

Intellectual Property and Information Technologies



Headline

Bill for a Digital Republic: new version

On 6 November, after three weeks of consultation, the Bill for a Digital Republic was presented by the Secretary of State in charge of Digital Affairs.

Several modifications have been made to the initial text.

Under the new Article 2, in cases where the administration makes an individual decision on the basis of an algorithmic processing, the administration would be required to provide the rules defining such processing and the main characteristics of its implementation to any citizen who so requests. This would apply, for example, to any decisions relating to tax rates.

The new Article 5 provides that Articles L 342-1 and L 342-2 of the Intellectual Property Code will not preclude the reuse of the content of the databases that administrations are required to publish pursuant to Article L 321-1 of the Code on relations between the public and the administration. Under this draft Article, a public person would no longer be able to invoke the sui generis database right for purposes of opposing the reuse of its data.

Considering that the reuse of public data is carried out under different, sometimes incompatible, licenses, the new Article 16 of the Bill provides for the possibility for the State to establish a framework of standard licenses used by the administration. These licenses will be set out in a list to be established by decree.

The provisions relating to the common informational domain have been removed. The Government will, however, appoint a working group to come up with "a satisfactory wording."

Lastly, the new Article 38 purports to set up a specific legal framework relating to e-sport. The aim is for the Government to regulate video game competitions which are now reaching a massive audience and generating substantial revenue, particularly through an ever-growing number of sponsors. Until now, this practice has been shrouded in legal uncertainty and could be considered, under the Internal Security Code, as gambling.

The Bill is now under Council of State review before being presented, on 9 December, to the Council of Ministers. Fidal will provide further details on the implications of this text in an upcoming communication.



It seems that the Paris District Court has decided to discourage any retired inventors whose memory may still be fresh. In a case heard on 8 October, a former L'Oréal manager requested information from his former employer for no less than 507 inventions made between 1972 and the 2000s, so that he could assess the fairness of the additional remuneration he had earned for most of them (he had nevertheless earned over one million euros on this basis). In other words, he claimed that L'Oréal had breached its duty to provide information related to the payment of such remuneration because it did not specify, at the time of the payment, either the patents to which the remuneration applied or the methods of its calculation. He nonetheless claimed a provisional sum of €38 million. The Court dismissed the claims and took the rare decision of ordering the former employee to pay compensation of €50,000 under Article 700 of the French Civil Procedure Code.

The line of attack used – basing the claims on the employer's duty to inform – may seem new but was probably devised so as to avoid the statute of limitations on direct claims for additional remuneration. We know that since the Act of 6 August 2015 "*The employer shall inform the employee who made the invention whenever an application is filed for an industrial property title for that invention and whenever such title is granted, as the case may be.*" The Court rightly acknowledged that such a duty could have existed before this change in legislation, particularly under collective bargaining agreements. However, such claims are held inadmissible or time-barred. Requests for information concerning inventions made before the Act of 26 November 1990 was passed are deemed inadmissible: if there is no right to remuneration, there cannot be any duty to inform. Pursuant to the provisions of Article 2224 of the French Civil Code, requests relating to later inventions are time-barred: "*actions to recover moveable property or actions to enforce rights in personam are time-barred 5 years after the date when the holder of a right knew or should have known about the facts allowing him to exercise that right*". According to the Court "the duties performed by the employee in the company meant he could find out about the element(s) himself" so as to solicit the information in question if necessary (proof was furnished that he had received the additional remuneration at the same time). The claimant was one of the senior managers in the company's R&D department.

In this case, the employer had the idea of systematically regularizing, from 2002 onwards, the situation of employee inventors (which explains the payments made to the claimant), for prior inventions, and of setting up a "charter" for subsequent inventions specifying the terms and conditions of the additional remuneration. This policy is paying off: it has allowed the employer to block these late claims which are like a Damocles' sword hanging over companies.

Paris District Court, 8 October 2015, Case No. 13/13715, G. v. L'Oréal

Seizure of ingringing goods report: a bailiff cannot delegate his power to make the findings to an expert accompanying him

Even though a bailiff carrying out a seizure of infringing goods may have been authorized, by an order, to be assisted by an expert, said bailiff cannot literally and indiscriminately reiterate the indications provided by such expert during the examination of the allegedly infringing goods. The bailiff cannot delegate, to the expert, his powers to make and report his findings.

By appropriating the findings dictated by the expert, the bailiff took them to be true until proved otherwise, however they only had the value of a simple witness statement, and the Court of Appeals could infer that the descriptive part of the report was flawed.

French Supreme Court, Commercial Chamber, 29 September 2015, Case No. 14-12430

Invalidation of the Safe Harbor: what impact?

Further to the judgment of the Court of Justice of the European Union (CJEU) of 6 October 2015 invalidating the Safe Harbor agreement, the G29 met on 15 October 2015 to analyze the consequences of this decision.

The Group asked the various European institutions and Governments to find legal and technical solutions before 31 January 2016.

The Member States have also been asked to initiate discussions with the US authorities in order to find political, legal and technical solutions to transfer data to the US territory in accordance with fundamental rights. An inter-governmental agreement offering sufficient guarantees to European citizens is therefore not to be ruled out.

In the meantime, the G29 confirms that data transfers from the EU to the USA are illegal if their sole legal basis is the Safe Harbor. Companies must therefore use other transfer tools such as BCR (Binding Corporate Rules) and standard contractual clauses especially as the European supervisory authorities have stated that they still reserved the possibility of verifying certain transfers and imposing penalties if

Law applicable to data controllers: details about the criteria for the application of national law



In a judgment of 1 October 2015, the Court of Justice of the European Union (CJEU) re-examined the criteria for the application of the national law to a data controller.

Pursuant to Article 4 (1) of Directive 95/46/EC of 24 October 1995, the law applicable to a data controller may be the law of another Member State than the State in which the data controller is registered, provided it exercises an effective and real activity through stable arrangements in that territory.

The CJEU indicates that to determine the existence of such an establishment, it is necessary to take account of the fact “(i) that the activity of the controller in respect of that processing, in the context of which that processing takes place, consists of the running of property dealing websites concerning properties situated in the territory of that Member State and written in that Member State’s language and that it is, as a consequence, mainly or entirely directed at that Member State, and (ii) that that controller has a representative in that Member State, who is responsible for recovering the debts resulting from that activity and for representing the controller in the administrative and judicial proceedings relating to the processing of the data concerned.”

The nationality of the data subjects is not relevant for the purposes of determining the applicable national law.

The Court also provides an important clarification on the powers of a supervisory authority which establishes that the law of another Member State is applicable: such supervisory authority may still carry out investigations and cooperate with its counterpart in the Member State whose law is applicable and request it to “establish an infringement of that law and to impose penalties if that law permits (...)”.

Companies directing activities to Member States via simple websites when they are not registered there or when they do not have physical establishments there must therefore be particularly vigilant as soon as any personal data processing is set up.

Court of Justice of the European Union, judgment of 1 October 2015, C-201/14

Websites with similarities: the existence of free-riding is characterized merely by drawing inspiration from the economic value



Can a website that has no original features be freely reproduced?

In a judgment of 28 September 2015, the Paris Commercial Court held that “the fact that websites resembling the Sound Strategy website exist on the market, or the supposed ordinariness of its concept, do not suffice to demonstrate that no free-riding exists, whereas merely drawing inspiration from the economic

necessary.

For its part, the US Department of Trade announced on 13 October that it was going to continue administering the Safe Harbor Agreement and even continue processing new requests from companies wishing to benefit from said agreement.

The European Parliament adopts the “Telecoms Package

On 27 October 2015, the European Parliament adopted at a second reading the Recommendation on a European single market for electronic communications putting an end to roaming costs.

From June 2017 onwards, telecoms operators will no longer be able to increase the communication costs of their customers travelling within the European Union.

The Recommendation also lays down the principle of net neutrality, a principle prohibiting Internet service providers from promoting or discriminating against certain content depending on their sender or recipient.

At a national level, the Bill for a Digital Republic writes the principle of net neutrality into French law. The French Parliament will therefore have to ensure consistency with the future European legislation which provides in particular exceptions relating to the prohibition of certain content following a court decision or to combat cyber-attacks.

These measures are part of the European Union’s strategy to establish a digital single market.



In brief

French-German Conference at the Elysée or how digitalization can be a driver for growth?

A French-German digital conference was held on 27 October 2015 at the Palais de l’Elysée, in the presence of the Chancellor of the Federal Republic of Germany.

The aim of this conference was namely to examine development opportunities in Europe for startups under the impetus of France and Germany. The issue of the digitalization of industry in France and Germany was also addressed, the main priority being the growth of certain sectors that are still closed, thanks to digitalization.

Trademark infringement by copying the opening sequence of a sign used for a referencing service



To dismiss the claim of infringement of the “Quanta” Community Trade Mark, the Court of Appeals had found that, from a visual and phonetic viewpoint, the signs in question gave a different overall impression of the claimed trademark and that although they shared the same opening sequence “Quanta” they nevertheless formed terms in which the opening sequence was not different from the end sequence and did not seem more distinctive than it, such that they would not be perceived by the consumer as variations of the “Quanta” trademark. The Court of Appeals inferred “insofar as there is no imitation of the trademark, there was no likelihood of confusion over the origin of these signs, notwithstanding “the similarity and/or identity” of the products in question.”

With reference to Article 9, 1, b) of Regulation (EC) No. 40/94 of 20 December 1993 (codified by Regulation (EC) No. 207/2009 of 26 February 2009 on the Community Trade Mark) and L. 713-3 IPC, the Commercial Chamber of the French Supreme Court criticized the Court of Appeals:

“by making this decision, without examining, as it had been invited to do so, whether the use of keywords containing the “Quanta” trademark in their opening sequence, in relation to a referencing service referring the web user, through the display of results pages, to websites promoting similar and identical products to those designated in the trademark registration, was not likely to cause for an average consumer, a likelihood of confusion as to the origin of the products mentioned in the advertisement, the Court of Appeals did not give any legal basis to its decision.”

This decision, as a form of warning, should be added to the numerous decisions on online referencing. On 23 March 2010, the CJEU laid down the principle whereby trademark proprietors may prohibit the use of their trademarks as a keyword for referencing in the AdWords system, if the use does not allow the web user to identify, without any possible likelihood of confusion, the commercial origin of the goods (CJEU, 23 March 2010, case C-236/08 and C-238/08, Google France Sarl v. Louis Vuitton Malletier).

French Supreme Court, Commercial Chamber, 29 September 2015, Case No. 14-14572

An informed user may be a general consumer... but with particular vigilance and a relatively high level of attention



In a case relating to a single-command bathroom tap model, OHIM’s Board of Appeals, whose decision was referred to the General Court, had considered, for the review of the specific character of the model, that the informed user was a general consumer who was choosing taps for his own residence or who wanted to change taps.

In criticizing this reference, the claimant argued that a general consumer does not become an informed user simply because he chose a tap for his own residence or wanted to change taps. It held that, in accordance with case law, an informed user must show, notably, particular vigilance and a relatively high level of attention as regards single-command tap models. Therefore, in its opinion, comparing an informed user to a general user may result in minimizing, on the one hand, the significant differences which exist between the conflicting designs or models and, on the other hand, their effect on the overall impression produced for the benefit of a general configuration of the conflicting designs or models.

The Court nevertheless validated this undoubtedly clumsy reference by the Board of Appeals while adding an essential detail. In considering that an informed user was a general consumer who was choosing a tap for his own residence or who wanted to change taps, the Board did not exclude that he may show particular vigilance and a relatively high level of attention: "Although it is admittedly true that the Board of Appeals used, in point 38 of the appealed decision, the term "general consumer" in the definition of an informed user, it nevertheless did not intend to refer to a consumer without any knowledge and having a low level of attention. Indeed, as indicated in point 22 above, it specified that such "general consumer" was familiar with basic characteristic features of taps, including bath taps and, on the other hand, it became an informed user by consulting catalogues, visiting manufacturers in the sector, going to their sales outlets or seeking out information on the Internet. Moreover, it is particularly the knowledge of the sector, as a result of the abovementioned actions, that makes the informed user particularly vigilant." The alleged assimilation of the informed user with a general consumer does not therefore lead one to consider that a general consumer would not have particular vigilance and a relatively high level of attention as regards single-command tap models and, as a result, minimize the differences existing between the conflicting designs or models, as well as their effect on the overall impression produced by the designs or models in question.

On a pedagogical note, the General Court recalled the CJEU's well-established interpretation in this respect:

- the status of 'user' implies that the person concerned uses the product in which the design is incorporated, in accordance with the purpose for which that product is intended

- The qualifier 'informed' suggests in addition that, without being a designer or a technical expert, the user is familiar with the various designs which exist in the sector concerned, possesses a certain degree of knowledge with regard to the features which those designs normally include, and, as a result of his interest in the products concerned, shows a relatively high degree of attention when he uses them."

**General Court (Fifth Chamber), 29 October 2015,
T334/14**

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