

The digital shift: 10 themes shaping the legal agenda

We are in the middle of the 2nd industrial revolution, comprising the 'digital shift' from an analogue to a fully networked society. It is transforming all aspects of economic and well as social activity. Businesses at the heart of the digital economy, such as software, e-commerce and online services providers, represent an increasingly significant part of the UK economy (see NIESR's recently published report¹). But the effect of the 'digital shift' is pervasive. There is virtually no company whose internal business processes, supply chain or customer engagement activities are not affected.

We are seeing how web and mobile-connected digital devices, together with social platforms, are transforming the ways we consume and participate in entertainment and information products and services. But the digital shift is also changing the broader world of business, and consumer products and services too. Peer-to-peer lending services like Zopa are growing in importance in the financial services industries. New fashion businesses are being established that sell online direct to consumers. The advertising industry is in the process of re-inventing itself to find new models for mobile advertising that works effectively on tablets and smart phones. Social sites like Facebook and Twitter are emerging as platforms for new services. In the retail industry, the boundaries between physical and online shopping are beginning to blur. Smart phones can be used by customers to get updates on the latest in-store offers and to enhance shoppers' in-store experience. The list goes on.

There are ten overriding, interlinked themes that characterise this shift and shaping digital media's legal agenda. In this article, I will identify each one and suggest the key messages for those responsible for governance and compliance. In a nutshell, the legal issues around data security, data protection and intellectual property are now top of the legal compliance agenda.

1. Digital disruption in the value chain

Digital disruption is a fact of digital media life. The disrupters are everywhere.

They are new players, often 'born digital' businesses, which enter an industry and create an entirely new business that didn't exist before; for example a new consumer products business which uses 'the crowd' as its R&D division to identify new inventions and product.

There are also new players who enter an industry and perform an existing activity in the value chain better and/or differently to existing incumbents, and in the process displace them. Kobalt (www.kobaltmusic.com) is an example; a new online platform offering a service to streamline royalty payments to artists.

But 'digital disrupters' are also existing players who reinvent themselves and in the process even cannibalise part of their business in order to create a new business and income stream; for example Getty's istockphoto service (www.istockphoto.com). Also, traditional retailers are now in the process of re-engineering their businesses to become omni-channel retailers, so that their customers get a consistent experience whether in store, online or via mobile devices.

As a business transforms itself internally and externally, a digital business legal planner is an indispensable tool to help navigate through disruptive change, covering each phase of the 'digital journey' from business set up, development and operation of the technical platform through to service or product delivery. For instance, where a new e-commerce platform is being introduced by a company, the planner can help ensure that the terms of the contracts for the platform delivery and hosting including the vital choice of project management methodology and contract governance, mirror the key business requirements and allocate risk appropriately.

¹ http://niesr.ac.uk/sites/default/files/publications/SI024_GI_NIESR_Google_Report12.pdf

2. Big data, big IP

With the ever increasing pressure to compete for consumer attention, companies are looking to personalise their customers' experiences whenever they use a digital device to access their services via mobile or the web. As a result, companies are gathering more and more data about their customers, via cookies delivered to customers' digital devices, social media platforms and via onsite analytics. This has brought the issue of data protection to the top of the business agenda.

In the July issue of 'Governance & Compliance', my colleague Aisling Duffy wrote about key compliance issues under the current Data Protection Act. The proposed new EU Regulation on Data Protection², if enacted, will introduce some significant changes to current data protection law. These include the so-called 'right to be forgotten' where data retention is not in compliance with the Regulation, the requirement for parental consent for processing personal data about children (i.e. under 13) as well as clarifying the application of the rules to data controllers who are established outside the EU but whose processing activities relate to goods and services to EU data subjects. But the Regulation also makes clear that the rights of data subjects are not absolute, and must be appropriately balanced with other rights such as the free flow of information.

Intellectual property (IP) has always played an important role in the media, entertainment and software industries. Increasingly, content owners are 'getting' the fact that they need to take a '360-degree' approach to their intellectual property (IP) in a multi-platform world, multi-format world. Outside those industries, trademarks have always been important to protect business brand and in industries such as pharmaceuticals, patents play a key role. But IP is crossing new frontiers as part of the 'digital shift'. Take, for example, retail brands that are becoming content producers and broadcasters in order to entertain customers and engage with them via social media. For example, Littlewoods has created 'Littlewoods Live!' shows hosted by celebrities including Laurence Llewelyn-Bowen which were streamed live via the Web and subsequently viewable as online videos. Red Bull has taken the concept even further and created an entertainment company in its own right.

The legal compliance message is that every business needs an IP and a Data Protection policy which is founded on a set of principles which balance business ethics and the requirements of the law with the particular needs and nature of the business. In the case of data protection, the proposed Regulation stresses the need for proportionate, risk-based compliance policies. In the case of IP, the policy must reflect the role which IP plays in the business, both as regards the use of 3rd party IP as well as the IP which the business creates. An impact assessment, which analyses the types of personal and other data and content flows through the business and how it is used, can help a business to strike this balance.

3. The rise and rise of social media

It's already a truism to say that social platforms such as Facebook, LinkedIn, Twitter and Pinterest are playing an increasingly significant role in business. For some, these platforms may simply be relevant from a marketing and PR perspective, for example a company having a Facebook page to build engagement with its customers.

For others, especially those in the media and information sectors, these social platforms are becoming increasingly integrated into their business. For instance, digital services provider Soundcloud (www.soundcloud.com) are embedded within Facebook so that Facebook users can launch sounds on SoundCloud from within Facebook. This integration process is two way – Facebook is also embedded into these services.

So what are the legal issues here? Linked to social media, but not confined to it, is the whole issue of tracking consumers' behaviour online and using this data in an aggregated way for marketing and advertising purposes. This brings us to the heart of the debate about privacy and data protection and the need for appropriate and effective data protection policies.

² http://ec.europa.eu/justice/newsroom/data-protection/news/120125_en.htm

Also, the presence of celebrities, public figures and others on social media such as Twitter makes reputation management an increasingly important area, which from a legal perspective brings defamation into the picture along with the laws and regulations governing data protection, consumer protection and marketing and advertising.

4. The digital consumer calls the shots

Ultimately, everything starts and ends with the consumer, who wants to enjoy a wide range of products and services accessed via mobile devices, moving seamlessly from online shopping to entertainment and information services. More than that, the consumer wants to actively engage in with their favourite brands, via a social media.

So it is the consumer/citizen who is really driving change. In the entertainment world, we are seeing innovative cross-media partnerships to create new content for consumers and make them available across a whole range of platforms. In the world of omni-channel retail, everything is orientated around the consumer experience.

On the legal compliance front, the increasing ways in which companies in all sectors are engaging directly with their customers via online retailing and direct to consumer services means that consumer law in all its forms, from marketing, sales and contract law to data protection, is on everyone's business agenda. But as well as being a compliance issue, it is also an opportunity to build brand and reputation for those that get it right.

5. Mind the (digital) platform

From digital gorillas like Facebook, Amazon, Google and Twitter to social media start-up platforms, the nature and variety of online platforms bringing content, services and communities together continues to proliferate. They are the real digital disrupters in the value chains in almost every industry, and represent an increasingly significant part of the digital landscape.

The legal compliance issues are as varied as the platforms themselves. At the top of the legal list are competition law (arising from the market dominance of the gorillas in this sector), liability of platforms for hosting illegal content and the role the law may require them to play in enforcement of rights, for example under the Digital Economy Act in the UK. We are also seeing growing pressure on social media platforms like Twitter to play a more active role, such as making it easy to report abuse by 'Trolls'.

6. Collaboration is the name of the game

'Collaboration' is defined as 'the action of working with someone to produce something'. Interestingly, the same definition cites the 'traitorous cooperation with an enemy' as an instance of collaboration. So it is certainly not synonymous with a harmonious relationship. Collaborations can be tough, conflicting and competitive, as long as they work and deliver sufficient benefits to the collaborators.

Collaborations come in all shapes and sizes in the 'post-digital shift' world. Some are operational, where the business outsources a business function to a third party, such as an ecommerce platform or the provision of payment or product fulfillment services. Others are strategic, where the relationship enhances the business' brand or enables it to increase market share or to enter new markets, thereby truly adding value.

On the legal front, the structuring of collaborations is equally diverse, ranging from straightforward contractual relationships, licences, corporate joint ventures, agency through to full-blown mergers. The digital business legal planner mentioned before can be used to identify the top legal issues to be covered in any collaboration contract.

7. Consolidation and fragmentation

The 'digital shift' is driving consolidation within different industries as companies seek scale where needed. At the same time, markets are fragmenting as industry players seek to build their brands by creating niches.

For instance, an example in the publishing industry we have seen the recent merger of Penguin and Random House. But there are also examples of niche publishers organising around 'verticals', i.e. creating imprints for specific genres/subjects/markets. Consolidation takes many forms, from mergers and acquisitions through to partnerships and joint ventures. We can therefore expect to see more compliance work, from due diligence to business integration issues, resulting from a rise in consolidation activities.

8. it's a mobile economy

The continuing growth in mobile devices – tablets and smartphones in particular – means that mobile commerce and mobile advertising will be an increasingly important part of the digital economy's landscape and in which it will be vital to create the right advertising products and business models for mobile. Innovation in the field of mobile payments, and all the compliance obligations arising from the provision of online financial services, is on the rise.

9. Everyone is in the technology business

I remember a meeting some time in 2000 (remember Y2K and how the world's IT infrastructure was going to collapse on the midnight chime of Big Ben?) between the representatives of the ISP industry and the creative industries discussing the Copyright Directive. The topic under discussion was the copyright exception that the ISP's wanted to ensure that copies of copyright works cached on their servers could not be treated as acts of reproduction needing the copyright owner's permission.

The meeting was a great example of how the worlds of intellectual property and technology lacked a shared vocabulary and vision. That is changing; slowly. But the drive to collaboration and sharing through machine to machine communications and API's is relentlessly driving the two together.

Over the next few years, we can expect to see a growth in the use of technology to manage legal compliance. 'Cookie' compliance via 'pop up' boxes is one example. In the world of data protection, there is much discussion about 'privacy by design'. As a minimum, whenever a company is about to launch a new service, it needs to ask itself how technical tools can make it easier to communicate privacy policies, online terms and conditions and managing the range of permissions and consents for the use of personal data and copyright and other IP protected content.

10. It's a borderless world

This is our number one challenge – national laws, but a global medium. We see this every day. How do we create an effective regulatory framework for the press in the UK when blogs publish the same content overseas? How does a digital platform based in country A set its standards for data protection compliance when it targets consumers on an international basis with EU and non-EU laws often setting different requirements for compliance for user consent?

The answer, of course, is a slow but inexorable move towards harmonised standards of 'hard law' (for example through a forthcoming revision to EU's data protection legal framework); and 'soft law' in the forms of voluntary codes of practice and an increasingly international outlook of the courts. In turn, this means that compliance policies and strategies need increasingly to cope with the ease with which data and services flow across borders.

If you're responsible for governance and legal compliance your in-tray has probably never been fuller. The compensation is that you have never been closer to the heart of your business.

About the Author



Laurence leads Shoosmiths' Publishing and Digital Media team. He provides strategically-focused advice to publishers, media and technology companies on e-commerce projects and on exploiting their intellectual property in digital and 'offline' forms. He also advises established brands and start-ups on 'multi-channel', e-commerce projects across a wide range of industries.

He is known for delivering strategic commercial insight and innovative legal solutions with high quality technical legal work. Neil Blair, of Pottermore, wrote about the work done by Laurence's team: "*Throughout, they have showed professionalism, sector expertise and an innovative and proactive approach in providing practical solutions to the many legal issues with which we have been faced.*"

Laurence combines this cutting-edge legal work with strategic and policy-related work in the field of copyright and online law. In his capacity as copyright adviser to the European Publishers Council (<http://epceurope.eu/>), he has advised and been actively involved on the Data Protection Directives, the Copyright Directive, the Database Directive and the E-Commerce Directive Directives. He also regularly chairs issue-driven workshops for in-house lawyers and has written and led a range of training modules for in house legal teams.

Laurence practises what he preaches. He's a regular writer and lecturer on copyright, digital media and other IP issues, and an active blogger on digital media law - <http://laurencekaye.typepad.com/> - and can be found on Twitter @laurencekaye.