



IP, IT and E-Commerce Bulletin

Intellectual property overview: France

Here are a few developments that have taken place in France over the last 12 months.

New provisions on reversed distance auctions

New provisions in the French Commercial Code have created a legal framework for "reversed distance auctions" ("RDA's") in the private sector. These aim to put sellers in competition, by inviting them to participate in a distance auction after analysing specifications communicated by the buyer knowing that the starting price is the highest price. RDA contracts have to comply with a prescribed form, even if organized outside France, as long as the products concerned are intended for commercialization in France.

Four legal criteria have to be observed. Failure to comply with any of these criteria has the following consequences:

- Contracts concluded following the RDA are null and void
- Compensation for prejudice suffered may be claimed
- Condemnation by a court to a civil fine of up to 2 million euros.

Peer-to-peer

Since the decision of the High Court (*TGI*) of Rodez (13th October 2004), confirmed by the Court of Appeal of Montpellier (10th March 2005), a number of legal authors agree that a distinction should be made between the act of downloading and the act of making the material available to the public (upload). According to case law, downloading acts are covered by the private copy exception, subject to downloaded material not being shared or used beyond the family circle. However, acts of uploading beyond the scope of private use may be punished.

From a technical point of view, most P2P software only permits file downloads if the Internet surfer authorises uploading acts on his/her computer at the same time. On 21st April 2005 and on the grounds of this analysis, the High Court of Maux criminally sanctioned several peer-to-peer software users.

A French Bill reforming copyright is currently being adopted which belatedly adopts the EU's Copyright Directive. Amongst the most criticised provisions is one which authorises authors, publishers and producers to implement technical protection measures aimed at preventing copying or playing works which they own. For some, this Bill heralds the death of private and peer-to-peer copying in the near future. For others, it is an opportunity to harmonise the law with recent legal decisions and existing practices concerning Internet downloading.

CNIL adopts a guideline document for the implementation of professional denunciation ("whistle blowing")

Further to two decisions refusing to authorise specific organised systems of professional denunciation and taking into account the tricky situation for companies which are otherwise subject to the American Sarbanes Oxley law which imposes the implementation of such procedures, the CNIL has adopted a guideline document which defines the conditions to be satisfied by professional denunciation systems in order to comply with the French Data-Processing Act.

Denunciation systems restricted to control in financial, accounting, banking and fight against corruption fields will therefore benefit from a unique authorisation, subject to compliance with other rules recommended by the CNIL. Companies implementing a system complying with these other rules will simply need to send the CNIL a commitment of conformity. A declaration receipt allows implementation of the system. However, if the system goes beyond the scope defined, the company must send the CNIL a complete declaration file for consideration.

On the basis of the CNIL guidelines document, the Article 29 group made up of the twenty-nine European authorities for data protection should take a decision on this issue during the first semester of 2006.

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Defamatory material on the internet - will innocent businesses be caught?

In a libel claim, the claimant must show that the words complained of lower him in the estimation of right thinking members of society generally, and are “published” by the defendant to a third party. The definition of a “publisher” includes not only anyone who exercises direct editorial control over the published statements, but also any party who makes the defamatory comments available to third parties.

It is common for a claimant to pursue the defendant with “the deepest pockets”, including web owners, web designers, companies who use the internet for sales or marketing purposes or hosting companies.

Defence

There is a statutory defence available to such defendants of “innocent dissemination”.

This requires a party to show that it:

1. Was not the author, editor or publisher of the statement complained of
2. Took reasonable care in relation to its publication
3. Did not know, and had no reason to believe, that what he did caused or contributed to the publication of the defamatory statement.



Melanie Brabin

As soon, however, as you are put on notice that you are storing or disseminating defamatory material, you will automatically lose the protection of the defence. Swift action needs to be taken if you receive a notification, otherwise you could be facing a libel claim.

John Bunt v David Tilley & others

In this recent case, Mr Bunt brought proceedings against three individuals who he maintained were the authors of defamatory statements on the internet, together with their internet service providers (“ISP”s). The court allowed the ISPs to strike out the claim against them on the basis that an ISP should not be treated as a “publisher” of its customer’s postings.

The judge felt that the Electronic Commerce (EC Directive) Regulations 2002 provided real protection to ISPs where their role was as a “mere conduit” or “host” of defamatory material, for example as a newsgroup or chat room. The judge drew on the analogy that ISPs do not participate in the process of publication as such, but merely act in a similar way to the postal services.

Lessons

For website owners, or those involved in the construction, running or maintenance of websites, the practical result is that whether a statement which is complained about is defamatory or not, your ISP will not risk the consequences of allowing it to remain on its server.

If you are a website owner, check the terms and conditions of your subscriber contract with your ISP. It is likely that the ISP will reserve the right to remove material from your website at their discretion. Ask your ISP for a copy of their procedure for dealing with defamation related complaints, and ascertain in advance the limits of acceptable content for your website.

If you run an online discussion forum, your liability may still turn on the extent of the editorial control which you exert over the website. You might have to show that you took all reasonable steps to avoid the publication of defamatory material, including monitoring the responses from users. If any editorial control is exerted, you may well be deprived of the protection of the defence.

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Damages under the New Italian Industrial Property Code

On 19th March 2005, Legislative Decree no. 30 of 10th February 2005, which enacted the New Code of Industrial Property (the “New Code”), came into force in Italy making, in particular, the regime of damages for infringement of intellectual property rights more definite and severe.

Article 125 (“Compensation for damages”) of the New Code states that the compensation due to



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the damaged party must be paid in accordance with the provisions of articles 1223 (“Compensation for damages”), 1226 (“Equitable evaluation of the damages”) and 1227 (“Contributory negligence of the creditor”) of the Italian Civil Code.

Of the main items of damages that case law preceding the enactment of the New Code deemed indemnifiable (namely (i) actual damage; (ii) loss of profit and (iii) non-patrimonial damages such as damage to reputation) only the second one has been regulated.

Article 125 of the New Code establishes that “*the monies deriving from a lack of earnings caused by the infringement are to be evaluated by the judge also taking into account the profits made in infringement of the right and the compensation which the author of the infringement would have had to pay if he had obtained a licence from the holder of the right*”.

In other words, based on the assumption that the rightholder would have sold the amount of goods actually sold by the infringer, the new law awards indemnification for infringement equivalent to the amount of a reasonable royalty, i.e. the equivalent of a retrospective compulsory licence.

Recent decisions and legal scholars had anticipated the contents of Article 125, which basically conforms with Article 26 of Community Directive no 48 of 29th April 2004. However, with regard to actual damage, despite the content of the Directive, the New Code does not expressly acknowledge compensation for expenses incurred by the rightholder, such as costs of identification and research. In addition, recent Court decisions have acknowledged the rightholder as having suffered non pecuniary damage to corporate image and/or reputation from the infringing activity.

In conclusion, the new Article 125 should make it easier for the rightholder to fulfil the burden of proof deriving from the extra contractual responsibility and in Italy the assessment of damages for infringement of IP rights should be simpler.

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Prize competition or illegal lottery?

The new Gambling Act 2005 (the "Act") will replace most existing gambling law. The purpose of the Act is to regulate gambling and betting. However, a side effect of this is that certain prize competitions may fall within the definitions of gaming, betting and lotteries. Although the Act does not seek to prohibit genuine prize competitions (such as prize crosswords), it will nevertheless impact on the format and rules of such competitions.

There has always been a fine distinction between lotteries and prize competitions which have been deemed acceptable. The new Act confirms that lotteries are competitions which the participant has paid to enter and where winning depends wholly on chance. Lotteries are generally illegal under English law.

Requirement of skill

Previously, organisers could avoid running a lottery by incorporating an element of skill, no matter how small, provided that the skill played a substantial part in winning. Many organisers made entry dependent upon answering a simple question, the answer to which was obvious. In the future, competitions which do not satisfy a minimum level of skill or judgment will be considered as depending wholly on chance.

As yet, there have been no cases to assist in interpreting the definition of skill required, although it is quite clear that just asking a simple question will no longer be enough to satisfy the minimum level of skill required to circumvent the new definition of a lottery. To avoid running an illegal lottery the question must be such that most people would either be unlikely to know the answer, or be unlikely to answer correctly.

Payment to enter

The Act has clarified that requiring participants to pay to collect a prize will constitute a payment to enter. This should stop competitions, often seen in the form of scratch cards, which require winners to call a premium rate number to discover what prize they have won.



Amy Chandler

Interestingly, a competition will not be a lottery if there is also a free entry route. This includes sending a letter by ordinary post, sending an email or making a telephone call at normal rates. The free entry route must be displayed with equal prominence as the paid entry route and must have no less likelihood of winning. The Act has also clarified that there will be no payment to enter where the participant has paid for goods or services at the same price as if there were no promotion.

It is intended that the new Act will be fully implemented by 2007. One could say the Act itself is like a competition for which most people will not know the answer!

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Differentiation through brands

On 28th April 2005, the court of Arnhem passed a verdict in the case of Unilever vs. Albert Heijn. Albert Heijn (also known as "AH"), is a Dutch supermarket which sells Unilever products and manufactures its own house brand articles which compete with the Unilever products.

Unilever claimed that AH was in breach of contract, was committing a wrongful act against Unilever or was infringing Unilever's registered trade mark rights in relation to products such as peanut butter, ice tea, margarine and liquid butters.

Breach of contract

Unilever claimed that its contract with AH should be based on mutual reasonableness and fairness because of their long history of working together and that there was an attributable failure to perform on the side of AH. AH should have taken the interests of Unilever into account and refrained from copying the appearance of the packaging of Unilever products.

The judge ruled that this claim was inadequately substantiated and that just because the parties had worked together for such a long time, Unilever did not have the right to claim that AH could not compete with Unilever by following the appearance of the packaging of a competitive product.

Wrongful act

Competition is not in theory unlawful, however, the circumstances and the manner of the competitive action can make it unlawful.

Unilever claimed that there was a risk of confusion to the public between the products based on the reputation and name of the Unilever products. The judge held that the differentiating ability of each brand had to be taken into account when deciding this point and, in this action, Unilever had failed to adequately substantiate its claim. The judge also ruled that by using its own house brand packaging consistently, AH had created its own corporate image.

Unilever further claimed that AH was systematically copying or imitating the Unilever packaging. This



Michel Schroots

was rejected as the issue arose on just 13 products within 4 product ranges out of a total of 4,500 house brand articles, of which 2,500 already had the new corporate image.

Trade mark infringement

Unilever based this claim on article 13A paragraph 1(b) and (v) of the Benelux Trademarks Bill whereby it had to show that AH had created the risk of direct confusion (mistake by the consumer between the two products) or indirect confusion (thinking that the products are somehow related) when looking at each packaging as a whole, or that AH had made any unjust benefits by acting this way, or that AH had impaired the distinguishing power or reputation of the Unilever brands.

The judge, who ruled on every product separately, ruled that in all 13 products there were obvious similarities and differences. However in two cases, the similarities were more distinguishing than the differences and Unilever's trade mark rights were infringed.

AH claimed that all the products followed normal market packaging and that the questioned colours and shapes were generally accepted colours and shapes for these products. The judge, however, would not permit this defence as there were many other colours and shapes in the market for these products or as yet there were no other producers using these colours and shapes.

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Digital Music: File-sharing in the workplace

2005 was a significant year in both the fight against internet piracy and the growth of the digital music retail sector. Apple's iTunes sold its 500 millionth song in July 2005, and is predicted to sell its 1 billionth track within the first months of 2006.

However, much progress still needs to be made before the legitimate digital music market catches up with the illegal one. According to recent research, three times as many European consumers are downloading music through illegal file-sharing as those downloading music via legitimate means. It is estimated that there are currently over 870 million unauthorised music files on the internet at any one time.

The unauthorised distribution of music over the internet infringes the copyright of the owners of the musical works. It also deprives existing artists of income to which they are entitled and is a threat to the development of new artists.

Copyright theft is both a civil and a criminal offence in response to which the courts can order an injunction, award damages and impose criminal sanctions. A company director's vicarious liability for the unlawful acts of employees who use a company's computer network is therefore a major concern.

Section 16 of the Copyright, Designs and Patents Act 1988 (the "Act") restricts any person other than the copyright owner from amongst other things, copying and communicating the work to the public. Any person who does or authorises another to do any of the acts restricted by the Act is infringing the copyright in the musical work and this constitutes a primary infringement. Under section 20 of the Act, as amended by the Copyright and Related Rights Regulations 2003, the copyright owner has the exclusive right to communicate the work to the public. This includes the communication of music via the internet.

A further issue is the increased risk of breaches of security in IT systems. The use of peer-to-peer software can lead to attacks from viruses and spam and leakages of confidential information.

So can organisations protect themselves?



Charlotte Wigham

Employers should have an Acceptable Use Policy ("AUP") in place in relation to the misuse of data or electronic communication systems. The AUP should be made known to all employees and be consistently enforced through the employer's disciplinary rules. Unfair dismissal claims arising out of the misuse of data or electronic communication systems are largely avoidable with a sufficiently enforced AUP.

But can an organisation monitor its employees at the same time as complying with the provisions of the Data Protection Act?

The Telecommunications (Lawful Business Practice) (Interception of Communications) Regulations 2000 and Part 3 of the Data Protection Code on Employment Practices give guidance on how employers should comply. The Code also provides benchmarks that employers are expected to achieve in order to comply with the Data Protection Act.

The law perpetually struggles to keep abreast of technological advances in the music industry. It is therefore essential that AUPs are regularly updated to take account of the ever increasing exposure to new risks.

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Is "Bud" an indication of geographical origin for beer for Czech consumers?

Two parallel cases between the Czech Budweiser Budvar National Corporation and two Austrian beer importing companies are currently pending before the Austrian courts regarding a dispute over the use of Anheuser-Busch's trade mark "American Bud".

A bilateral agreement, ratified by the Republic of Austria and the Czechoslovak Socialist Republic on 11 June 1976 (still in force with the Czech Republic and concluded before the date of accession of Austria to the EU) (the "Agreement"), "on the protection of indications of source, designations of origin and other designations referring to the source of agricultural and industrial products" contains "Bud" as a protected indication of geographical origin.

According to a preliminary ruling of the European Court of Justice (the "ECJ") in the more advanced of the two cases, IP related provisions in a bilateral agreement may lead to a justified restriction on the free movement of goods under Community law. The Agreement, under which a simple and indirect indication of geographical origin claimed by the Czech Republic is granted protection in Austria, is such an agreement. The ECJ noted that "Bud" is not a designation which comes within the scope of Regulation No 2081/92 on the protection of geographical indications and designations of origin for agricultural products and foodstuffs, as amended by Regulation (EC) No 535/97.

Article 28 EC does not preclude such protection from being extended to Austria if the findings of the national court show that, according to factual circumstances and perceptions in the Czech Republic, the product bearing the indication "Bud"

comes from a region or a particular place located in the territory of that state and its protection is justified there on the basis of the criteria laid down in Article 30 EC.

Although the Czech Republic has since become a member of the EU and therefore the Agreement must now be fully examined under Community law, the Austrian Supreme Court, referring to this preliminary ruling of the ECJ, recently returned the first case to the court of first instance and ruled that the court must ascertain if Czech consumers relate "Bud" in association with beer to an indication that the beer comes from a particular place, region or country. Although the name "Bud" is not a geographical name in itself, it could be at least capable of indicating to consumers that the product comes from a particular place, region or country. To resolve this matter, it will therefore be necessary to question if Czech consumers understand "Bud" as an indication of geographical origin in combination with beer.

It is anticipated that the Supreme Court will pass down the same decision in the second case pending appeal.

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The Management of IPR in Portuguese universities

Innovation, in the broadest sense, amongst other things means increasing the use of intellectual property rights ("IPR"). More than ever, universities and companies need to ensure products and technologies which are developed using significant in-house resources are legally protected so that in the long term, "innovative" bodies can benefit from use of their intellectual assets.

Portugal is bottom of the league of EU members with regard to patent applications, both in terms of European and American patents, and is consequently characterised as the country which makes the least use of patents. According to EU reports, "the weak uptake of IPR is not only down to low research and development ("R&D"), indeed for the most part innovators don't use IP, but it is also related to poor promotion and the fact that the dissemination of information and technical assistance are lacking."

In the case of universities, where the innovation process has focused only on the initial stages of the linear *science-push* model (applied research, development and production whose end purpose is not selling), the lack of innovation via IPR is reflected in the low transfer of knowledge (intellectual assets which can be legally protected). The democratization of education in Portugal has allowed free access to research carried out at universities and partly enabled a response to market pressures and the demands for knowledge which is applied and valued in economic terms. However, technological production is somewhat lacking. Greater interaction is required between universities and companies for the end results of research to be turned into potential market value.

The emergence of new competitive scenarios in terms of research and the failings of universities in the field of transfer of knowledge have led to the creation in Portugal of units providing support for intellectual property and transfer of technology. The central aim of these units is the promotion of technological evolution to help the diversified growth of goods and services on offer and a quality practice based on a culture of efficiency. These units play an important role in:

- Raising awareness and promoting the issue of IPR
- Providing training programmes in the domain of IPR



André Mendes

- Putting together and monitoring applications for protection/registration of industrial or intellectual property and managing IPR
- Regulating and managing confidentiality in R&D projects
- Drawing up and negotiating confidentiality agreements and R&D and technology transfer contracts.

Higher education institutions have needs in terms of the effective transfer of knowledge to their external surroundings however, to a great extent, this is subject to prior protection of the intellectual assets produced.

There is a stable legal framework for IPR, copyright and related rights at national and supranational level and internal laws contribute towards regulating and governing intellectual assets. Efforts have also recently been made by some Portuguese universities and R&D institutions to establish IPR policies regulating for example, ownership of the intellectual assets, sharing of revenue and the involvement in the decision-making throughout the process of protecting and evaluating technologies of all those involved in the research process.

In recent years, there has been an increase in the exploitation of industrial property resulting from emerging academic research. However, institutions do not yet have a structure geared towards IPR matters and many R&D results are freely published which potentially could be legally protected.

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Spanish Supreme Court case law on parallel imports

In a judgement dated 20th December 2005, the Spanish Supreme Court has departed from its previous case law regarding so-called "parallel imports".

The case was between the company Reebok International Limited and a Spanish parallel importer, ACQ, who had imported Reebok sport shoes from Mexico, then commercialized the product in Spain and Portugal without the authorization of the trade mark holder.

The Court of First Instance ruled in favour of the parallel importer, as it considered that Reebok's trade mark rights had been exhausted with the authorization of the trade mark owner by their commercialization in Mexico. However, the Appeal Court ruled against this decision recognizing Reebok's right to prevent the so-called parallel imports when the product was coming from a country which was not a member of the European Economic Area.

The parallel importer appealed this judgement to the Spanish Supreme Court, which ruled against him, rejecting the principle of the international exhaustion of trade mark rights, and confirming the application of the Community exhaustion, thus applying the doctrine of the European Court of Justice (ECJ).

The Spanish Supreme Court has previously analyzed on two occasions the question of the

international exhaustion of trade mark rights:

- 15th May 1985 in the Scotsman case; and
- 28th September 2001 in the Bacardi case.

In both these decisions, the Supreme Court admitted that parallel imports were legal on the basis of the international exhaustion of trade mark rights.

In this recent decision, the Civil Section of the Supreme Court has changed its position and followed the case law of the ECJ, by declaring the illegality of such practices. The Supreme Court points out that Trade mark Law must be interpreted according to European Directive 89/104/EEA and the case law of the ECJ (cases *Marleasing*, *Faccini Dori*, *Silhouette*, *Zino*, *Davidoff*, and *Sebago*). It concludes that the rights of a trade mark owner are not exhausted by the first marketing of its products in a third country, irrespectively of whether the trade mark holder has given its consent for the marketing on the domestic market of products identical or similar to those for which exhaustion is invoked.

In summary, the Supreme Court, with this new interpretation of the exhaustion of trade mark rights, reinforces the domestic protection of trade mark owners and recognizes them as having, without any doubt, a right to prevent parallel imports of their products into Spain, when such products are not coming from another Member State.

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TO OUR READERS

This Bulletin is intended to introduce and explain on a regular basis areas of European, North and South American Intellectual Property, IT and E-Commerce law of general interest to all of our clients. It is jointly written and produced by PLG's IP, IT and E-Commerce International Network which includes legal practitioners in several PLG firms and their contacts worldwide. We always welcome comments and questions on any matters raised in our Bulletin. Further information is available on all topics but nothing in the PLG IP, IT and E-Commerce Bulletin is to be regarded as a definitive statement of the law or as specific legal advice. Reliance should only be placed on specific advice obtained directly from the relevant practitioners after consideration of all relevant facts and circumstances. Readers are requested to direct their enquiries to the author of the relevant article.

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