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Appeals Court upholds US net neutrality rules

On 14 June 2016, the US Court of Appeal for the District of Columbia upheld the validity of the Federal Communications Commission's ('FCC') net neutrality rules, which classify broadband services as telecommunication services as opposed to information services. The FCC's net neutrality rules ban ISPs from favouring certain types of content over others.

Michelle Cohen, Member of Ifrah Law, explains that "the court did not ask whether the agency's decision is a good policy, but rather whether it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." In this case, the FCC's rules did not meet those standards.

Due to the significance of the FCC's classification of broadband service as common carrier services, the Supreme Court is likely to review the decision. In the meantime, the ruling will allow the FCC to assert its authority over those providing access to the internet going forward. Following the Court of Appeal's ruling, "the FCC is further empowered to watch the marketplace and to propose and implement additional regulations over broadband providers," concludes Cohen.

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The UK's uncertain position in the DSM following Brexit

Following the UK's vote to leave the European Union on 24 June 2016, the UK's ongoing role as part of the European Digital Single Market ('DSM') following Brexit is far from clear and despite the eventual shape of the negotiations to come, the UK's changing relationship with the EU will no doubt have a significant impact on UK businesses operating online, especially relating to intellectual property rights. "Even if some type of single market deal is done between Britain and the EU, the UK will inevitably lose its leading role in influencing the final shape of the DSM, which could have a negative impact for digital and e-commerce businesses based in the UK," explains Nick Fenner, Partner at TLT LLP.

Regarding cross-border sales of goods and services, the purpose of the DSM is to move from 28 national markets to a single market fit for the digital age, which according to the Commission could contribute €415 billion a year to the European economy. "If the UK is outside the DSM, it could encounter barriers to enter the EU wide market that would not be there for countries remaining within the EU," said Fenner. "In addition businesses and individuals in the UK would not have the equal right of access to digital products put on the market within the DSM."

Cross-border portability of digital content is one of the goals of the DSM and could lead to UK consumers being unable to access content considered a right for EU members. However, being outside the DSM could solve a problem for some UK rights owners, such as the BBC, who have historically restricted access to certain digital content from within the UK, adds Fenner.

A single pan EU injunction to protect intellectual property rights is amongst proposed reforms, to help copyright owners enforce their rights and control unauthorised use within the EU. Fenner remarks that "if the UK is outside that regime, the cost of enforcement represents an additional cost of doing business in the UK, which may be reflected in the terms offered to UK licensees and purchasers."

With harmonisation a fundamental building block of the DSM, the UK may have to face the prospect of copyright laws that are not equivalent to the rest of the EU. UK businesses should consider that compromises are worthwhile in order to receive the benefits and cost savings represented by harmonised laws, within a market to which the UK is a significant exporter, concludes Fenner.

Mini victory for publishers in the battle against the ad-blockers

The Higher Regional Court of Cologne provided publisher Axel Springer with a partial victory against ad-blocking provider Eyeo on 20 June 2016, ruling that Eyeo's use of a 'whitelist' of publishers and advertisers that are exempt from blocking in return for payment, in combination with a 'blacklist' of companies whose adverts are blanket blocked, is an anti-competitive practice and is therefore illegal under the German Act Against Unfair Competition.

The use of a so-called 'blacklist' is not *per se* unlawful, as ad-blocking is not considered a deliberate obstruction by an ad-blocking company, provided the user voluntarily uses the software. However it is the combination of black and whitelisting that places the ad-blocking provider in the position of 'gatekeeper,' with control over access to the online advertising market.

"The decision of the Higher Regional Court marks the first major victory for publishers in the battle against ad-blocking," said Stephan Zimprich, Senior Associate at Fieldfisher. "Eyeo's business model would qualify as an inadmissible interference with the advertiser's commercial decisions, which would be the case if a 'market participant uses a position of power *vis-à-vis* another market participant.' It would not be required that the position of power results from a dominating market position; it would be sufficient if it is based on structural or situational circumstances."

Appeal to the Federal Court of Justice has been granted given the significance of the matter.