The new EU copyright directive: backing creatives

By Peter Adediran

The new EU copyright law that copyright lawyers, artists, management and media companies have been waiting for was passed on 17 April 2019 as Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC. The directive (https://eur-lex.europa.eu/eli/dir/2019/790/oj) is not law as is (although some of its provisions are mandatory); most of its provisions will have to pass into the local law of member states by 2021. Other provisions will need to be implemented by 2022.

The diverse cultural differences across EU member states will mean its implementation is likely to be different across the EU.

The copyright law build up

The new directive builds on Directive 2001/29/EC and complements several previous directives seeking to tackle the digital world and harmonise (the so-called digital single market) copyright law in all EU member states.

The current copyright directives are:
- The Database Directive (Directive 96/9/EC)
- The Copyright Directive on harmonisation of certain aspects of copyright (Directive 2001/29/EC)
- The Rental and Lending Rights Directive (Directive 2006/115/EC)
- The Computer Programs Copyright Directive (Directive 2009/24/EC)

The new copyright directive specifies that the current copyright directives are not affected by its provisions. It aims to provide clarity in what was a fragmented copyright regime under the 2001 Directive, promote the European culture, and consolidate the proper functioning of the digital single market.

The reasons and objectives for the directive are summed up in the preamble to the proposal, which refers to rapid technological developments, new business models, and legal uncertainty for rights holders and users, as regards specific uses, including cross-border applications, of works and subject matter in the digital environment.

Stakeholders in the copyright battle

The two principal stakeholders affected by the directive are Information Society Services (ISSs), also known as Online Service Providers (OSPs), and Content Creators (CCs).

OSPs are online platforms that store, index, transmit, cache or distribute content including infringing copyright content on or through their servers, system, or website. These organisations include video sharing websites like YouTube, social media websites like Facebook, blogs and blog networks, search engines, and other platforms that disseminate content. OSPs do not include Internet Service Providers (ISPs). An ISP primarily provides internet access enabling
internet usage products like cloud services or data management services; for example, Web.com would be an ISP. OSPs are digital platforms on which to build other businesses; so Facebook, Instagram, YouTube are all OSPs.

An ISP can be an OSP, but not vice-versa. The directive recognises the distinction by exempting electronic communication services, i.e. ISPs, B2B Cloud Services and Cloud Services from its scope.

Content that is capable of copyright created and disseminated through the platforms provided by OSPs are the work of CCs. This copyrighted content can be user-generated, owned media or third-party creative works including text, images, film, photographs, audio, illustrations, or a combination of any of them, together commonly known as “works”.

**Educational and commercial effects**

The directive focuses on both the educational and the commercial effects of copyright within the EU. Firstly, it acknowledges that the use of materials protected by copyright is essential to the learning process. In the words of the explanatory memorandum to the directive, to “enhance cross-border access to copyright-protected content services [and] facilitate new uses in the field of research and education.”

Second, it compels OSPs to give a fairer deal to CCs by encouraging the negotiation of licensing agreements to publish their content. In the words of the explanatory memorandum, to “clarify the role of online services in the distribution of works and other subject matter.”

The wording of the directive is that OSPs shall obtain “authorisation” from CCs, suggesting a licence as an example of consent. In practice any authorisation of intellectual property is either a license or an assignment; this and fair remuneration and transparency provisions make it clear that what the EU wants is an outcome of fair value commercial licences for copyright content in the EU single digital marketplace.

**The balance of power**

Arguably, the balance of power has been in favour of OSPs since the start of the commercial internet.

The safe harbour provisions passed in Europe and the United States in the 1990s and early 2000s favoured OSPs over CCs.

Without the balance of copyright protection falling in favour of OSPs we would probably not have YouTube, Amazon and thousands of other platforms that have benefited from the less stringent copyright regime.

The call for the balance to be fairer by content creators has been going on for two decades, and the directive seeks to facilitate more cooperation among OSPs with CCs to detect and deal with online copyright infringement.

Anyone following the development of the context of the law in this area will be aware that the directive is the evolution of the battle of copyright politics between culture and competition.

The changes in the directive are severe. They will affect OSPs by increasing the costs of policing copyright infringement and negotiating better deals with CCs. OSPs will need to acquire more effective content filtration software and hire specialists in accounting for royalties and other licensing-related financial matters. Whilst digital music sites may already be familiar with licensing, publishers and other OSPs will be entering new territory.

However, in my view, the improved new copyright regime will also empower CCs which will lead to better quality content.

While the copyright directive comes with better provisions for a creator’s intellectual property, it provides for several reinforced copyright compliance regulations for small, medium and large OSPs.

**Controversial articles in the directive**

The directive’s most controversial and relevant provisions, now superseded, were the former Article 11 (now Article 15), Article 13 (now Article 17) and Article 14 (now Article 18).

**Article 15**

Article 15 relates to protection of press publications concerning online uses.

Article 15(1) states that press CCs shall receive the protections for the digital use of their works as set out in Article 2 (copyright reproduction rights) and Article 3(2) (copyright broadcasting rights) of Directive 2001/29/EC. In other words, press publishers are given the right to negotiate licensing for their works with news aggregators.

Small snippets are permitted although there is no clear definition of “very short extracts”. Google current short news snippets will probably be exempt but there will be uncertainty as different members states decide what exact amount will be “very short”.

Hyperlinking does not require a licence, so linking to part of a press article on a blog or social media is not caught by the directive.

Actual authors should share in publishers’ revenues, subject to contractual arrangements and employment contracts.

There is an expiration timeline of two years after the press publication is published by the news aggregator.

Article 15(1) is also subject to the exceptions in Article 5 to 8 (exceptions and limitations) of the earlier directive.

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**Internet Newsletter for Lawyers is edited by Nick Holmes and published by infolaw Limited**

ISSN 2046-9284. Personal Print+PDF subscription (6 issues) £50. Personal PDF £30+VAT. Multi-use £80+VAT

Subscription information and online access are at www.infolaw.co.uk/newsletter

Subscription enquiries to infolaw subscribe@infolaw.co.uk 5 Coval Passage, London SW14 7RE Tel 020 8878 3033

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Press publications do not include blogs or sites not under the editorial control of a news publisher.

Where a news publisher owns legal and beneficial title to the works, then the publisher should be entitled to a revenue share of licensed non-commercial activity, eg from text and data mining, scientific research, cultural research, teaching.

Article 17

Article 17 is contained in Chapter 2 (certain uses of protected content by online services). Its straightforward aims are:

- to clarify the status of OSPs’ responsibility for the copyright content on their websites without the consent of the actual copyright holder; and
- to provide rightsholders with greater control of the use of their copyright content and their ability to negotiate licensing agreements with OSPs without OSPs being able to unilaterally decide the terms of the licensing agreements (eg there can be no fixed license fee).

Article 17’s main effect, to make OSPs liable for copyright infringement on their platforms, met with significant resistance from OSPs like YouTube.

Companies like Universal Music Group Vivendi weighed in on the side of CCs.

Other stakeholders like the global music industry agencies and publishers as well as small individual artists were also vocal in support of Article 17.

OSPs are compelled to strengthen the protection of user-generated copyright content from copyright infringement, and they must put in place complaints procedures and other best practice processes.

OSPs must make best efforts in accordance with high industry standards of professional diligence. However, there is no general monitoring obligation on OSPs and no clear definition of “best efforts”. Article 14(1) of Directive 2001(29)/EC that gives safe harbour to hosting platforms will no longer apply.

Incidentally, on the 8 April 2019, the Department for Digital, Culture, Media & Sport published a Code of Practice for providers of online social media platforms. If implemented into company procedures and policies, the code could assist OSPs in complying with the directive (see [http://bit.ly/2GmgzlQ](http://bit.ly/2GmgzlQ)).

Article 18

Chapter 3 of the directive features Article 18 on fair remuneration in contracts of authors and performers and Article 19 on the transparency obligation.

OSPs are compelled to ensure that artists and performers receive clear and transparent information about the exploitation of their works and performances. This obligation focuses on revenue generated and monies due to artists from the use of such copyright works and performances. Digital music sites will already be familiar with accounting for royalties and other revenue stream models for CCs, but it will be new for other audio visual sites like gaming.

Who is affected by the directive?

Artists

The directive supports independent artists. Previously, large musical, digital or print artists received adequate copyright protection, namely being able to afford the representation that is needed, but previous copyright laws did not necessarily protect independent artists.

The directive ensures that OSPs will have greater accountability for the distribution of copyrighted material.

OSPs

With the increasing constraints on reusing the material of others in the EU, some influential OSPs may lose some copyright material.

The directive exempts open source development sites and not for profit sites that may contain copyright content like Wikipedia from authorisation requirements. To comply with the restrictions in the directive, small to medium size OSPs will most likely need to employ filtering software. These software solutions are expensive and they will be costly for smaller internet platforms.

There has been a fair amount of pushback by OSPs on the costs of complying with the directive. Some compromises allowed these smaller internet companies to be exempt if they met three specific criteria.

- under €10m in revenue per year;
- fewer than 5 million users; and
- younger than three years old.

News agencies

The directive will also benefit news agencies and other publications by giving them increased control over their copyrighted created content. The so-called “link tax” in Article 15 accomplishes this.

The link tax does not immediately charge people for using a hyperlink as the pseudonym implies; it empowers the press to exercise their rights over their articles.

Big tech companies

As you can probably imagine, some of the most significant opponents of the directive are the big tech companies like YouTube, Google, Facebook and Twitter.

Not only will big tech companies need to ramp up the amount of filtering that they are doing, but the directive also opens them up to potential lawsuits for removing content incorrectly or publishing content mistakenly.

The artists argue that the problem is not that they get too little, but that big tech companies get too much of the revenue from their works. The prevailing sentiment amongst artists is that the directive will level the playing field.

The legislation applies to organisations doing business in the EU or that are EU residents. While each specific country of the EU will need to decide how stringent they will be when implementing the copyright directive, you can be sure of its implementation.

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An Uber model for legal services delivery?

By Antony Smith

Some commentators have been asking whether law firms and other legal service organisations should adopt an Uber-like model for legal service delivery.

From a narrow technological point of view I think is safe to assume that this could well happen.

Looking at some of the less benign aspects of the model in practice, it seems regulators will need to ensure a good standard of ethics is adhered to if the model is to work fairly for all concerned (and there are signs they are prepared to do so).

Does the growth in legal operations generally, and my own field of legal project management in particular, facilitate the Uberisation of law? I don’t think it does. I think legal project management helps promote a more co-operative approach to progress, competition and innovation.

I also think we should put aside fixation with the Uber model and look to other approaches instead.

Introducing Lawber

Oz Benamram, Chief Knowledge Officer at White & Case posted an article on LinkedIn recently advocating the idea of legal services delivery based on the Uber services model, which he referred to as Lawber (http://bit.ly/2XRjDfB).

The basic premise is that a technology platform – Lawber – will identify the “right lawyer” for legal work and potential clients would be able to select and instruct that lawyer easily. Oz noted that, “If another lawyer is 30 per cent cheaper or 30 per cent better than you are, they will likely get the work, even if they’re working alone out of a basement at a remote location.”

It seems the main driver facilitating a “Lawber” service would be, as with Uber, technology.

The technology will have two main general features: ease of use for end-users and detailed analytics running in the background to help select the “right” lawyer.

But other components will be used as well, either as part of Lawber itself or to help with the journey towards the Lawber destination.

As Oz explains, “At White & Case we have been preparing for Lawber – or whatever comes next – through solid knowledge-management practices, legal project management, and a dedicated practice innovation team. Every day, our business services professionals work to make our lawyers and practices more efficient and indispensable to clients.”

Take out the reference to Lawber from the quote above and it is unexceptional. Most large law firms are engaged in this kind of activity.

As you would expect I always like to see legal project management referred to as a means of helping to make law firms “more efficient and indispensable to clients”. The reference to an Uber-like model makes me feel uncomfortable though. Looking at the replies to Oz’s article on LinkedIn I am not the only one who feels like this.

Oz says there are quite a few technical hurdles to overcome before a Lawber service becomes reality. I am sure he is right but I think we can safely assume that any technical hurdles will be overcome.

Cultural change poses more intractable problems. I know from my own experience there has historically been a lot of resistance within law firms to disclosing operational performance data with clients, much less with third parties.

Let’s assume, however, that collective client (ie market) pressure will be such that firms will have to expose detailed data (all that lawyer time-recording should come in useful) to help identify the “right lawyers” for matters.

From a rather narrow implementation point of view, therefore, I think we can safely say that an Uber-like model is likely to happen.

Unfortunately, there’s a catch.

What’s wrong with Uber as a model?

For many people, me included, the Uber brand is toxic.

It’s easy to dislike a brand which has a senior management ethical violations resulting in a widely reported culture of bullying and harassment. Uber is trying to change this, but only time will tell if it is successful. Personally, I find it difficult to separate the Uber brand from the Uber model.

I think the under-side of the Uber model is that it allows, if not encourages, Uber to exploit gaps and uncertainties in regulations covering traditional (taxi) service providers.

It’s interesting to consider whether this approach of continuously pushing the bounds of current practice and regulation has helped cause Uber’s poor ethical culture or whether it is a manifestation of it. At some point continuously pushing acceptable boundaries becomes illegal, which perhaps explains why Uber finds itself subject to a lot of legal actions worldwide.

While Uber may be disrupting the traditional taxi market, it is far from providing an “alternative” means of transport. Most Uber rides take place in large conurbations by people who are relatively well off. It appears app-based taxi rides increasingly replace walking, cycling or taking public transport (http://bit.ly/2XT04mY).

In short, the Uber model is less about finding new markets, more about trying to make money from
existing markets which are already very well served. How does Uber do this?

Essentially it undercuts existing service provider pricing. Yes, Uber rides are convenient and “on demand” but it’s really the low cost of the rides which gets people to use Uber. Ultimately, it’s the Uber drivers who pay for its low cost service. Uber drivers often make less than the minimum wage. As is well known, Uber believes its drivers are not employed by it, so they have no right to employee workplace protections. This argument is being challenged in the courts both here in the UK and elsewhere. Uber is currently appealing a judgment which went against it on this point in the UK where, as the Guardian put it, “The judges found there was a ‘high degree of fiction’ in the wording of the standard agreement between Uber and its drivers, which it argues are self-employed independent contractors with few employment rights” (http://bit.ly/2XQ0jiH).

The fiction of pretending its drivers are not employees has effectively turned the drivers into a casual labour force, although I don’t think there is anything casual about driving around for hours and competing against other drivers to pick up fares. Historically, casual labour has been easy to exploit. Uber may be all dressed up as being an example of technology-driven disruption etc, but essentially what it does is nothing new: taking advantage of people with relatively little power.

This is the principal reason why I am not a fan of the Uber model and similar business models, including the now common use of zero hour contracts by businesses of all kinds, whether they be disrupters or survivalists.

The Uberisation of legal services

Soon solicitors in England and Wales will be able to offer their services on a freelance basis. The SRA has itself referred to its freelance lawyer proposals as the “Uberisation” of legal services. There is nothing inherently wrong with the concept of freelance lawyers. I do wonder though whether undue pressure placed on young legal professionals – especially freelancers – to meet increasing demand by working ever longer hours for lesser pay will become more common.

Poor ethical practices can be found among senior staff of even the largest and most respected law firms. At which point, a question: would senior people with poor ethical standards be tempted to take advantage of junior staff, especially freelance staff, under cover of needing to do “more for less” and being driven by technology as part of a Uber-like model?

We already know the answer: yes they will – and do.

As Ed Nally, President of the Solicitors Disciplinary Tribunal (SDT) has said in an interview on the Legal Futures website: “There are many people who are working in unattractive environments where bosses are putting people under pressure or behaving shabbily towards them, or perhaps behaving in a very improper way and encouraging them to do things they shouldn’t be doing.” (http://bit.ly/2XPFUdT)

Encouragingly, the SDT appear to recognise that sometimes when junior lawyers have acted improperly and unethically, it is not solely they who are at fault. Mr Nally goes on to say, “The only way you’ll actually treat appropriately and protect the junior end of the profession is to make sure that you hold to account the senior end.”

To be fair, there are signs that some law firms are becoming increasingly sensitive to instances of unethical behaviour, evidenced by the rising numbers of partners in law firms asked (or told) to leave the firm because of it.

Another effect of unethical practices is that they increase the level of stress felt by legal service team members, As is well known (eg see the Bellweather Report from Lexis Nexis at http://bit.ly/2XRIpVl), suffering from stress is already a significant issue for many people in the legal services industry. Presumably this would get worse if teams are put under Uber-like pressure to deliver results ever more quickly.

What of the clients?

Uber is successful (but ironically, it is not profitable) because an awful lot of people book rides via its app. Arguably most Uber users don’t care about the welfare of their driver or the wider social, environmental and economic impacts of exercising their choice. They just
want a ride from A to B immediately and at low cost. It’s assumed that in an Uber-like world legal service clients will display similar traits. They will just want their legal problem solved at low cost and they won’t particularly care who is providing the service or how.

In theory legal service clients should currently be able to differentiate their potential provider in terms of quality of service, but this is hard for them to do, especially in the field of consumer legal services.

Lawyers could try and educate their clients about differing levels of service and quality, but lawyers find this hard too so it tends not to get done properly.

It’s much easier for clients to differentiate by price and perhaps speed of delivery. Presumably these will acquire even more emphasis in a Uber-like legal service market.

Meeting the challenge

It is obvious that society as a whole is faced with huge challenges. Many of these challenges are driven by the current availability of software applications, data analytics and our preference for acquiring things on demand.

Everyone who has ever bought anything from Amazon is part of this wider phenomenon too.

The legal services industry is not immune from the trends we see all around us. In this sense, Oz’s article on LinkedIn is a fair reflection of what is going on and demonstrates an awareness that legal service delivery will almost certainly change, probably radically so, sometime in the future.

What do we – clients, lawyers and everyone else in the legal services industry – want the future to look like in practice? What action can we take to help make our future vision a reality?

Is the Uber model a fate which awaits us all?

Personally, looking at the current model in practice, I hope not.

How about following this, or something very like it, as a means of doing business now and in future?

“We will build a long-term business on long-term relationships. Competition drives innovation and contributes to flexibility, but often comes at a high human and environmental cost, especially when combined with hunger for short-term profit over long-term benefits. We will avoid a culture of short-term contracts driven solely by price, in favour of stable, long-term, trusting partnerships designed to achieve efficiency, create enjoyable relationships and avoid unnecessary anxiety.”

This comes from the Riverford Organic Farm collective (www.riverford.co.uk). Other than being a consumer of their excellent produce I have no connection with the Riverford business. So far as I can tell, the business puts the above into practice. Shouldn’t we all?

Information overload: time to take a break?

By Alex Heshmaty

Information overload is defined by Wikipedia as “the difficulty in understanding an issue and effectively making decisions when one has too much information about that issue” – although, ironically, it offers alternative definitions based on multiple sources!

History

The concept of excessive information is nothing new. Back in the 16th Century, renaissance scholar Erasmus blamed the printing press for creating too much reading material: “Is there anywhere on Earth exempt from these swarms of new books?” But it has really been over the last couple of decades, since self-publishing on the internet became prevalent, that the problem has moved beyond academic circles and crept into the lives of all and sundry.

Until the early 90s, most people relied upon fairly limited sources of information. Consumers had access to books (often borrowing these from libraries, where they could also use microfiche if they wanted to do more extensive research), print newspapers and magazines, radio, four TV channels (in the UK) and sound and video recordings. Academics and professionals additionally had access to sector specific journals and commercially produced databases of information, usually distributed via floppy disks and later CD-ROMs. Most published formats – both written and audio-visual – were expensive to produce and distribute (or broadcast). As such publishers wielded a lot of power but also – crucially for the purposes of information overload – this meant that a very strong content filter was in place. The vast majority of people would never have anything published and the most they could hope for in terms of achieving their 15 minutes of fame was having a letter to the editor printed in their local paper.

Although some tech-savvy individuals started learning HTML and tentatively building their own websites as soon as they had figured out how to get their 28.8k modems talking to their brand new Windows 95 PCs, it took many years for online self-publishing to gradually gain in popularity. It wasn’t until blog and community platforms (like WordPress and MySpace – both launched in 2003) removed the need to understand code in order to publish that things truly took off. In 2000 a grand total of 23 blogs were listed on the internet. By 2006 this had grown to 50 million (http://bit.ly/2Z3vml), by which point Facebook started really taking off and spawning the full panoply of social media services we see today.

According to research from Radicati (radicati.com), the “total number of business and consumer emails sent and received per day will exceed 293 billion in 2019.” Meanwhile, 500 hours of video are uploaded to YouTube every minute, whilst 65 billion WhatsApp messages are sent and 500 million tweets are posted each day. It’s no wonder that we often feel like we are drowning in a sea of information.

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Photo by Anouk Fotografeert on Unsplash.

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Photo by Anouk Fotografeert on Unsplash.
Consequences

There are a plethora of practical issues stemming from information overload, as well as emotional and societal quandaries which have yet to be addressed.

Stress and mental health issues

The late futurologist Alvin Toffler, who popularised the term “information overload”, predicted that it would play a part in increasing levels of social alienation. Although some commentators argue that social media enables people to connect more to one another, the rising mental health epidemic and increased levels of loneliness, especially amongst young people, appears to contradict the assertion that being more connected online translates to better offline connectedness.

Poor decision making

We have a limited cognitive capacity and can only process so much data at any one time, beyond which the brain needs to rest. According to a survey from the Chartered Institute of Management Accountants (CIMA) and the American Institute of CPAs (AICPA), 36 per cent of organisations are struggling to cope with information overload; Barry Melancon, CEO at the AICPA has said, “We are in the age of big data, and the common wisdom has been that the more, the better. However, our research found that big data is actually making life harder for those charged with decision making in many organisations because they are unable to extract relevant information and turn it into insight.”

Fake news

The removal of the publishing content filter (described above) means that anyone can disseminate their version of the truth which is then supported by social media echo chambers. The Cambridge Analytica scandal exposed the way personal data can be used to manipulate voters by planting fake news, and Facebook is now facing a $5 billion fine in respect of its shortcomings.

Information overload in legal

The effects of information overload are similar for most professionals, but lawyers are perhaps particularly prone due to the fact that a large part of their work involves keeping up to date with both legal developments and their clients’ affairs. Many solicitors and barristers are now engaging with social media, not just with the aim of promoting their services, but also to keep on top of the latest trends in their niche sectors. Ed Boal, senior solicitor and head of digital media and technology at Stephenson Law, says, “I use Twitter more than any other platform - mostly to ensure that I’m aware of what's going on and reading other people's perspectives on things. As a lawyer in the fast-moving tech sector, I would struggle to “give it up” in fear that I would be left uninformed - even embarrassed. At the same time Twitter is like drinking water in fear that I would be left uninformed – even from a firehose and sometimes it can make you feel a kind of anxiety that you’re not as informed as others (which of course will always be the case).”

Lawyers can of course use dedicated legal information resources such as LexisPSL and Practical Law to keep abreast of legal developments which have the effect of re-introducing the content filter. But once lawyers step into the realm of social media – either due to a fear of missing out (FOMO) or because they are trying to promote themselves or their firm – they can end up suffering some of the consequences of information overload.

Prevention

Various techniques of mitigating information overload and its effects have been put forward. Many of these specifically relate to emails and the quest for Inbox Zero by deploying services such as Slack (slack.com) or Inbox Pause (inboxpause.com). Technologist Clay Johnson, author of The Information Diet, argues that we should watch our consumption of information as carefully as we (should) take care of our diet, with suggestions including turning off push notifications, scheduling media consumption and using an old fashioned alarm clock (so the phone isn't the first thing we look at in the morning).

In France, workers have a legal “right to disconnect” whereby companies with over 50 employees are obliged to consult with their employees on company policies to allow them to disconnect entirely from work; this law has already resulted in at least one fine. Although there is no equivalent law in the UK, the government is finally taking tentative steps towards internet regulation with its Online Harms White Paper (http://bit.ly/2Z72Oii) – so regulatory techniques may be able to tackle some of the ills of too much information.

Will Richmond-Coggan, a director in the IT and data team at Freeths Solicitors, says that lawyers should remember to stick to core principles when doing online legal research: “Where decisions need to be made based on facts, look for specialised research or, if you are going to get information from generally available sources, make sure you understand the source – how well resourced is it; does it have a political or other axe to grind; is it well respected? As with case law, finding a source which is cited with approval by other authoritative sources is best.”

Social media, Will argues, “is only really useful as a source of information about sentiment, or levels of interest in particular topics and even then, only when used appropriately. It is important to understand that what shows up in your default feed is often curated content – selected based on what is thought most likely to resonate with you. Without doing some suitably neutral keyword searching you are unlikely to find anything other than a biased subset of information on a topic, skewed towards your own preconceptions and preferences.”

It’s also worth mentioning the nuclear option: deleting social media accounts and considering a digital detox. Although lawyers are often encouraged to
network on LinkedIn and engage on Twitter, in order to build their business and enhance their profiles, the consequent emotional stresses and strains may actually backfire and cause professional burnout. Maybe it’s time to deactivate your social media accounts and switch off your mobile in the evenings and at weekends; unplug and give your brain a rest?

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Airbnb should be seen as a digital service provider

Airbnb has been a phenomenal success since it was launched just over a decade ago, arguably creating more choice for travellers seeking accommodation while providing a user friendly platform which allows homeowners to rent out a spare room easily. However, it has also faced mounting criticism from various quarters: city officials claim that investors snap up rental properties to add to their Airbnb portfolio, making it more difficult for local residents to find homes to rent; neighbours often complain that Airbnb properties are continuously let out to noisy tourists in residential areas; and hoteliers and regulators argue that Airbnb simply offers a way for unscrupulous businesses to act as hotels whilst avoiding the overheads or regulation. But a recent legal opinion from one of the ECJ Advocates General provides the tech giant with hope that it may avoid planned stringent regulation in France – its biggest market outside the US.

The opinion relates to a claim lodged by the French tourism association (Association pour un hébergement et un tourisme professionnel) against Airbnb Ireland (the European arm of Airbnb) – referred to the European Court of Justice (ECJ) by a French court – which argues that Airbnb should face the same accounting, insurance and financial obligations as traditional providers of real estate.

Maciej Szpunar, one of the Advocates General, in his non-binding legal opinion, said that Airbnb should be considered an information society service: “a service consisting in connecting potential guests with hosts offering short-term accommodation, via an electronic portal, in a situation in which the provider of that service does not exercise control over the essential procedures for the provision of those services, constitutes an information society service.” As such, the French authorities would need to first notify the European Commission, as well as the authorities in Ireland, before it could apply French law to the company. This notification had not taken place and therefore, in the opinion of the Advocate General Szpunar, Airbnb does not have to face the same rules in France as traditional providers of real estate.

The ECJ is due to make a final ruling in the next few months. – Alex Heshmaty

Key IT skills for modern lawyers

By Brian Inkster

There is often an assumption made that young lawyers (Millennials) entering the profession have the technology skills that my generation (Generation X) and the one that went before me (Baby Boomers) lack. A life brought up with a smartphone in hand equips them to tackle legal technology in a law office standing on their head. Or does it?

I had my own personal computers as a schoolboy in the early 1980s: a Dragon computer followed by a BBC Micro. I taught myself a bit of basic coding at the time.

The first law office I worked in during university holidays in the mid 1980s had no computers but electronic typewriters (with a limited memory) and a Telex machine. Carbon paper was used to produce your file copy letters/documents.

When I started my legal traineeship in the early 1990s computers were in use for Client Record Management (CRM), document production and cash room accounting functions. I introduced email to that firm and ensured they registered their domain name.

In 1999 I formed my own law firm, Inksters. At day one I purchased a sophisticated practice management system (more advanced than the one the firm I left had). It set me in good stead to build and grow Inksters.

That system has evolved and improved over the years. We moved it completely into the cloud in 2011. Millennials have missed out on that evolution and may expect law firm technology to work like their smartphone does. They might be sorely disappointed.

Adapting to the individual firm

Legal technology will vary from law firm to law firm. There are a plethora of different practice management software solutions available and what appears to be an ever increasing array of document automation tools from new legal technology start-ups.

Some firms (more likely the larger ones) will have ‘Frankenstein’ systems. Where new bits of software have been added to old bits and possibly where amalgamations of different firms has resulted in them still operating systems brought over from the firm(s) that they amalgamated with as well as, and in addition to, whatever they had in operation pre amalgamation.

Many of these law firms will have invested heavily in non-cloud based technology and need to sweat their expensive IT investments before they can justify a move to the cloud or an investment in more up to date practice management systems.

However, those law firms are also more likely to be investing in Artificial Intelligence (AI) systems for e-discovery and contract review.

A lawyer joining such a firm will have to get used to all sorts of different types of legal technology; some maybe clunky and old fashioned, others modern and more sophisticated. They will never come equipped with the skills to use all of it. That will involve training whilst in the job.
An older lawyer (Generation X) joined my law firm. His first two days involved training on our IT systems. He left after those two days as he couldn’t cope with our technology. I think it was probably more a case of not coping with change from a law firm with very little emphasis on technology to one with such an emphasis. You really just need very basic computer skills (which most lawyers young or old will have) and then training on how to use the systems in your particular law firm. You need an openness that you don’t know everything when it comes to legal technology and a willingness to learn.

Going retro

Millennial lawyers may also need to be prepared to see technology in use that they thought they might only ever see in a museum. The fax machine is still an integral part of many law firms, especially when it comes to conveyancing. This is because many of the banks/building societies will only issue loan instructions and redemption statements by fax and not email. Likewise some will only receive Certificates of Title and requests for loan funds by fax and not by email. This is slowly beginning to change with the use of online lender management portals. Also in Scotland fax is still often the preferred means of sending offers to purchase at a closing date as you get evidence of transmission that email doesn’t really provide.

Getting used to Microsoft Windows may also be a thing. Before joining a law firm, a Millennial may only ever really have known Android or iOS, especially through their smartphone usage.

Even email might be alien to a Millennial brought up on instant messaging via WhatsApp. They will have to get used to email being ubiquitous in law.

Digital dictation may be a new skill to learn but on the whole this now seems to be the preserve of the older lawyer. Younger more keyboard savvy solicitors are more likely to be happy tapping away than dictating. Also if they are in a law firm with a good case management set up they will find that much can be produced with ease without worrying about dictating.

Do lawyers need to learn to code?

This is a debate that rears its head from time to time on social media. I mentioned earlier that I taught myself some basic coding on a BBC Micro-computer way back in the early 1980s. My need/desire to code since has been non-existent.

My view is that if I need coding done I will hire in an expert to do it. I wouldn’t expect a lawyer to do it. Just like I wouldn’t expect a coder to represent me in a court of law.

Eddie Hartman of LegalZoom made this observation on Twitter: “Lawyers should learn to code’ is our century’s equivalent of ‘farmers should learn to build tractors.’ Simultaneously wrong-headed and underestimates how hard it is to build a good tractor.”

Jon Busby commented on LinkedIn: “I don’t see any mileage for the legal profession to generically learn to code. I wouldn’t take the time to go to law school if I wanted to know the legal implications of something. I’d go and ask (and pay) a lawyer to do that because that is what they do.

“My other add is, do they actually need to be tech savvy? Maybe they just use stuff because it is easy to use and don’t use stuff because it’s a bit shit.

“If that is pen and paper or a device so be it, what works for the individual user is key. I couldn’t live without post-it notes on my desk, (technically I could, it would be a bit sad if I couldn’t). Not exactly tech savvy. Or maybe they use stuff like an iPhone because the savvy bit has all been removed by good design.

“Most stuff usually fails because it is crap design and most crap design is made by people who think they have the solution, obsess about it but fail to understand the granularity (often hidden) of the problem. Time and time again I see vendors try to map the client onto their solution rather than the other way round.”

Unfortunately, lawyers will find some of that "crap design” in the legal technology within their law firms and that might, as Jon suggests, influence user take up. Sometimes the technology can be intuitive and need little training. Other times (and true of a lot of legal technology) training will be required. That training will vary from system to system.

Legal tech at law school?

It annoys me when I hear talk about needing to start the legal technology training at law school. What system are they going to be trained on and to do what? Given that law school is far removed from the workings of a law firm I find it difficult to imagine how any real meaningful legal technology training could be given at that stage.

In a typical day of a modern lawyer they will be using a practice management system to produce documents (invariably using Word) that will more likely than not be issued via email or perhaps shared via an online portal. The skills required to do this are not difficult and are easily learned.

What is also required is basic legal technology housekeeping skills. That is to make sure those documents and emails are properly filed and labelled within the case management system. Lawyers often fall down on such simple tasks.

Time recording will also be a pre-requisite in many law firms despite the never ending call to end the billable hour. Finding a system that will accurately capture that time without manual intervention is not easy. Again like the housekeeping I mentioned, it comes down to lawyers ensuring they actually do it, as the technology won’t necessarily do it for them.
Thinking about our digital afterlives

By Alan Eccles and Stacey Gourley

The internet is now not something used only by younger generations but by all ages as the digital world continues to grow apace. The ONS also reports that, since 2011, the percentage of adults aged 65 years and over who had never used the internet has declined by 27 per cent.

The digital world now influences almost every facet of our lives. But what happens to our digital assets after our deaths? Is there a “digital afterlife”? How should this be regulated?

This is an area which is increasingly being given attention by the media, internet service providers and others.

What are digital assets?

We are seeing more and more use of the phrase “digital assets” but there does not yet seem to be a universal, legally-accepted definition. A simplistic view would be that a digital asset is content owned by an individual that is stored in digital (non-physical) form. But often we are not talking about assets or ownership at all; instead the issue is often one of contract law. In some ways the law does not need to adapt at all, as it only gets one line: “Cryptoassets will be property for the purposes of Inheritance Tax”. This tells us that on the death of a Bitcoin or other cryptocurrency owner there may be inheritance tax payable on those assets. As a result it is very important that details of these assets are held somewhere. Tax issues aside, this will make passing them on to beneficiaries more straightforward.

Digital assets with little financial value could include any digitally stored content such as images, videos, graphics, audio files, animations, data, presentations and even the relevant user rights, and perhaps may extend to online accounts owned by individuals. Some online accounts may be considered assets in and of themselves, such as blogging accounts and accounts of Instagram influencers.

The relationship between account holders and service providers is usually regulated by a contract, with the user agreeing to various terms and conditions of use. This often provides that the user does not own the account itself; instead they only have user rights or rights to the content. Therefore, many digital assets which individuals consider part of their estate may not be assets at all, as contract provides that ownership remain in the hands of the service provider. To give an analogy, an individual may have a treasured music collection. If this were in CD format, there is little question that the physical CDs which the individual bought over time forms part of their estate and the executors to the estate could distribute this accordingly. But what about, say, an iTunes account? The individual may have bought various tracks to store in their music library but does not actually own these like they would CDs. iTunes’ terms and conditions grant users access to listen to the music, but they do not actually own the account or the music they have downloaded. Is this sentimentally valuable collection locked away from next of kin as a result? Is that fair?

Many of us have amassed a large digital estate of significant value – be that financial or sentimental. It is important that digital asset providers acknowledge this

Details of other assets which may have a determinable financial value capable of being passed on might include air miles and loyalty accounts. It would be advisable to include details of these in the inventory of digital assets together with the provider’s current policy on transferal. It will of course be the executor’s responsibility to check the date of death position but this could be made easier by providing as much detail as possible in the inventory.

It is probably fair to say that (almost) everyone will have heard of cryptocurrencies, the most commonly recognised of these being Bitcoin. By its very nature Bitcoin is difficult to trace or attach to a particular individual and this problem is exacerbated by the death of the holder.

There is a significant section on GOV.UK dedicated to the tax treatment of cryptocurrencies (www.gov.uk/government/publications/tax-on-cryptoassets/cryptoassets-for-individuals). Perhaps unsurprisingly given that cryptocurrencies are a relatively recent phenomena, the vast majority of the guidance deals with their income tax and capital gains tax treatment. As far as inheritance tax is concerned, this only gets one line: “Cryptoassets will be property for the purposes of Inheritance Tax”. This tells us that on the death of a Bitcoin or other cryptocurrency owner there may be inheritance tax payable on those assets.

As a result it is very important that details of these assets are held somewhere. Tax issues aside, this will make passing them on to beneficiaries more straightforward.

By Alan Eccles and Stacey Gourley

The Society of Trust and Estate Practitioners’ (STEP) Digital Assets Special Interest Group have created an Inventory for Digital Assets and Digital Devices (www.step.org/digital-assets-global-special-interest-group), designed to inventorise assets and identify the location of access instructions (such as passwords) which are recommended to be stored elsewhere.

That is the crux of the matter. The technology is only as good as the lawyer who is using it. And those lawyers need training (however tech savvy they may be) to use it properly and in particular to do the essential housekeeping that the IT can’t yet do for them.
and seriously think about how digital assets should be administered after an account holder’s death.

What are the issues?

The issues surrounding digital estates are extensive and raise a number of questions.

Ownership

If online accounts can be considered digital assets, this begs the question – does an individual own the account or just the content stored and accessed using that account? How can executors readily ascertain this?

Administration

Banks and other financial institutions have long had bereavement teams – will internet service providers soon follow suit? Will providers have a formal checking and processing of death certificates to verify the death of the account holder? When, if ever, should a “digital asset” appear on an application for confirmation / probate to give executors formal authority to deal with the asset?

Information gathering

Executors have traditionally sifted through post, bank statement and financial papers to ascertain the extent and details of the deceased’s estate. But with the increase of “paperless” financial assets and communications by email, how do executors now carry out this exercise?

Email accounts often represent the master key for all other online assets. Will valuable assets be missed because the details are locked behind a username and password and there is no other readily accessible indication of the asset’s existence?

Privacy

Social media accounts have been compared to a form of online diary and can contain private messages between individuals not intended to be seen by anyone else. Should executors be able to access these accounts or are online service providers right to operate strict policies? What about the people on the other side of the correspondence? Is their right to privacy being breached?

Security

What if information ends up in the wrong hands? Is it safe to write down a note of usernames and passwords? Does this breach user policies?

Legal

Can a deceased’s executor legally access a deceased person’s digital assets when they know the password if they do not have explicit authority to do so or is this in contravention of the Computer Misuse Act 1990? Is it a breach of internet service providers’ terms of use?

Jurisdictional

Different digital asset providers are subject to different laws across multiple jurisdictions. Whilst a user is situated in one location, where is the server located? What law applies to the service provider? How does this fit in with our digital estate planning? If different laws could apply, which one takes precedence? Do we really know the governing law of data held in the “cloud”?

In the media

Internet service providers, such as Facebook, originally provided platforms designed for the living. However, as the social network grew, it has also had to decide what should happen when users die.

In 2015, Facebook rolled out a new feature allowing users the chance to have more of a say in what happens to their online presence following their death. The feature provides users with the option to either have their profile page permanently deleted when they die or kept going (“memorialised”) by an appointed other. It was envisaged that the appointed legacy contact would be able to upload profile and cover photos, manage friend requests, write a post on the deceased person’s timeline and amend posts already published, but would not have access to the deceased’s private messages.

However, Germany’s federal court of justice has recently ruled that Facebook must grant a grieving mother access to her late daughter’s profile and private messages. The mother had wished to view the private messages in a search for answers surrounding the circumstances of her daughter’s death. She had the details and was able to log in, but as the account has been memorialised the private messages could not be accessed. Facebook had originally refused to allow the mother access to the private messages, citing data protection laws, but it seems arguably greater interests trumped this.

Facebook has been seen to issue apologies to various family members and friends of deceased persons whose accounts have been memorialised, for causing upset by making inappropriate suggestions through their automatic features and algorithms. Algorithmic features have sent users suggestions to invite them to events. The “Year in Review” feature (which selects posts which have had high levels of engagement from users) has also caused distress by highlighting images of friends or pets that have died that year. Facebook has promised to use more emotionally intelligent artificial intelligence to stop such suggestions in an effort to minimise the distress which has been caused to users so far.

It is not just social media accounts which have made it into the news in this regard. Recently, a widow won her long legal battle to gain access to her late husband’s online Apple account. Being an avid photographer, he took and stored all of the family
photographs on his iCloud. When he died, his wife had no access to these precious memories. Apple referred to their terms and conditions which stated that a user account is not transferable and that the right to access the content ends on the death of the user (like many other service providers), unless it has otherwise been provided in law, or required to grant access by court order. Ultimately, the court granted Mrs Thomson access to her husband’s account and made clear that changes to the law need to be made in order to avoid the need for such a protracted and expensive action in these situations.

A recent study by Oxford researchers reported that if Facebook continues to grow at its current rate, the site could have 4.9 billion deceased members by 2100 – and may eventually have more dead users than living ones. As such it becomes more and more important that we think about our digital afterlife; online service providers must adapt.

Is there anything we can do now?

Given the speed at which the digital world continues to evolve, there is no doubt that the law has some catching up to do. Pending any definitive guidance as to how digital assets are managed on death there are a number of things to be considered in the meantime.

Encourage your clients to think about the extent of their digital estate and how these assets are to be dealt with on their death or incapacity as part of overall estate planning when preparing wills and powers of attorney.

Ask the question. What digital assets do clients have? How valuable (financial or sentimental) are these assets to them? Are these owned by the client or by the service provider? Who would be the appropriate, tech-savvy person to be appointed to look after such matters?

Different digital service and social media providers have different policies when it comes to how assets are dealt with after death. Encourage clients to familiarise themselves with the policies of the online service providers that will apply. How would they like these assets to be dealt with on their death?

Discuss making a digital inventory, “digital will” or some other record of digital assets which are important to the client. The Digital Legacy Association suggests a template and other considerations.

As technology is evolving at an extremely fast rate, the need to consider reforming legislation to cater for these circumstances is becoming more and more important. These digital issues arising on death are only going to continue to occur, as we increasingly rely on technology for every aspect of our lives. It is time we start thinking seriously about our digital afterlives.

Porn age checks delayed (again)

Internet regulation has been very much in the public eye lately, particularly following the Cambridge Analytica scandal, and the government recently published its Online Harms White Paper which seeks to address some of the concerns surrounding the “Wild West Web”. One of the key issues regularly raised is the protection of children from exposure to online pornography.

Back in 2013, former PM David Cameron announced that, following extensive discussions between government and internet service providers (ISPs), the largest ISPs had agreed to switch on “family friendly filters” by default. These filters were designed to block pornographic and other offensive material (subject to parental controls) but they were criticised as ineffective, applying a cumbersome broad brush approach which blocked content not intended to be targeted (such as educational material about biology) whilst failing to block much of the offensive material – not to mention the fact that tech-savvy youngsters were often able to easily circumvent the filters.

The following year, in the face of the abject failure of default ISP filters to effectively tackle the problem, the now defunct video-on-demand regulator Atvod suggested that age checks be made mandatory for all adult sites, and the government put forward proposals soon after. Two years later, it looked like mandatory age checks had finally been realised by Part 3 (sections 14–30) of the Digital Economy Act 2017 (DEA 2017) which set out a regulatory framework. Individual websites are free to implement their own age verification methods, but it’s envisaged that it would generally work by requiring credit card details to be submitted prior to access being granted to view any pornographic material (whether free or paid). The British Board of Film Classification (BBFC) has been chosen to act as the age verification regulator.

In July 2017, then digital minister Matt Hancock announced that mandatory age checks would come into force from April 2018. But just weeks before this date, the Department for Digital, Culture, Media and Sport scrapped the introduction, apparently due to a lack of preparation (a spokesman said at the time, “We need to take the time to make sure we get it right”). A new date of 15 July 2019 was set but, once again, it was delayed at the last minute, apparently due to a failure by government to notify the European Commission. Culture secretary, Jeremy Wright, has said this new delay is due to last “in the region of six months” and he emphasised that it did not indicate a change in policy.

Separately, the Law Commission is examining the legislative position surrounding so-called “revenge porn” (where sexual images or videos are distributed by ex partners) and a public consultation is being launched to consider laws which tackle the phenomena of “cyber flashing” (when someone receives an unsolicited sexual image on their smartphone) and “deepfake pornography” (where someone’s face is superimposed on sexual imagery). – Alex Heshmaty

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Photo by Ari He on Unsplash.

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