

# eipr

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### BOOK REVIEW

# COMMENTS

## No Liens over Electronic Data: Court of Appeal Keeps Equity out of the Digital World: *Your Response Ltd v Datateam Business Media Ltd*

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 Databases; Electronic documents; Intangible assets; Possessory liens

*In Your Response Ltd v Datateam Business Media Ltd* the UK Court of Appeal considered whether a lien could be exercised over intangible property (a database). It was held that no lien could arise. Despite this, the court expressed sympathy for the view that modernisation was required to bring the law up to date, and called for parliamentary intervention. The thorough analysis provides lessons for contracts and disputes governing IP rights, as well as for the legal profession itself.

The case of *Your Response Ltd v Datateam Business Media Ltd* concerns the treatment of intangible property rights, and the question of whether they can be

“possessed” in the formal sense. Although the intangible property in the case itself was an electronic database (in which UK database right subsisted),<sup>2</sup> the ratio of the decision is transferable to any data or information stored electronically, as well as potentially to other types of intellectual property.<sup>3</sup> The decision creates practical consequences for IP dispute resolution, contractual remedies governing the supply of intellectual property, and for the exercise of liens in the legal profession itself.

### Introduction

Commercially speaking, a lien can be among the most effective remedies available to an aggrieved party for securing fast payment of outstanding moneys as it denies access to a valuable resource. At the same time, though, this remedy is arguably among the most stale that equity has to offer. Notwithstanding that liens have existed over the years in many factual circumstances,<sup>4</sup> the application of the remedy has traditionally been applied only to very restrictive circumstances, and has developed slowly.<sup>5</sup>

Modern minds are well accustomed to the digitisation of data, and the ability to possess that information is an axiom of the digital age; much of the commercial and academic world operates online and the concept of ownership and property is well established socially. It has been suggested that the law lags behind practice in the way intangible property is treated in the digital age.<sup>6</sup> Liens, for example, were developed in the 18th and 19th centuries, before the law of contract was more than primitive<sup>7</sup>—and well before information or data could be stored or owned electronically.

On March 14, 2014, the Court of Appeal tested the application of liens to intangible property in *Your Response v Datateam Business Media*.<sup>8</sup> The claim itself concerned the exercise of a purported possessory lien over information stored in a database. The judgment turned on the treatment of intangible property rights, and the question of whether they can be “possessed” in the formal sense at all.

At the heart of this case was an attempt to bring historic concepts of equity up to date. Although the attempt to modernise has failed owing to the application of binding precedent, the court was sympathetic to the motives, and the analysis provided in the judgment was detailed and informative. The arguments brought into play by the parties were novel and creative, and will be of interest to IP practitioners. They serve to illustrate certain fundamental areas of UK law that are not likely to be changed other than by parliamentary intervention.<sup>9</sup>

<sup>1</sup> *Your Response Ltd v Datateam Business Media Ltd* [2014] EWCA Civ 281.

<sup>2</sup> Specific reference is made to the Copyright and Rights in Databases Regulations (SI 1997/3032).

<sup>3</sup> Other than to patents, for which statutory provision supersedes the common law approach to ownership.

<sup>4</sup> See *Halsbury's Laws of England*, 5th edn, Vol.68, para.845.

<sup>5</sup> See for example the analysis of Basil Montagu in *A Summary of the Law of Lien* (J. & W. T. Clarke, 1821), pp.30–31, where are listed the professions that did and did not benefit from general liens at that time. The remedy was not set out with general application, but rather arose and was settled on a case-by-case basis as members of each profession sought to apply it, the entitlement of a Dyer still being unsettled at that time.

<sup>6</sup> “History shows that our track record of implementing change in the UK IP framework is patchy at best.” See Professor Ian Hargreaves, *Digital Opportunity — A review of Intellectual Property and Growth* (UK Intellectual Property Office, May 2011), p.92.

<sup>7</sup> According to the analysis of Diplock L.J. in *Tappenden v Artus* [1964] 2 Q.B. 185 CA at 195.

<sup>8</sup> *Your Response v Datateam* [2014] EWCA Civ 281.

<sup>9</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [27].

Even if parliamentary intervention is eventually forthcoming, it is likely to be slow and the lessons learned may therefore inform practice for years to come.

## Factual background

The defendant is a publisher of business magazines to industry, and operates a large subscriber database. The claimant provides a database management service, and was engaged by the defendant to manage its subscriber list by way of an electronic database (the database). The defendant's subscriber base is large enough and active enough that amendments required were in the order of hundreds per day. This was a complex task and the claimant has exclusive responsibility for it. As such, it was effectively in sole control and possession of the database while it was so engaged.

Crucially, the contract between the parties was very informal, having arisen partly orally and partly by email. These contractual discussions at the time of engagement were never formalised, and contained no provisions as to termination of the contract at all, nor to the property, storage or transfer of the database itself.

The defendant, in time, became unhappy with the claimant's performance of its obligations and purported to terminate the contract unilaterally, with effective notice of one month.<sup>10</sup> At this time, three months' worth of the claimant's fees were outstanding. After two weeks, the defendant requested that the data be provided to it; the claimant refused to comply or to continue to provide access to the database unless and until its fees were paid, purporting to exercise a lien over the database. The claimant took the opposite view, creating an impasse.<sup>11</sup>

The claimant considered the defendant's acts to amount to a repudiation of the contract, and proceeded to claim for payment of its outstanding fees. The defendant counterclaimed for its losses incurred due to being denied access to its data.

## Decision at first instance

There were two issues in the case: the validity of the notice, and the validity of the lien.

The key issue of interest to intellectual property practitioners<sup>11</sup> was whether a possessory lien, (traditionally only applicable to chattels) could validly be exercised over intangible property. At first instance in the Brighton County Court,<sup>12</sup> the judge found in favour of the claimant. It was held that a lien could be exercised over electronic records in these circumstances. The judge said:

“[I]t would not be appropriate for the law to ignore the development in the real world of record keeping moving from hard copy records into electronic media ... I do not accept [the defendant's submission] that a lien cannot exist over the electronic data which was in the Claimant's possession in just the same way as it could exist over the hard copy records in the Claimant's possession.”<sup>13</sup>

This broke new ground. A lien had not been held to exist before in respect of any electronic data. The judge explicitly acknowledged in the excerpt above that his judgment was an attempt to prevent the law from stagnating.

On the remaining issue, the judge also held for the claimant in respect of the repudiation finding (primarily on the facts) that notice was unreasonably short.

## The appeal

The respondent appealed on both points. However, in the event the appeal was almost entirely concerned with the counterclaim as to validity of the lien over electronic data.

This part of the appeal was brought on the basis that the judge at first instance had applied the law incorrectly, and in particular in a manner inconsistent with *OBG Ltd v Allan*<sup>14, 15</sup> and other cases in which digital data was not capable of being held in “possession”.

## The law and the artificer's lien

Giving the leading speech, Moore-Bick LJ first conducted a legal analysis of the relevant details of law, and then considered the claimant's innovative arguments<sup>16</sup> in response to that analysis.

He began by rehearsing the general legal history of the lien itself. He drew an analogy between the lien purported to exist over the database and the traditional artificer's lien. Going back to first principles (by way of Diplock LJ's 1964 analysis of the artificer's lien<sup>17</sup>), he noted that it can arise only in circumstances when:

- (a) the exercising party is in possession of the subject property;
- (b) the property was delivered to him for the purposes of doing work on it; and
- (c) consideration (ie payment) for that work falls due to be paid.

It was the first of these points that caused problems. The judge noted that Diplock LJ had placed a strong emphasis on possession being “actual possession” in order for a lien to arise.

<sup>10</sup> An original two weeks' notice was extended to one month. See *Your Response v Datateam* [2014] EWCA Civ 281 at [4]–[5]. In the event, the time from notice to effective termination was three weeks.

<sup>11</sup> The remaining issues concerned the construction of the informal contract on the facts, and the question of what would amount to a reasonable period of notice in the circumstances.

<sup>12</sup> *Your Response Ltd v Datateam Business Media Ltd* Unreported 2012 Brighton County Court, case 2 RH 00211.

<sup>13</sup> Excerpted in the appeal judgment *Your Response v Datateam* [2014] EWCA Civ 281 at [9].

<sup>14</sup> *OBG Ltd v Allan* [2008] 1 A.C. 1 HL.

<sup>15</sup> Although *OBG v Allan* had not been brought to the judge's attention at first instance.

<sup>16</sup> As put by Mr Stephen Cogley QC and Miss Iris Ferber (instructed by Lopian Wagner Solicitors).

<sup>17</sup> *Tappenden v Artus* [1964] 2 Q.B. 185 at 194–195, and excerpted in *Your Response v Datateam* [2014] EWCA Civ 281 at [11].

A similar question had been considered in the House of Lords decision in *OBG v Allan*.<sup>18</sup> In that case, receivers were purportedly appointed over OBG Ltd. Their appointment was not, however, valid. It was pleaded that the taking control of OBG's assets (including intangible assets such as receivables and contractual rights) was a tortious interference by the receivers, and that the losses arising should be recoverable. The House of Lords disagreed, however: the contractual rights were purely intangible and it was held that the common law tort of conversion could not apply to choses in action. The tort was applicable only in respect of interferences with a physical object. The reasoning was given by Lord Brown of Eaton-Under-Heywood<sup>19</sup>:

“[T]o my mind there remains a logical distinction between the wrongful taking of a document of this character and the wrongful assertion of a right to a chose in action ... It is one thing for the law to impose strict liability for the wrongful taking of a valuable document; quite a different thing now to create strict liability for, as here, wrongly (though not knowingly so) assuming the right to advance someone else's claim.”

Moore-Bick LJ was bound by the House of Lords' reasoning, and applied the same logic to the test of “actual possession” of property for the purposes of a lien. He found<sup>20</sup> (and Davis and Floyd LJ agreed<sup>21</sup>) that common law draws a sharp distinction between the ability to possess a chattel compared to a chose in action.

He observed that chattels were also originally known as choses in possession. This was more than a semantic observation as it highlighted the quality that they can in fact be “possessed”. A chose in action, by contrast, can only be enjoyed in the acting, rather than in the possession. Any property that was not physical must be a chose in action,<sup>22</sup> and could therefore not be held “in possession”. This reasoning was supported by a clear line of binding precedent and it was not open to the Court of Appeal to divert from them.<sup>23</sup> He drew further inferences in support of this opinion by reference to the Copyright and Rights in Databases Regulations,<sup>24</sup> which imposes a framework of rights in the database that exists only in the sense of a chose in action.<sup>25</sup>

Key to the decision<sup>26</sup> was that the law recognises only two types of property: chattels and choses in action. Anything which is not in the first category (physical goods) necessarily belongs in the second, and so any

intangible property, being by definition non-physical, can only be treated in law as a chose in action. The categories are both collectively exhaustive and mutually exclusive. Despite the fact that liens have been recognised in a wide variety of cases, the court could find no case in which liens have been recognised over intangible property and much indication that they could not be.

## The claimant's case

The analysis above strongly suggested that the lien could not exist. It was a prima facie finding to the claimant's detriment and it was for the claimant to overcome that finding.

In arguing for the validity of the lien and against the analysis set out above, the claimant raised four key lines of argument,<sup>27</sup> as follows. These points contained a novel approach, framing four bases on which the lien could be said to be brought up to date. They concerned:

1. treating the database as a physical object;
2. the meaning of “actual possession”;
3. treating the database as a document; and
4. the suggestion that a third type of property should be recognised in law.

Any of these arguments, individually or together, could render the lien valid. Each was dealt with in turn by the court, as follows.

### *Treating the database as a physical object*

The first line of argument was that because a piece of data exists in the form of a computer file, it makes a physical impression, however small, on the servers where it is stored. If it is physical, it must be a chattel and not simply a chose in action.

Although this submission purports to be an argument on the facts, it has the quality of a finding of law. If it was found that the database had a small, yet real, physical presence, this would open up the way for any intangible property to be treated as physical depending on its storage.

Accepting that the storage creates a physical change,<sup>28</sup> Moore-Bick LJ distinguished the information itself from the physical storage device upon which it was being held, noting that the ease of transfer of digital copies negates

<sup>18</sup> *OBG v Allan* was decided in the same judgment as two other important cases of 2005, incorporating the landmark decision of *Douglas v Hello!* on appeal from [2005] EWCA Civ 595 (which case may be better known to intellectual property practitioners than *OBG* itself).

<sup>19</sup> *OBG v Allan* [2008] 1 A.C. 1 at [321].

<sup>20</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [13].

<sup>21</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [37] and [41] respectively.

<sup>22</sup> See below for further discussion on this point.

<sup>23</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [12], [27], [32] and [34].

<sup>24</sup> SI 1997/3032.

<sup>25</sup> It is observed that the Copyright and Rights in Databases Regulations 1997 make reference to the Copyright Designs and Patents Act 1988, implementing a database right as a specific form of copyright. Implicit in this analysis is the suggestion that the approach to databases may be applied identically in respect of any digital data in which database right, copyright, or even other related rights exist.

<sup>26</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [13]–[18], [25]–[27] and [42].

<sup>27</sup> Summarised in *Your Response v Datateam* [2014] EWCA Civ 281 at [18].

<sup>28</sup> A notable finding: “I fully accept that entering information into an electronic data storage system results in an alteration to the physical characteristics of the equipment”: *Your Response v Datateam* [2014] EWCA Civ 281 at [19].

the physical effects of any one storage medium. Case law<sup>29</sup> was applied again analysing the requirements for a lien in the light of the authorities dealing with the tort of wrongful interference.

The court did, however, leave open the question of whether a lien could be exercised over the expression of data in their physical form. On the facts of the case the contract was silent on any physical transfer of equipment (e.g. DVD or hard drive) on which the database was to be stored. Absent any attachment to a physical item, the database could not be said to exist as a physical object. It was all but expressly provided that the exercise over a physical medium designated for storage of the database could be the subject of a lien.

To the extent that the facts did not support this finding, the comment must be regarded as obiter. However, the judge expressly set out at the beginning of his judgment to deal with the “interesting and difficult questions [in a] matter of some importance”,<sup>30</sup> perhaps implying that the judgment including its obiter comments) is intended to give clarity on the state of the law in this difficult area.<sup>31</sup>

### *The meaning of “actual possession”*

The second line of argument was more philosophical. It was suggested that possession is made up of not just of physical handling, but of “physical control coupled with an intention to exclude others”,<sup>32</sup> and that possession in this sense can be related to the ability to exercise complete control over it.

This approach was considered more attractive, but it was not accepted. Although practical control and possession go hand in hand, they are not identical concepts. Practical control is a circumstance going beyond possession, and although the claimant was entitled to (and indeed contracted to) exercise practical control over the information in the database, it was not possible to exercise physical control over the information itself.

The analogy given on the claimant’s behalf was that possession of goods was the same as control, if they were placed in a warehouse locked by a single unique key. Control of the key amounted to possession of the goods.

The court agreed that in this circumstance possession of the key would constitute possession of the goods. The test of possession of the goods became control of the key; however, the apparent contradiction between the warehouse analogy and the actual finding in the case did

not arise, because the key itself was a chattel and possession of that amounted to possession of the goods themselves<sup>33</sup> by proxy through that chattel.

### *The database as a document itself*

It was then argued, in the alternative to the first submission, that if the database was not itself physical then it was purely analogous to a document in its treatment and importance. If the business world treated digital documents as effectively physical, then so should the law.

This argument was supported by reference<sup>34</sup> to the CPR requirements for disclosure of documents in the course of litigation. When electronic documents first came to the fore in the late 1980s, the rules of procedure were slow to be updated and it was eventually considered in 1991<sup>35</sup> whether those electronic documents were caught by the phrase “possession, custody or power”. It was found that electronic documents should be disclosed as if they were ordinary physical documents.

This submission was dealt with and refused in short order. Although the documents were caught by those cases, the courts at the time were not considering the niceties of possession, but rather the purpose of the rules of disclosure. The context was too different and the reasoning could not be applied to the questions of law arising in this case.

### *A third type of property?*

The final line of the claimant’s resistance was the opposite of the first, in that it is an argument of law intended to have the consequence of a factual finding.

The legal argument was that that a third type of property should be introduced. The basis of submission was that if only two types of property are recognised by law, the law does not adequately cater for the real modern world. If a digital database is not physical, neither is it treated for any practical purpose as a chose in action in the sense that that legal construct was originally developed.

Coupled with the third line of argument (above), it is inferred that treating an electronic database as distinct from a physical record of that database would be an

<sup>29</sup> *St Alban’s City and DC v International Computers Ltd* [1996] 4 All E. R. 481 QBD, followed and applied by Patten J (as he then was) in *Thunder Air Ltd v Hilmarsson* [2008] EWHC 355 (Ch) Unreported.

<sup>30</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [8].

<sup>31</sup> The court did not, however, consider whether the physical medium would satisfy the test of having been provided to the artificer for the purposes of doing work on it. Even if a physical medium was provided, it is left unclear whether the medium would have been provided “for the purposes of doing work on it”, which is another requirement of the lien. Even if the database had taken physical form in the sense that it was stored on a designated medium, the work done in modifying the information still has the same non-physical qualities as the modification of data on a non-designated medium, namely that the work done (modification of information) is distinct from the physical implementation of that work (modification of the physical qualities of the storage medium). Such an argument remains to be tested but absent any contractual provisions, the situation is not left as clearly for the future as this obiter observation perhaps implies.

<sup>32</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [18].

<sup>33</sup> The court did not consider the extension of this analogy, where instead of a key the warehouse was controlled by a passcode. It is arguable that passcode would be an item of intangible property, entirely analogous to a key in the modern world yet still not sufficiently physical to constitute ownership of it as a chattel. The passcode could not be reduced to a physical medium because knowledge of it could be retained notwithstanding that the medium was no longer possessed. The implication of his Lordship’s analysis is that a shift from key-protected storage to passcode protected storage would change the quality of possession. This was made in respect of an analogy and must be considered obiter, but notwithstanding that its application leads to a regrettably unsatisfactory result and one that does not reflect business practices today.

<sup>34</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [24].

<sup>35</sup> *By Vinelott J in Derby & Co Ltd v Weldon (No.9)* [1991] 1 W.L.R. 652 Ch D.

absurd result. If the absurdity is to be avoided, a third category of intangible property is required for the law to govern modern business relationships effectively.

The factual consequence of this argument would be that the authorities, which applied to considerations of choses in action, would no longer apply to this case having being neatly distinguished on the facts.

Moore-Bick LJ referred to and applied the words of Fry LJ<sup>36</sup>: “all personal things are either in possession or in action. The law knows no *tertium quid* between the two.” The Court of Appeal was bound to follow the preference of the House of Lords for this view, and it was not open for them to accept it even if they shared the same opinion.<sup>37</sup>

## The law of unintended consequences

The new treatment of data suggested by the claimant is likely to appeal to businesses and practitioners whose work is concerned with the treatment of intangible property, because it would solve many practical problems encountered in those industries and put owners in an advantageous position when controlling those data. Such a move would, however, be a sea change in the legal treatment of choses in action.<sup>38</sup>

Davis LJ observed that such a dramatic change would cause consequences beyond those simply applicable to liens: “the law of unintended consequences is no part of the law of England and Wales [b]ut it is worth paying attention to it, in an appropriate case, all the same”.<sup>39</sup> He went on to list some difficulties and undesired consequences the change could cause, including in insolvency and digital crime. Despite expressing sympathy<sup>40</sup> for the view that the law needs to be modernised, setting that precedent on these limited facts would be ill-considered and the Court of Appeal could not and would not do so.

## Finding in the appeal

None of the claimant’s arguments had overcome the case against it. The purported lien was invalid and the defendant’s appeal was allowed to that extent only.

## Practical consequences for businesses

The key practical consequences of this case will be that:

- a lien over electronic data, no matter how useful a remedy, can arise but only if specifically provided for in contract;
- a lien may arise automatically in respect of physical manifestations of intangible rights, but only if a contract provides for systems of data transfer by physical means and then only in respect of the chattel, not the information; and
- should a dispute arise, a person purporting to exercise such a lien improperly will become liable for any damages flowing from that act including the costs of reconstituting that data.

The scope of the judgment touches the treatment of all intellectual property and is not limited to the management databases. In particular, the software-as-a-service model (“SaaS”) continues to rise in popularity and is a key new industry of the digital age.<sup>41</sup>

SaaS is being applied to a wide range of practical ends, and tends to create new and unusual business-to-business relationships. These new applications will often require bespoke contracts, and practitioners will be accustomed to preparing these for developing businesses. Whether the service provided relates to the complete hosting of a business’s computer systems at large or only to one aspect of the business’s operation, the data held on such a system are likely to be sensitive and valuable. A SaaS provider with the ability to exercise a contractual lien it will no doubt find good use for that right from time.

The relevance of the artificer’s lien to the artificers and engineers of modern times is also called into question. For example, any freelance software developer is in the business of creating digital works for customers. The developer’s role is clearly analogous to the artificer of old, with the only difference being that the product is intangible. It seems obvious that he should therefore be able to withhold the work if payment terms are not satisfied.

The natural inference from this case, however, seems to be<sup>42</sup> that the developer will not benefit from a lien because his work is intangible—a result that applies equally to the creation of online content, music, artwork and any other digital information. This is true even if the digital content relates directly to real property, such as in the case of architectural plans, databases drawn up digitally by building surveyors, or even electronic versions of physical documents.

Academic and commercial research will also be affected; the value of research projects lies in the data produced, and the timely and accurate presentation of those data (whether to the public at large by way of academic journals, or by implementation, or by inclusion on a relevant patent application). These data are acutely

<sup>36</sup> In *Colonial Bank v Whinney* (1885) 30 Ch. D. 261 CA. Fry LJ’s view was a minority judgment but subsequently preferred by the House of Lords on further appeal in (1886) 11 App. Cas. 426.

<sup>37</sup> Moore-Bick LJ: “that decision makes it very difficult to accept that the common law recognises the existence of intangible property other than choses in action”: *Your Response v Datateam* [2014] EWCA Civ 281 at [26].

<sup>38</sup> It is observed that such an approach could even serve to destroy the historical boundaries between the two.

<sup>39</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [39].

<sup>40</sup> *Your Response v Datateam* [2014] EWCA Civ 281 per Moore-Bick LJ at [10], and per Davis LJ at [38].

<sup>41</sup> See for example S. Moral-Garcia et al., “Enterprise security pattern: A model-driven architecture instance” (2014) 36 *Journal of Computer Standards & Interfaces* 748.

<sup>42</sup> Setting aside any normal contractual provisions.

time-sensitive and the exercise of a lien could be destructive to any business application of them. Practitioners dealing with such contracts should be mindful of the potential problems a lien could create, and this will be of especial relevance to practitioners managing in-house IP portfolios for research-driven companies in the technology and pharmaceutical industries.

### Practical consequences for the legal profession

The case also has some serious commercial repercussions for lawyers themselves.

The solicitor's lien, for example, is specifically provided for in the SRA Code of Conduct and is a useful (although often unwelcome) tool for effective management of fees.

The judgment in this case expressly makes it clear that electronic documents will not automatically be analogous to the paper equivalent, even if the function and treatment of the electronic files is no different from their paper counterparts. The step is not large from the database in this case to legal email correspondence and electronic records of evidence gathered on behalf of a lawyer's client.

As the legal profession as a whole continues to move from paper to electronic filing systems, will the lien over case documents begin to be eroded? Firms would be wise to review their terms and their client care documents to guard against this.

### Further appeal

This case has drawn the attention of the legal press, and this may not be the last word on it. Moore-Bick and Davis LJ both remarked on the attractiveness of modernising the law, and noted that they were bound by established authorities despite their recognition of the contradictions with the modern world.

Specific reference was made to the reasoning set out by Sarah Green and John Randall QC<sup>43</sup> in relation to the case for reconsidering the law of possession of digital materials, and for recognising a third type of property. The volume was described as presenting a powerful case on both these grounds, which if adopted would have a beneficial effect.<sup>44</sup>

Parliamentary intervention was also called for,<sup>45</sup> and on the basis of that call and the key observations made an appeal would not be surprising. Practitioners should watch this space, for developments that suggest that the United Kingdom may be beginning to entertain an updated approach to intangible assets to reflect the way business is conducted in the modern world.

<sup>43</sup> S.Green and J. Randall QC, *The Tort of Conversion* (Hart Publishing, 2009).

<sup>44</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [27].

<sup>45</sup> *Your Response v Datateam* [2014] EWCA Civ 281 at [27].

<sup>1</sup> *UPC Telekabel Wien v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH* (C-314/12), March 27, 2014.

## ISPS and Blocking Injunctions: *UPC Telekabel Wien v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*

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*The CJEU finds a blocking injunction in general terms acceptable in relation to an ISP's freedom to do business, but ISPs must achieve effective blocks which balance the interests of internet users and right holders.*

### Summary

In a reference from the Austrian courts, *UPC Telekabel Wien v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*,<sup>1</sup> the Court of Justice of the European Union has confirmed that ISPs are liable as intermediaries where their services are used to provide internet access to infringing material. However, an injunction requiring an internet service provider (ISP) to block infringing sites does not have to specify the steps the ISP must take to block such access but can be in the form of a general requirement, leaving the ISP to choose the most effective steps to take. These steps must be "all reasonable measures" that could be taken and must be effective at blocking or at least seriously discouraging internet users who are using the services of the ISP from accessing the (infringing) subject-matter; although ISPs must not "unnecessarily deprive" internet users of the possibility of lawfully accessing the information.

The CJEU found that it was compatible with Union law and the required balance between the fundamental rights of the right holder to protect its rights and the ISP to conduct business, to prohibit in general terms an ISP from allowing its customers access to a certain website