

# Articles

FRANCESCA ALLPORT

HETTIE HOMEWOOD

# Comments

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AND ELIZABETH WAUCHOPE

BEN GISBEY AND DIONNE CLARK

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## A Clear View of the Risks of Indiscriminate Digital Facial Recognition 233

Whilst very popular in some parts of the world, facial recognition technology is facing regulatory difficulties in the UK. The Clearview AI fine by the ICO is a clear signal that the indiscriminate processing of biometric data for commercial or even law enforcement purposes will likely be unlawful, except in limited specific circumstances. The UK Government wishes to change that and unlock biometrics for law enforcement.

## Influencer Culture: Filling the Regulatory Gaps 237

This article reviews the Digital, Culture, Media and Sport Committee report “*Influencer culture: Lights, camera, inaction?*”, considers the regulatory gaps it identifies relating to current influencer marketing practices, and discusses the Committee’s recommendations to improve the regulation of “influencer culture”.

## Shazam v Only Fools the Dining Experience: A “Cushty” Result for Authors of Well-known Characters as Del Boy Becomes a Copyright Protected Work 240

This comment considers the judgment of the Intellectual Property Enterprise Court in *Shazam Productions Ltd v Only Fools the Dining Experience Ltd*, which found that (amongst other things) literary and dramatic copyright subsisted in the scripts of the well-known TV show *Only Fools and Horses* and the core character of Derek “Del Boy” Trotter, both of which were infringed by use in an interactive dining experience. The judgment represents the first time that an English court has definitively held that copyright may subsist in a character and provides useful guidance on application of defences of parody and pastiche.

## No Luv Lost: IPEC Rejects Passing-off Claims in Band-name Dispute 243

In the latest instalment of the “Luv Injection” band-name dispute, the IPEC has rejected passing-off and trade-mark claims. The goodwill in the band’s name was a partnership asset. So the claimant, as only one former member of that partnership, could not bring a passing-off claim in his own name against another former member. The fact that the claimant was one of the front men was irrelevant, and did not change the legal position that the goodwill was owned by the original partnership as a whole and could not be “appropriated” by individual partners without a transfer of ownership.

## Realtid Reality Check: Libel Lessons from a Bygone Era 246

In a libel case about alleged “ecocrime” involving publication in Sweden and the UK, the High Court ruled on an application for a declaration that the court had no jurisdiction to hear the case (or should not exercise its jurisdiction). As it was filed before the end of the Brexit transition period, the hearing turned on the application of Article 7(2) of the Recast Brussels Regulation. The court accepted partial jurisdiction over the first claimant, refusing jurisdiction over the second. While the ruling turned on some superseded law, the findings on serious harm remain instructive. This article reviews the court’s ruling on jurisdiction, and identifies and comments on the notable points on serious harm arising from the judgment.

## Honors Uneven as EU General Court Upholds Huawei’s Opposition to Video Game Company’s Figurative FOR HONOR Mark 249

This article reviews the EU General Court’s ruling in *Ubisoft Entertainment v EUIPO* upholding a EUIPO Board of Appeal decision that there was a likelihood of confusion between the video game company’s figurative FOR HONOR sign for computer game-related goods and services and Huawei’s earlier HONOR word mark. The decision highlights the significant value of owning a word mark registration for a distinctive word, particularly when enforcing trade mark rights.

EMMA MACALISTER HALL

### **Misuse of Data is a Matter of Substance not Semantics 251**

In *Graeme Smith v TalkTalk Telecom Group* the High Court considered two key issues in the context of a data breach claim: first, whether TalkTalk's alleged failure to secure its IT systems from criminal attacks amounted to an "act" of misuse in the tort of misuse of private information; and second, whether a data protection claim pleaded on the basis of an inference that there had been further (as yet unidentified) data incidents affecting TalkTalk's systems, was tenable. Saini J struck out the claimants' misuse of private information claim, confirming that the principles in *Warren v DSG Retail Ltd* remain correct. The claimants' data protection claim was allowed to proceed. This article reviews the High Court's decision and considers the implications for legal claims arising out of external cyberattacks.

EILEEN WEINERT

### **High Court Refuses Application for Jury Trial to Determine Meaning of "Racism" in Libel Action of Twitter Spat 253**

This article reviews the decision of Mr Justice Nicklin in the High Court in *Blake v Fox* to refuse an application for trial by jury to determine the meaning of "racist". The application was made on the grounds that the judiciary have been misguided on the correct definition of racism by judicial guidance notes which defined the term "racism" in a way which was not the natural and ordinary meaning of the word but which instead endorsed an expansive and ideological view. On this basis, the defendant contended no judge following the guidance could be unbiased.

ALEXANDER ROSS

### **CJEU Confirms the Validity of the Liability Regime for Online Content-sharing Service Providers in the DSM Directive art.17 256**

This article reviews the decision of the Court of Justice of the European Union in *Republic of Poland v European Parliament*. The CJEU rejected Poland's challenge to Article 17 of the DSM Copyright Directive, ruling that it contains sufficient protections for the freedom of expression and information.

UCHE ESEONU

### **Court of Appeal Lowers the Target for Trade Mark Use on Amazon.com 258**

This article reviews the Court of Appeal's ruling in *Lifestyle Equities v Amazon* that the claimants' UK and EU trade marks were infringed by an Amazon entity after they were sold through an Amazon US e-commerce platform and subsequently shipped to the UK and EU.

GIOVANNI VISINTINI

### **Luen Fat Metal v Funko: Not Enough "FUNTIME" to Stop "Funtime Freddy" 259**

This article reviews *Luen Fat Metal v Funko* in which the Intellectual Property Enterprise Court rejected a toy maker's infringement claims in relation to the use its FUNTIME trade marks by the defendant on the packaging of a range of action figures, pop vinyl and plush toys which represented the characters of a video game.