

**Intellectual Property and Information Technologies**



 **Headline**

**Public software source codes are administrative documents to which citizens should have access**

In a decision of March 10th 2016, the Paris Administrative Court ruled that public software source codes are administrative documents which citizens are entitled to access, thereby confirming the opinion of January 8th 2015 of the Commission d'accès aux documents administratifs (CADA – Commission for Access to Administrative Documents) which stated that “ *IT files constituting the requested source code, produced by the general directorate of public finances during the course of its public-service mission, are administrative documents within the meaning of Article 1 of the Act of 1 July 17th 1978.*”

Regarding the different versions of the source code, the Court ruled that each version constitutes a completed administrative document and may be communicated in that form, as there is no legislation or regulations prohibiting access to the source codes of IT programs.

A student asked the general directorate of public finances (French acronym: DGFip) for access to the source code of micro-simulation software for the French socio-tax system, but his request was denied. While the CADA granted the student's request, in response to the administration's resistance, the student filed a claim before the Paris Administrative Court which expressly acknowledged that the source codes were not excluded from the scope of application of the Act of July 17th 1978.

This decision foreshadows the Bill for a Digital Republic, adopted at its first reading by the National Assembly on January 26th 2016, which provides that public data shall be open by default and particularly that source codes which constitute administrative documents that may be disclosed to the public. This nevertheless raises one particular question : will public entities which have invested in creating such software not benefit from any right to protection, not even the protection afforded to trade secrets?

*Paris Administrative Court, March 10th 2016, M. A. / Minister of Finances and Public Accounts.*

**Video-surveillance: a legal entity cannot claim a breach of privacy within the meaning of Article 9 of the French Civil Code**

Although legal entities have notably a right to the protection of their name, their domicile, their



**In brief**

**Entry into force of the Regulation on the Community trade mark**

[Regulation \(EU\) 2015/2424](#) of the



correspondences, their reputation and may be granted protection of their moral rights, only natural persons may claim a breach of privacy within the meaning of Article 9 of the French Civil Code. This was the French Supreme Court's ruling on March 17th 2016.

A company invoked the existence of a manifestly unlawful disturbance resulting from a breach of its privacy, caused by the setting up of a video-surveillance system by residents who recorded its employees' movements at the company's entrance. The company therefore brought summary proceedings seeking the removal of the system and a provisional amount of compensation to redress the harm caused by the breach of its privacy and its moral harm.

While the appellate court's decision upheld the existence of a manifestly unlawful disturbance that should be stopped, the Supreme Court reminded the parties that a legal entity "does not have a private life" and thus refused to grant the claimant's requests.

Of course, the decision would have been different if the company employees had brought the legal action individually on the basis of the French Data Protection Act ("loi Informatique et libertés") of January 6th 1978.

To read the decision, click [here](#).

### Transferring the hosting of a website may characterize a breach of a confidentiality undertaking



In a decision of February 15th 2016, the Paris Commercial Court ordered an IT service provider to pay €100,000 as a contractual penalty for having breached a confidentiality undertaking.

In the scope of a project to revamp its e-commerce website selling furniture, a company entered into several agreements including a non-disclosure agreement whose purpose was to prohibit the service provider from disclosing to third parties the confidential information it received during the course of the project, before or after the signature of the agreement, and for a period of 36 months. The service provider then transferred the hosting of the website to another service provider, without obtaining the customer's authorization, thereby breaching its confidentiality undertaking.

This case shows why it is worth setting-up contractual penalties in a confidentiality undertaking: the Court did not change the amount thereof, even though it was significant.

*Paris Commercial Court, judgment of February 15 2016, Destock Meubles / Blue Acacia*

European Parliament and of the Council amending the Regulation on the Community trade mark entered into force on March 23rd 2016.

OHIM is now called the European Union Intellectual Property Office (EUIPO) and the Community trade mark is now called the European Union trade mark.

Besides adopting new names, the Regulation amends certain provisions regarding the European Union trademark law.

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### Use of a trade mark as decoration: no infringement

In a decision of March 17th 2016, the Douai Court of Appeals dismissed an infringement claim brought by the "P'TITES CANAILLES" trademark owner, requesting that a third party be ordered to stop using a "PETITES CANAILLES" sign on a line of children clothes.

As the signs in question were not identical, the Court of Appeals ruled on the likelihood of confusion and found that "the words 'LES P'TITES CANAILLES', commonly and frequently used with respect to early childhood, [...] are not used as a trademark but as a decoration which they are a part of." The sign in question indeed featured on the front of the clothes, and not on the label, which led the Court to find that consumers will not consider these indications as an identity of origin but as a simple decoration. The Court of Appeals therefore dismissed the claimant's claims on the basis of infringement but also its claims based on unfair competition and held that the claimant had not furnished proof of separate events from those of infringement.

So would an "infringement" line of defence consisting in arguing that the sign is used as a decoration and not as an identity of the origin of the goods and services be effective? Such an approach should be taken carefully because it is quite unusual to rule that a trademark's function of identifying origins depends on where its position on the object.

*Douai Court of Appeals, Ch. 1 sect. 2, March 17th 2016, no. 15/01931*

## Unfair competition and/or free-riding actions: an interesting complement to infringement actions



In a judgment of March 14th 2016, the Paris Commercial Court ordered a platform selling diamonds online to pay one of its competitors an amount of €34,000 on the basis of unfair competition, as well as the publication of the decision.

A company operated a platform selling investment diamonds online and also offering incidental services such as the deposit of the diamonds in a safe, home delivery or an investment guide aimed at assisting customers in estimating their value. The same year, a competitor also developed an online platform for selling investment diamonds, which the first company considered was similar to its own. The company therefore sued its competitor before the Paris Commercial Court, invoking acts of unfair competition and free riding.

The Court granted these claims, holding that the platform in question contained “numerous identical copies of [the claimant’s] website for the following content: marketing presentation of investment diamonds advantages, the price policy, a warning on high-risk investments and money laundering provisions, the investment guide.” These similarities created a likelihood of confusion for average users, and the defendant had unduly benefited from its competitor’s investment and know-how.

Imitation can be an act of unfair competition if the imitated object is not protected by intellectual property rights (this was not invoked in this case) and its consequences may also constitute free-riding: these actions therefore have just as much economic interest as an infringement action.

To read the decision, click [here](#).

## An advertiser whose service provider disregards instructions to remove all references to the trade mark is not guilty of trade mark infringement



Daimler (Mercedes Benz’s parent company) had entered into an agreement with company X whereby it was authorised to describe itself as an “authorised Mercedes-Benz dealer” in its advertisements. While the agreement was still in force, X had ordered from a service provider the publication of an advertisement stating that the company was an authorised Mercedes-Benz dealer. Following the termination of the agreement, X asked the service provider to modify the advertising so that it no longer contained the reference of a Mercedes-Benz authorised dealer, but was not successful in doing so. Online advertisements containing this reference continued to be published on the Internet. It was in this context that Daimler sued for infringement of the Mercedes-Benz trademark.

On a request for a preliminary ruling, the CJEU ruled that “Article 5(1)(a) and (b) of Directive 2008/95 must be interpreted as meaning that a third party, who is

## (CNCPI) (French patent attorneys association) adopts in March 2016 modified Internal Rules forming a Code of Professional Ethics:

voted at the General Assembly, it should be approved by a decision of the supervisory ministry during the course of 2016.

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## “US-EU Privacy Shield”: implementation expected in June 2016

The European Commissioner for Digital Economy and Society declared that the agreement on the data transfers to the USA is expected to enter into force in June 2016.

The agreement will be evaluated in the following weeks by the data protection authorities of the Member States and they should publish a non-binding opinion on the agreement in April 2016.

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## Medef’s digital congress: several actions launched to promote the French economy’s conversion to the digital era

At the closing of the Medef’s digital congress held on May 16th-17th 2016, the Medef’s vice-president announced the launch of several actions to promote the French economy’s conversion to the digital era.

This will include, in particular, launching a working group on block chains, the organization of a conference on digital sovereignty or the launch of a study on new skills and new occupations created by the digital revolution.

named in an advertisement on a website, which contains a identical or similar sign to a trademark in such a way that it gives the impression that there is a commercial relationship between him and the owner of the trademark, does not make a use of that sign that may be prohibited by that owner, when that advertisement has not been put by that third party or on his behalf or, if that advertisement has been put by that third party or on his behalf with the consent of the owner, when that third party has expressly requested the operator of that website, from whom the third party ordered the advertisement, to remove the advertisement or the reference to the trademark contained therein."

The solution is logical, as it is not reasonably possible to attribute acts of infringement to a person who does not have the power to stop them.

To read the decision, click [here](#).

### **A public officer-inventor's receivables, based on the additional remuneration due for inventions devised during the course of his duties, are time-barred after four years**



Pursuant to Article 1 of the Act of December 31st 1968 on the statute of limitations for receivables against the State, départements, municipalities and public entities: "All receivables which are not paid within four years on the first day of the year following the year during which the rights were acquired (...) are time-barred for the benefit of the State, départements and municipalities. / Receivables against public entities with a public accountant (...) are time-barred, within the same period (...)".

Pursuant to Article 2: " The statute of limitations is tolled by: / Any claim for payment or written claim sent by a creditor to the administrative authority, providing that the claim or request relates to the triggering factor, the existence, amount or payment of the receivable, whereas the administrative entity against whom the action is brought is not eventually the entity which will bear the payment (...)".

When an indemnification dispute arises between a public officer and the administration. Moreover when the harm for which compensation is sought results from the illegality of an administrative decision, the factor triggering the receivable must be attached to the year during which this decision was duly notified.

Mr. A...claimed indemnification for the harm he considered he had sustained as a result of the decision – the legality he was challenging – whereby the chief authorising officer of the entity had determined, on the basis of de Article R. 611-14-1 (III) of the French Intellectual Property Code, the terms and conditions of the allocation between the various co-inventors of the additional remuneration due on the basis of the profit-sharing.

The Administrative Court of Appeals upheld the public entity's plea of the statute of limitations without determining whether this decision had been duly

notified to the claimant or on what date such a notification was made, and in doing so, the French Supreme Administrative Court considered that the Administrative Court of Appeals had committed an error of law.

In the case of an inventor (or co-inventor, like in this case) employed by a public entity, the statute of limitations and the tolling of the statute of limitations for claims for additional remuneration (provided by Articles L. 611-7 of the French Intellectual Property Code and Articles R. 611-14-1 et seq. of the French Intellectual Property Code) therefore escape the five-year statute of limitations under Article 2224 of the French Civil Code civil and the civil law provisions regarding the tolling of such statute of limitations.

*Supreme Administrative Court, February 10th 2016, no. 369797*

**An employee-creator is not guilty of theft or abuse of trust when he keeps in his possession drawings and copies of his employer's creations without using them for different purposes than those for which they were handed over to him**



Mr. X... was charged with having, while he was employed as jewellery worker by V., misappropriated several hundred original drawings, copies and photocopies of drawings, some of which he had created and others which had been handed over by his employer with the purpose to returning them or using them for the purpose of his salaried activity.

The accused was acquitted of the counts of theft and abuse of trust and the parties' civil claims for damages were dismissed, the Court of Appeals highlighting that the accused may have believed he owned the drawings that he had signed and that there was no proof that he had used the others for different purposes than those for which they had been given to him . These documents had not been handed over to him for any specific use or purpose. The Supreme Court has now upheld the Court of Appeals' ruling.

Claims of theft and abuse of trust are often used by companies as a way to protect the company's intangible assets and to prevent employees from transferring them to third parties. In the present case, in the absence of specific instructions regarding the possession of these documents relating to the company's creations, the materiality of the accusations was not evidenced.

To read the decision, click [here](#).

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