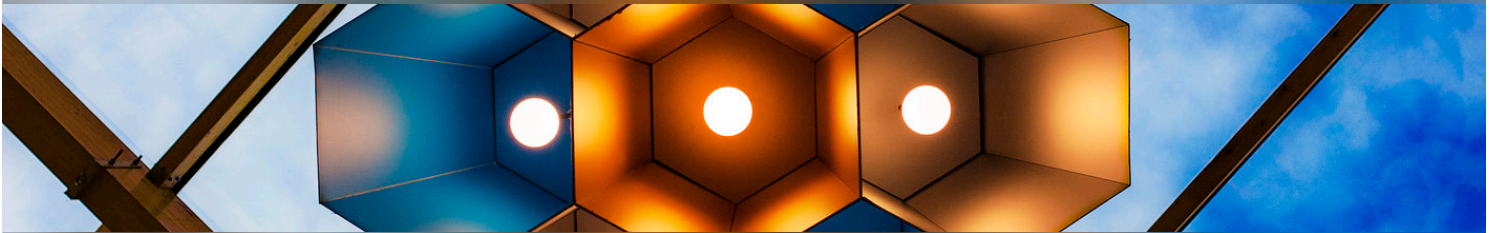


C L I F F O R D
C H A N C E

25TH EDITION



GLOBAL INTELLECTUAL PROPERTY NEWSLETTER
IP TOPICS FROM AROUND THE GLOBE
ISSUE 03/20

25TH EDITION

Introduction

Welcome to the 25th Edition of the Clifford Chance Global IP Newsletter. In this first edition of 2020, we would like to present current trends as well as particularly relevant challenges in the world of IP law around the globe.

We will start with **the evolution of IP protection for artificial intelligence in France**, particularly by discussing the patentability of AI systems' inventions and the challenges regarding the protection of artificially created works in France.

Back to trademarks, our London office analyzes a recent decision of the Court of Justice of the European Union regarding the **clarification of grounds for EU and national trade marks' invalidity**. Our colleagues in Barcelona take a look at a decision dated 3 October 2019 handed down by the Supreme Court of Spain holding that the financial compensation foreseen in **Art. 43.5 of Spanish Trade Mark Act** does not apply in any case.

Our Düsseldorf team provides you with an update on the **use of cookies**, specifically analyzing the liability risks in case of violations of the relevant data protection laws against the background of **the increasingly strict requirements for the use of cookies** as set out by ECJ case law.

Further, this edition talks about significant modifications of the French IP framework the so-called **PACTE law**, a new law on Business Growth and Transformation. In China, we explore two recent efforts to strengthen the process for **resolving patent disputes**. Remaining in the world of patents, we will also shed some light on the most relevant changes regarding **the first discussion draft on the planned reform of the German Patent Act** recently issued by the ministry of Justice and Consumer Protection, before outlining the legal implications of **a new special law proposed by the Italian government with respect to ambush marketing** which is currently still subject to discussion and approval by the Italian parliament.

Finally, turning to the world of social media, the last article of this edition concerns the **higher legal standards applicable to influencers** set by the Spanish self-regulation body for advertising disputes, and their impact on Spanish advertising law.

As always, we hope you enjoy reading this edition. We look forward to receiving your feedback.

Your Global CC IP Team

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AI will have significant repercussions on intellectual property law, as AI can perform tasks that, until now, could only be undertaken by humans, especially inventive activities. This article examines the challenges of the protection of artificially created works/inventions in France, and argues that there is a legal framework under French law available to protect some inventions and/or creations generated by AI.

London: Sky v. SkyKick – EU Court of Justice clarifies grounds for invalidity of EU and national trade marks

The Court of Justice, in response to a preliminary reference from the English High Court, has confirmed that a lack of clarity in the specification of a trade mark is not of itself a ground for invalidity of a registered trade mark. It also gave some further guidance on where a lack of intent to use a trade mark should be considered bad faith.

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This article summarises the Supreme Court Judgment of 3 October 2019 by means of which the Supreme Court has qualified the 1% rule for the calculation of the compensation for damages in cases of trade mark infringement foreseen in Article 43.5 of Spanish Trade Mark Act, establishing that does not apply in any case.

Düsseldorf: ECJ toughens the requirements for the use of cookies: Active consent of users required

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In its recent decision on cookies, the ECJ has ruled that users – for a large variety of cookies – must actively consent to the storage and re-activation of cookies on their terminal equipment. This article analyses the consequences of the decision, particularly in the light of the current use of cookies and the resulting liability risks.

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The Administrative Court for Lazio was tasked with hearing Facebook’s appeal of the sanctions imposed on Facebook by the Italian Antitrust Authority for two unfair commercial practices, in breach of Articles 21, 22, 24 and 25 of the Italian Legislative Decree no. 206/2005. The Administrative Court partially confirmed the fine on grounds that the social network’s claim addressed to users – “*Sign in, it’s free and it will be forever*” – qualifies as unfair commercial practice, as it lacked further disclaimers on the use of personal data by Facebook for commercial purposes. The Court concluded that not only data protection laws, but also consumer protection laws apply to the processing of personal data due to the economic value of data.

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PARIS

Loïc Lemerrier / Tom Blanchet

EVOLUTION OF IP PROTECTION FOR ARTIFICIAL INTELLIGENCE IN FRANCE

Artificial Intelligence (AI) is set to transform all aspects of our lives, including our home and health. AI is already widely used in Internet searches, and home devices with speech recognition, but in the near future we will see AI become even more widespread. This will have significant repercussions, as AI performs many tasks that, until now, could only be undertaken by humans. AI will remove human intervention from much of the picture. This will particularly affect intellectual property law.

With automatic execution when ordering products¹, the consumer is completely removed from the purchasing process. Consequently, this could impact trademark law, as visual, phonetic and conceptual comparisons between trademarks will no longer occur and cause confusion amongst consumers.

From a copyright standpoint, AI is able to generate and perform music or create artworks. Should traditional copyright requirements, such as originality, apply? Could AI be deemed as an author under copyright law?

Likewise, numerous questions are arising regarding the patentability of innovation in and arising from AI that have not been previously addressed. Can AI systems patent their inventions? How does the doctrine of equivalents apply to AI inventions? Will the 'person skilled in the art' change?

There is a vast array of issues related with seeking intellectual property protection for AI and machine learning systems. As French lawyers, it appears that the process of protecting AI is similar to making wine since a good wine requires quality of grape and time to mature. The same requirements apply to AI protection.

Fortunately, many tools, such as patents and copyright, are available to help companies protect their intellectual property rights (IP) in France. The French Patent and Trademark Office (INPI) has recognized the growing need to clarify the rules on how inventions related to and made by AI will be handled, and to determine what patent protection exists for this technology. The recent amendment of the Directives by the INPI² is a clear sign that France does not want to lag in dealing with the rapid developments in AI.

Loïc Lemerrier

IP Stars: Rising Stars 2019

¹ For instance, Amazon Dash Replenishment Service (DRS) enables connected devices.

² Directives Brevet, INPI, October 2019, "The issue of patents and utility certificates".

I. One certainty: AI is entitled to IP rights in France.

Usually, AI encompasses computers and computerised devices that exhibit behaviours perceived as intelligent by humans, including learning, reasoning and decision-making. Other types of AI, such as machine learning systems, give the computer an ability to change behaviour according to experience.

In this section, we will focus on the IP rights that could be created and generated by Aaron³, Emi⁴ and Adam⁵, three manifestations of AI that are 'live' today. Aaron is an AI application that combines theories and techniques to generate computer programs or computational models; Emi and Adam are AI databases that gather and combine algorithms enabling machines or robots to reproduce a form of artificial intelligence.⁶

When deciding to disclose AI and not choosing the option of trade secrets⁷, how can the above-mentioned AI be protected under French law? Probably:

- **Aaron's AI program** could be protected by copyright law if legal requirements are met (e.g. originality of the program). It is based on an understanding of (i) the creative choices made early in the creation of the AI, and (ii) the selection made in what is proposed by the program.
- **Emi and Adam's AI databases** could be protected both by copyright law and *sui generis* database law. The creative choices made at the initiation of the database, i.e. the content that will define the AI, can be protected. In this case, what is protected is no longer the work itself but the conditions of creation of the work through AI.
- In some circumstances, AI could also be protected by a French patent using specific conditions, as was recently underlined by the INPI.⁸ The amended Directives detail what is considered technical or non-technical in regards to AI. There are several existing examples of other similar AI that could be protected under current patent law. These include: (i) a precise selection of datasets for learning; (ii) the architecture of neural networks used for a specific task; (iii) the management of memory during learning; (iv) recognition of the environment of an autonomous vehicle based on data obtained by using sensors; (v) image analysis in medicine; and (vi) the use of AI to analyse human language by a dedicated robot.

Key Takeaway:

- AI is everywhere but is only at the beginning of its development. From the music industry, through medical innovation and security/defence, to aeronautics, there is a real need for building trusted AI for industry. In order to avoid a "black box" AI legal regime, the criteria for protection must be precisely defined, both for AI instruments and for AI results.
- As of now, there is a legal framework under French law available to protect some inventions and/or creations generated by AI. It is therefore important to companies to determine the value of their IP assets. French patent and copyright law must evolve to catch up with the evolution of AI. Companies should keep in mind that technological advances are often years ahead of legislative change. As a result, when building a portfolio of AI patent assets, companies should take a strategic approach with the certainty that the current legislation will certainly change.
- Likewise, it is important to identify if the innovation relates to (i) core AI, where the challenge is that it could refer only to algorithms (mathematical methods), or (ii) AI as a tool with technical effects.
- A French patent lasts 20 years from its filing date, so that substantial changes may occur during that term of its enforceability. Consequently, it is advisable that companies have a long-term AI divisional filing strategy which would focus on protecting the implementation of the generic AI algorithm and its purpose.

3 Aaron is a computer program written by artist Harold Cohen that creates original artistic images.

4 Emi (Experiments in Musical Intelligence) is an analysis program developed by David Cope that composes original music.

5 The robot scientist Adam has developed, without human intervention, a patentable pharmaceutical invention related to the genomic functions of baker's yeast.

6 Directives Brevet, INPI, October 2019, "The issue of patents and utility certificates", p.74.

7 Unlike copyright or patent law, trade secrets are not real property rights.

8 Directives Brevet, INPI, October 2019, "The issue of patents and utility certificates".

II. Challenges of the protection in France of artificially created works/inventions.

This section aims at evidencing solutions offered to companies to overcome the hurdles to, and obtain, IP protection in France.

1. AI and French Patent Law: an effective protection

Under French law, programs for computers shall not be regarded as inventions. Applicants will sometimes avoid mentioning AI in their patent application to avoid the exclusion of computer programs. However, the ethos is changing and innovation generated artificially by AI might be protected by a French patent when the following requirements are met: a patent shall be granted for any invention in all fields of technology, on the condition that it is new, involves an inventive step, is capable of industrial application and is not subject to prohibition of patentability:

- The debate surrounding AI inventorship is premature until the existence of an AI truly capable of an inventive act has been proved. However, we would point out that the European Patent Office (EPO) has refused two European patent applications⁹, in both of which a machine was designated as inventor, on the grounds that they did not meet the requirement of the European Patent Convention that the inventor designated in the application has to be a human being, not a machine. Both patent applications indicated “DABUS” as inventor, which is described as “*a type of connectionist artificial intelligence*”. We can therefore imagine that the INPI will, for the time being, follow the same reasoning for **Aaron, Emi and Adam**.

Nonetheless, with the prospect of AI contributing to invention, AI provides an opportunity for more collaborative innovation and more thorough patent filing strategies must be determined and implemented.

- Novelty might be an issue, since AI and machine learning will certainly use information previously obtained or disclosed to generate innovation. In other words, AI may improve but cannot change common general knowledge.
- If novelty is established, examiners will assess from April 2020¹⁰ whether the claimed subject matter is inventive. To assess an inventive step, the directives revised by the INPI¹¹ suggest that AI and machine learning inventions would be eligible for patentability if their application in a particular field contributes to the technical character of the claimed invention.
- Thus, inventions relating to AI and machine learning systems must demonstrate that the claimed subject matter serves a technical purpose. At a minimum, the claimed invention should provide a technical effect that is more than simply a way

⁹ Refusal of EP 18 275 163 and EP 18 275 174 by the European Patent Office (“EPO”) on the 20 December 2019 (publication of the minutes of oral proceedings on 20 December 2019): “*The applications are refused in accordance with Article 90(5) EPC since the designations of inventors filed for each of the applications do not meet the requirements of Article 81 and Rule 19 EPC*”.

¹⁰ Law No.2019-486 of 22 May 2019 (known as the “Loi PACTE”) extends the scope of the French Patent and Trademark Office (“INPI”) examination to the inventive step, as a ground for rejecting a patent application. Directives Brevet, INPI, October 2019, “*The issue of patents and utility certificates*”.

¹¹ Directives Brevet, INPI, October 2019, “*The issue of patents and utility certificates*”.

of achieving the solution to a problem more quickly. Achieving the technical effect should not be reliant solely on the AI or machine learning system; both are, arguably, well-known and have expected outcomes, at least in the sense of providing improvements. Nevertheless, where AI or machine learning systems are used, the application should comprehensively describe its detailed implementation, both functionally and structurally.

- The ‘person skilled in the art’ will be also a huge issue. At first glance, we assume that the INPI¹² will consider that the person skilled in the art of AI and machine learning systems is likely to be multidisciplinary, and therefore involve scientists, engineers and/or computer scientists. Hence, the person skilled in the art is correspondingly likely to be a similarly composed team. The common general knowledge of the person skilled in the art in this field includes pre-processing data, setting parameters (such as for training and selecting validation data) and experimentation.
- The same reasoning could be followed for the sufficiency of disclosure allowing the reproduction of the invention. For a patent to be granted, there is no need to describe how Aaron, Emi or Adam arrived at this invention, or to explain their reasonings. To meet this requirement, it is sufficient to describe how the invention was conceptualized so that the person skilled in the art can reproduce it. These solutions may appear in the medical field, e.g. **identification of new molecules that may have a therapeutic effect**; in the mechanical field, e.g. **identification of a particular profile of an aircraft wing with a strong lift or drag coefficient**; or in any other technological field.
- When it comes to enforcement, evidence of the act or acts of infringement is clearly another challenge. Due to the nature of the innovation, it is difficult to demonstrate how exactly the AI worked and how it is reproduced by a competitor.

2. AI and French Copyright Law: a limited protection

AI can be engaged in a creative activity on two levels:

- Creation of a work undertaken both through human intervention and the assistance of AI.
- Creation of a work autonomously accomplished by AI, fed by millions of data and modelled on the works of human beings. We will focus on these artificially generated works.

Artificially created works could be protected, amongst others¹³, by a copyright law. Under French law, copyright protects any work carrying “*the imprint of the author’s personality*”, from the moment of its creation, under the conditions that it is original and made material in any form (e.g. paper, digital media, etc.):

¹² See footnote 11 Directives Brevet, INPI, October 2019, “The issue of patents and utility certificates”.

¹³ On the margin, artificially created works can be protected by a design to the extent that it is new and has an individual character, i.e. the configuration of neural networks. The creative process is never taken into account to attribute – or not – the protection. This means that the legal requirements could be met whether the design is created by a human or AI.

- It can be any type of work, be it **musical, literary, graphic, digital or plastic**. Nowadays, we have tangible examples of paintings and music created by AI, such as **The Next Rembrandt**, a painting made via a facial recognition algorithm which “learned” Rembrandt’s techniques and was trained on Rembrandt’s 346 known paintings, or **original music** composed by Emi.
- However, copyright requirements seem not to be suitable for AI as a ‘creator’. It seems that textual reference to human creation, in the Berne Convention and national laws, might exclude the possibility of construing AI as an author under the current legal framework. More specifically, the essential requirement of “originality” is subjective, attached to the author’s deliberate choices. Today’s artificially generated creations seem much more the “**random result of a set of algorithms**”.¹⁴ In any event, AI cannot express a personality. That is still the author who **uses** AI and who defines the framework within which the specific work will be created.
- As it stands, the status of author can only be attributed to a physical person (legal entities being unable to claim it¹⁵). It is important to point out that French law does not recognize AI – such as Aaron, Emi and Adam – as a legal person. In the absence of property, they cannot receive the moral and economic rights arising from the IP protection of ‘their’ works.
- Leaving the domain of author’s rights, it can be highlighted that AI-generated works may be eligible for protection through existing related rights, such as **phonograph, audio-visual, communication companies, or database producer**, even where there is no human intervention and as long as they meet the required criteria.¹⁶

¹⁴ AIPPI, Study Guidelines, “*Copyright in artificially generated works*”.

¹⁵ *Cour de cassation* (French Supreme Court), 15 January 2015, No. 13-23.566: “a legal person may not be the author” of software. This decision deals with copyright law and author which differs from patent law and inventor.

¹⁶ AIPPI, Summary report, “*Copyright in artificially generated works*”.

LONDON

Vanessa Marsland / Leigh Smith

SKY V. SKYKICK – EU COURT OF JUSTICE CLARIFIES GROUNDS FOR INVALIDITY OF EU AND NATIONAL TRADE MARKS

In *Sky v. SkyKick* Case C-371/18, the English Court had asked questions about whether lack of clarity in the specification of goods and services was of itself a ground for invalidity of a registered trade mark. The Court of Justice has now held that it is not. The Court also found that a lack of intent to use a trade mark for goods or services applied for only constitutes bad faith if the application was made with the intention of undermining the interests of third parties, or with the intention of obtaining an exclusive right for purposes other than those falling within the functions of a trade mark.

The decision

The High Court of England & Wales referred several questions to the Court of Justice in a trade mark infringement dispute brought by several companies in the Sky plc group (“**Sky**”) against SkyKick UK Ltd and SkyKick Inc (“**SkyKick**”). The questions concerned (1) whether a lack of clarity and precision in a trade mark specification could be a ground for invalidating that trade mark, and (2) whether filing without the intent to use a trade mark for some or all of the specified goods or services amounted to bad faith and was therefore a ground for invalidity.

Clarity of the specification

The Court of Justice held that the grounds for invalidity both for EU trade marks and for national trade marks in member states are exhaustively provided in the applicable Regulation and Directive, and do not include lack of clarity.

SkyKick had argued that clarity and precision of the specification should be read into the general requirement that a trade mark be clearly and precisely represented on a trade mark register. The Court found this requirement related only to the representation of the trade mark and did not extend to the specification. Lack of clarity of the specification is also not a ground for invalidity as falling within the ground of being contrary to public policy.

Bad faith

The referring court had also asked whether filing without intent to use the mark for some or all of the specified goods or services amounted to bad faith and was therefore a ground for invalidity, at least to the extent of the relevant goods and services for which the applicant had no intent to use.

Vanessa Marsland

Chambers UK 2020: London

Key Issues

- A lack of clarity in a trade mark specification is not a ground for invalidity of a registered trade mark.
- A lack of intent to use only constitutes bad faith if the applicant can be shown to have the intention of undermining the interests of third parties, or the intention of obtaining an exclusive right for purposes other than those falling within the functions of a trade mark.

The Court of Justice acknowledged that at time of filing an applicant may not know precisely for what it will use the mark. Under EU trade mark law it has five years in which to put its mark to genuine use before the mark becomes vulnerable to revocation to the extent it has not been in genuine use.

Against this background, the Court of Justice has held that lack of intent to use at time of filing is not of itself bad faith. It affirmed that the EU rules on trade marks are aimed, in particular, at contributing to the system of undistorted competition in the European Union, in which each undertaking must, in order to attract and retain customers by the quality of its goods or services, be able to have registered as trade marks signs which enable the consumer, without any possibility of confusion, to distinguish those goods or services from others which have a different origin. The EU concept of bad faith therefore applies where *“it is apparent from relevant and consistent indicia that the proprietor of a trade mark has filed the application for registration of that mark not with the aim of engaging fairly in competition but with the intention of undermining, in a manner inconsistent with honest practices, the interests of third parties, or with the intention of obtaining, without even targeting a specific third party, an exclusive right for purposes other than those falling within the functions of a trade mark, in particular the essential function of indicating origin”*.

This goes well beyond a simple lack of specific intent to use at time of filing.

UK practice

Under current UK practice, an applicant for a UK national trade mark must state that the mark is in use or that it has intent to use it. The Court of Justice held that the practice of requiring this statement is not incompatible with harmonised EU law, even though it is not required by it. The Court held, however, that the fact an applicant made such a statement without having intent to use for specified goods or services could be evidence of bad faith but does not constitute, in itself, a ground for invalidity. The Court has clarified that bad faith requires the further elements identified above.

This case is not the first time the English Court has asked the Court of Justice about the requirement for clarity in specifications of goods and services. In *Chartered Institute of Patent Attorneys* Case C-397/10, the Court of Justice had held in that case that the goods and services for which the protection of the trade mark is sought must be identified with sufficient clarity and precision to enable the competent authorities and economic operators, on that basis alone, to determine the extent of the protection conferred by the trade mark. This does not preclude the use of the general indications of the class headings of the Nice Classification to identify the goods and services for which the protection of the trade mark is sought, provided that the identification is sufficiently clear and precise. Where an applicant for a national trade mark uses all the general indications of a particular class heading of the Nice Classification to identify the goods or services for which the protection of the trade mark is sought, it should specify whether its application for registration is intended to cover all the goods or services included in the alphabetical list of that class or only some of those goods or services. If the application concerns only some of those goods or services, the applicant should specify which of the goods or services in that class are intended to be covered.

DÜSSELDORF

Florian Reiling / Sarah Kleinschumacher

“FRIDAYS FOR FUTURE” AS A TRADEMARK?

In December 2019, the “Greta Thunberg and Beata Ernman Foundation” (the “**Foundation**”) – formed by Greta Thunberg (climate activist and progenitor of “Fridays for Future”, the school strike movement) and her sister – applied to register “Fridays for Future” as a trademark with the European Union Intellectual Property Office (“**EUIPO**”). According to Thunberg, this step is due to the fact that both “Fridays for Future” and her own name are regularly exploited for profit by people and organisations not connected with her; for example, by producing and selling products with the respective slogan. Thunberg expressly rejects such usage.

In light of this, Thunberg’s wish to protect “Fridays for Future” appears understandable. However, from a legal perspective, the success of this application is by no means certain. An earlier attempt to protect it under German trademark law has already failed and this application may also fail under European law. Both Art. 7 of the European trademark regulation and the corresponding paragraph in German law – which formed the basis of the decision of the German Patent and Trademark Office – contain an **absolute barrier for protection** in the case of trademarks that are devoid of a **distinctive character** in relation to the goods or services for which they are used.

According to the ECJ, this is due to the public and consumers’ interest in excluding trademarks which do not fulfil the essential function of guaranteeing the identity of the origin of the goods or services as distinct from others of a different origin. Therefore, a trademark is distinctive if it is capable of identifying the respective product as originating from a particular undertaking.

The German Patent and Trademark Office ruled that the slogan “Fridays for Future” does not meet this requirement, as it is merely a descriptive indication of fact. Indeed, it cannot be considered evident that “Fridays for Future” is sufficiently connected to Thunberg and her Foundation in a way that would clearly identify products as originating from them. Instead, it could still be understood only as the name of the climate protection movement as such. If, however, a respective connection had by now developed in the view of the EUIPO, trademark protection might be granted. Indeed, that EUIPO has already published the application indicates that it does consider “Fridays for Future” to be protectable.

Claudia Milbradt

*Chambers Global 2020: Germany
WIPR Leaders 2020*

Key Issues

- The German Patent and Trade Mark Office refused a national trade mark for “Fridays for Future”;
- The EUIPO seems likely to grant an identical trademark as a Union Trade Mark;
- The Greta Thunberg and Beata Ernman Foundation will have to genuinely use the Trade Mark, which might become a relevant obstacle;
- The fact that profit-making is not a motive of the Foundation will not prevent the granting of the trade mark *per se*.

In the next step, once/if protection is actually granted, Art. 18 of the regulation would become relevant as a possible second obstacle. It lays down that it is necessary to **genuinely use** a protected trademark, in contrast with a symbolic use that only aims at keeping the advantages of the protected trademark whilst excluding others from using it. According to the ECJ's market-based approach, a genuine use must be based on the main function of the trademark, which is, as pointed out, to enable the consumer to identify the origin of a product or service. This might become a challenge for Thunberg and the Foundation as, at present, "Fridays for Future" as a movement is not market-oriented in the sense that it is engaged in selling products. They will need to find a way into the market and to participate economically, to avoid losing potential trademark protection for "Fridays for Future".

That profit-making is not a motive of the Foundation, however, is not going to stand in its way. In 2008, the ECJ acknowledged that a non-profit organisation, as with any other, may have a legitimate wish to promote the sale of its products or services by developing and subsequently securing an outlet for them.

In conclusion, the outcome of the application does not appear clearly predictable. Additionally, even if the EUIPO decides in favour of Thunberg and the Foundation, they will need a functioning strategy for the following five years, following which a trademark can be declared forfeit for not being genuinely used (in the sense described above) during that time.

BARCELONA

Sònia Sebé

THE SUPREME COURT QUALIFIES THE 1% RULE FOR THE CALCULATION OF THE COMPENSATION FOR DAMAGES IN CASES OF TRADE MARK INFRINGEMENT SPECIFYING THAT IT DOES NOT APPLY IN ANY CASE

The Judgement of 3 October 2019 handed down by the Supreme Court has qualified the application of the provision contained in Article 43.5 of the Spanish Trademark Act 17/2001 on Trade Marks¹ (“**Trade Mark Act**”).

Article 43 of the Spanish Trade Mark Act contains the criteria for quantification of the damages that the holder of a trade mark is entitled to claim as a result of a trade mark infringement.

Section 5 of said article contains as the criterion for the calculation of damages the possibility for the holder of the trade mark whose infringement has been declared in court, to opt, in any event and without the need for any proof, to receive as damages 1 per cent of the turnover recorded by the infringer with the unlawfully marked products or services. The trade mark holder can also require further indemnification if it can prove that the trade mark infringement caused greater harm or damage, in accordance with the terms of the foregoing sections.

Article 43.5 of the Trade Mark Act is a provision without precedent in European Community law, not being contained in Directive 2004/48². It was introduced into the Spanish legal system for the first time with the passing of the 2001 Trade Mark Act.

This rule, as has been recognised by both legal scholars and case law, is designed to overcome the difficulties faced by the holder of an infringed trade mark in providing evidence to quantify the damage suffered as a result of the infringement of its right. However, the rule does not supersede the general requirement for the trade mark infringement to have caused real and effective harm to the wealth of the corresponding right holder in order for indemnification to be appropriate. What effectively occurs is that this right to indemnification is borne precisely of the recognition by the legislator that trade mark infringement is an essentially and inherently harmful event and, as such, an example of “ex re ipsa” case law doctrine.

Clifford Chance named as **Patent Litigation Firm of the Year for Spain**

Global IP Awards 2020

Clifford Chance named as **Spanish Patent Contentious Firm of the Year**

Managing IP Awards 2020

Miquel Montaña

Chambers Global 2020:

Spain – Star Individual

IAM Global Leaders 2020

WIPR Leaders 2020

Josep Montefusco

Chambers Global 2020: Spain

WIPR Leaders 2020

Key Issues

- Article 43.5 of the Trade Mark Act was introduced into the Spanish legal system for the first time with the passing of the 2001 Trade Mark Act.
- Article 43.5 of the Trade Mark Act was not contained in Directive 2004/48.
- Article 43.5 of the Trade Mark Act was designed to overcome the difficulties faced by the holder of an infringed trade mark in providing evidence to quantify the damage suffered as a result of the infringement of its right.
- The Supreme Court has qualified that the financial compensation foreseen in Article 43.5 of Spanish Trade Mark Act does not apply in any case.

¹ Act 17/2001, of 7 December on Trade Marks (Ley 17/2001, de 7 de diciembre de marcas).

² Directive 2004/48/EC of the European Parliament and of the Council dated 29 April 2004.

As the Supreme Court had recognised in past judgments, with the inclusion of Article 43.5 in the 2001 Trade Mark Act the legislator was substantively recognising the case law position existing up to that point, where the “*ex re ipsa*” doctrine was upheld occasionally, qualified by the presumption of the existence of harm “in any event”, albeit limited to a certain percentage. Thus, the inclusion of this article consolidated the idea that trade mark violation always entails harm, dispensing with the difficulty intrinsic in the requirement of evidence and the uncertainty involved in making the indemnification contingent entirely on the application of the “*ex re ipsa*” doctrine.

Based on this reasoning, the Supreme Court, in its previous decisions on trade mark infringements, has widely recognised that Article 43.5 of the Trade Mark Act contemplates an indemnification scenario that, if requested, will be granted in any event, without the need for any evidence. This interpretation has also been followed by the lower courts.

This literal interpretation of the terms of Article 43.5 of the Trade Mark Act has now been qualified in the Judgment of the Supreme Court dated 3 October 2019.

The Judgment in question resolved a cassation appeal filed before the Supreme Court against the Judgment of Section 15 of the Barcelona Court of Appeal, dated 14 December 2016. In that Judgment, the Court of Appeal found that there had been a violation of denominative trade mark La Nuba, held by Grupo Empresarial VP Frontera S.L. to distinguish nightclub services as a result of the use of the denomination Nuba by the entity Nuba Lounge S.L. to distinguish restaurant and musical bar services in Barcelona and Ibiza. Although the use of the Nuba denomination by the defendant did not cause any harm to the trade mark holder, since it was using its trade mark to run a local night club in a small town in the Community of Navarra and the establishments of the parties involved were not in competition with each other, the Court of Appeal ordered Nuba Lounge, S.L. to pay damages amounting to 20,349.74 euros as a result of the trade mark infringement. This indemnification had been determined according to Article 43.5 of the Trade Mark Act, despite the fact that harm suffered by the trade mark holder was not proven. As indicated in the Judgment of the Court of Appeal, according to Article 43.5, the declaration of a trade mark infringement necessarily determines, without the need for any proof, financial compensation for the trade mark holder consisting of 1 per cent of the turnover recorded by the infringer. Only if the compensation requested is higher than this 1 per cent, is there a need to prove said harm.

In the appeal filed by before the Supreme Court, the defendant alleged an infringement of Article 43.5 of the Trade Mark Act insofar as the infringement did not cause any harm to the trade mark holder.

In the Judgment of 3 October, the Supreme Court indicated that the application of the calculation criteria for damages envisaged in Article 43.5 of the Trade Mark Act, like the rest of criteria established in Article 43 of said act, is contingent on the existence of harm.

And, based on this need for the existence of harm in order for the compensatory action to be appropriate, it specified that, despite the objectivation of the financial compensation contained in article 43.5 of the Trade Mark Act, this article could not be understood in the sense that there is a right to financial compensation even in those cases where it has been verified that the trade mark infringement could not have caused any harm to the trade mark holder. Article 43.5 of the Trade Mark Act requires the prior condition of the existence of harm, regardless of the magnitude of the same.

Based on the criteria explained, and in view of the fact that in the case in question the trade mark infringement had not entailed either harm for the holder of the infringed trade mark or financial benefit for the infringer, the Supreme Court found that there were no grounds for application of the indemnification criterion in Article 43.5 of the Trade Mark Act, meaning that the appeal in cassation had to be upheld and the order to pay damages quashed.

The qualification made by the Supreme Court in this Judgment has cast more light on the conditions that must exist in order to apply this particular provision of the Spanish Trade Mark Act and to avoid decisions that could order the payment of financial compensation even if the trade mark infringement had not caused any harm.



DÜSSELDORF

Florian Reiling / Till Valentin Völger

ECJ TOUGHENS THE REQUIREMENTS FOR THE USE OF COOKIES: ACTIVE CONSENT OF USERS REQUIRED

Are the common cookie banners still state-of-the-art? Or do websites have to stay black before the user has given his consent? Which liability risks exist in the event of a breach of the relevant data protection regulations? And who is affected by ECJ's recent ruling?

What are cookies and what types of cookies exist? A brief overview

The ECJ adopts the definition of the German Federal Court of Justice and defines cookies as text files which the provider of a website stores on the website user's computer. Generally the website provider can access those cookies again when the user visits the website on a further occasion, in order to facilitate navigation on the internet or transactions, or to access information about user behavior.

Cookies can be used to track which websites the user has visited. In addition, information about e-mail addresses and the name of the user can also be included and transmitted. Hence, the use of cookies makes it possible to determine surfing habits, which can be evaluated automatically.

Different types of cookies can be identified, e. g. by their functions and possible uses. The first category are the so-called **session cookies**. They are only stored on the user's computer for the duration of a user session and are intended to simplify the use of the site. A common example is that a user does not have to constantly re-type his/her password on a password-protected page. After the end of the respective session, the session cookies are automatically deleted, which is why they are often referred to as "non-persistent cookies".

The second category are the so-called **tracking cookies**. They are a marketing tool and collect data about the user across sessions and are stored permanently on the user's computer ("persistent cookies"). These tracking cookies can either be placed on the user's computer by the website operator, in which case they are called **First-Party-Cookies**. Or, such cookies can be stored on the user's computer by third parties (**Third-Party-Cookies**), e. g. via a displayed advertising banner. This almost always happens unnoticed.

Key issues:

- The information stored by cookies – in most cases – has to be classified as personal data;
- The ECJ has ruled that for cookies that generally require consent, users must actively consent to the storage and re-activation of cookies. A mere passive behavior is not (or no longer) sufficient;
- The ECJ did not rule on the question, which types of cookies do require consent;
- As a company can be heavily penalized, it is particularly important to keep their own practice legally compliant, in particular with the ECJ's recent ruling.

Stricter requirements for the use of cookies according to the current legal situation

Cookies always include a certain reference to the respective user, thus the stored information has to be classified as personal data. Both the Directive On Privacy And Electronic Communications (2002/58/EC – in its current version) and the General Data Protection Regulation (EU 2016/679) are therefore applicable.

In its recent decision on this issue, the ECJ has now ruled that for cookies that generally require consent, users must actively consent to the storage and re-activation of cookies on their terminal equipment. A mere passive behavior is not (or no longer) sufficient. Accordingly, it is – for a large variety of cookies – not possible to store information on the user's computer without the user's explicit consent. Hence, for these types of cookies, the simple reference regarding the use of cookies in a corresponding banner or even a preselected checkbox are no longer eligible. Nor can consent be given implicitly (e.g. through the use of the website and/or services), but must be given expressly for the specific purpose.

These requirements concern not only persistent cookies but also session cookies. It should however be noted, that the ECJ did not rule on the more general (but still very important) question, which types of cookies do require consent. Nevertheless, the decision of the ECJ constitutes a clarification of a question which was rather uncertain for a long time in the EU.

Other effects of the ECJ's decision on the operation of websites

A thorough reading of the reasons for the ECJ's decision raises the question whether the consequences of the decision have implications that go beyond the mere use of cookies. The ECJ also clarified that the requirement of "active consent" under the Directive On Privacy And Electronic Communications does not only apply to personal data. The user should be protected against any violation of his or her privacy. Hence it does not matter whether personal or other data is stored on the user's terminal device.

This raises the question which (intermediate) data storage, e.g. in the user's main memory, is covered by the active consent requirement. This requires a precise legal analysis of the data processing operations in order to exclude liability risks.

What will change once the ePrivacy-Regulation enters into force?

The so-called ePrivacy Regulation was originally intended to enter into force together with the General Data Protection Regulation. As things stand at present, it is not expected that the ePrivacy Regulation will enter into force before 2021/2022 and replace the Directive on Privacy and Electronic Communications.

MILAN

Andrea Tuninetti Ferrari / Iolanda D'Anselmo / Vittoria Pontecchiani

SOCIAL NETWORK: AN ITALIAN COURT CONFIRMS THAT PERSONAL DATA HAS ECONOMIC VALUE AND RULES THAT THE USE OF PERSONAL DATA FOR COMMERCIAL PURPOSES MUST ALWAYS BE MADE SUFFICIENTLY CLEAR TO USERS

(i) The Facebook vs Italian Antitrust Authority case

2020 kicks off in Italy with an important decision on Big Data from the *Tribunale Amministrativo Regionale* for Lazio (the “**Administrative Court**”), the Court tasked with the appeal of the sanctions imposed on Facebook by the *Autorità Garante della Concorrenza e del Mercato*'s (the “**Italian Antitrust Authority**”) for breaches of competition and consumer laws.

In its decision no. 261 published on 10 January 2020 (the “**Decision**”), the Administrative Court partially confirmed the fine the Italian Antitrust Authority imposed on Facebook on grounds that the social network's claim addressed to users – “*Sign in, it's free and it will be forever*” – qualifies as unfair commercial practice, lacking further disclaimers on the use of personal data by Facebook for commercial purposes.

The Decision concludes that not only data protection laws, but also consumer protection laws apply to the processing of personal data due to the economic value of data.

(ii) Background: the investigations of the Italian Antitrust Authority

Following complaints from several Italian consumer associations in April 2018, the Italian Antitrust Authority launched investigations against Facebook Inc. and its EU subsidiary Facebook Ireland Limited (jointly, “**Facebook**”), to ascertain whether Facebook was liable on grounds of unfair and aggressive commercial practices concerning its users.

The investigations resulted in an order dated 29 November 2018 (the “**Antitrust Order**”), whereby the Italian Antitrust Authority fined Facebook EUR 10 million for two unfair commercial practices carried out against its 31 million Italian users, in breach of Articles 21, 22, 24 and 25 of the Italian Legislative Decree no. 206/2005 (the “**Italian Consumer Code**”).¹

The first was a misleading practice² carried out by Facebook during the sign-up process on the social network's platform (website and app), in that Facebook did not provide users with adequate information as to the purposes of the processing of their personal data.

¹ According to The Guardian, the fines issued by the Italian Antitrust Authority are some of the largest levied against the social media company for data misuse, dwarfing the £500,000 fine levied by the British Information Commissioner's Office in September 2018.

² Prohibited by Articles 21 and 22 of the Italian Consumer Code.

Key issues:

- the Administrative Court for Lazio states that personal data has an economic value
- the economic value of personal data requires traders to comply with consumer laws, meaning that they have a duty to properly inform consumers and users about the commercial purposes for which their personal data are collected and used
- the processing of personal data for commercial purposes is not exclusively covered by privacy laws and regulations: privacy laws do not conflict with consumer and competition laws, as they are closely entwined with each other
- the Italian Antitrust Authority and the Administrative Court took the view of many commentators that while social networks, search engines and gaming platforms are, free of [monetary] charge, this by no means implies that they are cost-free: data is the consideration.

Leveraging on the claim “*Sign up, it’s free and it will be forever*”, Facebook emphasised the free nature of the social network without highlighting that the collection of users’ personal data was carried out for marketing purposes.³

The information provided to users was, in fact, general and incomplete: it did not clearly make a distinction between the use of data to personalise the service (in order to connect users with each other) and the use of data to undertake advertising campaigns aimed at specific targets.

Therefore, the Italian Antitrust Authority concluded that Facebook had encouraged users to make transactional decisions⁴ that they would not otherwise have taken had they been properly informed and conscious.

The second practice was qualified as “aggressive” pursuant to Articles 24 and 25 of the Italian Consumer Code.

According to the Italian Antitrust Authority, Facebook forced an “aggressive practice” on registered users whose data were automatically transmitted from the Facebook platform to third-party websites / apps, and vice versa, for profiling and commercial purposes without the data subjects’ express and prior consent.

In particular, according to the Italian Antitrust Authority, Facebook preselected the “Active Platform” function, which allowed the data sharing; therefore, every time users accessed a third party’s web-site (such as a game, app &c.), the transfer of personal data to those parties was automatically activated. A user attempting to opt out was unduly discouraged by threatening negative consequences in the use of both Facebook and third-party websites and apps.

(iii) Facebook’s appeal against the Antitrust Order

Facebook appealed the Antitrust Order before the Administrative Court for Lazio, alleging the unlawfulness of the Antitrust Order on the following main grounds:

- consumer protection laws do not apply to the case: as the access to the social network is “*free of charge*”, there is a lack of any consideration (the “**Consideration Argument**”); therefore,
- the case falls within the competence of the privacy – rather than competition – regulators. Therefore, only GDPR rules apply (the “**Privacy Argument**”).

(iv) The Decision of the Administrative Court for Lazio

The Administrative Court confirmed the sanction relating to Facebook’s *misleading practice* against users during the sign-up process, but stated that the transfer of personal data to third parties does not constitute an *aggressive practice*, because the preselection of the “Active Platform” function did not allow any automatic transfer of users’ personal data to third parties.

³ The Antitrust Order restates that Facebook’s incomes from online advertising represents the entirety of Facebook Ireland Ltd.’s revenues and 98% of Facebook Inc’s revenues.

⁴ *I.e.*, to register in the social network and to continue using it.

Following the publication of the Decision, Euroconsumers, a member of the Organisation of Consumers and Users (“**OCU**”), described the Decision as “*very important*” and pointed out that “*for the first time it is recognised by a court that consumers’ data has an economic value for companies*”.

We would now review the major issues the Decision addressed.

(v) Personal data has an economic value (the rejection of the Consideration Argument)

According to the Decision, the economic value of personal data requires traders to comply with consumer laws, meaning that they have a duty to properly inform consumers and users about the commercial purposes for which their personal data are collected and used.⁵

When users sign up to a social network, such as Facebook, they enter into a contract that binds the parties to mutual obligations: Facebook undertakes to allow users to use the social network’s services, while the user joins Facebook’s community by inputting certain personal data that is required for the registration.

On this basis, the Administrative Court concludes that, from a legal standpoint, the collection of users’ personal data by Facebook qualifies as the performance of a contractual obligation on the user’s side.

The Decision embraced the view expressed in Euroconsumers’ manifesto “*#MyDataIsMine*”.

(vi) Protection of personal data is not only a privacy affair... (the rejection of the Privacy Argument)

According to the Decision, the processing of personal data for commercial purposes is not exclusively covered by privacy laws and regulations.

Indeed, privacy laws do not conflict with consumer and competition laws, as they are closely entwined with each other.

They both protect users and consumers’ rights in relation to the usage of their personal data, one protecting personal data as a fundamental right of individuals and the other ensuring that users are properly informed before making everyday decisions.

Additionally, the legislator has ensured co-ordination between privacy and consumers laws, preventing any risks of consumer-related fines overlapping with privacy-related fines.

⁵ The Administrative Court also recalled the guidance on the implementation of directive 2005/29/EC on unfair commercial practices published by the EU Commission on 25 May 2016, whereby the Commission stated that “*personal data, consumers’ preferences and content [that] users generate have a de facto economic value*” (the paper is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163>).

(vii) The use of personal data continues to create challenges at EU level

The Decision addresses the delicate issue of the exploitation for commercial purposes of personal data in the digitisation era.

Social networks and ISP in general make huge investments in data mining and reuse: data is collected and analysed, then shared with third parties which, based on the profiling of the user, send tailored advertising.

The Italian Antitrust Authority and the Administrative Court took the view of many commentators that while social networks, search engines and gaming platforms (so-called 'freemiums', to mention a few) are, *free of [monetary] charge*, this by no means implies that they are *cost-free*. Data is the consideration.

Therefore, while users can impact the web by inputting content (so-called user-generated content), authorities such as the Italian Antitrust Authority are progressively reaching the conclusion that they cannot entirely leave it to the terms and conditions of the social network to govern the relationship between the web and the user. Hence, the Authority's call for greater transparency over the use of personal data.

Link Directory:

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016SC0163>

CHINA

Ling Ho / Iris Mok / Michelle Sum

NEW CHINESE GUIDE TO ADMINISTRATIVE DECISIONS ON PATENT INFRINGEMENT DISPUTES / NEW APPELATE IP COURT

A. New Chinese Guide to Administrative Decisions on Patent Infringement Disputes (the “Guide”)

Particular administrative bodies have authority to handle IP infringements; although they cannot award compensation to the IP owner, they have powers to find infringements and issue injunctions. Because of its efficiency and simplified process, the administrative route is often a preferred means to stop IP infringement in China.

The Guide was published by the CNIPA on 26 December 2019. It is intended to provide detailed guidance on the end-to-end process for administrative proceedings for patent disputes, including case management process, evaluation of evidence, determination of infringement, and grant of relief.

Trademark owners who seek to enforce rights in China will be familiar with the local administrative enforcement mechanism, which offers time and cost efficiency in taking enforcement actions via administrative raids against infringers. It has been a widely used mechanism by trademark owners to stop blatant infringements of their trademarks. In 2018, 31,000 trademark infringement cases were investigated and handled through administrative authorities. It is not surprisingly that this mechanism is so popular; the right owner is simply required to adduce evidence of ownership in the mark and evidence of infringement. Once the local administrative authority is satisfied with the evidence, prompt enforcement action will be taken against the infringer to cease infringement. The entire process usually only takes weeks to complete.

Unlike the administrative process of trademark infringement, the process for patent cases is generally much longer and subject to more formalities. In addition, the responsible administrative authority may not have sufficient resources to fully understand the technical issues which, invariably, are involved in any patent dispute. The prolonged process defeats the intended advantage of administrative process of stopping the infringement within a short time (without the need to apply for an interim injunction in courts, which are generally difficult to obtain in China).

The Chinese government has recognised the difficulty in adducing evidence, and the prolonged duration and high costs of patent proceedings in court. It is against this background that, in the words of the CNIPA, the Guide was issued to improve the efficiency and standard of patent infringement administrative disputes, with the obvious aim of incentivising right owners to take patent disputes to administrative bodies. In the following, we will look at how the Guide offers procedural and technical clarity on administrative patent disputes.

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Filing a claim¹

The Guide provides clear guidance on who is entitled to file a claim. This includes the legal owner of the patent or an authorised exclusive user (if such rights are stipulated in the contract, or if there is a written declaration from the patent owner relinquishing the right to make out or file a case). A non-exclusive user may not bring a claim alone unless otherwise stipulated in the contract.

A local department has jurisdiction over an applicant's case if the city/county is where the respondent is located or where the patent infringement occurred. In light of technical advancements, right owners often face the uncertainty of jurisdiction when an infringement occurs over an e-commerce platform. In such cases, the Guide provides that the location of infringement would be the place where the network server or computer terminal was used in carrying out the infringement.²

However, it should be noted that a case will only be accepted if a claim has not been brought before the local People's Courts *and* both parties have not contractually agreed to resolve the dispute in another manner.

Burden of proof³ and evidence requirements⁴

The burden of proof is no different from the general rule that "the one who claims shall prove", meaning that when patent infringement is denied, the applicant bears the burden of proving the infringement of rights.

It should be noted that the local authority also has powers to collect evidence, including conducting on-site inspections and interviewing relevant staff members. It can also ask experts to produce a written report on technical matters within the dispute. This offers obvious flexibility, and is particularly helpful for claimants who are dealing with difficult defendants, or where it would not be easy for the claimant to adduce the relevant evidence on its own.

Case handling procedure⁵

The special feature of an administrative proceeding is that the local authority has discretion whether or not to proceed with the case by conducting a formality check on the materials filed, without evaluating sufficiency of evidence. The claimant is entitled to appeal against a refusal to proceed by commencing administrative proceedings before a local People's Court. Alternatively, it can also choose to bring a civil claim for patent infringement before a People's Court. Mediation is also encouraged throughout the dispute resolution process; a successful outcome to that will terminate the administrative proceedings.

An apparent advantage of administrative proceedings is its streamlined process. Within five working days of creating a case file, a notice of defence will be sent to the respondent together with materials submitted by the applicant, and the respondent must submit its written defence within 15 days thereafter. The local authority will decide

Key issues:

- In China, requesting a local authority to process a patent infringement dispute is an alternative to bringing a civil claim before a local People's Court; however, the administrative process suffers from a lack of uniform guidance on its procedures and decision-making. The China National Intellectual Property Administration (the "CNIPA") published the Guide to Administrative Decisions on Patent Infringement Disputes (the "Guide") in an effort to promote clarity and encourage efficiency in resolving patent disputes through administrative process. The Guide provides clear guidance on the end-to-end process in administrative patent complaints, including a party's entitlement to file a claim, the burden of proof, administrative bodies' right to collect evidence, case-handling time frame, and possible sanctions, in addition to the appeal mechanism.
- A centralised appellate IP court has been established in the Supreme People's Court in late 2019. Its jurisdiction covers appeals against first-instance judgments, and the review of decisions by lower courts of administrative decisions made by local authorities. It is presided over by specialist IP judges, and is an indication of China's recognition of the importance of protecting IP rights.

¹ Ibid, P. 6 – 7 and 58.

² The Guide, P. 1 – 2.

³ Ibid, P. 17 – 22.

⁴ Ibid, P. 9, 14, 23 – 30 and 71. For further details, please refer to Chapter 4 of the Guide.

⁵ Ibid, P. 31 – 47.

whether an oral hearing is required; that would normally be open to public. A case should generally be concluded within three months after a case file is established, but an extension of no longer than one month can be granted for complex cases. This streamlined process offers efficiency and certainty to the right owners.

After the oral hearing, the adjudication panel will deliberate with a confidential written record of the deliberations. The majority view will be adopted and a decision handed down to the parties. The decision is made public and will include the name of the infringing party and the acts of breach (if any). This greatly promotes transparency to right owners and traders, and is a major improvement on the existing administrative enforcement mechanism.

Possible sanctions and enforcement of the decision⁶

If it is determined that there has been a patent infringement, possible sanctions include orders to:

- Stop any production, use, sale, offer to sell or import of the infringing product;
- Dispose of the infringing product and destroy all production equipment; and
- Inform the relevant e-commerce platform to delete or unlink the page for the infringing product.

This list is not exhaustive and the local authority can take any other measures necessary to stop the patent infringement, providing flexible solutions to tackle infringements. More good news for right owners is the power to enforce the administrative order. If the infringement continues and the infringing party ignores a reminder issued by the local authority, the local authority can (on its own motion, or upon a party's application) request that the relevant Intermediate People's Court make an order for compulsory enforcement of the local authority's decision.

Appeal of administrative decisions⁷

A party can bring an appeal before a local People's Court within 15 days of the handing down of the decision. The principle whereby the second instance is the final instance under the *Administrative Procedure Law* is adopted for administrative cases related to patent disputes. Any appeals against a local department's decision will first be heard by the relevant Intermediate People's Court or Basic People's Court. A second, final appeal will be heard by the Supreme People's Court; that would normally involve more technical patent disputes, and offering certainty on finality of the decision.

The publication of the Guide provides comprehensive guidelines in terms of all aspects of the patent administrative proceedings, including procedures and the relevant considerations when adjudicating a dispute. This clarifies aspects of the existing system and is encouraging for right owners and defendants who now have a better idea of their positions. Legal practitioners also benefit from being able to advise their clients better, both on how to fight the case and the possible next steps. Given the Guide is 'fresh from the oven', it awaits the nuances of how it will be adopted by the local authorities in practice.

⁶ Ibid, P. 12 – 13, 41 – 42, 45 – 46.

⁷ The Guide, P. 44 – 47.

B. Appellate intellectual property court in the Supreme People's Court

On 1 January 2019, a centralised appellate intellectual property court was established within the Supreme People's Court ("**SPC IP Court**"). The aim of centralising appeals of intellectual property cases at the SPC IP Court is to produce more consistent rulings and generate more expertise in complex, technical disputes. The SPC IP Court is now operating under a three-year trial period⁸. It has jurisdiction to hear⁹:

- appeals against first-instance decisions for civil cases concerning, amongst others, invention patents, utility model patents, technical secrets and anti-trust disputes;
- appeals against first-instance administrative decisions concerning the granting and confirmation of, among others, invention patent and utility model patent rights;
- appeals against first-instance judicial review decisions concerning administrative decisions made by local authorities for, amongst others, invention patents, utility model patents, technical secrets and anti-trust disputes; and
- complex civil and administrative cases falling within the subject matter of any of the above categories.

The SPC IP Court conducted its first public trial hearing of an appeal against a Shanghai IP Court's decision on 15 February 2020. It confirmed the infringement of patent rights of Valeo Systems D'essuyage by two Chinese companies.

The establishment of the SPC IP Court with experienced and specialist judges has been widely welcomed as an indication of China's commitment to protecting IP rights and providing due process for complex IP disputes.

Link directory

Administrative Procedure Law of the People's Republic of China:
http://english.court.gov.cn/2015-09/11/content_21845451.htm

CNIPA guide to administrative decisions on patent infringement disputes:
<http://www.cnipa.gov.cn/docs/20191230135034915155.pdf>

Patent Law of the People's Republic of China:
<http://english.sipo.gov.cn/lawpolicy/patentlawsregulations/915574.htm>

The Decision of the Standing Committee of National People's Congress on Several Issues concerning Judicial Procedures for Patent and other Intellectual Property Cases dated 26 October 2018: http://www.gov.cn/xinwen/2018-10/27/content_5334909.htm

Provisions of the Supreme People's Court on Several Issues concerning the Intellectual Property Tribunal dated 27 December 2018:
<http://www.court.gov.cn/zixun-xiangqing-137481.html>

⁸ *The Decision of the Standing Committee of National People's Congress on Several Issues concerning Judicial Procedures for Patent and other Intellectual Property Cases* dated 26 October 2018.

⁹ *Provisions of the Supreme People's Court on Several Issues concerning the Intellectual Property Tribunal* dated 27 December 2018.

PARIS

Loïc Lemerrier / Tom Blanchet

UPDATE ON THE FRENCH PACTE LAW

Law No. 2019-486 of 22 May 2019, also known as the PACTE law, significantly modifies the French IP framework. The aim of this law is to meet the needs of business by adapting the IP framework to accommodate new practices and to bolster IP rights.

PACTE LAW: amendments already in force since 2019

24 May 2019	<ul style="list-style-type: none">• Five-year period for an infringement action. Such an action shall lapse after five years from the day on which the owner of a right knew, or should have known, the last fact allowing him to exercise it. This applies to designs, patents, plant-variety certificates and trademarks.• Absence of statute of limitation of a nullity action. Such an action cannot lapse. This applies to designs, patents, plant-variety certificates and trademarks.• Public research:<ul style="list-style-type: none">– the conditions of co-ownership between public entities invested with a research mission related to IP rights (e.g. patent, know-how) are specified regarding the content of the parties' agreement and the designation of the sole agent.– the obligation to exploit the invention by the co-owner of the patent, within five years from the date of the technology transfer, is repealed.
11 December 2019	<ul style="list-style-type: none">• New trademark forms and requirements:<ul style="list-style-type: none">– for a trademark registration, sound and media files are allowed.– the absolute conditions for the validity of a trademark were amended to consider the latest developments in case-law, implementing the condition of autonomous distinctiveness and the prohibition of a fraudulent trademark application.• Amendment of the opposition procedure before the INPI:<ul style="list-style-type: none">– opposition proceedings are open to a larger number of opponents, including the owner of a company name, of a business name, of a sign, of a domain name and of a public entity name.– these proceedings can be initiated based on one or more prior rights, under the condition that they belong to the same owner. See the overview of new proceedings below **

Key issues:

Firstly, the *PACTE* law reinforces the role of the French Patent and Trademark Office (“**INPI**”), both at the examination level and at the litigation level:

- (i) At the examination level: while expanding the possibility to initiate trademark opposition proceedings for a wider range of opponents, it creates an opportunity for patent opposition proceedings before the INPI.
- (ii) At the litigation level: it will be possible to bring actions for cancellation and forfeiture of a trademark before the INPI. One of the main consequences of the creation of these new proceedings is to define IP issues for which the INPI will have jurisdiction and those for which courts of first instance will continue to have jurisdiction.

Secondly, the *PACTE* law broadens the scope of IP rights. For instance, it creates new instruments of protection, such as the provisional patent application, and makes the utility certificate more attractive. Regarding trademarks, new elements can be presented before the INPI to justify a trademark application.

Finally, various amendments provided for in the *PACTE* law have already entered into force in 2019, and some will come into force throughout 2020.

	<ul style="list-style-type: none"> • New grounds for challenging trademarks: <ul style="list-style-type: none"> – only the actual use of the sign to designate goods or services can constitute an act of infringement, excluding the mere registration as a trademark. Therefore, an application which infringes a prior trademark may be sanctioned by an opposition to the trademark application or a cancellation action once the trademark is registered. – customs authorities can withhold goods in transit suspected of being infringing without the need for the trademark owner to prove that they are intended for an EU Member State where their marketing is prohibited. – the infringement of a well-known trademark will be sanctioned on the sole ground of civil liability.
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PACTE LAW: reform of the French IP framework throughout 2020

<p>11 January 2020</p>	<ul style="list-style-type: none"> • Extension of the duration of a utility certificate from six to ten years. • Possibility to convert a utility certificate application into a patent application: <ul style="list-style-type: none"> – a request for conversion shall be made in writing at any time within the period of 18 months following the filing of the utility certificate application (or the priority date, if a priority has been claimed). – when the patent application results from the conversion of a utility certificate application, the fees for the research report shall be paid within a period of one month from the date of receipt of the request for conversion.
<p>1 April 2020</p>	<ul style="list-style-type: none"> • New trademark revocation and forfeiture proceedings before the INPI: <ul style="list-style-type: none"> – it will be possible to bring actions for revocation and forfeiture of a trademark before the Director General of INPI. However, courts of first instance should have exclusive jurisdiction to hear any application for revocation, whatever the grounds, where such application is connected with any other action within the jurisdiction of the court (such as an action for infringement, unfair competition or contractual liability) or where provisional or protective measures have been ordered to prohibit infringement of a trademark and are being enforced before an action on the merits is brought.

	<ul style="list-style-type: none"> – for these proceedings, an equivalent of article 700 of the French Civil Procedure Code (reimbursement of fees) is created: <i>“at the request of the winning party, the Director of the INPI shall condemn the losing party to pay for all or part of the costs incurred by the winning party”</i>. – it must be emphasised that decisions related to the trademark revocation or forfeiture issued by the INPI could be overturned before the Court of Appeal and that the filing of the appeal has suspensive effect. See the overview of new proceedings below ** • New patent opposition proceedings before the INPI: <ul style="list-style-type: none"> – it will allow third parties to request the cancellation or amendment of a patent through administrative proceedings, while at the same time preventing abusive opposition proceedings. – applicable to all patents whose notification of grant has been published in the Official Bulletin as from 1 April 2020.
<p>22 May 2020</p>	<ul style="list-style-type: none"> • News grounds for rejecting a French patent application (inventive step): <ul style="list-style-type: none"> – a change in vocabulary will occur by removing the term “manifestly”, regarding applications which have as their subject matter an invention which is not patentable or whose subject matter cannot be considered as an invention under the current provisions of the French IP Code. – the “inventive step” requirement will be examined by the INPI, as a ground for rejecting a patent application. Until now, only the “novelty” requirement was examined.
<p>1 July 2020</p>	<ul style="list-style-type: none"> • Creation of a provisional patent application: <ul style="list-style-type: none"> – this new title will allow a date to be set with respect to prior art, with a simplified content and an absence of burdensome formalities. – the conversion of the provisional application into an application for a patent or utility certificate shall be requested within a period of 12 months following the filing date of the provisional application or the earliest date on which it was filed. Failing that, the provisional patent application shall be deemed withdrawn.

**** Overview of the new administrative proceedings
before the French Patent and Trademark Office (“INPI”)**

Similar proceedings apply to (i) trademark opposition proceedings and (ii) trademark cancellation and forfeiture proceedings.

Operative event for the period	Start of the preliminary inquiry	End of the preliminary inquiry and start of the INPI’s ruling phase	INPI decision
<ul style="list-style-type: none"> • Within two months following the publication of the application for registration, an opposition may be filed at the INPI. • An application for cancellation or forfeiture may be filed at any time by the owner of prior rights. 	<p>The preliminary inquiry can last up to six months, depending on the “rights of reply”:</p> <ul style="list-style-type: none"> • From the notification to the owner of the contested application or trademark, the latter has two months to submit his written observations. • In the event of a reply, the opponent/ applicant has one month to respond. • In the event of a reply, the owner also has one month to reply. • In the event of a reply from the owner, the opponent/applicant has a further one month to reply. • Finally, the owner has a final period of one month to reply. 		<p>From the date of the end of the preliminary inquiry, the INPI has three months to rule on the opposition OR on the action for cancellation and forfeiture.</p> <p>If the INPI fails to reply within this period, the opposition OR the action for cancellation and forfeiture is deemed to be rejected.</p>

DÜSSELDORF: GERMAN FEDERAL MINISTRY OF JUSTICE OUTLINES REFORM OF GERMAN PATENT ACT

Florian Reiling / Katharina Brandt

Establishing the status quo, the first Draft for the planned reform of the German Patent Act does not move mountains. In some cases, however, no movement but only strengthening of rights seem to suffice.

The draft

The German Federal Ministry of Justice and Consumer Protection has issued the discussion draft on the planned reform of the German Patent Act (the “Draft”). As it is only a discussion draft of the Ministry, the Draft will still have to go through the national legislative process. Therefore, this is only the very first step for changing the existing Patent Act. However, as the proposed changes have been expected, it is not too unlikely that they will pass the legislative process and come into effect. This is why a brief glance at the new provisions is already worthwhile.

Most relevant changes

Ten years after the last major reform of intellectual property protection, the legal provisions are again examined and challenged in order to maintain Germany's outstanding position in the field of intellectual property protection. The Draft encompasses changes in most of the intellectual property related provisions throughout Germany. For Germany, and in particular Düsseldorf, as a highly recognised location for patent litigation, attention will be focused on any changes in relation to the Patent Act.

Among minor adaptations, the Draft includes two major changes.

Synchronisation of infringement and nullity proceedings

The bifurcated system is one of the decisive factors for Germany's highly regarded reputation in the field of patent litigation. This system, however, does bring the difficulty that infringement and nullity proceedings differ immensely in terms of their duration.

Ten years ago, the legislator introduced Sec. 83 Patent Act, creating the possibility for the Federal Patent Court to indicate as early as possible those aspects which will presumably be of particular significance in respect of the pending decision. This indication was supposed to simplify the Infringement Court's assessment of the outcome of nullity proceedings.

Apparently, Sec. 83 Patent Act did not fully fulfil its original aim. Currently, the duration of nullity and infringement proceedings still differs considerably. Nullity proceedings are taking up to two years, whereas infringement proceedings can be decided within a year. Therefore, the Draft proposes an amendment of Sec. 83 Patent Act, allowing the Infringement Court and the parties to gain access to the (in)validity indication of the

Key Issues

- The ministry of Justice and Consumer Protection issued the first Discussion Draft on the planned reform of the German Patent Act.
- Infringement and nullity proceedings shall be better synchronized.
- The injunctive relief will be subject to the principle of proportionality – which is (at least technically) already the case.

Federal Patent Court within six months after bringing the nullity action. To achieve this, the proceedings before the Federal Patent Court shall be further streamlined.

Clarification of injunctive relief

So far, the German Patent Act does not explicitly state the principle of proportionality within the right to claim for an injunctive relief in Sec. 139 Patent Act. The Draft intends to change this situation, as a claim would be unjustified if the enforcement was disproportionate.

Although such amendment seems to be a big step, the proposed change does rather state the status quo. The Federal Court of Justice has previously decided that an injunctive relief may only be granted if it does not constitute disproportionate hardship for the infringer and is therefore contrary to good faith.

The Draft indicates that the Regional and Higher Regional Courts are still very reluctant to make use of this exclusion. Therefore, the principle of proportionality shall be explicitly incorporated. The Draft, however, also recognises the importance of effective injunctive relief, especially with Germany being such a well-recognised location for patent protection. Therefore, the exclusion shall still be limited to exceptional cases – which was the situation previously.

Practical implications

As expected, the proposed changes are rather modest. However, the Draft addresses a problem which has been intensively discussed over the past years. The so-called injunction gap between the decision in infringement proceedings and nullity proceedings was, and still is, a common point of criticism.

The new provision in Sec. 83 Patent Act will not fundamentally change the system but might provide a way to accelerate the exchange of information between the infringement and nullity proceedings forum. This could further strengthen the German patent law system.

Regarding injunctive relief, both the clarification and the implementation of the principle of proportionality were expected. Since the German Courts have had to take the proportionality principle into account before, this will not lead to a ground-breaking new practice. The patentee will also not be expected to state grounds why the enforcement, in fact, is proportionate. It will be the obligation of the alleged infringer to argue that the enforcement would constitute disproportionate hardship. Since the Draft specifically states that the granting of injunctive relief shall not be weakened and that a strong enforcement regime is indispensable for the German industry, patentees should not be roused too much by the current reform efforts.

MILAN

Andrea Andolina

AMBUSH MARKETING: ITALIAN GOVERNMENT PROPOSES A NEW SPECIAL LAW

Sport and other popular events are always a great occasion for marketing, thanks to the worldwide attention which they attract among the general public. In the era of digital advertising, this exposure is indeed multiplied: a viral hashtag or few trend topics can give large visibility in few minutes to an online campaign. The incoming European Football Cup and, for Italy, the 2026 Winter Olympic Games in Milano-Cortina will certainly offer the umpteenth example, as well as in the past World Football Cups or other popular events have made (e.g., the launch of the new Star Wars movie or Milan EXPO 2015, just to mention the more recent cases decided by the Italian Courts on that regard).

On the other side, **event organizer, sponsors** and **corporate stakeholders** have often complained that they do not have enough returns from the mediatic and marketing exposure of “their” event and that in any case the success of these advertising campaigns is mainly relying on the parasitic exploitation of the events they “create” (or at least they had paid for, speaking of sponsors). Even if the campaign does not use trademarks, logos or other owned or registered distinctive signs or it does not claim official sponsorship, the mere conceptual link or suggestion can be enough to attract consumers’ attention and, in a certain way, **misleading** them or, in any case, cause a **competitive prejudice** *vis-à-vis* the official sponsor who is paying to have that kind of consumer’s attention.

Ambush marketing and unfair competition

Ambush marketing is the “legalese” notion used by lawyers and Courts to tackle this phenomenon. Until now, in Italy ambush marketing is a special figure of the general **unfair competition rules**: in a recent decision rendered by the Court of Milan, it has been defined as the marketing strategy where a competitor tries to illegitimately create an association between its trade mark or image and a high profile event, without having any sponsorship or other contractual relationship with the event organizer.

The proposed law on ambush marketing

After previous attempts and proposals in the last years, on 17 January 2020, the Italian Government officially proposed to the Italian Parliament to approve a law which make ambush marketing a special figure of unlawful conducts. According to the press release of the Government, a special effort was made in “*making a careful balance between the protection of the economic interests of the organizer and official sponsor of the event, on one hand, and the marketing opportunities of third-parties*” ([Press release of the Italian Government of 17.01.2020](#)).

Key Issues

- A draft law on ambush marketing has been proposed by the Italian Government; the law shall be then discussed and approved by the Parliament;
- The ambush marketing would be sanctioned with fines ranging from 500,000 EUR to 2,500,000 EUR; the competent authority to issue the fine is the AGCM (Italian Competition Authority);
- According to the draft law, the ambush marketing will be sanctioned only if it occurs starting from ninety days before the event and within the ninety days after; and
- The interested parties should maintain the right to action the ordinary unfair competition rules before the Courts, as further level of protection and when the new law will not be applicable.

The subject-matter

The proposed law defines the events potentially exposed to the ambush marketing, as the “*sport events or exhibitions of national or international exposure, as well as shows with artists of national or international reputation*”. According to the draft law, it would be prevented to make “*parasitic marketing*” which is the marketing activity (i) “*unauthorized by the event organizer*”; and (ii) aimed to obtain an “*economic or competitive advantage*”.

The draft law provides with a (non-exclusive?) list of potential subject-matters, *i.e.*:

- (a) the creation of an indirect link between the owned trademark, name or distinctive sign and the event able to deceive the public on the identity of the official sponsors;
- (b) the declaration to be an official sponsor of the event, without being official sponsor of the event;
- (c) the marketing of the owned trademark, name or distinctive sign by means of any sufficient action to attract consumers’ attention, during the event or in venues closed to the event;
- (d) the selling or merchandising of products and services branded even if only partially with the event logo or other distinctive signs able to deceive regarding the same logo or give an incorrect link with the event or the organizer.

Exemption

The draft law provides an express exemption with regard to the marketing activity carried out by virtue of sponsorship agreements with athletes personally, clubs, artists and authorized attendants of the event.

Sanctions and competent authority

The ambush marketing would be sanctionable with administrative fines ranging **from 500,000 EUR to 2,500,000 EUR** and the competent authority to issue the fines would be the AGCM (in Italian, *Autorità Garante per la Concorrenza ed il Mercato*, which is the Italian Competition Authority).

Duration and coordination with general unfair competition rules

The special law on ambush marketing would sanction conduct only if occurred between the ninety days before the event and the ninety days after the event.

The draft law expressly provides that the special law, if approved by the Parliament, would not prevent the interested party from proceeding based on other available grounds of protection, *e.g.*: the general unfair competition rules. Therefore, event organizers and sponsors would apparently maintain the right to start proceedings before the civil courts, for instance where and when the special law would be no longer applicable, although the proposed route before the AGCM would constitute certainly a more sharp and effective alternative, in terms of time and sanctions.

BARCELONA

Fernando Cerdà Belda / Adrián Crespo

WARNING SIGN FOR INFLUENCERS: THE “#AD” HASHTAG MIGHT NO LONGER DO THE TRICK

In a landmark opinion, the appellate panel of Autocontrol (Spain’s self-regulation body for advertising disputes) decides that the use of the “#ad” tag in an influencer’s post on social media does not rule out a finding of surreptitious advertising, even if the influencer has not received any compensation.

The appellate dispute resolution panel of Autocontrol, the Spanish independent advertising self-regulatory organisation, has ruled on the issue of influencer marketing. In an *en banc* opinion dated 8 January 2020 in *Undisclosed individual vs Paulina Eriksson*, the panel has reached the conclusion that a post published on social media by an influencer might be considered as surreptitious advertising if its marketing purpose is not made obvious to the consumer.

The background of the case is the following: a Marbella-based Swedish influencer, Paulina Eriksson, posted a picture of herself on Instagram holding a mobile phone and using a pair of wireless earbuds from a brand called Urbanista®, together with a written text in which the influencer highlighted the earbuds’ features and advantages. At the bottom of the text, the influencer included the hashtag “#ad” (short for “advertisement”).

Following a complaint by an undisclosed individual, Autocontrol’s panel concluded that Ms Eriksson’s post did not meet the “authenticity principle” and, therefore, was an act of surreptitious advertising. The panel’s reasoning highlighted that:

- Given the post’s content and features –focused solely on the product and on showcasing its advantages and benefits, without mentioning any alternatives–, there were solid reasons to believe that it had a marketing purpose;
- The commercial nature of the post was not easily identifiable as such by the targeted consumers, since it was posted on Ms Eriksson’s personal social media sites, which might suggest that she was just sharing her personal opinion with her followers; and
- Other than the “#ad” hashtag, the post was not explicitly and sufficiently identified as advertisement.

The influencer alleged that the post was not a marketing communication *per se*, because she did not receive any compensation in exchange. However, Autocontrol’s panel dismissed this allegation on the basis that the marketing nature of a communication only depends on the specific features and circumstances of the communication, regardless of whether or not the advertiser has received compensation.

Adrián Crespo

IP Stars: Rising Stars 2019

Key Issues

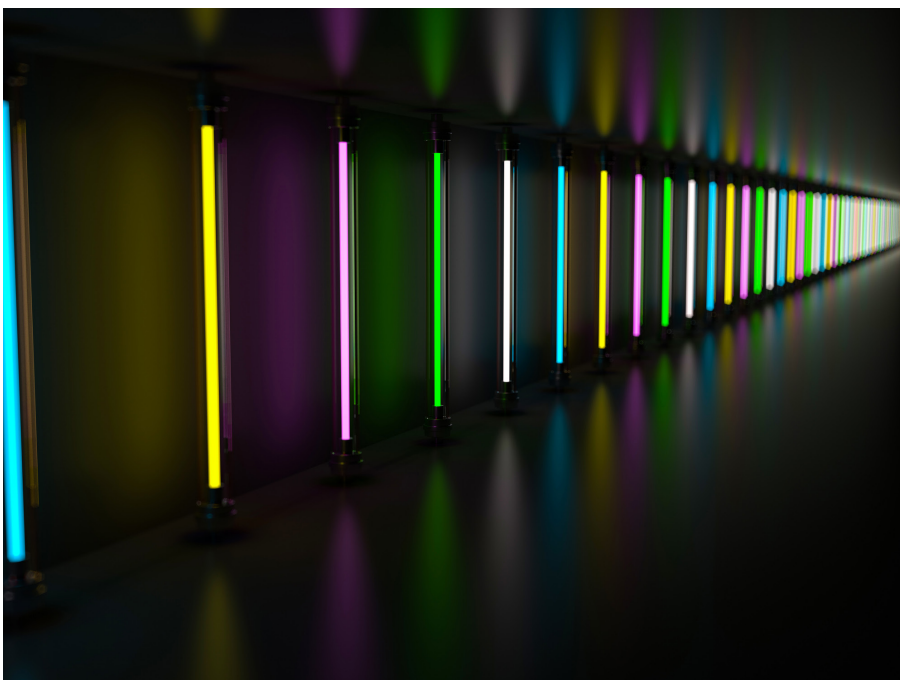
- The Spanish self-regulation body for advertising disputes sets higher standards for influencers on social finding: they must make an effort to identify commercial communications beyond the mere use of “#ad”-style hashtag disclaimers.
- While a non-judicial, non-binding decision, this precedent is likely to have an immediate impact on Spanish advertising law.

Of particular note, Autocontrol's panel highlighted that the fact that the post included the hashtag "#ad" was not sufficient to meet the requirements of the authenticity and transparency principles, which require that a marketing communication must be identifiable as such. The panel noted that the "#ad" disclaimer got watered-down when briefly included at the end of the written text and might go unnoticed by followers. Therefore, it was concluded that the post was not easily identifiable as an advertisement by the consumer.

Autocontrol's opinion in this case is not binding, insofar as neither party adheres to its self-regulation scheme. However, given the prestige of the dispute resolution panel, this opinion *de facto* constitutes a landmark precedent on the issue of influencer marketing and might have a significant impact in this field. Indeed, since the inception of Autocontrol in 1995, Spanish Courts tend to follow Autocontrol's opinions when a case reaches the judicial stage. Furthermore, most Spanish companies and players in the advertising arena -whether subject to Autocontrol's self-regulation scheme or not- pay close attention to the panel's decisions and opinions.

It is worth mentioning that the threshold set out in this opinion (i.e. the "#ad" hashtag might not always be enough to identify a marketing communication) slightly departs from the recommendation of the UK's Advertising Standards Authority (ASA) in its landmark ruling on the "*Rooney/Nike*" case back in 2012 which, so far, had been consistently followed as a guiding principle by most influencers in Spain.

Lastly, the panel's opinion will probably shape the upcoming *Code of Conduct on Influencer Advertising*, which is being currently drafted by Autocontrol, the Spanish Advertisers Association and the Spanish Government.



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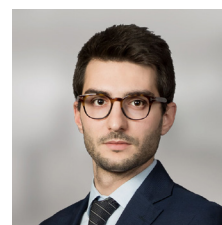
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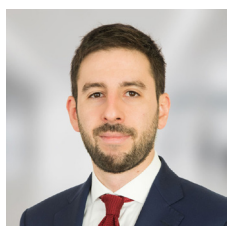
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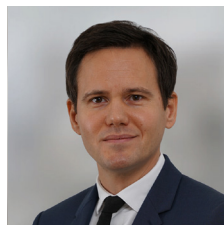
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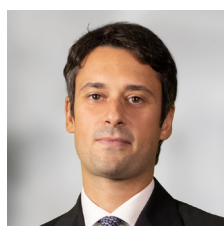
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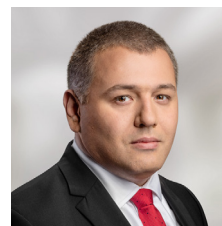


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