

## IP/IT/Data Newsletter - March-April 2022

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The IP / IT / Data Department of Steering Legal presents the legal news that caught its attention in March-April 2022 in the following areas Intellectual property (1), Technology (2), Personal Data (3), Media, Entertainment and Advertising (4). Enjoy your reading!

### 1. INTELLECTUAL PROPERTY

#### a) **ARCOM: blocking illegal streaming sites**

A law of October 25<sup>th</sup>, 2021<sup>1</sup> introduced a mechanism enabling sports channels to first apply to a judge to obtain restrictions to the access to websites broadcasting matches without their authorisation; then, in a second phase, to ask ARCOM to extend the measures ordered to websites that appeared after the order.

This so-called "dynamic prescriptions" mechanism has been put into practice many times since.

BeIn Sports<sup>2</sup>, Canal+<sup>3</sup> and the Ligue de Football Professionnel filed such requests before the Judicial Court of Paris for the African Cup of Nations, the TOP 14, the Champions League, the Ligue 1 and Ligue 2 matches for which they hold the audio-visual exploitation rights.

The judge found on each occasion that there had been serious and repeated infringements of the exclusive rights of these companies and ordered the Internet services providers to take all appropriate measures to prevent access to the illegal streaming sites within three days.

#### b) **Cloud (private copy exception)**

In a [judgment of](#) March 24<sup>th</sup>, 2022<sup>4</sup>, the European Court of Justice (ECJ) decided whether the private copy exception also covered copies of works stored in the cloud.

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<sup>1</sup> [French law n°2021-1382 of October 25th, 2021](#) on the regulation and protection of access to cultural works in the digital age (1).

<sup>2</sup> Interim order issued on January 20<sup>th</sup>, 2022, No. 22/50416; Interim order issued on February 7<sup>th</sup>, 2022, No. 22/50584.

<sup>3</sup> Interim order issued on January 28<sup>th</sup>, 2022 n°22/50583; Interim order issued on February 7<sup>th</sup>, 2022 n°22/50582.

<sup>4</sup> ECJ, March 24<sup>th</sup>, 2022, C-433/20, Austro-Mechana.

**Reminder:** the private copy exception allows anyone to reproduce a copyrighted work of art without the consent of the rights holder when the copies are made for private use.

ECJ answers positively: when a backup of a work of art is made in the cloud of a storage service provider, it does constitute a reproduction of the work of art. Rights holders will therefore have to be compensated under the private copy royalties.

In principle, those royalties will be payable by the user of cloud storage services. However, due to practical difficulties in identifying the user, the Court asserted that Member States may introduce royalties which will be payable by the producer or importer of the cloud storage servers.

## 2. TECHNOLOGIES

### a) **Digital Markets Act / Digital Services Act: interim agreements of March 24<sup>th</sup> and April 23<sup>rd</sup>, 2022 of the Council of the European Union and the European Parliament**

**Reminder:** the Digital Markets Act (DMA) and the Digital Services Act (DSA) are draft European regulations published on December 15<sup>th</sup>, 2020.

The objective of the DMA is to fight against monopoly situations and anti-competitive practices of the large digital platforms (GAFAM, etc.) on the European market by putting in place harmonised rules. They target companies considered as "gatekeepers", i.e. those having over the last three years an annual turnover of at least €7.5 billion in the EU or having a stock market valuation of at least €75 billion, and having at least 45 million monthly end-users and at least 10,000 professional users in the EU.

It includes:

- Allow users to uninstall pre-installed applications or software on their computer, tablet or phone;
- Give companies access to the data generated by their activities on a platform;
- Enable application developers to have fair access to the ancillary functionality of smartphones.

The DSA aims to modernise the European legal framework for illegal content, protecting the digital space against its distribution and ensuring the protection of users' fundamental rights.

It includes:

- The possibility of accessing platforms' algorithms;
- Increasing the prohibitions on targeted advertising to minors;
- The obligation for online platforms to remove illegal content, products and services as soon as possible after they are reported.

These draft regulations must now be approved by the Council and the European Parliament.

### b) **Crypto: Proposal for an EU Regulation on Markets in Crypto-Assets**

A [proposal for a regulation](#) on the supervision, consumer protection and environmental sustainability of crypto-assets, including cryptocurrencies<sup>5</sup>, was adopted by the European Parliament's Economic and Monetary Affairs Committee on March 14<sup>th</sup>, 2022.

This proposal aims to address the lack of specific regulation of cryptocurrencies at EU level.

It specifies that the definition of crypto-assets should correspond to the definition of virtual assets as given by the Financial Action Task Force (FATF): a virtual asset is "*a digital representation of value that can be exchanged digitally, or transferred, and that can be used for payment or investment purposes. Virtual assets do*

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<sup>5</sup> Proposal for a Regulation of the European Parliament and of the Council on crypto asset markets and amending Directive (EU) 2019/1937.

*not include digital representations of fiat currencies, securities and other financial assets which are already covered by other provisions of the FATF Recommendations».*

It provides for better consumer information on the risks, costs and burdens of cryptocurrencies. It also introduces measures against market manipulation and prevention of money laundering, terrorist financing and other criminal activities.

In order to reduce the carbon footprint of crypto-currencies, Members of the European Parliament are calling on the European Commission to prepare a text including crypto-currency mining activities in the European Union's taxonomy for sustainable activities. This taxonomy is a classification system that lists environmentally sustainable economic activities.

Negotiations with the Member States on the final form of the regulation will start shortly.

**c) Artificial intelligence: publication by the CNIL of resources on the subject**

On April 5<sup>th</sup>, 2022, the CNIL published a set of documents on artificial intelligence for:

- The general public with a [presentation of the challenges of artificial intelligence for data protection](#) accompanied by [resources to understand how it works](#) and a [glossary](#);
- Professionals: a [reminder of the main principles for processing personal data based on artificial intelligence](#) and an [analysis tool](#) so that companies can assess the compliance of their artificial intelligence systems with the positions of the CNIL and the GDPR;
- Specialists in the field: [studies](#) on future artificial intelligence technologies, [presentations of](#) the current state of knowledge on certain aspects of artificial intelligence, [testimonies](#) of recognised experts.

### **3. PERSONAL DATA**

**a) EU/US transfers: agreement in principle on new agreement of principle announced**

On April 6<sup>th</sup>, 2022, the European Data Protection Committee (EDPS) declared that it had reached an agreement of principle on draft of a new transatlantic data protection framework.

This agreement comes is the result of the famous "Schrems II" judgment<sup>6</sup> of July 16<sup>th</sup>, 2020 by the ECJ which invalidated the "Privacy Shield", a mechanism which governed data transfers between the European Union and the United States.

The Court found that the US legislation did not meet the requirements of the GDPR. It also found that the Standard Contractual Clauses in force at the time were not sufficient for data transfers to the United States. New Standard Contractual Clauses were then published on June 4<sup>th</sup>, 2021 by the European Commission.

However, the EDPS recalls that this announcement of an agreement does not constitute for the moment a legal framework on which to base data transfers to the US.

In the meantime, all data transfers to the United States should continue to be suspended.

**b) Commercial prospecting: formal notice from the CNIL for transmission of prospect data to partners without prior consent**

The CNIL has issued formal notices to three organisations after checking data transfers with their partners for commercial prospecting purposes.

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<sup>6</sup> ECJ, C-311/18, July 16<sup>th</sup>, 2020, Data Protection Commissioner v Facebook Ireland Ltd, Maximilian Schrems.

Several breaches of the obligations under the RGPD had been identified, including:

- Failure to inform data subjects about the transmission of their personal data for commercial prospecting by telephone;
- The lack of prior consent for commercial prospecting by e-mail and text messages.

Organisations have three months to comply.

- c) **Sanction procedure: creation of a simplified procedure for cases that are not very serious or complex**

The CNIL is currently facing an increase in the number of complaints. To overcome this, the Data Protection Act and its implementing decree were amended on [January 24<sup>th</sup>, 2022](#)<sup>7</sup> and [April 8<sup>th</sup>, 2022](#)<sup>8</sup> to introduce a simplified sanction procedure.

From now on, the CNIL may direct cases considered to be of little complexity or seriousness towards a simplified procedure. This procedure is similar to the ordinary sanction procedure, with the difference that the chairman of the restricted panel decides alone, and that no public session is organised. The sanctions that will be imposed will be limited to a call to order, a fine of up to €20,000 or an injunction subject to a maximum fine of €100 per day of delay.

- d) **Storage: the CJEU reiterates the ban on the general and indiscriminate retention of traffic and location data to fight crime**

The ECJ confirms in a [judgment](#) delivered on April 5<sup>th</sup>, 2022<sup>9</sup> its case law<sup>10</sup> on the prohibition of general and indiscriminate retention of traffic and location data relating to electronic communications for the purpose of combating serious crime.

Indeed, as these data may reveal information on a significant number of aspects of the private life of the persons concerned, their storage constitutes an infringement of privacy.

The Court recalls that the objective of combating crime cannot justify the necessity of such a generalised and undifferentiated storage measure and that it is for the Member States to reconcile the legitimate interests and rights involved.

The Court recalls that it is possible for Member States to provide for certain types of storage under conditions, such as:

- Rapid and/or targeted storage of traffic and location data;
- General and undifferentiated storage of IP addresses assigned to the source of a connection or data relating to the civil identity of users of electronic communications.

#### 4. MEDIA, ENTERTAINMENT AND ADVERTISING

- a) **Press: ECJ rules that a journalist may disclose inside information necessary for his or her work**

The ECJ issued a [judgment](#) on March 15<sup>th</sup>, 2022<sup>11</sup> in which it considers that a financial journalist may disclose inside information where this is necessary to carry out his or her activity and where it respects the principle of proportionality.

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<sup>7</sup> French law No. 2022-52 of January 24<sup>th</sup>, 2022 on criminal responsibility and internal security (1), Article 33.

<sup>8</sup> French decree n°2022-517 of April 8<sup>th</sup>, 2022 amending decree n°2019-536 of May 29<sup>th</sup>, 2019 taken for the application of law n°78-17 of January 6<sup>th</sup>, 1978 relating to information technology, files and freedoms.

<sup>9</sup> CJEU, April 5<sup>th</sup>, 2022, C-140/20, G.D. v Commissioner of the Garda Síochána and others.

<sup>10</sup> CJEU, October 6<sup>th</sup>, 2020, C-623/17, C-511/18, C-512/18 and C-520/18.

<sup>11</sup> CJEU, March 15<sup>th</sup>, 2022, C-302/20, M.A v. Autorité des marchés financiers.

Inside information is defined by Article 621-1 of the General Regulation of the Autorité des marchés financiers as "*precise information which has not been made public, which relates, directly or indirectly, to one or more issuers of financial instruments, or to one or more financial instruments, and which, if it were made public, would be likely to have a significant influence on the price of the financial instruments concerned or on the price of related financial instruments*".

A journalist had published an article reporting rumours of takeover bids for a company's shares.

**b) Advertising: the French Autorité Nationale des Jeux requests for the first time the withdrawal of an online advertisement**

**Reminder:** in order to prevent excessive gambling addiction and to ensure the protection of minors, the National Gaming Authority (NGA) can require the withdrawal of a commercial communication.

On February 23<sup>rd</sup>, 2022, the NGA published guidelines on the interpretation of the rules governing the content of commercial communications for gambling.

Implementing its measures, the NGA , in a decision dated March 17<sup>th</sup>, 2022<sup>12</sup>, ordered Winamax to withdraw an advertisement entitled "Everything for mum". The ANJ considered that this commercial, which included symbols of social climbing, violated Winamax's legal obligation to "*prevent excessive or pathological gambling*".

The operator has four weeks from the notification of the decision to withdraw the advertisement.

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<sup>12</sup> National Gaming Authority, March 17th, 2022, Decision No. 2022-073.