

## IP/IT/Data Newsletter - July-September 2022

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Steering Legal IP / IT / Data Department presents legal news that caught its attention in July-September 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) **PATENTS: an artificial intelligence cannot be designated as an inventor**

By a decision of December 21, 2021<sup>1</sup> and available since July 6, 2022, the European Patent Office (EPO) confirmed that the inventor named in a patent application must be a human.

The applicant had filed two patent applications with the EPO in 2018 relating to a "*food container*" and "*devices and methods for eliciting increased attention*". The named inventor in those applications was an artificial intelligence that had autonomously generated both inventions.

The EPO considered that, by application of article 81 of the European Patent Convention, the designated inventor must have a legal personality, thus excluding artificial intelligence systems. The designation of an inventor being mandatory under the European Patent Convention, the patent applications were therefore rejected.

#### b) **TRADEMARKS: sanction of a bad faith filing**

On September 7, 2022<sup>2</sup>, the General Court of the European Union (EGC) rendered a judgment sanctioning the practice of "*trademark trolls*". This phenomenon consists of registering a trademark without any intention of using it but only to be able to oppose it to third parties and profit from it.

In the present case, the trademark "MONSOON" was filed with the EUIPO in 2011 in classes 12, 28 and 36. It was then subject to several transfers of ownership to different companies, all represented by the same person. In 2018, the owner of the trademark attacked other trademarks with the term "MONSOON" and succeeded in Germany in obtaining a ban on their use.

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<sup>1</sup> [European Patent Office, Legal Board of Appeal, December 21, 2021](#), J 0008/20.

<sup>2</sup> [General Court of the European Union, September 7, 2022](#), "Segimerus Ltd v. EUIPO", T-627/21.

At the end of 2018, a company finally filed an application for invalidity of the trademark "MONSOON" with the EUIPO. The latter considering that the trademark had been filed in bad faith, granted the application. Upon appeal, the EGC confirmed the EUIPO's decision.

To rule on the invalidity of the MONSOON trademark, the EGC characterized the applicant's bad faith using several criteria: the challenged trademark was the *"last link in a chain of applications for national trademarks, which have been filed, every six months since 2006, alternating between Germany and Austria"*; the various filings were considered invalid for non-payment of fees; and the trademarks were not examined by the competent offices.

In upholding the invalidity of the trademark, the EGC concluded that the applicant's actions were only intended to give it a blocking position by monopolizing the sign MONSOON and artificially extending the priority period.

**c) COUNTERFEIT OF DRAWINGS: absence of the website host's responsibility for an infringing image**

In a decision dated September 15, 2022<sup>3</sup>, the Marseilles Court of Justice refused to impose liability on a platform that hosted an infringing photomontage.

This photomontage, which included two logos protected as designs registered with the French national intellectual property office, had been published by an artist on an online image platform. In 2019, the owner of the logos had infringement seizures carried out at the home of the author of the photomontage and at the premises of the platform. The latter proceeded to remove the content as soon as it was informed of the dispute.

The Court considered that the host of the photomontage could not be held liable pursuant to article [6-I-2 of the law for confidence in the digital](#) economy of June 21, 2004. Indeed, insofar as the applicant had not notified the host of the infringement before proceeding with the seizure, it could not have been aware of the illicit nature of the published content. According to the Court, the applicant should have sent a message or a registered letter to the host to bring to its attention the litigious facts.

## **2. TECHNOLOGY**

**a) DIGITAL PRODUCTS: new regulations amending the Consumer Code**

**Reminder:** The ordinance<sup>4</sup> of September 29, 2021, on the legal guarantee of conformity for goods, digital content and digital services, transposed into French law the European directives [2019/770](#) and [2019/771](#) of May 20, 2019. This text has reworked several provisions of the Consumer Code to thoroughly modify the legal guarantee of conformity and strengthen the protection of consumers of digital products.

A decree<sup>5</sup> implementing this ordinance was promulgated on June 29, 2022 and comes into force on October 1, 2022. It adapts the regulatory provisions of the French Consumer Code.

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<sup>3</sup> [Marseilles Court of Justice, September 15, 2022](#), "M.X c/ M.Y & Art Majeur".

<sup>4</sup> [Ordinance no. 2021-1247 of September 29, 2021](#) on the legal guarantee of conformity for goods, digital content and digital services.

<sup>5</sup> [Decree no. 2022-946 of June 29, 2022](#), on the legal guarantee of conformity for goods, digital content and digital services.

First, it restructures the general pre-contractual information obligation. Secondly, it provides for new provisions concerning the terms of the legal guarantee of conformity. This is extended to all digital content and services from January 1, 2022: mobile applications, video-on-demand services, subscriptions to a digital channel or digital radio, and the purchase of an online video game. The decree indicates the information relating to the guarantee that must be specified in the general conditions.

➡ General terms and conditions and all consumer contracts for digital goods, content and services must therefore be amended to incorporate this new warranty information.

#### **b) ONLINE CONTENTS: promulgation of the French law transposing the "TCO" regulation**

The law<sup>6</sup> transposing into France the European regulation on the prevention of the dissemination of terrorist content online (TCO) of April 29, 2021<sup>7</sup>, applicable since June 7, 2022, was enacted on August 16, 2022. It adapts French law to ensure the implementation of the rules on the removal of terrorist content and to prevent radicalization.

This text provides, among other things, for the removal of online terrorist content within one hour. In a decision of August 13, 2022<sup>8</sup>, the Constitutional Council concluded that the provisions of the law were consistent with the Constitution. This decision contrasts with the one rendered on June 18, 2020, concerning the examination of the Avia law, in which the Council had censured such an obligation to remove terrorist content within one hour.

The text also gives national authorities the possibility of issuing withdrawal or blocking injunctions. It lists the competent authority in France that can issue them (OCLCTIC), as well as the authority that must receive them and that is responsible for investigating cross-border injunctions (ARCOM). It also specifies the criminal, administrative and financial penalties incurred by hosts who do not comply with the obligation to remove or block content or who do not inform the authorities of terrorist content "*presenting an imminent threat to life*" or announcing a planned attack.

#### **c) CONNECTED OBJECTS: European Commission proposes new legislative framework**

On September 15, 2022, the European Commission presented a text proposal<sup>9</sup> on cybersecurity applicable to connected objects.

This text proposal had been announced in 2021 following the increase in the number of cyberattacks during the Covid-19 crisis. It aims to strengthen the protection of consumers and businesses when using connected objects for which the security features would not be sufficient.

This text will apply to all products connected directly or indirectly to another device or network. In particular, it will ensure that:

- Manufacturers of digital products placed on the EU market remain responsible for cybersecurity throughout the product's lifecycle.
- Transparency on software and hardware security is improved.

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<sup>6</sup> [Act no. 2022-1159 of August 16, 2022](#), containing various provisions for adapting to European Union law on the prevention of the dissemination of terrorist content online.

<sup>7</sup> [Regulation \(EU\) 2021/784 of the European Parliament and of the Council of April 29, 2021](#) on combating the dissemination of terrorist content online.

<sup>8</sup> [Constitutional Council, August 13, 2022](#), no. 2022-841 DC.

<sup>9</sup> [Proposed cyber resilience legislation, September 15, 2022](#).

- Consumers and business users of connected objects are provided with better protection.

It foresees that the companies concerned will have to obtain certificates attesting that they meet the new European requirements in terms of cyber security. Companies that fail to comply with the regulation may be fined up to 15 million euros or 2.5% of their worldwide turnover.

### 3. PERSONAL DATA

#### a) SENSITIVE DATA: the CJEU extends the possibilities of data qualification as "sensitive"

On August 1, 2022, the Court of Justice of the European Union (CJEU)<sup>10</sup> ruling on a preliminary question submitted by a Lithuanian court, considered that it was possible to deduce from simple personal data, information analyzed as sensitive within the meaning of the GDPR.

The referral to the CJEU followed a Lithuanian case involving a national anti-corruption law requiring certain public officials to make a "declaration of private interests". This declaration involved entering information about relatives and acquaintances to analyze any possible conflict of interest. One of the questions posed to the CJEU was whether processing of personal data that may indirectly disclose the political opinions, trade union membership or sexual orientation of a natural person constitutes processing of special categories of personal data.

In response, the CJEU points out that the following must also be considered as processing of sensitive data *"Data that indirectly reveals, by means of an intellectual operation of deduction or cross-checking, information of this nature"*.

The scope of this ruling is consequential since it extends the possibilities of qualification as "sensitive" data and a fortiori the prohibition of their processing and the obligation, if necessary, to carry out an impact assessment (PIA).

#### b) GDPR VIOLATION: record fine for Instagram

In a decision dated September 2, 2022<sup>11</sup>, the Irish Data Protection Commission (DPC) fined Meta Platforms Ireland Limited (Instagram) €405 million for violating Article 6 of the GDPR. This follows the [binding decision](#) issued by the EDPS on July 28, 2022 concluding that Instagram was processing the personal data of minors in a manner contrary to Article 6-1 of the GDPR.

In this case, the email addresses and phone numbers of professional accounts on Instagram are, by default, public. The contact information of minors who have a professional account is therefore also open by default to all users.

To justify this practice, Meta relied on the fact that this data processing was necessary for the performance of a contract, as well as for the legitimate interests it was pursuing. However, the CPD found that there was no basis for Meta to conclude that the processing was necessary for the performance of the contract and that it could not rely on Article 6-1(b) as a legal basis for such processing, but also that it

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<sup>10</sup> [CJEU, August 1, 2022](#) "Vyriausioji tarnybinės etikos komisija", C-184/20.

<sup>11</sup> [Data Protection Commission, September 2, 2022](#), IN-20-7-4.

did not meet the requirements of Article 6-1(f) since the processing did not pass the balancing test required to characterize the legitimate interest.

This penalty is the second largest fine since the RGPD came into force.

#### c) **COOKIES: Injunction against Facebook closed**

**Reminder:** In a [decision](#) rendered on December 31, 2021, the CNIL's restricted panel fined Facebook Ireland Limited 60 million euros and ordered it, within a period of three months, to allow users of the site "facebook.com" located in France to refuse cookies placed on their terminal as easily as to accept them.

On July 11, 2022<sup>12</sup>, given Facebook's efforts within the time limit, the CNIL decided to terminate the injunction. Indeed, Facebook has implemented an opt-out button labeled "Only allow essential cookies" above the opt-in button labeled "Allow essential and optional cookies".

#### d) **TAX FRAUD: validation by the Council of State of the experimental system for collecting freely accessible data**

**Reminder:** In order to fight against tax evasion and illegal sales, the [2020 Finance Act](#) authorized, on an experimental basis and for a period of three years, a system for the collection and automated exploitation of content freely accessible on the websites of online platform operators. The tax authorities and the customs and excise authorities were responsible for implementing this system.

The Conseil d'Etat had been seized with an appeal for annulment on the grounds of excess of power against this system, which was considered disproportionate and invasive of privacy.

In a decision<sup>13</sup> rendered on July 22, 2022, the Council of State rejected the appeal, ruling that "*the authorized collection of data can only concern content that (...) is freely accessible (...) and relates to the person who deliberately disclosed it*". Moreover, the technical implementation of this device does not allow "*contrary to what is claimed, a generalized and undifferentiated collection of personal data during the learning and design phase*".

#### e) **PERSONAL DATA: condemnation of France by the ECHR**

In a ruling handed down on September 8, 2022<sup>14</sup>, the European Court of Human Rights (ECHR) condemned France for collecting and storing personal data based on assumptions about the sexual orientation of a candidate for blood donation.

In 2004, the plaintiff refused to answer questions about his sexual orientation during a medical interview prior to donating blood. After being refused a second blood donation in 2006, he filed a complaint for discrimination. In 2015, his complaint resulted in a dismissal by the Court of Cassation. Then in 2017, the Council of State rejected his appeal for excess of power against the decrees setting the selection criteria for blood donors.

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<sup>12</sup> [Deliberation of the restricted formation no. SAN-2022-016 of July 11, 2022](#) relating to the injunction pronounced against the company FACEBOOK IRELAND LIMITED by deliberation no. 2021-024 of December 31, 2021.

<sup>13</sup> [Council of State, July 22, 2022](#), no. 451653.

<sup>14</sup> [ECHR "Drelon v/ France", September 8, 2022](#), no. 3153/16 and 27758/18.

Before the ECHR, the plaintiff argued that data reflecting his alleged sexual orientation was collected and stored by the Etablissement Français du Sang under conditions contrary to Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) proclaiming the right to privacy.

The ECHR thus ruled that the data collected had no proven factual basis and that the excessive length of time they were kept made it possible to use them repeatedly against the applicant.

For clarification, an [order](#) dated January 11, 2022 removed the ban on homosexual men donating blood. References to sexual orientation in pre-donation questionnaires have since been removed.

**f) CONNECTION DATA: the Court of Cassation aligns with the case law of the CJEU on criminal investigations**

**Reminder:** Last May, the [Constitutional Council](#) declared the system of requisitioning computer data and connections in flagrante delicto investigations to be in conformity with the Constitution, contrary to the case law of the [CJEU](#).

In four rulings<sup>15</sup> of July 12, 2022, the Court of Cassation aligned itself with European jurisprudence. The criminal chamber thus ruled that the regimes relating to access to connection data in the context of the preliminary investigation and the investigation in flagrante delicto are contrary to European Union law.

According to the [CJEU](#), in a "La Quadrature du net" ruling, such data is "likely to reveal information about a significant number of aspects of the private lives of the persons concerned, including sensitive information (...). Taken as a whole, such data may make it possible to draw very precise conclusions about the private lives of the persons whose data have been stored, such as their daily habits, places of permanent or temporary residence, daily or other movements, activities carried out, social relations of such persons and the social circles frequented by them."

In a judgment of September 20, 2022, the CJEU also recalled that European Union law opposes the generalized and undifferentiated retention of personal traffic and location data, except in the case of a serious threat to national security<sup>16</sup>.

#### **4. MEDIA, ENTERTAINMENT AND ADVERTISING**

**a) MEDIA: TF1 and M6 merger project abandoned**

On September 16, 2022, after several months of proceedings before the French Competition Authority (Autorité de la concurrence), TF1 and M6 abandoned their merger project<sup>17</sup> in view of the concessions demanded by the Authority. The commitments offered by the parties were not sufficient to counterbalance the competitive risks identified by the French Competition Authority.

The proposed merger of the activities of TF1 and M6, the two main French television groups, was announced in May 2021. This operation consisted of the Bouygues group taking exclusive control of the new entity that would have resulted from the merger of the assets of the TF1 group (owned by Bouygues) and the Métropole Télévision group.

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<sup>15</sup> Criminal Chamber, July 12, 2022, no. 21-83.[710](#), no. 21-83.[820](#), no. 21-84.[096](#) and no. 20-86.[652](#).

<sup>16</sup> CJEU, September 20, 2022, no. C-793/19 and no. C-794/19, "Bundesrepublik Deutschland v/ SpaceNet AG, Telekom Deutschland GmbH".

<sup>17</sup> [Competition Authority press release](#), September 16, 2022.

Given the significant revenues and market shares held by the two entities, the completion of the merger was subject to prior merger control by the French Competition Authority. It then had to be authorized by the French regulatory authority for audiovisual and digital communication (Arcom).

However, the French Competition Authority identified major competitive risks, such as an increase in the price of advertising space sold by the parties. It suggested at least the sale of the TF1 channel or the M6 channel to allow the transaction to be authorized.

**b) ONLINE NEWS: Google dereferences France Soir website for lack of reliability and quality of information**

In a judgment dated September 6, 2022<sup>18</sup>, the Paris Commercial Court rejected France Soir's claims concerning its dereferencing by Google News.

On February 4, 2021, Google had dereferenced the site "francesoir.fr" from its News and Discovery services, because of publications denying the existence, mortality, and contagiousness of Covid-19.

The terms and conditions of Google News stipulate that content can be dereferenced from the search engine if it does not comply with its conception of the quality and reliability of information. They also prohibit sites that "*contradict scientific or medical consensus*" as well as content that does not indicate the name of the author and the sources.

The Commercial Court rejects France Soir's argument based on freedom of speech and abuse of dominant position by Google. It considers that Google, as the owner of a search engine and a hosting platform (property rights) and as an operator of commercial services (freedom of enterprise), has the right to stipulate in its general terms and conditions the obligations that the user of its service must respect in order to benefit from it.

The YouTube channel and the Ad account of the France Soir website were also removed by Google, but the referencing was maintained on the Google search engine.

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Thanks to Zoé Cassavetti for her contribution.

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<sup>18</sup> [Paris commercial Court, 1<sup>st</sup> ch., September 6, 2022, "France Soir Groupe and Shopper Union France c/ Google France, Google LLC & Google Ireland LTD"](#).