

## Opinions

THOMAS G. C. HOOD

### **As Brands Become “Social Markers”, Creatives Must Be Allowed to Parody Trade Marks 51**

Using the *Easy Life v easyGroup* initial proceedings from October 2023 as a backdrop, this opinion points to marks having an established role as “social markers”. This creates a need for the law to amend the assessment of use to permit parody and creativity as identified by the average consumer as separate from economic use. In so doing, creators would have an exception permitting them to critique established marks that are at the heart of life in 21st century Britain.

SIMON MILES AND HANNAH SIMPSON

### **Copyright in Works Generated by Artificial Intelligence—Is Human Input Necessary? 53**

This article considers the intricate topic of AI and copyright “authorship” starting with the recent ruling of US District Court of Columbia in *Thaler v Perlmutter* and moving on to discuss the position in the UK.

## Articles

PETER MASON

### **Implementing the Beijing Treaty on Audiovisual Performances—Extension of Moral Rights and Options Dealing with Broadcasting and Communication to the Public of Audiovisual Performances 56**

The Government has confirmed its intention to implement and ratify the Beijing Treaty on Audiovisual Performances. How it might do this is set out in a UKIPO Consultation on the options for implementing the Beijing Treaty published on 14 September 2023. This article considers the likely changes to the UK copyright framework and their practical implications.

BEN STEVENS

### **The Protection of TV Formats: Part 2—Confidentiality 59**

The second part in this series of articles on protecting the rights in television formats deals with the law of confidentiality, in terms of the tort of breach of confidence and free-standing contractual obligations, as potential means of protection.

DR SOUMYA PRAKASH PATRA

### **Safety Concerns in AI-Driven Live Performances and Virtual Events: A Study in the Indian Entertainment Industry 63**

India’s entertainment industry is embracing Artificial Intelligence (AI) in live performances, but safety concerns loom large. This article delves into the legal and ethical issues in an Indian context. It explores intellectual property rights, safety regulations and ethical considerations. Recommendations encompass safety training, robust assessments and specialised regulations. Balancing innovation and safety is essential as India’s entertainment industry advances with AI, ensuring a secure and ethical creative ecosystem.

ASTRID BULMER AND RÉRÉ OLUTIMEHIN

### **The Impact of the Online Safety Act on Content Producers 68**

The Online Safety Act aims to protect the safety of users of online services, imposing duties on user-to-user platforms and search engines. Notably, it defines categories of “illegal content” and “content that is harmful to children”. So producers should consider whether their productions and promotional clips contain any such regulated content and try to mitigate the risk that content might be taken down by platforms. In effect, the Act will add a new dimension to the existing task of “legalling” content before transmission, especially as risk-averse platforms might take a hard line on filtering out or removing potentially problematic content.

ROBERT LISTER

### **It is Time to Get to Grips with the Digital Services Act—What this Means for Online Intermediary Service Providers: Part 3: Additional Obligations for Online Platforms 72**

The EU’s Digital Services Act came into force on 16 November 2022. Since 25 August 2023, only a small number of organisations with a large EU user base have needed to comply in full with the DSA. However, a significant majority of other online service providers now only have until 17 February 2024 to put in place the required measures to ensure compliance. This article is the third in a series by Robert Lister on what the DSA means in practice and provides a summary of the supplemental obligations applicable to online platforms and online trading platforms.

## **Fox News—Actor’s Slur was Used Rhetorically and Not Defamatory 79**

The Court of Appeal has dismissed much of an appeal by the actor Laurence Fox against a High Court ruling on the ordinary meanings of “racist” and “paedophile”. Mr Fox had criticised Sainsbury’s on Twitter for celebrating Black History Month. Simon Blake and two others separately tweeted that he was a “racist”. In response, Mr Fox tweeted that each of them was a “paedophile”. He was sued for libel but counterclaimed and then appealed. The Court of Appeal agreed with the High Court on most of its findings, but found that, in one tweet, Mr Fox was not using the word “paedophile” literally, and as such it did not have a defamatory meaning.

RACHEL ALEXANDER AND SIMONE ROWAT

## **Sky UK Ltd v British Telecommunications Plc: “Live Blocking” with a Difference 82**

In the most recent application for a blocking injunction under the Copyright, Designs and Patents Act 1988 s.97A, the High Court has granted an order in favour of Sky UK Ltd targeting certain IPTV services and streaming servers that make available Sky’s copyright content without authorisation. The application was not opposed by the respondent UK internet service providers.

EMMA FLETT, JACQUELINE CLOVER AND NOÉMIE BROUSSOUX-COUTARD

## **CJEU Continues the VOGUE for Tricky Trade Mark Jurisdiction Cases 83**

This article reviews and comments on *Beverage City & Lifestyle GmbH v Advance Magazine Publishers Inc* (C 832/21), a case involving the trade mark “VOGUE” in which the Court of Justice of the European Union considered the relationship between the EU Trade Mark Regulation and the Recast Brussels Regulation, and provided guidance on the circumstances in which an infringement action involving multiple defendants can be brought in a single EU Member State.

JAMES CLARK AND DAVID COOK

## **First-tier Tribunal Provides Clearer View of “Territorial” and “Material” Scope of UK Data Protection Law 85**

This article reviews *Clearview AI v Information Commissioner* in which the First-tier Tribunal, in ruling that the Information Commissioner did not have jurisdiction to impose a fine on a facial recognition service based in the US, provided helpful judicial interpretation of both the territorial and material scope of UK data protection law.

ELIZABETH MORLEY AND AMBER DAVIES

## **Court of Appeal Rules Judge got it Wright—Damages for Defamation Could be Reduced to Reflect Claimant’s Exaggeration 87**

This article reviews the Court of Appeal’s decision in *Wright v McCormack*, in which the claimant appealed against the first instance judge’s decision to award damages of £1 in his defamation claim. Despite succeeding in liability, the claimant was awarded nominal damages on the basis that he was found to have advanced a “deliberately false” case. The Court of Appeal therefore considered whether damages for defamation could be reduced to reflect a claimant’s exaggeration.

HUGO MASON

## **False Rape Allegations on Social Media Result in Substantial Damages 90**

In *Aaronson v Stones*, a pornography entrepreneur was awarded substantial damages by the High Court after being falsely accused by the defendant of being a rapist and a serial rapist. The defendant attempted to defend the claim on the basis that the publications were true, and that they were publications on a matter of public interest, but the defences failed completely.

COURTNEY BROTHERRSON AND ASHLEIGH FEHRENBACH

## **Searching for the Perfectly Registrable Slogan Trade Mark 92**

The European Commission’s IP Helpdesk has published a useful note on “Protecting slogans as EU trade marks”. Reviewing the note and adding to examples cited by the Commission, this article considers two key trade mark principles—distinctiveness and descriptiveness—and the common pitfalls to avoid when attempting to register slogans as trade marks in both the EU and the UK.

ANDREW WILSON-BUSHELL

## **CJEU Scrutinises Facebook’s Use of Personal Data for Behavioural Advertising 95**

In *Meta Platforms Inc v Bundeskartellamt* (C-252/21), the Court of Justice of the European Union found that Meta failed to establish a legal basis for processing personal data for the purpose of behavioural targeting of adverts. That might put Meta in the tricky position of relying on its user’s consent for such purposes, which must be express, freely given, informed and revocable. The CJEU also decided that the German competition authority can assess compliance with national law (in this case, the GDPR) when assessing whether there has been an abuse of a dominant position, as long as the authority consults with the relevant data protection authorities.

DR JANET STRATH

## **EUIPO Puts the Brakes on LEWIS HAMILTON Trade Mark 97**

This article reviews the recent ruling of a EUIPO Board of Appeal that LEWIS HAMILTON was not registrable as an EU trade mark for jewellery, watches etc and retail services in relation to such goods, in the face of a likelihood of confusion opposition brought by Swiss watchmaker Hamilton International on the basis that the evidence was insufficient to prove that the racing driver's fame extended throughout the entire EU.