalent, has at least 15 years' practical or research experience, and holds or has held a responsible post in a scientific or technical department of a federal or state government or any other organization.

Further, Justice Shali ruled that in patent cases there is no presumption of validity and it is up to the plantiff to prima facie prove an infringement.

Since Vringo had failed to make such as case, he vacated the injunction granted against ZTE, and listed the case for hearing on Sept. 1, 2014.

By Madhur Singh

Commentary

Mexican Telecommunications and Broadcasting Law Enters into Effect

By Federico Hernández Arroyo, Hogan Lovells BSTL, Mexico; Email: federico.hernandez@hoganlovells.com.

On June 10, 2014, after a fast-track approval, the decree to reform the Mexican Constitution (the "reform"), mainly in telecommunications matters, was enacted by President Enrique Peña Nieto. The Reform recognized as human rights the access to:

(i) Information and communications technology; and

(ii) Broadcasting and telecommunications services, including broadband and the internet.

Following the Reform, the Federal Telecommunications and Broadcasting Law (the "Law") was published on 14 July and entered into effect on August 13, 2014.

The reform creates the Federal Institute of Telecommunications ("IFT"), a new regulatory agency that enjoys constitutional autonomy in charge of regulating all broadcasting and telecommunications matters, including all economic competition matters related to both sectors. The IFT replaced the former Federal Telecommunications Commission created in 1996, as a subordinated governmental body.

Among other tasks, the IFT is in charge of the regulation, promotion and supervision of:

(i) The radio spectrum;

(ii) Networks;

(iii) Provision of broadcasting and telecommunications services; and

(iv) Access to active and passive infrastructure and other essential facilities.

With respect to telecommunications and broadcasting concessions, IFT will be the sole authority in charge of determining:

(i) Granting;

(ii) Revocation;

(iii) Assignments; and

(iv) The compensation of its granting, as well as the authorization of the corresponding services, prior opinion of the tax authority.

The reform also provides the creation of specialized judges and courts in broadcasting, telecommunications and economic competition matters, which is expected to bring more certainty in this highly litigated field.

The reform provides for the implementation of numerous actions within certain timeframes, such as:

1. Direct foreign investment was permitted as of 12 June, 2013 up to:

   (a) 100% in telecommunications and satellite communications; and

   (b) 49% in the broadcasting sector subject to reciprocity from the country of the ultimate investor.

2. The publication of a new convergent law to jointly regulate the telecommunications and broadcasting sectors on or before Dec. 9, 2013;

3. Once the IFT is created, "Must Offer" and "Must Carry" obligations will be valid, except in certain cases;

4. On or before March 8, 2014, the Institute should have:

   (a) Published the bidding rules for the tender of two new television channels with national coverage; and

   (b) Declared the existence of "preponderant economic agents" (see below) and imposed on them measures in order to avoid adverse effects on competition.

5. The State will ensure the installation (between 2014 and 2018) of a shared public telecommunications network of wholesale wireless services by mainly using the 700MHz band; and

6. The transition to digital terrestrial television ("DTT") must end on or before Dec. 31, 2015.

Implementation of the Reform

In August 2013, the specialized judges and courts were created. In September 2013, the Institute was duly created and published its new organic statute.

In 2014, the Institute began to implement the reform as follows:

(i) It published (prior to a public consultation) the general guidelines to regulate the "Must Offer" and "Must Carry" obligations (February 2014);

(ii) It declared as preponderant agents and imposed different measures on March 2014 on:

   (a) Telcel and Telmex in the telecommunications sector; and

   (b) Televisa in the broadcasting sector.

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(iii) It published (prior to a public consultation) the call for a public bidding in order to create two new national television networks in Mexico (March 2014).

Although according to the reform the convergent law should have been published on or before Dec. 9, 2013, it was not until March 24, 2014 when the President submitted the bill before the Senate.

The new Federal Telecommunications and Broadcasting Law (the "Law") was published on July 14 and entered into force on Aug. 13, 2014. The Law repealed the Federal Telecommunications Law and the Federal Radio and Television Law.

The New Law

The Law sets forth a new regulatory regime for the telecommunications and broadcasting sectors based on the principles and guidelines of the Reform. Some of the main provisions of the Law are as follows:

1. Telecommunications and broadcasting services are considered as public services of general interest and any discrimination in its provision is forbidden.

2. The IFT is granted with new powers, functions and institutional design, including specific rules of transparency and contact with the regulated industry.

3. There is a new concessions regime (not involving spectrum or orbital resources) called "unique concession" that allows the provision of all telecommunications services and is granted through a special procedure — prior request — considering a specific term of 60 calendar days and if the IFT fails to resolve the request, it shall be understood that the concession should be granted. A unique concession can only be granted to Mexican individuals or entities, but there is no limitation with respect to foreign investment for telecommunications services.

4. The spectrum and orbital concessions are granted through a public bid, but the economic factor (consideration) will not be the sole element to determine the winner of the bid.

5. Concessionaires may lease only frequency bands that were granted in concession for commercial or private use, private communication purposes, and prior approval of the IFT.

6. An authorization granted by the IFT is required to:

   (i) Establish a reseller of telecommunications services without being a concessionaire;

   (ii) Install earth stations to transmit satellite signals;

   (iii) Install telecommunications equipment and transmission media that cross the borders of the country; and

   (iv) Exploit emission allowances and receive signals and frequency bands associated with foreign satellite systems providing services on the country.

   The requests for authorization are resolved within 30 business days of their submission. After this period without being resolved, it shall be deemed granted.

7. The Law provides a new kind of public/private network structure, called "public telecommunication networks with public participation." The concessions for commercial use to public bodies under a public-private partnership scheme have the character of "shared network of wholesaler telecommunications services." Such networks cannot provide services to final users.

8. The Law contemplates and regulates the following matters: network neutrality; numbering; access and interconnection services; the use of State goods for the deployment of telecommunications infrastructure; satellite communications; Must Offer and Must Carry obligations; broadcasting services, and pay-TV/audio services.

9. The IFT will be in charge of the Public Registry of Telecommunications, composed by the Public Registry of Concessions and the National Information System of Infrastructure.

10. The Law includes different obligations for regulated agents in security and justice matters, such as the obligation to give a geographic location in real time of mobile devices as provided in the corresponding laws, among other obligations.

11. The final users of telecommunications and broadcasting services will have rights provided in the Law. All telecommunications concessionaires shall observe the federal consumer protection law. There are new and specific rights regarding disabled users.

12. The Law provides the right of freedom of information, expression and of receiving content through the public broadcasting service and pay-TV/audio, which shall not be not subject to censorship or limitation.

13. The Law provides two main figures, which trigger asymmetrical regulation:

    (i) In the case of preponderant agents; and

    (ii) In the existence of dominant agents.

14. Preponderant agents are those who hold a national participation in the telecom or broadcasting sectors that exceeds 50% of users, subscribers, audience, traffic on its networks or used capacity thereof and are declared by the IFT following a specific procedure and implementing measures provided in the Law.

15. The IFT is authorized to determine the existence of agents with substantial market power in any of the telecom and broadcasting markets under the Federal Competition Economic Law in which case the IFT is allowed to impose specific obligations in certain matters

16. The telecommunications products, equipment, devices or gadgets that can be connected to a telecommunications network or use radio spectrum frequencies, should be approved according with the applicable norms.

17. The Law provides a new set of rules to limit the cross ownership of telecom and broadcasting concession-

aires and other restrictions in the acquisition of spectrum for broadcasting services, so that in certain market or coverage areas there is no restricted or limited access to plural information.

18. The IFT is in charge of the verification and supervision of the fulfillment of the Law, and the obligations established in the concessions and authorizations.

19. The IFT is in charge of the application of sanctions provided in the Law following the procedure set forth in the Federal Law of Administrative Procedure, except in the following matters:

    (a) Protection of consumers (Federal Consumer Protection Agency); and

    (b) Content and publicity (Ministry of Interior).

20. The Law introduces a new scheme of sanctions based on percentages of income of the offender.

21. The general norms, acts or omissions from the IFT can be appealed only with a constitutional trial (*amparo indirecto*) and there is no injunction. Such trials will be held before the specialized judges and courts.

Nigeria's Telecommunications Sector: What are the Operational and Fiscal Challenges in the Midst of Success?

By Oluseye Arowolo and Fatai Folarin, Deloitte, Lagos; Email: oarowolo@deloitte.com; ffolarin@deloitte.com

The service industry, according to the National Bureau of Statistics, presently makes up approximately 50% of the rebased gross domestic product of Nigeria, which is put at approximately NGN80.3 trillion (US$510.1 billion). The telecommunications and information services sector makes up NGN6.9 trillion (US$44.3 billion) of this rebased number. Compared with the 2012 non-rebased figure of NGN364.4 billion (US$2.3 billion), this is a significant increase in GDP contribution. This can only be attributed to the government's decision to liberalize this sector.

The liberalization of the telecommunications sector was initiated in 1992 (with the establishment of the Nigerian Communications Commission (NCC)), aftermath of implementation of the Structural Adjustment Programme aimed at the liberalization of the economy. However, until the beginning of the civilian regime in 1999 when the then government fully deregulated the sector, there was no remarkable impact by the sector. The National Telecommunications Policy was adopted in September 2000 and three service providers — MTEL Nigeria Limited, MTN Communications Limited, and Econet Wireless Nigeria Limited[1] — were granted second generation Global System of Mobile Communications (GSM) licenses. Further in 2002, a second national operator license was granted to Globacom Limited and five years later, in January 2007, a unified access license was granted to Emerging Markets Telecommunications Services Limited.

Today, many businesses in Nigeria leverage the output of the telecommunications sector. For instance, numerous innovative products in the financial services industry (internet banking, mobile banking, etc) rely heavily on internet access. Many online retail platforms have emerged and as far as telephony is concerned, the gap between the rich and the poor has virtually disappeared and only rears its ugly head in the choice of handsets or other gadgets that individual users deploy in communicating. A Nigerian farmer in the sub-urban areas in 2014 is superior to top-level government functionaries or top business executives pre-2001 by virtue of quality and quantity of information available to him through his handheld device.

The revolution in the telecoms sector has constantly challenged our imagination on the possibilities and associated benefits that a turnaround in the power sector can deliver to the Nigerian economy. There is palpable envy of those who invested in the telecommunications sector to make this happen as if they did not deserve the returns on their investment. This is accompanied by the pervasive feeling amongst Nigerians that the sector can still do more. Investments are still required to eliminate drop calls, enhance faster internet access or connectivity, etc.

Given the contribution and impact of the operators in this sector, it is often incompatible when policies are not instituted to encourage the sustenance of the telecommunications sector. Specifically, the following two areas are continually held accountable for the challenges in the sector:

(i) **Operational** — There are a plethora of operational challenges faced by businesses in Nigeria. These challenges either lead to the demise of the business or to the emigration of such businesses to neighboring countries from where they access the Nigerian market. The telecommunications sector is not an exception, although the positive operating margins have somewhat tempered concerns on the huge operational costs. Operational challenges faced by telecommunications operators in Nigeria include:

- **Power** — A key component of telecoms infrastructure is the Base Transceiver Station (BTS), which essentially connects mobile phones to the network. BTS requires constant electricity supply to keep it running. However, the telecommunications sector is faced with an epileptic power supply, which is a major area of concern in Nigeria. Generating sets have replaced the national grid as a more reliable source of power supply. With the cost of fuels on the rise, operational costs arising from the need to keep facilities up and running have substantially increased the cost of production. Operating BTS' in Nigeria account for about 60% of operators' network costs. If this is true one can only imagine what business would be like without the generating sets.[2]

- **Infrastructure damage** — There are incidents of attacks on telecoms equipment, infrastructure and workers. NCC reported in 2013[3] over 1,200 fiber cuts not forgetting the cannibalization of generating sets and other equipment. Furthermore, approximately 2% to 3% of Nigeria's BTS are shut down due to vandalism resulting in a loss of US$50 million to US$100 million every year.

- **Insecurity** — Various groups in the south and northeastern parts of the country have made it difficult for operators to successfully deploy or maintain infrastructure in these parts of the country. This has made their services epileptic and unsatisfactory to many subscribers resident in these affected regions. Expectedly, this has led to lost revenue with no reciprocating decline in operational costs.

(ii) **Fiscal**

- **Interest and exchange rates** — The telecommunications industry is largely capital intensive with sophisticated equipment and machineries needed for its operations. To this end, operators who are continually seeking to expand their business (but are unable to sufficiently generate capital internally), or are sustaining the technological requirements of the business as the minimum requirement, are typically at the mercy of the high interest rates charged by the local banks. This borrowing cost, although tax deductible, has affected the declining margins of the telecommunications operators. Furthermore, purchasing equipment or seeking technical support from countries outside Nigeria (which is common in the sector due to its high technological and skill requirements and the shortage of these resources in Nigeria) constantly exposes operators to foreign exchange risk.

- **Taxation** — There is some uncertainty about taxation in the sector with operators complaining of discouraging tax provisions or practices. For instance the following issues have been widely regarded as back breakers:

  - **Deductibility of expenses:** It is commonplace that the basis of deductibility of expenses for a company operating in the telecommunications sector is the WREN test i.e. only expenses that are wholly, reasonably, exclusively and necessarily incurred in generating profits of the business are deductible for tax purposes. However, there are instances where valid business expenses such as non-receipted discretionary payments (e.g. payments to various groups for approvals or security of their equipment or employees) are incurred by these operators. These expenses are sometimes huge and arise as a result of the peculiar nature of the industry. The tax authorities have often taken an inflexible position in this area, especially during tax audits/investigation exercises in relation to tax deductibility of these expenses.

  - **Multiple taxation:** Different tiers of government have enacted regulations imposing additional taxes/levies on telecommunications operators. While some of them are illegal, others are often based on perception that operators are cash cows and should willingly submit to any form of levies or charges imposed on them. This trend needs to be evaluated, considering the intent of the government's drive to eliminate multiple taxation at all levels.

In the midst of what can be termed a success story of the telecommunications sector, it appears however, that the mobile telephony market has reached an advanced stage. This is evidenced by indicators such as:

- The demand for better service by consumers (unlike the growth stage when consumers were generally satisfied with access to services provided by telecommunications operators);

- The outsourcing of infrastructure management to specialists;

- The decline in the average revenue per user; and

- The intense marketing drive by operators.[4]

Nigeria still holds a future market for the telecommunications sector due to the demographic constitution, with a high population below the age of 15 years. This group of people have little or no access to mobile telephony and have yet to be drawn into the telecommunications market.

Hence, there has been an effort by operators to reach out to this group, while expanding their operations to neighboring countries in the midst of the temporary saturation. However, it is yet to be seen if the hope borne by the telecoms companies would be enough to sustain the sector in the midst of the stiff challenges.

To the extent that the telecoms sector remains one of the clear successful policy implementation stories of the last decade, friendlier tax practices, infrastructural development and monetary policies can only stimulate continuous productivity and investment by the operators. The government and its associated bodies, which are responsible in this regard should therefore take up the challenge and enable the necessary positive changes.

Notes

1. Now Airtel Nigeria Limited. Vodacom in 2003 took over Econet Wireless Nigeria resulting in a change of name to Vmobile. Celtel, a division of Zain purchased over 60% stake in 2006. In 2010, Zain sold its stake to Bharti Airtel.

2. Business Day Newspaper, July 28, 2014, which is accessible via http://businessdayonline.com/2014/07/telecoms-operators-a-case-of-the-misunderstood/#.U9jUW_ldVic.

3. Thisday Online Newspaper, Nov. 5, 2013, which is accessible via http://www.thisdaylive.com/articles/accord-telecoms-installations-status-of-critical-national-infrastructure-fg-urged/163467/.

4. Telecoms Industry Report 2014, published by Agusto & Co, page 56.

Net Neutrality: The Emerging Debate in Asia

By Mark Parsons and Peter Colegate; Hogan Lovells, Hong Kong; Email: mark.parsons@hoganlovells.com; peter.colegate@hoganlovells.com.

Asia is joining the US and Europe in the debate over "net neutrality," the concept that telecommunications infrastructure should be regulated to ensure non-discriminatory access to all content and services available on the internet.

The fact that net neutrality issues could arise in Asia may surprise many observers. Asia's leading open telecommunications markets — Japan, Hong Kong, Singapore and South Korea — have for some time now been characterized as "broadband paradises," consistently scoring at the top of the list of places to find fast, cheap and high quality internet access. Competitive DSL markets and high quality infrastructure have meant that capacity constraints have not been so noticeable.

The cracks, however, are beginning to show.

Bandwidth-intensive over-the-top (OTT) and peer-to-peer (P2P) services have gained significant popularity in Asia. The runaway success of Voice-over-Internet Protocol (VoIP) services has posed challenges for network capacity and at the same time eroded telecoms operators' revenues. The emergence of nest regeneration networks (NGNs) risks a "rebundling" of local loops that threatens business for content providers and independent ISPs.

Japan

To close observers, these issues have not emerged unexpectedly. Japan's Ministry of Internal Affairs and Communications studied net neutrality in detail as early as 2007. Japan's unbundling of the local loop in the early 2000s was remarkably successful, producing a highly competitive DSL market that supported neutrality. However, the ministry's 2007 report noted that there were new kinds of vertical integration in the telecoms sector at play due to increasingly sophisticated integrated content platforms and new forms of horizontal integration through fixed-mobile convergence. They noted that next generation network services and IP-based services more broadly would only make these integration issues — and potential anti-competitive effects — more pronounced over time, particularly with the rapid expansion of P2P services that consume large amounts of bandwidth. These new services were projected to generate a doubling of traffic every other year, which made the risk of capacity constraints apparent.

The Japanese formulation of network neutrality that followed is a nuanced one, twinning "fairness in network use" with "fairness in network cost sharing," leaving it open to a case-by-case assessment to determine if, for example, heavy users can be surcharged. Traffic shaping is characterised as a last resort, with official guidance for ISPs being that they need to look to measures to increase or free up capacity prior to taking any steps to throttle traffic. Transparency to consumers is critical; disclosing the basis for charging and the basis for limiting available bandwidth.

Hong Kong

Hong Kong was next to consider the issue in 2009, making reference to the Japanese study and noting similar traffic volume growth patterns and potential capacity constraints. Like Japan, Hong Kong concluded that its market was fundamentally competitive. So long as ISPs adopted a fair and open method to controlling the flow of internet traffic, no specific intervention was required. Operators are allowed to apply traffic control measures to atypical users, provided that they are transparent in explaining how their fair usage policies work.

Singapore

Singapore completed its own study of net neutrality in 2011. Like its counterparts in Japan and Hong Kong, Singapore's Infocomm Development Authority concluded that market competition was healthy and there was no evidence of discriminatory treatment of access. Singapore's policy for net neutrality is three-fold:

i. Use existing anti-trust laws to ensure competitive market access;

ii. Ensure transparency of pricing and quality of service standards; and

iii. Prohibit the blocking of legitimate internet traffic.

These past few weeks, however, have seen a net neutrality flashpoint in Singapore. The inexorable growth of VoIP in Singapore has, as is the case elsewhere, posed a serious challenge to operator revenues. When incumbent Singapore Telecommunications suggested that VoIP was posing a risk to network investment, the IDA made a fairly swift rebuff to the comments, suggesting that there is a will to take net neutrality seriously.

South Korea

The region's counter-example is South Korea. When Kakao Talk launched its VoIP service in South Korea in June 2012, network operators immediately raised concerns and reportedly began degrading Kakao Talk services for the lowest two tiers of their data plans. South Korea's telecommunications regulator sided with the operators, ruling that they could block access or charge extra fees to KaKao Talk users.

It may be that a different balance of policy objectives is at work in South Korea. The country is seeking to be the world leader in 5G services, not just in terms of bringing super-fast networks to its people, but also in terms of building global industry leaders in network equipment and technology. In this context, operator complaints about revenue-eroding VoIP and P2P services threatening investment in new networks may be heard more loudly and more clearly.

What is clear is that the net neutrality debate in Asia is emerging and is unlikely to go away. As new technologies test the limits of existing networks in many countries and new services threaten established revenue models, we look to see more flashpoints and a more focussed debate on what net neutrality policy means to Asia's lawmakers.

Right to Forget Extraterritorial Reach, Broad Scope May Affect EU Social Media

By Rick Mitchell, Bloomberg BNA, Washington

The European Court of Justice's recent landmark right to be forgotten ruling didn't directly address social media, but it broadened European Union jurisdiction in data privacy cases in a way that could affect non-EU-owned social media companies, attorneys interviewed by Bloomberg BNA said.

In addition, the way that social media platforms, such as Facebook, and LinkedIn, reuse and index public data is akin to the kind of data use and indexing on which the ruling relied to conclude that search engines are data controllers subject to EU data protection law, they said.

However, there are still many questions about how the right to forget ruling will be applied by privacy officials in the 28 EU Member States to search engines, let alone social media platforms, the attorneys said. There are also differences in how data are used on social platforms, including how users control the posting and deletion of comments, so it isn't clear how they will be treated under the right to forget ruling, some noted.

Expanded Basis for Jurisdiction

The May 13 ruling by the European Union's top court held that EU data subjects have the right to compel Google Inc. and other internet search engines to remove results linking to websites containing personal information about them (see "Data Subjects Can Compel Google to Delete Site Links From Search Results" [09 WCRR 10, 6/15/14]).

The ECJ broke new ground in finding that EU data privacy law applies to a non-EU company's local subsidiary, even if that subsidiary doesn't directly process EU personal data, attorneys in the US and Europe said. It suffices that the local subsidiary's activity, such as advertising or sales, is related to that processing, which can even be outside of the EU, attorneys noted.

They called that finding a major change, likely to directly alter the way companies, including social media companies, manage compliance with EU data protection law.

Christopher Wolf, a partner at Hogan Lovells LLP, in Washington, said the court's finding "seems like a fairly broad proposition and a broad jurisdictional grab" that raises questions about the breadth of the right to be forgotten under EU privacy law.

Data Protection Regulation

A report from the Article 29 Working Party on the ECJ decision — which is expected in autumn — and the EU data protection regulation — which EU officials say will be finalized before the end of 2014 — should provide much needed clarity on the scope of the right to be forgotten. However, there is debate among the member states about whether the proposed regulation should even contain the right to forget principle.

The amended version of the proposed data protection regulation, which was approved by the European Parliament on March 12, 2014, changed the term to a "right to erasure" of personal data.

"We will see whether or not in the new proposed EU regulation jurisdiction is considered to be equally broad," compared with the ECJ ruling, Wolf said. "I know that there is language in the new regulation that suggests that it may be."

If the regulation that is finally passed includes similarly broad language, one result could be that the right to be forgotten could apply to non-data processing EU subsidiaries of certain social media companies, he said.

Reusing Public Data

Berend van der Eijk, an associate at Bird & Bird LLP, in Brussels, said the search engine ruling may have a broader effect, in particular for companies that re-use publicly available data, which include social media platforms.

The ECJ right to be forgotten decision is "ultra-important for all online companies, including social media, because they process personal data." Some companies "thought they weren't subject to EU law, but now realize they are."

Laurent Szuski, Partner,
Baker & McKenzie SCP, Paris

The ECJ ruling said search engines are data controllers under the EU Data Protection Directive (95/46/EC), citing in particular the way they reuse, organize and index data already available to their spiders, Van der Eijk said.

A spider, or crawler, is an automated program that searches the internet for resources like posts, articles and documents. A data controller is a person or company that determines the purposes for which and the manner in which personal data are processed.

Observing that search engine results can combine to produce a detailed profile of a person, the ECJ said that, under the EU Directive, search engines, as data controllers, must remove links upon a data subject's request, even if the original data were published lawfully.

Practitioners said the EU decision doesn't specify what kinds of user information search engines must remove. "Google itself has acknowledged that it will be struggling with applying the ruling because it was so opaque and broad in its language," Wolf said.

There is no bright line test to apply," he added.

Affects Many Companies

Valérie Aumage, a Paris-based partner at Taylor Wessing, said the ECJ decision upends jurisprudence holding that to be subject to the Data Protection Directive, an EU-based subsidiary of a non-EU business should be directly involved in personal data processing. "The ruling said that the establishment only needs to deal with advertising and commercialization of the processing, not the processing itself," she said.

That's the only part of the decision that directly affects social media, but any EU court or data protection authority could use it in the context of a legal dispute involving any kind of company that processes personal data, Aumage said. She said her Taylor Wessing colleagues in the UK and Germany concurred in that assessment.

Van der Eijk said that, in the past, non-EU companies, or companies with headquarters in Ireland, such as Google Inc. and Facebook Inc., or in Luxembourg, could successfully argue that Dutch or French data privacy law didn't apply to them. "I don't know if that would still be defendable. A regulator could come with this ruling in hand and tell such a company that it must comply with Dutch law, or French law," he said.

"I think that this has a very direct and concrete impact on the way companies will have to think about compliance with EU data protection legislation," van der Eijk said.

Laurent Szuski, a partner at Baker & McKenzie SCP in Paris, said the decision is "ultra-important for all online companies, including social media, because they process personal data," adding that, "some of these companies thought they weren't subject to EU law, but now realize they are."

Same Issues as Search Engines . . .

There haven't been any EU rulings specifying to what extent social media companies are responsible for data processing, "but social media are data controllers in the sense of the EU Privacy Directive," van der Eijk said. "I think that's without a doubt."

Stéphane Lilti, a Paris-based attorney who represented the French Jewish students association in its 2013 criminal and civil cases against Twitter Inc., said social networks raise the same right to forget issues that big search engines do.

"When you post a tweet with photos showing yourself at a party when you're 25 years old and then 20 years later the same photo is on social networks, the problem is the same: Can you get them removed or will they be there forever?" he said.

. . . or Different Problems?

Nevertheless, Lilti said social networks raise different legal problems than search engines, "because the information is spread out and comes and goes without any real control."

Wolf said the ECJ viewed the Google search engine as an autonomous data controller that had responsibility to ensure that personal data are processed fairly and lawfully. The court said Google, as a data controller, is obligated to ensure that processed data aren't "excessive" and that the data are adequate, accurate and relevant, Wolf added.

"I don't know that that's the role of a social media platform, because by definition the content on social media platforms is content produced by others. It really is the individuals who control what goes up or what goes down," on their own profiles, Wolf said.

"That seems like a proper scope for the so-called right to be forgotten," he said. "It's when you get into what others have said about you or replicated in their own postings that it becomes a much more difficult issue to address."

User Deletions on Social Media

Aumage said that, in the French context, social networks are data controllers, but not necessarily for all contents posted in each profile. She noted that social networks have specific processes through which people can obtain deletion, not necessarily based on the right to be forgotten, if they believe that content is defamatory or breaches their rights to their own image. There is also a process to get in touch with a profile owner to obtain such a deletion.

That means practical issues related to deletions are simpler for social media than for search engines, she said.

Van der Eijk said, however, that sometimes it isn't clear cut whether a person posting content on a social media network is a controller or whether the social network is, noting that social media platforms make decisions on where posts appear in news feeds and can remove posts, while users have their own responsibility for their posts.

"For example, what happens if somebody posts a link to the newspaper article" targeted by "the opposing party in the Google case?" he said.

Different Member State Approaches

Van der Eijk said it isn't clear how EU Member State data protection authorities are going to apply the right to be forgotten, even to search engines, and in any case, there is likely to be wide variation in how member states apply the ruling.

"I would expect a notable difference in approach to applying the ruling among the various EU DPAs, with, for example, the Netherlands, Germany and France taking a more strict approach, and the UK taking a more business friendly line," van der Eijk said.

Aumage said that the French data protection authority has posted a memo explaining how to obtain deletion of data from a search engine, but it hasn't indicated plans to expand that right beyond search engines. "I don't know if in the very near future we will see decisions applying" this ruling to social networks, she said.

For Lilti, "there is a legal trend in Europe that says that we want control of personal data that belongs to Europeans, even if they are stored in the United States. That trend is not going to be reversed. On the contrary, it is likely to grow in the coming years."

The UK's New Data Retention and Investigatory Powers Act 2014: Affecting Communication Services Providers Based in the UK and Beyond

By Rafi Azim-Khan and Steven Farmer, Pillsbury Winthrop Shaw Pittman LLP, London; Email: rafi@pillsburylaw.com; steven.farmer@pillsburylaw.com.

The UK Data Retention and Investigatory Powers Act 2014 (the "DRIP Act") received Royal Assent on July 17, 2014, and came into force with immediate effect.

This emergency legislation was passed speedily through the House of Commons and the House of Lords, being somewhat of a band aid in light of the European Court of Justice's decision of April 8, 2014, in the Digital Rights Ireland case (Joined Cases C-293/12 and C-594/12), in which it declared the EU Data Retention Directive (2006/24/EC) (the "Directive") to be invalid.

The DRIP Act replaces the UK Data Retention (EC Directive) Regulations 2009 (the "Regulations"), and confirms that companies can be required to retain certain types of communications data for up to 12 months (rather than the fixed 12 months provided in the Regulations), so that this data may later be acquired by law enforcement and used in evidence.

The DRIP Act also clarifies that anyone providing a "communication service" to customers in the UK, *regardless* of where that service is provided from, should comply with lawful requests made under the UK Regulation of Investigatory Powers Act 2000.

The DRIP Act also clarifies that anyone providing a "communication service" to customers in the UK, *regardless* of where that service is provided from, should comply with lawful requests made under the UK Regulation of Investigatory Powers Act 2000 ("RIPA"). This was previously considered to be a grey area, and this clarification has significant ramifications for those providing communication services in the UK from overseas.

The DRIP Act is not without its critics, however. Many argue that it raises more questions than it answers and that it goes too far, especially with respect to the powers that can now be exercised against providers of communication services based outside the UK. Subsequent legal challenges have also been lodged against it on the basis the new rules (like the old rules) continue to insufficiently protect individuals' privacy rights.

The Data Retention Directive

The main objective of the Data Retention Directive was to harmonise EU Member States' provisions concerning the retention of certain data generated or processed by providers of publicly available electronic communications services or of public communications networks.

In summary, the Directive stated that providers had to retain traffic and location data, as well as related data necessary to identify the subscriber or user, for the purpose of the prevention, investigation, detection and prosecution of serious crime. The Directive did not permit the retention of the content of communications (this being protected by privacy related legislation).

In its decision in the Digital Rights Ireland case, the ECJ found that the Directive amounted to a wide-ranging and particularly serious interference with the fundamental rights to respect for private life and to the protection of personal data, because, in a nutshell, the retention was not being limited to what was "strictly necessary." In particular, the ECJ found that the Directive was too wide-ranging in allowing data about individuals to be collected and retained even where "there is no evidence capable of suggesting that their conduct might have a link, even an indirect or remote one, with serious crime."

When challenged by the human rights advocacy group Digital Rights Ireland (as well as privacy campaigners in Austria), the ECJ found that, by adopting the Directive, the EU legislature had not complied with the principle of proportionality, and therefore declared the Directive invalid.

The DRIP Act

Given the Directive was invalidated by the ECJ, new rules urgently became necessary to plug potential holes in UK intelligence gathering capabilities that could have arisen if the companies subject to the retention requirements had stopped collecting the information in light of the ECJ's ruling.

The DRIP Act is made up of two components, which are, according to the UK government, "designed to strengthen and clarify, rather than extend, the current legislative framework."

The first component of the DRIP Act relates to government requirements for the retention of communications data. The second puts beyond doubt that the interception and communications data provisions in RIPA have extraterritorial effect.

Retention of Communications Data

The DRIP Act provides power for the Secretary of State to issue a data retention notice on a telecommunications services provider, requiring it to retain certain types of communications data. It goes on to provide that the period for which data can be retained can be set at a maximum period not to exceed 12 months (rather than the fixed 12 months provided in the Regulations, which was one of the objections of the ECJ), allowing for retention for shorter periods when appropriate.

The DRIP Act goes on to provide a power to make regulations setting out further provisions on the issuance of and contents of notices, safeguards for retained data, enforcement of requirements relating to retained data and the creation of a code of practice in order to provide detailed guidelines for data retention and information about the application of safeguards.

RIPA Provisions' Extraterritorial Reach

The second element of the DRIP Act puts beyond doubt that the interception and communications data provisions in RIPA have extraterritorial effect. Interception provides, under strict conditions and for a limited number of public authorities, access to the content of a communication.

However, the DRIP Act does not alter the existing safeguards under RIPA which regulate interception, and law enforcement and intelligence agencies will continue to need an interception warrant signed by the Secretary of State.

Specifically, Chapter 2 of Part 1 of RIPA provides a regulatory framework for the acquisition of communications data. Before a request for data can be made, necessity and proportionality tests must be carried out by a designated senior officer, at a rank stipulated by parliament, within a public authority. Section 25(1) defines what constitutes a relevant public authority and Section 22(2) provides the purposes for which communications data may be accessed. The Secretary of State has powers to add or remove public authorities and add purposes through secondary legislation.

Regarding interception, Chapter 1 of Part 1 allows for the law enforcement and security and intelligence agencies to gain access to the content of communications made by post or telecommunications. There are a number of safeguards to ensure access is permitted only under warrant from the Secretary of State. The Secretary of State must be satisfied that the interception is necessary for the purposes of national security, the prevention or detection of organised crime, or the economic well-being of the UK (where this specifically relates to national security), and proportionate to what is sought to be achieved. The information must not be able to be reasonably obtained by other means.

According to the government, the DRIP Act is necessary in order to clarify the intent of RIPA. While RIPA has always had implicit extraterritorial effect, some companies based outside the UK, including some of the largest communications providers in the market, had questioned whether the legislation applied to them. These companies often argued that they would comply with requests only where there was a clear obligation in law. The DRIP Act makes this obligation clear.

The DRIP Act also clarifies the economic well-being purpose for obtaining communications data or issuing an interception warrant under RIPA, and the definition of a "telecommunications service." This is to ensure that interception warrants can be issued and communications data can be obtained only on the grounds of economic well-being when specifically related to national security. Clarifying the definition of "telecommunications service" ensures internet-based services, such as webmail, are included in the definition, the government says.

Safeguards

The government says that the DRIP Act merely maintains and clarifies the existing regime and does not create any new powers, rights of access or obligations on companies beyond those that already exist. It also strengthens existing safeguards and includes a two-year sunset clause to ensure the legal framework is kept under review into the next parliament.

In parallel, the government has announced new measures to increase transparency and oversight. These include:

- The Interception of Communications Commissioner will report every six months on the operation of the legislation;
- A senior diplomat will be appointed to lead discussions with overseas governments and communication service providers to assess and develop formal arrangements for the accessing of data for law enforcement and intelligence purposes held in different jurisdictions;
- An Independent Privacy and Civil Liberties Board will be created to consider the balance between the threat in question and civil liberties concerns in the UK, where they are affected by policies, procedures and legislation relating to the prevention of terrorism;
- The number of public bodies currently able to request communications data will be reduced; and
- The government will publish annual transparency reports to make more information publicly available on the way surveillance powers are used.

The government has also published new draft regulations, which flesh out more detail on how the new data retention powers can be exercised.

The draft Data Retention Regulations 2014 set out what information must be included in retention notices served to telecommunications companies. They also set out a number of issues that the Secretary of State issuing the notices must take into account before serving the notices.

Comment

The passing of the DRIP Act demonstrates that the fight against crime and the protection of the public remain top priorities for the government, and such a legislative response was undoubtedly necessary in light of the ECJ's decision.

Nevertheless, the DRIP Act has attracted a fair amount of criticism, not least from civil rights campaigners Liberty, which has said it will seek a judicial review of the DRIP Act on behalf of Members of Parliament David Davis and Tom Watson.

The position of Liberty is arguably best summed up by Mr Watson: "The new Data Retention and Investigatory Powers Act does not answer the concerns of many that the blanket retention of personal data is a breach of fundamental rights to privacy," and the fact that the maximum 12 month blanket retention period for all data appears not to reflect the requirement of the ECJ's decision that retention periods should distinguish between different categories of data would certainly lend itself to Liberty's argument.

For US and other foreign companies that provide UK citizens with services, it is also argued that the clarification that RIPA applies to them amounts to new and unprecedented powers, whilst others argue that the new definition of "telecommunication services" is too wide. In addition, importantly, the position regarding existing retention notices that communication service providers are subject to is unclear. In particular, are these automatically repealed or will they be superseded by new notices? Clearly, questions hang over the DRIP Act.

Whilst arguments rage on over the DRIP Act and questions remain unresolved, the fact is that those affected by it, including those based outside the UK, that are providing communication services in the UK, must be up to speed with these latest developments, whether they be categorised as clarifications of existing law or changes to it.

Broadband Internet, a Basic Right in India: Converting Dream into Reality

By Neeraj Dubey, Partner, PSA, Legal Counsellors, New Delhi; Email: n.dubey@psalegal.com

India conceived its National Telecom Policy, 2012 ("NTP") with a vision to transform the country into an empowered and inclusive knowledge-based society using telecommunications as a platform.

This platform could be made possible by providing secure, reliable, affordable and high quality converged telecommunication services anytime, anywhere.

As such, NTP envisaged providing reliable and affordable broadband services to both rural and urban India on demand and leveraging telecom infrastructure to enhance India's competitiveness. The overall strategy of NTP, therefore, has been to:

- Create an ecosystem for broadband;
- Provide and eventually recognize telecom, including broadband connectivity as a basic necessity like education and health; and
- Work towards a "Right to Broadband."

NTP outlines the establishment of fibre optic agencies in each state of India and a national agency.

Bharat Broadband Network Limited ("BBNL") was set up to manage and operate the national fibre optic network ("NOFN"), which will provide connectivity to 250,000 villages for e-services in the areas of education, business, entertainment, environment, health households and e-governance. It will also help provide synergy between government projects through this platform.

BBNL has already started pilot projects in Rajasthan (*Arian in Ajmer district*), Andhra Pradesh (*Parvada in Visakhapatnam*) and Tripura (*Panisagar in North Tripura district*). Through the pilot projects, the ground realities of implementing broadband at the rural level will be tested and the subsequent planning can be streamlined accordingly. The pilot blocks will be integrated with existing networks upwards. As such, this mammoth project will eventually connect rural India to urban India.

For a successful NOFN, BBNL will need to adopt best practices to address issues like encryption, privacy, network security, law enforcement assistance, interoperability, best-to-connect devices, preservation of cross-border data flows, and those related to cloud services.

The real issues in NOFN would be to ensure safety, provide machine-to-machine communication at a rural level and the ability to intercept and monitor facilities for effective management. Furthermore, BBNL would need to create a support system by establishing a dedicated centre of innovation to engage in R&D and specialized training. BBNL aims to provide cost effective services with increased bandwidth and download speed of 1Mbps.

Once the broadband infrastructure is complete, there will be a reduction in fees and levies as well. Upon successful completion of this project, the corresponding onus will be on private players to effectively pass on the increased bandwidth to the consumers, thereby improving the environment for service providers involved in the delivery of broadband and mobile internet.

Now, this is a wait and watch situation until the successful completion of the pilot projects.

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Special Report

European Commission Publishes Report on Telecommunications Market and EU Regulation

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A Digital Agenda for a Digital Age

It has become a saying that we live in a digital age. Indeed, searching Google for "we live in a digital age" returns over 4,900,000 results (in no less than 0.45 seconds). However, whilst it is difficult to dispute the pervasiveness of digital technologies — at least across the European Union — the quality and access to these is far from uniform. Most of us have experienced the angst of not having a mobile phone signal while in rural areas or the sensation of receiving a mobile phone bill with high roaming charges following a short trip across Europe.

To help address some of these issues, in May 2010, the Digital Agenda for Europe (DAE) was adopted by the European Commission in response to the rapid growth of the use of digital technologies across the EU (see "EU Ministers Approve European Digital Agenda" [05 WCRR 6, 5/1/10]). The DAE is one of seven initiatives under the EU's 10-year strategy to obtain "smart, sustainable and inclusive growth," in what is known as Europe 2020. The implementation of DAE is expected to increase European GDP by 5% by 2018 and create up to 1.2 million jobs through infrastructure construction by 2020.

The DAE fits in with the general EU framework and aims at striving to create a truly single market across Europe. In some respects, the DAE can be viewed as another step towards achieving a single telecommunications market for growth and jobs.

The DAE contains 13 specific goals[1] that aim to make a difference to citizens and businesses in the EU by keeping the region at the forefront of future digital developments. The scope of these goals is broad, ranging from public investment targets in ICT to encouraging increasing consumer use of digital technologies.

One of these goals was to implement broadband coverage in the entire EU by 2013 and, in the future, to have EU-wide broadband speeds above 30Mbps by 2020. In fact, it was underlined in the DAE that wireless broadband is an important means to boost competition, consumer choice and access in rural areas, and this could be achieved if sufficient spectrum was made available and the rights of use of spectrum were awarded quickly. However, in practice, member states have come across certain issues when trying to implement these goals, as discussed below.

Other goals introduced by the DAE include, by 2015, securing free mobile roaming across the entire EU and having at least 50% of the population purchase goods or services online. The progress of the DAE's goals at the EU and national level are measured by the annual Digital Agenda Scoreboard, which formed the basis of a report published by the Commission on July 14, 2014.[2]

Current Progress of Achieving Goals in the DAE

First, some good news. It was mentioned in the DAE report that basic broadband coverage in the EU is now 100%, which means that the first goal of the DAE has been achieved. This was attained through the use of different types of technologies such as fixed, wireless, mobile and satellite technologies. However, high speed fixed broadband coverage and penetration rates are still quite low in some member states (e.g. Italy and Greece), although it is generally growing rapidly.

In contrast to this, the fixed voice market was declining by 2012 as consumers increasingly switched to using mobile phones and Voice over IP (VoIP) alternatives such as Skype. Revenues on the mobile market have been decreasing despite an increase in data traffic, largely because of problems in the current infrastructure, which still needs to be improved. Investments therefore still needs to be made for network upgrades and roll-out.

However, mobile operators in the EU are trying to boost data traffic and profits through various means, such as by offering bundled products to consumers to encourage the growth of fixed voice market with the growing mobile market. Moreover, there is an average number of around three to four dominant mobile operators in most EU Member States with each having average market shares of between 25-35%. It is observed that price pressures would increase when the number of main operators in a member state increase. Therefore, consolidations of operators could be beneficial in order to keep the price pressures down, instead of allowing new operators to become dominant.

Disparities Across Member States

As with many EU initiatives, the implementation of the DAE has varied across EU Members States. Some member states have not fully implemented the DAE for various reasons, such as a lack of willpower and commitment on the part of the national operators to achieve those goals, as well as the market and regulatory constraints discussed below. This has resulted in a disparity in the progress made across different member states.

Termination Charges

Termination charges in a telecommunications context refer to when a call passes — or is "routed" — from one network to another, resulting in one operator charging another for this process.

In the EU, wholesale voice call termination rates (fixed and mobile) are charged based on a principle known as "Calling Party's Network Pays." This means that the termination charge is set by the network, which is called and paid by the network that is calling. However, significant divergences in these termination rates prevail across EU Member States as different costing tools and implementation practices have been adopted. Most member states have adopted the costing methodology recommended by the Commission, which is based on a pure bottom-up "Long Run Incremental Cost" (BU-LRIC) approach (i.e. those variable costs which can somewhat be predicted). However, Germany and Lithuania are using an alternative costing methodology, LRIC+, and Finland is adopting the Fully Allocated Costs methodology (which attributes the costs to defined activities such as products and services). Nonetheless, regulators in Luxemburg, Latvia, Portugal, Ireland and Romania are still developing their LRIC model based on benchmarking analysis of BU-LRIC models already applied in member states.

Also, it is evident that the absolute level of termination rates have remained high in a number of member states compared to countries outside the EU. This is because operators are increasingly in competition with each other for subscribers, meaning that they strategically set their termination rates above efficient costs. The net result is higher charges for consumers.

Broadband Network Roll-out by 2020

The broadband goals set out in the DAE had been fully adopted by most member states by 2013 with the exception of Greece, Romania and Cyprus. However, the timing of implementation has varied; the Netherlands and Luxembourg are already at an advanced stage, whereas Poland and Slovenia are lagging behind. Some of the constraints of developing this further are discussed below.

Member states receive funding for their broadband rollout projects from the European Agricultural Fund for Rural Development (at the national level) and the European Regional Development Fund (at the EU level) as well as from state aid for the purpose of furthering general economic development. However, facilitating the further roll-out of broadband networks can depend on the financing status in each member state. For example, Cyprus and Croatia are still finalizing the amount of funding needed from the EU. Luxembourg on the other hand is self-sufficient and does not need additional funding from the EU for broadband development, which partly explains why its implementation of the DAE's goals has been so successful.

Market and Regulatory Constraints

The implementation of the DAE is also hindered by market and regulatory constraints in different EU Member States. The following few examples are discussed in the DAE report.

Spectrum Management

Spectrum is a key public resource for various sectors such as mobile, television broadcasting, radio broadcasting, wireless broadband and satellite communications. In order to improve the quality and efficiency of services provided through electronic communications and to create new opportunities for innovation, the Commission promoted the harmonisation of appropriate spectrum across the EU under Article 6(2) of the radio spectrum policy programme (RSPP) Decision in 2012.[3] Prior to this Decision, it was stated in Directive 2002/20/EC that the deadline for the authorization process for terrestrial communications should be carried out by the end of 2012, subject to market demand. However, 23 member states have failed to meet this binding deadline due to a lack of market demand in some cases (e.g. Bulgaria, Malta and Portugal).

The optimal spectrum band — or the "digital dividend" — was recommended by the Commission to be 800MHz, which can be transmitted over larger areas and supports the development of 4G technology (which offers users faster and more reliable mobile broadband internet for devices than the previous 3G technology).

By January 1, 2013, 21 member states had already assigned the digital dividend band. However, 14 other member states (e.g. Austria, Cyprus, Spain, Poland and Romania) had applied for derogation from the deadline, of which 12 were granted derogations for periods between six months and three years whereas two were declined derogations outright. In particular, Poland has significantly exceeded its derogation deadline as its auction, planned for February 2014, was annulled.

Legislative Constraints

Apart from the lack of market demand for certain spectrum bands, the development of 4G has been impeded where local legislation has set electromagnetic field limits largely below the recommended value in a previous recommendation by the European Council.[4] This is the case in Belgium, Croatia, Italy, Poland and Slovenia and the Commission is monitoring this legislative situation. Out of those member states, Belgium has already put in place higher limits in response to the Commission's correspondences.

Regulatory Constraints

Procedures for granting rights of way and access to infrastructure vary across member states. In particular, it has been reported that Bulgaria, France, Luxemburg, Czech Republic, Poland, Malta and Belgium have particularly complicated and burdensome procedures to obtain rights of way. Applications for permits may take from days to years to process and the fees for such rights also vary across member states. Although tacit approval or one-stop-shop procedures have been adopted in certain member states such as Greece, a lot more needs to be done to improve the current system.

The Future

Differences in Business Models Internationally

It was noted in the DAE report that the revenues in the European electronic sectors declined between 2011-2012, while there was a 5.1% increase in the US during this period. Further, the trend of mobile revenues from 2005-2012 in the US shows a steady growth, while it has been quite unstable and unpredictable in the EU. These figures can be explained by the different business models and market strategies adopted by regulators in the USA and EU. For example, the average voice revenue per minute in the EU is almost three times higher than the US, but the monthly revenue per subscription in the US is twice as much as the EU.

Net Neutrality

The principle of net neutrality allows internet users to access the content, applications and services of their choice, and promotes competition among network, services and content providers. However, the current debate on net neutrality is mainly focused on EU level legislation and centres around the management of internet traffic by internet service providers (ISPs) and what constitutes reasonable traffic management.

Member states have implemented different approaches towards net neutrality. Some member states such as Denmark, the UK, Hungary and Sweden rely on self-regulatory initiatives to ensure the openness of the internet, using forums and code of practices to promote net neutrality. In addition, the French and UK national regulatory authorities (NRA) have issued guidance on net neutrality, and the Austrian NRA adopted a position paper in May 2013, which included seven net neutrality principles. More recently, in December 2013, the Czech Republic NRA issued guidelines on data traffic management.

Legislative Amendments

The problems with the rights of way and access to passive infrastructure is expected to improve with the recently adopted Directive 2014/61/CE on May 15, 2014, which includes measures to reduce the cost of deploying high-speed electronic communications networks in the EU, which will be implemented by member states in the near future.

Conclusion

As with many ambitious projects with multiple goals, there is a patchwork of success and failures towards achieving the DAE's goals by 2020. Overall, the progress of achieving the DAE goals have been optimistic and it is evident that the mobile market and data traffic will continue to expand going forward.

Mobile operators across EU Member States have responded to this trend through corporate consolidations and pooling together capital in order to concentrate resources on developing the mobile market. However, the inconsistent approaches of implementing the objectives of the DAE (such as termination charges and broadband roll-out) and the obstacles faced by different member states will need closer monitoring and assistance by the Commission — and, indeed, EU Member States — to achieve the 2020 target.

Notes

1.The Digital Agenda for Europe. The specific goals in the DAE are:

1. The entire EU to be covered by broadband by 2013;
2. The entire EU to be covered by broadband above 30Mbps by 2020;
3. 50% of the EU to subscribe to broadband above 100Mbps by 2020;
4. 50% of the population to buy online by 2015;
5. 20% of the population to buy online cross-border by 2015;
6. 33% of SMEs to make online sales/purchases by 2015;
7. The difference between roaming and national tariffs to approach zero by 2015;
8. To increase regular internet usage from 60% to 75% by 2015, and from 41% to 60% among disadvantaged people;
9. To halve the proportion of the population that has never used the internet from 30% to 15% by 2015;
10. 50% of citizens to use eGovernment by 2015, with more than half returning completed forms;
11. All key cross-border public services, to be agreed by member states in 2011, to be available online by 2015;
12. To double public investment in ICT R&D to EU€11 billion by 2020; and
13. To reduce energy use of lighting by 20% by 2020.

2. 2014 Report on Implementation of the EU regulatory framework for electronic communications.

3. 243/2012/EU.

4. Council Recommendation 1999/519/EC.

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