

Newsletter IP/IT/Data – May-June 2022



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Steering Legal IP / IT / Data Department presents legal news that caught its attention in May-June 2022 in the following areas: Intellectual Property (1), Technology (2), Data Protection (3), Media, Entertainment and Advertising (4). Enjoy your reading!

1. INTELLECTUAL PROPERTY

a) TRADEMARKS REVOCATION: Apple loses EU trademarks for "*Think Different*" slogan following judicial battle with Swatch

In a judgment of June 8, 2022¹, the European General Court dismissed Apple's appeal against the EUIPO's decision to revoke its "*Think Different*" European trademarks.

From 1997 to 2002, Apple used the slogan "*Think Different*" in its marketing campaigns. This sign was registered as an EU trademark in 1997. Further registrations were made in 1998 and 2005 to extend the categories of goods protected by the mark.

In 2016, Swatch applied to the EUIPO for revocation of the three registered trademarks. Swatch uses the expression "*Tick Different*" in its own marketing campaigns. According to the watchmaker, Apple had not used the "*Think Different*" mark for five years.

In 2018, the EUIPO had admitted Swatch requests and revoked the contested marks. In upholding this decision, the EU General Court found that "*Think Different*" had not been put to genuine use in the ten years prior to the filing of Swatch's application for revocation.

b) REFERENCING AND TRADEMARK COUNTERFEIT: Amazon sentenced

By judgment² of June 10, 2022, the Judicial Court of Paris condemned the company Amazon Europe for infringement of the trademark CARRÉ BLANC.

Amazon reproduced the words "*Carré Blanc*" in the title and URL address of pages on its *amazon.fr* website in order to generically designate household linen. The mention of the trademark CARRÉ BLANC thus

¹ [European General Court, June 8, 2022](#) "Apple v. EUIPO", T-26/21 to T-28/21.

² [Judicial Court of Paris, June 10, 2022](#), "CARRÉ BLANC EXPANSION et alii vs/ Amazon EU et alii".

increased the natural referencing and traffic of these pages, even though no authentic products of the brand were offered for sale.

The Court ordered Amazon to pay €15,000 in compensation for moral damages caused by the infringement of the CARRÉ BLANC trademark, together with a prohibition order under penalty and judicial publication. On the other hand, the Court rejected the claim for €150,000 damages for the economic loss alleged by CARRE BLANC, as the plaintiff failed to justify the corresponding quantum.

2. TECHNOLOGIES

a) ARTIFICIAL INTELLIGENCE: European Parliament adopts a resolution

Artificial intelligence is one of the major topics in European law. In particular, the European Commission published a [white paper](#) on 19 February 2020 and a [proposal for a regulation](#) on artificial intelligence on April 21, 2021.

On May 3, 2022³, the European Parliament adopted a resolution on "*artificial intelligence in the digital age*". Noting that artificial intelligence, the "*fourth industrial revolution*", is nonetheless accompanied by ethical and legal concerns, this text makes several recommendations including:

- Strengthening Member States' cooperation in the field of cyber security;
- The creation of a single European data space;
- Consumer protection, for example by giving consumers the right to know if they are interacting with a virtual agent;
- Funding for women-led projects in the digital sector.

b) E-COMMERCE: entry into force of the "Omnibus" directive

Since May 28, 2022, the ordinance of December 22, 2021⁴ transposing the European "Omnibus" directive of November 27, 2019⁵ has come into force.

The new provisions are included in the Consumer Code. They aim to add definitions: online marketplace, online marketplace operator, revision of the notion of commercial practice. They define the new conditions that professionals must respect in terms of misleading commercial practices, unfair terms or contracts concluded at a distance, particularly by digital means, with reinforced sanctions.

c) COPYRIGHT DIRECTIVE: ECJ's validation of Article 17

Article 17 of the Directive of April 17, 2019⁶ on copyright and related rights in the digital single market obliges providers of online content sharing services to control, before its distribution to the public, the content that users wish to upload to their platforms.

In May 2019, Poland brought an action for annulment before the European Court of Justice (ECJ) against the filtering obligation in Article 17, on the grounds that it violated the principles of freedom of expression and information protected by Articles 10 and 11 of the European Convention on Human Rights.

³ [European Parliament resolution of May 3, 2022](#) on artificial intelligence in a digital age (2020/2266(INI)).

⁴ [Ordinance n°2021-1734 of December 22, 2021](#) transposing Directive 2019/2161 of the European Parliament and of the Council of November 27, 2019, on better enforcement and modernisation of Union consumer protection rules.

⁵ [Directive 2019/2161 of the European Parliament and of the Council of 27 November 2019](#) amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards better enforcement and modernisation of EU consumer protection rules.

⁶ [Directive 2019/790 of the European Parliament and of the Council of April 17, 2019](#) on copyright and related rights in the digital single market and amending Directives 96/9/EC and 2001/29/EC.

On April 26, 2022⁷, the ECJ rejected Poland's appeal. The Court thus stated that the obligation to monitor online content is accompanied by the necessary safeguards to ensure that Article 17 is compatible with the freedom of expression and information of the users of the services, and to allow a fair balance with intellectual property law.

d) FACIAL RECOGNITION: the Senate calls for an experimental law

The Senate Law Commission presented a [report](#) on May 10, 2022 on "*Biometric recognition in the public space: 30 proposals to avoid the risk of a surveillance society*".

In the absence of a legal regime, the Senate mission recommends adopting an experimental law to determine the relevant and effective uses of biometric recognition. Indeed, biometric recognition techniques are currently governed exclusively by the law on personal data.

The rapporteurs have established "*red lines*" (or prohibitions that must not be crossed) to be set out in the law, including

- Social rating ;
- Categorisation of individuals on the basis of ethnicity, gender or sexual orientation except in the context of scientific research and subject to appropriate safeguards;
- Emotional analysis;
- Real-time remote biometric surveillance in the public space, for use exclusively by law enforcement agencies.

The cases of use of biometric recognition that could be authorised on an experimental basis would be: the application of artificial intelligence to images from video protection in publicly accessible areas, biometric authentication with a view to secure access control, biometric identification operations *a posteriori* or in real time, as well as use by private actors based on user consent.

3. DATA PROTECTION

a) COOKIE WALLS: the CNIL publishes the first criteria for assessing their legality

The practice of "*cookie walls*" consists of making access to a website conditional on acceptance of the deposit of cookies. In some cases, the site may offer an alternative in the event of refusal of cookies, consisting of the Internet user having to provide a consideration, such as the payment of a sum of money to access the site.

The CNIL has [published](#) criteria for assessing the legality of such practices in order to compensate for the absence on that date of European regulations or the position of the CJEU on the subject:

- The Internet user who refuses to accept the use of cookies must be given a real and fair alternative that does not require him to consent to the use of his data in order to access the website;
- The fee-based alternative to consenting to trackers is not prohibited, but the fee must be reasonable on a case-by-case basis;
- If access to the site is conditional on consent to one or more of the purposes of the trackers, the publisher will have to demonstrate that its cookie wall is limited to those purposes that allow "*fair payment for the service offered*".

⁷ [ECJ, April 26, 2022](#) "Poland v Parliament and Council", C-401/19.

b) STANDARD CONTRACTUAL CLAUSES: publication of a "questions and answers" document by the European Commission

Reminder: on June 4, 2021, the European Commission adopted two sets of standard contractual clauses (SCCs), [one](#) for use between controllers and processors within the European Economic Area, the [other](#) for the transfer of personal data to countries outside the European Union.

On May 25, 2022, the Commission published practical guidance on the use of SCCs in the form of [Q&As](#). They do not constitute legal advice and are provided for general information purposes only.

The document answers 44 questions concerning, among other things, the problems of signing SCCs, their modification, their relationship with other contractual provisions or the functioning of the so-called "docking clause" (the possibility for a third party to be a party to SCCs).

It also contains a specific section on each SCC, including: the scope of application of the SCCs to different data transfer scenarios; the fact that other commercial clauses in the contract (e.g., liability caps or special rules on the allocation of liability) cannot contradict the liability regimes of the SCCs.

c) PERSONAL DATA BREACHES: a consumer association can take legal action without a mandate from a specific person

The ECJ received a preliminary question from the Federal Union of German Consumer Centres and Associations in a dispute with Meta Platforms Ireland (Facebook). The question was whether the GDPR can allow a consumer association to bring an action in the absence of a mandate from a data subject and independently of any breach of a data subject's rights.

On April 28, 2022⁸, the ECJ answered in the affirmative, holding that consumer protection associations may bring representative actions against personal data protection infringements without a mandate and where national legislation so permits.

This is because the association does not represent a particular consumer or group of consumers, but the collective interests of those whose personal data have been processed in a manner contrary to the GDPR.

However, the ECJ specifies that this option must be provided for by the law of the Member State concerned.

d) CONSTITUTIONAL RULING: validity of the requisition of computer and connection data in flagrante delicto investigations

Contrary to the case law of the [ECJ](#), the French [Constitutional Council](#)⁹ declared the system of requisitioning computer and connection data in flagrante delicto investigations to be in conformity with the Constitution.

As a reminder, Articles 60-1 and 60-2 of the Criminal Procedure's code allow the prosecution authorities, in cases of flagrante delicto, to request third parties to communicate data, including "*data from a computer system or processing of nominative data*", without the prior control of a magistrate.

According to the Constitutional Council, these provisions do not violate the right to privacy.

⁸ [ECJ, April 28, 2022](#) "Meta Platforms Ireland Ltd v Bundesverband der Verbraucherzentralen und Verbraucherverbände and others", C-319/20.

⁹ [Constitutional ruling n°2022-993 QPC, May 20, 2022](#).

This system remains fragile because it is contrary to European law.

e) DPO: the CNIL gives formal notice to municipalities to appoint one

In a [decision of](#) May 5, 2022, the CNIL made public the formal notices issued to 22 municipalities, enjoining them to appoint a data protection officer (DPO).

Article 37 of the GDPR requires any "*public authority or public body*" that processes personal data to appoint a DPO, regardless of their size.

The municipalities have four months to comply.

f) CNIL: publication of its annual activity report

The CNIL's 2021 [activity report](#) shows an intensification of solicitations and of its repressive activity. Here are the key points to remember:

- 384 controls were conducted (+55% compared to 2020);
- The main subjects targeted by the controls are health data, cookies and cybersecurity;
- 135 formal notices were issued;
- 214 million (+55% compared to 2020), half of which concerned poor data security;
- 5,037 data breach notifications received (+79% compared to 2020).

g) RGPD: EDPS Guidelines on the calculation of fines published

On 12 May 2022, the European Data Protection Board (EDPB) adopted a first version of the [guidelines](#) for harmonising the calculation of administrative fines. They state, inter alia, that:

- The starting point for the calculation of the fine is determined by three constituent elements: the categorisation of infringements by nature, the gravity of the infringement and the turnover of the undertaking;
- The authorities must consider mitigating or aggravating circumstances, which may increase or decrease the fine;
- The authorities must analyse whether the final amount of the fine is in line with the requirements of effectiveness, deterrence and proportionality; adjustments to the amount may be necessary.

h) CNIL: "questions and answers" can be appealed on grounds of misuse of power

In a decision of April 8, 2022¹⁰, the French Council of State accepted that the "questions and answers" published on the CNIL website can be the subject of an appeal for annulment on the grounds of misuse of power.

In this case, an appeal had been lodged by two professional organisations against a series of thirty-two Q&As on the amending guidelines and the "cookies and other tracers" recommendation published on the CNIL website on March 18, 2021. The appeal was deemed admissible but rejected on the merits.

Reminder: Documents of general scope issued by public authorities may be referred to the judge of misuse of power when they are likely to have significant effects on the rights or situation of persons other than the agents responsible for implementing them. The principle of a challenge by this means to so-called "soft law" administrative acts, likely to have an effect on citizens, is not new and had already been affirmed in

¹⁰ [French Council of State, April 8, 2022](#), n°452668.

two decisions of 2016 relating to a press release of the Autorité des marchés financiers¹¹ and a position of the Autorité de la concurrence¹².

4. MEDIA, ENTERTAINMENT AND ADVERTISING

a) **VIDEOS INVOLVING MINORS UNDER THE AGE OF SIXTEEN:** a decree of April 28, 2022, specifies the conditions

To regulate the commercial exploitation on online platforms of the image of children under the age of sixteen, a French law was adopted on October 19, 2020¹³. Pursuant to Article 1 of this law, Decree No. 2022-727 of April 28, 2022¹⁴ specifies the conditions under which persons may "*direct, produce and distribute videos featuring minors under the age of sixteen on online video-sharing platforms, for profit*".

The decree applies to all children under the age of sixteen who are the main subjects of videos posted on the Internet, such as on YouTube, Instagram or TikTok.

This text specifies that the service provided by the child constitutes work subject to prior administrative authorisation, a medical examination and the deposit of the sums received at the French Caisse des dépôts et consignations, with the children receiving the money when they reach the age of majority.

It also introduces a right to be forgotten at the request of a child who has reached the age of majority. The video broadcasting platform will then have to stop broadcasting the child's image "*as soon as possible*".

b) **ONLINE CONTENT: EU Regulation on the prevention of the dissemination of terrorist content online enters into force**

Since June 7, 2022, hosting service providers are required to comply with the EU Regulation on the prevention of the dissemination of terrorist content online (TCO)¹⁵.

A bill to adapt French law to this regulation has been under discussion in Parliament since January 11, 2022.

BREAKING NEWS: On July 5, 2022, the European Parliament held its final vote on the Digital Markets Act (DMA)¹⁶ and the Digital Services Act (DSA)¹⁷. These texts will be applicable in 2023 and 2024.

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¹¹ French Council of State, March 21, 2016, n°368082.

¹² French Council of State, March 21, 2016, n°390023.

¹³ [French law n°2020-1266 of October 19, 2020](#) aimed at regulating the commercial exploitation of the image of children under the age of sixteen on online platforms.

¹⁴ [Decree n°2022-727](#) of April 28, 2022, on the supervision of the commercial exploitation of the image of children under the age of sixteen on online platforms.

¹⁵ [Regulation \(EU\) 2021/784 of the European Parliament and of the Council of April 29, 2021](#) on addressing the dissemination of terrorist content online.

¹⁶ [Digital Markets Act \(DMA\)](#), proposed regulation of the European Parliament and the European Council on December 15, 2020, on fair and contestable markets in the digital sector.

¹⁷ [Digital Services Act \(DSA\)](#), proposal for a Regulation of the European Parliament and of the European Council on December 15, 2020, on an internal market for digital services.