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INTELLECTUAL PROPERTY AND TECHNOLOGY NEWS

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The award-winning *Intellectual Property and Technology News* is now published in the United States, Asia Pacific and EMEA regions. Find all current and past editions of the *IPT News* here: www.dlapiper.com/ipt_news.

Welcome

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Welcome to our largest edition of IPT News – EMEA. This quarter has seen DLA Piper announced as the biggest law firm in the world. This has only been made possible by you, our clients. Although we are proud of this title, our objective still remains the same, to provide you with quality, quality, quality legal services.

As a result, our IPT Group has had a renewed focus on innovation to ensure we are meeting your needs, this includes webinars (see page 17) – recordings are also available online, new blogs – IPT Spain and All-In (our gaming resource) and of course this newsletter (see page 20 for details on how to access previous editions). We are always eager to provide additional value added services for you, so if you have any suggestions do let me know.

I hope you enjoy reading this edition of IPT News – EMEA.

For any queries contact myself, John or our authors.

Editor's Column

On 15 July 2013 the UK government launched a consultation on the European Commission's review of the EU copyright framework. One of the more controversial areas covered by this review is private copying levies. The divergent law across the EU in this area is discussed from Austrian, Netherlands and UK perspectives, in the context of recent ECJ case-law on film copyright at page 06. This review forms part of the Commission's Digital Agenda for Europe, upon which Patrick van Eecke provides an insightful update at page16. Elsewhere, a year on from the London Olympics, and with the Rio 2014 football World Cup just around the corner, it is high time to mull over the key ingredients of a successful sponsorship agreement (page 10), and to examine the prospects for Africa's rapidly developing nations to host future global sporting events (page 04). Other hot topics from around EMEA covered in this issue include the Spanish angle on late payment of debts (page 14), data protection aspects of cloud computing contracts (page 08), and the patenting of DNA sequences (page 12).

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IPT INSIGHTS

MEDIA

GERMANY

The Regional Court of Bielefeld Rules Against the Resale of Audio Books and e-books. The court had to decide on an action brought by a consumer protection organisation against an audio book and e-book publisher (file no. 4 O 191/11). The plaintiff had filed for an injunction regarding the use of clauses in the publisher's General Terms and Conditions granting the buyer a non-transferable right to use audio books and e-books and prohibiting their resale.

The plaintiff was, in particular, invoking the recent ECJ judgment in the Used Soft case (C 128/11), which applies the principle of exhaustion of software copyright purchased via download.

In the matter at hand, the court decided that the ECJ judgment does not apply to audio books and e-books. It argued that the European court had based its decision on the software directive 2009/24/EC, which only applies to computer programs. Audio books and e-books do not fall into that category.

The plaintiff has announced that the case will go to appeal.

TELECOMMUNICATIONS

EMEA

BTG Pactual the Brazilian investment bank, asset manager and wealth manager, has acquired the Globenet submarine cable network from Brazilian telecoms operator Oi. The acquisition is valued at over US$ 750m, and is one of the largest ever submarine cable acquisitions. The deal is a good example of a renewed interest in telecoms infrastructure by buyers from outside the telecoms industry and was the first investment into this specific sector by BTG Pactual. The acquisition includes the transfer of a 22,500 km system of fibre-optic submarine cables held by GlobeNet, linking connection points between the US, Bermuda, Colombia, Venezuela and Brazil, as well as supply of capacity by GlobeNet to Oi and its subsidiaries through a fixed-price long-term "take or pay" contract with volume guarantees. The latter was an especially important element of the deal – adopting a model commonly used in other project finance deals but never before used, to our knowledge, in the submarine cable sector. If this model succeeds, similar deals on other cable networks in the EMEA region, can be expected.

IPT INSIGHTS

INTELLECTUAL PROPERTY

FRANCE

Two recent judgments of the Paris Court of Appeal have clarified which types of trademark infringement justify the jurisdiction of the Paris Court of First Instance acting as Community Trademark Court.

In the cases referred to the Court (Intra-EU Trade v. Transit), the infringing goods, which were detained by the French Customs, were manufactured in Poland and were en route for Spain via France.

The Court ruled that these goods were not in transit but were already traded intra-community. As these goods were not genuine and the intellectual property rights claimed were Community trademark rights, the Court held that the infringing goods were not lawfully manufactured in Poland and could not be sold lawfully in Spain. As a consequence, the Court concluded that the Paris Court of First Instance acting as Community Trademark Court had jurisdiction over the infringement and related unfair competition acts committed in the European Union.

This decision is a straight-forward application of the existing law. The transit issue is however clearly an issue to follow closely in the forthcoming discussion on the legislative package of Proposals for a new Community Trademark Regulation and Directive.

PATENTS

UK

The UK Supreme Court in the Virgin Atlantic Airways v Zodiac Seats case has reversed the 100 year-old position that a person found to infringe a patent following an unappealable judgment remains bound to pay damages for that infringement, regardless of what subsequently happens to the patent.

In UK intellectual property cases an inquiry into the amount of damages payable is typically held as a separate trial after the trial on liability. The effect of the ruling is that, if a patent (or other registered intellectual property right) is revoked or amended before the infringer has paid damages, the rights holder may not be able to recover any damages. The Court did not decide whether or not the infringer could recover damages already paid, but suggested this may be possible.

This brings the UK more into line with the position in Germany, where an infringer may recover damages already paid, but runs counter to the position in France, where the Cour de Cassation held last year that an infringer could not recover the damages he had paid notwithstanding the later revocation of the patent.

Consequently, a rights holder would be advised to seek earlier payment of damages.

INTELLECTUAL PROPERTY AND SPORT

A WINNING COMBINATION...

By Claire Bailey

Can it really be a year since London welcomed the world for the 2012 Olympic and Paralympic Games? Similarly with FIFA announcing its ticketing strategy for the *2014 FIFA World Cup* we are reminded that the next world cup is just around the corner.

As with all major events there were London 2012 sceptics who thought the venues weren't going to be ready and it wouldn't be a success, but the London 2012 Olympic Games and Paralympic Games proved to be a great triumph. According to the office of National Statistics 680,000 overseas residents came to the UK primarily to watch, but also to participate in and work at the Games. As confirmed in the IOC's London 2012 Facts & Figures sheet produced in March 2013, it has been estimated, in an Oxford Economics study commissioned by Lloyds Banking Group that the Games will generate GBP 16.5 billion for the British economy from 2005 to 2017 including pre-Games construction and other early Games-related economic activity.

There is no doubt that the meticulous planning, the support of stakeholders and the general public, together with the efforts of the 70,000 volunteers (the Games Makers) helped to make the Games a great success. However, the importance of the brand protection programme to the success of the Games and other sporting events should not be underestimated. The London Games were put on by LOCOG, a private limited company. The operating budget of nearly £2billion was required to be raised privately and largely through sponsorship and licensing. Without the support of the sponsors and licensees the Games could not have been staged in the truly inspirational manner that we witnessed.

This crucial role of sponsors is common across major sporting events. As a result, any city or country bidding to host such an event will be required to protect the rights and exclusivity offered to the sponsors who will fund the event. This is generally achieved through specific legislation; for example, we have seen the introduction of the Glasgow Commonwealth Games Act 2008 (Games Association Right) Order 2009 for the Commonwealth Games to be hosted in Glasgow in 2014, and laws in New Zealand for the 2015 Cricket World Cup.

In relation to the impact of major sporting events in Africa, a presentation by Mvuzo Mbebe Chief Executive Officer of the Local Organising Committee of the 2013 African Cup of Nation in May 2012 estimated the value of audiovisual and publicity rights for the 2013 African Cup of Nations (AFCON), which was held in South Africa, at R44,000,000,00 just over £91million. AFCON attracts large international sponsors. For example, since 2009, Orange has been the leading sponsor, with the official title of the AFCON "Orange Africa Cup of Nations" agreed until 2016.

The next big footballing event in Africa will be the 2015 Africa Cup of Nations, administered and controlled by the Confederation of African Football (*Confédération Africaine de Football*), the 30th AFCON, which is being hosted in Morocco. The 2013 AFCON was subject to the terms of the South African Merchandise Marks Act, declared by its Minister of Trade & Industry as a "protected event" so that ambush marketing could be prohibited as had been the case in the 2010 FIFA World Cup also in South Africa. It will be interesting to see if a similar approach is adopted in Morocco.

As can be seen from the London 2012 Games, the hosting of major sporting events not only brings in major investors; it also leaves a legacy of sporting and transport infrastructure which can benefit a country long after an event has occurred.

Senegal May 2013

The benefit of hosting major sporting events for the development of countries is something well understood by the World Intellectual Property Office.

On 21 to 22 May 2013 the World Intellectual Property Organization (WIPO), in cooperation with the Government of Senegal, organized an International Conference on the Strategic Use of Intellectual Property to Sustain Sport in Africa in Dakar.

The conference opened with addresses from: His Excellency Mr. Bagnick Ndiaye, Minister for Sport, Ministry of Sport, Dakar; His Excellency Mr. Fodé Seck, Ambassador, Permanent Representative, Permanent Mission of Senegal to the United Nations Office and other international organizations in Geneva; and Mr. Geoffrey Onyeama, Deputy Director General, Development Sector, World Intellectual Property Organization (WIPO), Geneva.

Mr Geoffrey Onyeama confirmed that WIPO's activities were designed to encourage the strategic use of IP to create a sports culture with the ability to host major events. He referred to UN Secretary General Ban Ki-Moon's perception of sport as a tool for promoting development.

The conference attracted attendees from 11 African countries: Gambia, Guinea-Bissau, Ghana, Cameroon, South Africa, Ivory Coast, Kenya, Ethiopia, Congo, Burkina Faso and Senegal.

The event was well supported not only with great speakers from across Africa, but also internationally with talks from Mr. Roderick Gordon, Principal of Gordon McGrath, Kingston, Jamaica who hosted the first such conference, the International Olympic Committee, myself and Andaleeb Basunia as former Brand Protection Lawyers of the London Organising Committee of the Olympic Games and Paralympic Games and Mr. Auke-Jan Bossenbroek, Legal Counsel at FIFA who spoke via a video link from Zurich, Switzerland.

Our presentation was aimed at providing information about the London 2012 brand protection programme, the challenges that LOCOG faced, how LOCOG sought to deal with the risks and challenges, and what happened at Games time. Attendees were keen to see a worked example of how a successful brand protection programme is set up and operated.

From the discussions that followed, it was clear that real challenges for potential African hosts include raising funding, and generating sufficient audience numbers to attract sponsors.

This successful conference seems to be part of a drive to promote the importance of IP and to put the hosting of major sporting events onto the development plans of African countries. For example:

- In September 2012, African Ministers of Industries and Culture of the African Intellectual Property Organisation (OAPI) member countries attended a conference in Cameroon with a theme "Intellectual property at the service of Africa's development"; and
- In November 2012 in Kenya, the national athletics body held a seminar for 300 active athletes at both junior and senior level to address issues including IP rights and sport.

As provided in the Independent Online Business Report dated 27 May 2013, foreign direct investment in Africa may rise more than 10 percent to $56.6 billion this year, which will near the record set in 2008, while portfolio inflows are set to increase to a record $26.2 billion. For example, as confirmed in Business Day Live on 10 June 2013, Protea Hospitality Group has completed a deal which will mean it has hotels in 10 African countries, with the total value of projects in Africa well in excess of $100m.

What next?

Foreign investment into sporting events and infrastructure is not without its hiccups.

Coke signed a USD1.5million naming rights deal in February 2009 with the Kenyan government agency in charge of sporting facilities, for the Nyayo national stadium. This was supposed to secure Coke branding, marketing and naming rights for three years.

This investment was challenged by Pepsi, and this ultimately resulted in Coke withdrawing from the deal. However, after three years of negotiations Coke's sponsorship is back in place. The Coca-Cola general manager for East Africa, Peter Njonjo, commented "*I feel we have arrived at a mutually beneficial statement with the Government through SSMB (Sports Stadia Management Board). The Ministry of Sports appreciates that partnering with the private sector is key to sports' development and hence their willingness to conclude this deal in a way that does not impair relations*".

The WIPO conference sparked a healthy debate. This is a topic of great interest and it is hoped this will inspire countries in Africa to improve IP harmonisation and protection in order to attract major sporting events.

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THE CJEU GOES TO THE MOVIES

REFLECTIONS ON FILM COPYRIGHT FROM AUSTRIA, THE NETHERLANDS AND THE UK

By Catherine Beloff, Sabine Fehringer and Jan Kabel

Film and TV copyright cases (including TV production cases) tend to be complicated because of the complexity of the inter-relationship between the many different contributors to a film work. The film producer has an interest in a work that is free from financial and moral claims by film authors (director, authors of scenarios and dialogues, author of the music) and film actors, whereas authors and actors have an interest in fair compensation that relate to any exploitation of the film, and an interest in the way they are presented as contributors to the work. The Berne Convention offers no clear solution but leaves the Member States ample freedom in this respect. The UK and Austria grant the film producer a legal copyright (a cessio legis); countries like the Netherlands provide in the absence of contractual stipulations for a presumption of transfer of some copyrights in favour of the film producer. This granting of rights is compensated for by an obligation on the film producer to compensate the authors. In many cases the relationship between the different parties is regulated by contract and it will not be a surprise that the legal position of many authors is weak, compared to the position of the film producer. That is also the case when statute law solutions are applicable: the right to fair compensation mostly could be and indeed often is bought off for a lump sum.

In its decision of 9 February 2012 (case C-277/110, *Martin Luksan v. Petrus van der Let*), the Court of Justice of the EU decided that the rights to exploit a cinematographic work vest by operation of law, directly and originally, in the principal director. According to this decision, the relevant European Directives must be interpreted as precluding national legislation which allocates those exploitation rights by operation of law exclusively to the producer of the work in question. However, Member States, are allowed the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of the rights to exploit the cinematographic work, provided that such a presumption is not an irrefutable one precluding the principal director of that work from agreeing otherwise. Furthermore, according to the Court, the principal director, in his capacity as author of a cinematographic work, must be entitled, by operation of law, directly and originally, to the right to the fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the 'private copying' exception. In the UK and Austria proposals are pending to adapt the legislation to the Court's decision about the legal position of the film producer. Fair compensation for private copying still is quite differently regulated in the Member States.

INFLUENCE OF THE LUKSAN CASE ON THE LEGAL POSITION OF THE FILM PRODUCER

Dutch law is in conformity with these rulings. Paragraph 45d of the Dutch Copyright Act (DCA) determines that, unless otherwise agreed in writing by the authors and the producer, the authors of a cinematographic work shall be deemed to have assigned to the producer the right to communicate the work to the public, to reproduce it, to add subtitles to it and to dub the dialogue. Composers of music and writers of the lyrics are excluded from this transfer of rights. A fair compensation must compensate for this loss of rights. The Dutch proposal in relation to copyright contracts (*Wetsvoorstel Auteurscontractenrecht*) provides for a legislative and proportionate compensation to authors that have contributed an essential part of the film work. Lump sums therefore are not possible any more, and the same holds of course to waivers of the fair compensation. Transfer of rights by the producer to a third party implies the right of the author to claim the compensation from that party. Paragraph 38 Sec 1, 1st sentence of the Austrian Copyright Act (ACA) lays down that the exploitation rights in commercially produced film works are vested in the film producer. This is the so called *cessio legis* which has now been reversed by the Luksan judgment of the CJEU as it held such original assignment of rights by operation of law to be a breach of EU law.

The Austrian Ministry of Justice has presented a working paper regarding amending the law on copyright in film works. It should, of course, contain at least a presumption of transfer in favour of the producer of a film work, but a provision like that, oddly enough, is not included. The latest version of the draft contains no changes of the cessio legis rules. No explanation was given on that. We believe that the existing cessio legis rules will be just interpreted in line with the ECG judgment or the amendments will be introduced at a later point in time. One may doubt whether UK legislation is in accordance with the ruling of the Court regarding the ownership of copyright in a film. Under section 9(2)(ab) of the Copyright Designs and Patents Act 1988 (CDPA), the author of a film work is the producer and the principal director, so there is a presumption of joint-ownership. The judgment of the Court precludes national legislation which allocates film copyright exclusively to the producer. The use of the word 'exclusively' could be construed to mean that joint-ownership is permissible, but that construction seems to be built on shaky ground. However, one must admit that the decision of the CJEU does not explicitly refer to the position of the film producer as a co-author of the cinematographic work.

INFLUENCE OF THE LUKSAN CASE ON THE RIGHT TO FAIR COMPENSATION FOR PRIVATE COPYING

The further ruling of the Court implies that the principal director, in his capacity as author of a cinematographic work, must be entitled, by operation of law, directly and originally, to the right to fair compensation provided for in Article 5(2)(b) of Directive 2001/29 under the 'private copying' exception. According to this ruling, Member States are not allowed the option of laying down a presumption of transfer, in favour of the producer of a cinematographic work, of the right to fair compensation vesting in the principal director of that work, whether that presumption is couched in irrefutable terms or may be departed from.

Section 16c DCA provides for an irrefutable right to fair compensation to authors for the private copying of their work. Therefore Dutch law is in conformity with the ruling of the Court on this point too. Paragraph 38 Sec 1 2nd sentence of the ACA, saying that the original authors are entitled to half of the legal entitlement for remuneration, was considered illegal by the CJEU. The Austrian working paper, mentioned above, still contains a rule that the legal entitlements to remuneration are shared between the author and the producer: each gets half of it, as far as the entitlements are not indispensable. This wording has been criticised by leading Austrian copyright commentators; these commentators also believe that the Luksan judgment might be transformed into Austrian law just by correct interpretation of EU law without the necessity of an express legislative amendment.

In the UK, currently, there is no private copying exception, save for in relation to time shifting in the CDPA. However, the UK government has expressed its intention to introduce a private copying exception as part of its response to the recommendations of the Hargreaves Review of Intellectual Property and Growth. As ever, the final drafting of the legislation will be key, but early drafts indicate that it will be narrow, solely permitting copying of content lawfully owned by an individual to another medium or device owned by that individual, strictly for their own personal use. The UK government has also expressed its desire that any such exception is framed in such a way that the amount of harm to rights holders that would result in "fair compensation" under EU law is minimal, and hence the amount of fair compensation provided would be zero. The rationale is that this avoids market distortion and the need for a copyright levy system, which the government opposes on the basis that it is likely to have adverse impacts on growth and be inconsistent with its wider policy on tax. The UK government seems to be firmly against any kind of levy. It will be interesting to see whether the Luksan judgment re-opens the debate on fair compensation and the circumstances in which it should be paid, particularly in the film industry.

On 31 January 2013 the European Commission published recommendations on private copying levies. Levies have been, and to a large extent still are, a significant source of income for rights holders. However, as every Member State has its own interpretation of the private copying levies, they also have been a source of friction with the Internal Market principles of free movement of goods and services for quite some time. On January 1, 2013 the fair compensation for private copying in the Netherlands was extended to MP3 players, DVD recorders, mobile phones, tablets and laptops. Before this extension, the compensation was only applicable to private copies made on blank CD's and DVD's. The amount to be paid is five euros for items that have a capacity of 16 GB or more, to be paid to the Dutch Foundation Thuiskopie by the producer of the hardware or the party which imports the hardware and to be distributed by the Foundation among the authors.

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CLOUD COMPUTING CONTRACTS AND DATA PROTECTION CHALLENGES

By Didier Wallaert

On 1 July 2012, the Article. 29 Working Party (WP 29), which includes representatives of the data protection authorities of each of the EU member states, issued its interesting Opinion WP 196 on the data protection risks and some concrete compliance recommendations in relation to cloud computing contracts (the Opinion). Given the increasing popularity of cloud solutions (which in most cases involve the processing of personal data) within enterprises and organisations, set out below the most important data protection risks and recommendations in relation to cloud computing contracts as identified by the WP 29.

LOOK BEFORE YOU LEAP – RISK ASSESSMENTS

One of the key messages of the Opinion is that businesses and administrations wishing to use cloud computing should first conduct a comprehensive and thorough risk analysis. In this respect, cloud providers must provide their clients with all information required to properly assess the pros and cons of the envisaged cloud solution. The main drivers for cloud customers to acquire cloud services on the EU market should be based on security, transparency regarding all modalities of the solution and legal certainty. These and other risk factors should be carefully reviewed prior to moving into the cloud.

SOME KEY DATA PROTECTION COMPLIANCE RISKS

The WP 29 identifies, among others, the following data protection compliance risks faced when using or offering cloud solutions:

- **Vendor lock-in:** when the cloud solution is based on proprietary technology, customers may face data portability and interoperability issues when moving the services/data to another cloud provider.
- **Confidentiality issues:** there is a risk that cloud data may be disclosed by the provider under foreign law to enforcement agencies without a valid EU legal basis and possibly in violation of EU data protection law (e.g. US subpoenas and similar requests).
- **Lack of information** on the processing of the cloud data: the cloud customer should be duly informed in which jurisdictions cloud data will be processed, as this may have an impact on the law applicable to such data and/or data protection formalities required for transfer of data outside the EEA. In this respect, EU Model Contracts or Binding Corporate Rules (**BCR**) can be used but the cloud customer (which is in most cases the data controller responsible for the cloud data), should ensure it knows exactly what happens to the data, in order to be able to ensure maximum compliance. In addition, the cloud customer will require a high level of transparency as, being a data controller, it has to duly inform the relevant individuals (data subjects) whose personal data are processed in the cloud. The information provided by the cloud provider to its customer should also include the identification and location of any sub-contractors used. As a result, cloud providers should be as transparent as possible about their services.
- **Security/availability risks:** cloud customers should verify whether the cloud provider has taken all required technical and organisational measures in order to ensure security and availability of the cloud services.
- **Risk of use of the data by the provider for own purposes:** cloud providers must only process personal data for the restricted purposes agreed with the cloud customer. Cloud providers should therefore refrain from using cloud data for their own purposes (e.g. direct marketing) even when this would be technically possible (e.g. due to shared resources by many cloud customers, providers may be able to cross-link data). In such case of illegitimate use of the data, the provider will not only be subject to criminal and/or administrative sanctions, but it will itself be treated as a data controller having to comply with mandatory data protection laws. In this respect, adequate data governance rules should be implemented, and no excessive administrator privileges should be granted to the provider.
- **Unlimited data retention:** cloud providers should not store cloud (personal) data longer than necessary for the purpose of the processing (i.e. returning/deleting the data upon termination of the services or when these data are no longer relevant).

RECOMMENDATIONS

Most of the above mentioned issues can be dealt with in a contractual manner, as per the WP 29's recommendations. The cloud computing contract should, in addition to the mandatory data processing wording (i.e. that the cloud provider is processing the data upon the instructions of the customer and that the provider will take all technical and organisational measures to protect the personal data) also deal with the following topics (among others):

- detailed instructions of the customer, including applicable (objective and measurable) service level requirements and penalties for non-compliance therewith;
- specification of the security measures used by the cloud provider depending on the risks represented by the processing and the nature of the data. The cloud customer should in particular pay attention that such measures are implemented ensuring availability, integrity and confidentiality of the cloud data;
- strong contractual confidentiality obligations for the provider and its staff;
- specifications on the conditions for and modalities of returning/destroying personal data on termination of the cloud services (including secure deletion upon request of the cloud customer);
- obligation for the provider to support the customer in facilitating exercising of data subjects' rights (e.g. right to correct his/her data);
- informed consent of the cloud customer for sub-contracting: a general consent can be given linked to the provider's obligation to inform the customer of any intended changes, linked to the customer's right to terminate the agreement in the event it does not agree to such changes.
- an obligation on the cloud provider to provide a list with locations where the data may be processed;
- a notification obligation of the cloud provider in case it faces legally binding requests for disclosure of the data;
- the cloud provider should ensure the lawfulness of any cross-border (and in particular extra-EEA) data transfers by entering into EU standard model clauses or by using BCR for processors that are allowed by the WP 29 as from 1 January 2013. As regards transfers to the US, where some of the main cloud providers are located, it should be noted that the WP 29 provides a negative evaluation of the ability of Safe Harbor self-certification to ensure lawful data transfers to the US. As a result, cloud providers should preferably rely on other techniques such as the BCR for processors as a legitimate basis for their transfers to the US and other countries. The BCR path also offers more flexibility than Safe Harbor (e.g. in case cloud data are not only stored in the US by the provider but also in other non-EEA jurisdictions).

The WP 29's recommendations will not be uniformly warmly welcomed by cloud providers, as they may appear rather burdensome. However, given the heavily regulated environment and in particular taking into account the reform of EU data protection laws which is currently in progress, cloud providers will have to take these recommendations into account so far as possible, as they reflect how EU data protection authorities will interpret the current and the future applicable legislation. Where the implementation of these measures and additional obligations may come with a cost increase, the question arises whether the customer will be willing to pay for such a compliance-related mark-up. However, it is likely that the cloud market will support these recommendations, and that customers will be happy to pay a slightly higher price for compliance, in particular to the extent data will be moved into the cloud. In addition, as more and more cloud providers offer compliant solutions, it is likely that competition may flatten the price increase and that offering and advertising compliant and secure cloud services can create a strong selling position towards customers.

OTHER LEGAL RISKS AND POTENTIAL ISSUES OF CLOUD SOLUTIONS

In addition to the data protection-related aspects, both cloud customers and cloud providers face other legal complexities such as the need for tailored contracts taking into account the legal qualification of the cloud services and the potential risks and costs related to cloud solutions. Indeed, a so-called cloud contract goes beyond the typical structure and content of a standard IT services agreement. In this respect, contractual clauses such as liability, early termination of the agreement and proper exit management linked to (inter)operability and business continuity, and in particular the intellectual property rights in cloud data will need to be carefully assessed prior to entering into cloud agreements.

SOME PRACTICAL ADVICE

Both cloud providers and customers should be aware that cloud services can only be offered and acquired in a compliant manner in a heavily regulated environment. The risks and recommendations identified above are only a short-list of potential issues that may arise when moving into the cloud. As a result, in line with the WP 29's recommendations, a careful but efficient risk assessment carried out by the cloud customer, whereby the Opinion can be used as a check-list, should lead to a compliant offer of cloud services by providers that have adapted their services and infrastructure in order to meet EU data protection obligations. Given the complexity of the applicable legal framework and the importance of contractual safeguards both for cloud customers and cloud providers, legal assistance will be required prior to acquiring/offering cloud services.

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SPONSORSHIP AGREEMENTS

9 STEPS TO MAXIMISING RETURN ON INVESTMENT

By Jamie Ryder

Sponsorship is something of an intangible concept which has no real definition in law. It has been defined as *"a mutually acceptable commercial relationship between two or more parties in which one party (the Sponsor) acting in the course of business, trade, profession or calling seeks to promote or enhance an image, product or service in association with an individual event happening, property or object (called the Sponsee)."*[1]

Perhaps it is the abstract nature of sponsorship that sometimes causes Sponsors (and often, Sponsees alike) to undervalue the importance of the sponsorship agreement (Agreement).

The modern financial landscape dictates that return on investment (ROI) is a key driver of sponsorship arrangements. As a result, sponsorship relationships, and the agreements that govern them, are under ever-increasing scrutiny in terms of the true value they offer to a business.

Proposed Sponsors must therefore utilise the Agreement both to enhance their (ROI) (by ensuring that the sponsorship property being purchased is clearly defined, and broad enough to be exploited as widely as possible) and to avoid any potential pitfalls.

WHY SPONSOR?

In order to increase its ROI, a Sponsor must first have a clear idea of what it wants to achieve by entering into a sponsorship relationship. While some of the benefits of sponsorship are obvious, other potential benefits may not be immediately apparent, which is where pre-planning and consideration can really add value to a given sponsorship opportunity. Some of the reasons for considering sports sponsorship (as financially the most significant area of sponsorship) are as follows:

- the use of sports events/individuals for promoting a Sponsor's products/services;
- association of a Sponsor's products/services (whether sporting or otherwise) with the clean, healthy image of sport;
- suggestion the Sponsor company is a winner by association;
- if affiliated with a national team/individual, can be seen to be patriotic;
- unique marketing opportunity – most sport demographics are quite narrow allowing a Sponsor to target such demographics and reach maximum exposure;
- increase brand awareness;
- improve/change/reinforce brand image; and
- hospitality/client entertainment opportunities.

Whatever the reason may be, a clear understanding of why a business is seeking to sponsor is imperative so that the Agreement can be geared towards increasing the ROI on the basis of the specific goal.

Once the reason is clear, there are a number of ways in which the Agreement can then be utilised to increase ROI and protect the Sponsor if things should go wrong.

FOOD FOR THOUGHT

We set out here just some of the issues that a Sponsor should consider when entering into sponsorship agreements. Ultimately, the contents of the Agreement, and the relevance and importance of the various terms, will be determined by the specifics of the situation, the parties' bargaining position, and the commercial deal available and agreed between the parties.

[1] 'Sponsorship of Sport', Townley and Grayson, Arts and Leisure.

ESSENTIAL CONSIDERATIONS INCLUDE:

1. **Authority** – The Sponsor must ensure that the person purporting to grant the rights (the Sponsee) actually has the legal authority to grant such rights in the first place. While this may sound a somewhat simplistic and obvious point, failure to include appropriate protection to this effect could mean any agreement is ultimately worthless. Often sponsorship opportunities involve third parties who may purport to have the authority to grant the rights, but in truth, the rights reside with the Sponsee.

2. **Sponsorship Term** – The term of any agreement is, of course, crucial as to the actual and potential value of any Sponsorship opportunity. The term must be of a suitable length to allow the Sponsor to maximise its ROI, but also provide the opportunity, at a suitable stage, to cancel/renegotiate the specifics of the deal. Further, the Sponsor will need to consider whether any of the rights granted under the agreement will need to be capable of surviving the termination/expiry of the agreement. For example, the Sponsor may wish to retain the right to refer to the Sponsorship in an historical context.

3. **Sponsorship Rights** – It will be critical to the success of any Sponsorship agreement that the rights being granted (and paid for) are adequately defined and packaged, setting out all the benefits in detail and thus ensuring there is no breakdown at a later date over who is entitled to what. For example, the parties should consider whether the rights are exclusive. If so, they will need to be stated as such as exclusivity cannot be implied. The parties should consider also whether any ancillary rights are attached, for example, corporate hospitality or the right to use images of the Sponsorship (see point 6 below) etc.

4. **Obligations** – Is the Sponsee responsible in any way for managing the event or, for example, operating/managing the stadium being sponsored? If so, the Sponsor will want to place positive obligations on the Sponsee. Consider such things as an obligation to organise and run the event/stadium; assurances (in the form of warranties, see point 9, below) that the granting of the rights does not breach any third party rights (and to the extent it does, such breach is indemnified); that no similar/equivalent agreement has been entered into with another third party;

5. **Sponsorship Fee** – A number of practical issues need to be considered in respect of the Sponsorship fee. What is the fee for the Sponsorship rights being purchased? What are the terms of payment, i.e. instalment/lump sum? Inclusive or exclusive of any applicable taxes? Is the fee variable depending on performance/other factors? Consequences for late/non-payment? Reimbursement of fee following breach?

6. **Intellectual Property Rights** – Adequate IPR protection is fundamental to any Sponsorship agreement. Not only should the Sponsor seek to have its own IPR protected, it should seek assurances that the rights being granted don't infringe any third party IPR and to the extent that they do, that the Sponsee indemnifies the Sponsor against any breach. Further, if the agreement is likely to give rise to the creation of joint IP, provision should be made as to ownership of such IP and an obligation to register and protect the same.

7. **Termination** – Not only should the Sponsorship agreement provide for when the parties are entitled to terminate, it should also be as detailed as possible with regard to who is entitled to what on termination. Specifically, things such as repayment of any Sponsorship fees, or the use/ownership of pre-existing/new IPR should be considered. Where the association is with an individual, provision should be made for a right to terminate in the event the individual does anything which may harm the reputation of the Sponsor or otherwise affects the value of the Sponsorship arrangements (with Oscar Pistorius, Tyson Gay, Tiger Woods and Lance Armstrong being recent examples of why this is so important).

8. **Insurance** – The Sponsor will need to ensure that the Sponsee has in place suitable insurance; what is required will vary depending on the type of Sponsorship. For example, does the Sponsee have adequate public liability insurance covering injury/loss to spectators; insurance in the case of cancellation or abandonment of the event(s); or insurance in the event of broadcasting cancellation? and so on.

9. **Warranties and Representations** – The negotiation of extensive warranties, representations and indemnities is a significant tool in a Sponsors bid to avoid the pitfalls of Sponsorship. In respect of warranties however, it may be that the Sponsor has to give a little to gain a little. For example, if the Sponsor is seeking a warranty that the Sponsee is entitled and has the power to grant the rights in question, the Sponsor should be happy to warrant that it is entitled and has the power to enter into the agreement. Mutual warranties as to the parties having taken all necessary action to authorise entry into the agreement and perform its obligations therein should also be sought. If the sponsor agrees to mutual warranties such as the above (which should be no cause for concern for the Sponsor) it will be difficult for the Sponsee to refuse to give reciprocal comfort.

As above, these are just some of the important provisions of the Agreement which can be utilised to a Sponsor's benefit to ensure maximum ROI.

Whilst it is difficult to exhaustively list all the potentially important elements of a sponsorship agreement (and indeed we have not sought to do so here), starting with a checklist such as the above should prove useful when next considering a potential sponsorship opportunity, and assessing the true value of the relationship.

In applying the above principles, what first appears to be a moderate opportunity might actually, with a little hard work and negotiation, be exploited to provide maximum benefit.

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US SUPREME COURT DECISION IN ASSOCIATION FOR MOLECULAR *PATHOLOGY V MYRIAD GENETICS*

The Patenting of DNA Sequences and Implications for the BioPharma Industry

By Lisa A. Haile and Caroline Scott

SUMMARY

On 13 June 2013, the US Supreme Court ruled that the key claims of certain US patents owned by Myriad Genetics, the US biotech company that holds the patents covering a diagnostic test for breast and ovarian cancer related genes (BRCA1 and BRCA2), are invalid as products of nature.

ANALYSIS

This is a landmark decision as it concerns the patenting of DNA sequences.

Mutations in the BRCA genes can drastically increase the risk of developing breast and ovarian cancer. Knowledge of the DNA sequences enabled Myriad to develop genetic diagnostic tests for detecting mutations in the BRCA genes and hence an assessment of a patient's risk of developing breast and ovarian cancer.

Myriad did not create or alter the genetic information or structure of the BRCA genes, but rather determined their precise location and nucleotide sequence. Myriad's patent claims in issue were directed to (i) an isolated DNA sequence that encodes the BRCA1 (or BRCA2) protein; (ii) the corresponding complementary DNA (cDNA) nucleotide sequence which is derived from mRNA; and (iii) isolated sub-sequences of at least 15 nucleotides of the BRCA1 and BRCA2 DNA and cDNA. The broad scope of these claims was such that in practice the patents conferred on Myriad the exclusive right to conduct BRCA testing.

The US Supreme Court considered whether the following could be patented: (i) isolated genes; and (ii) cDNA.

(i) isolated genes

The Court considered prior case law to the effect that there must be some form of alteration of the genetic material in order to distinguish between an unpatentable product of nature on the one hand and a "new and useful… composition of matter" (35 U.S.C. §101 US Patent Act) on the other. Myriad's patents describe in detail the iterative process used to identify and locate the BRCA genes as well as the nucleotide sequence of the BRCA DNA. The patent claims however are neither expressed in terms of chemical composition nor rely on the chemical changes resulting from the isolation of a particular fragment of DNA. Instead the claims focus on the nucleotide sequence of the coding sequence of the BRCA genes.

The Court concluded that "genes and the information they encode are not patent eligible… simply because they have been isolated from the surrounding genetic material." In this regard, the DNA sequence and coding information is inherent in the gene whether it is isolated or not. The isolated genes were therefore no more than a product of nature. The Court, quoting from its decision last year in *Mayo Collaborative Services v Prometheus Laboratories Inc.* (556 U.S. 2012), went on to say that as products of nature, the genes "are basic tools of scientific and technological work" which fall outside the scope of patent protection.

(ii) cDNA

In contrast however, following a very brief analysis, the Court concluded that cDNA is patentable as it is not a "product of nature" due to the fact that it is created in the laboratory and consists only of exons (coding regions) as the introns (non-coding regions) are removed from the DNA sequence beforehand. The Court recognised that this process of deleting introns creates something new and therefore is in principle patentable. The Court commented however that insofar as a very short DNA fragment may have no introns to remove when creating cDNA, the cDNA may be indistinguishable from natural DNA and therefore, by implication, unpatentable. The Court also emphasised that it had only considered whether cDNA was patent eligible but had not expressed

any view as to whether the BRCA cDNA satisfied the other criteria for patentability, especially novelty and non-obviousness.

Whilst this holding as to cDNA is, in our opinion, crucial for the protection of important aspects of biopharma innovation, this aspect of the Court's ruling is somewhat remarkable since the sequence of cDNA is essentially the same as naturally occurring mRNA (though one is DNA, one mRNA). The Court was aware however that the nucleotide sequence of cDNA is dictated by nature, not by the lab technician. It therefore apparently considers that the patentability of cDNA should be determined by the traditional criteria of novelty and obviousness rather than being excluded from patentability in any event.

IMPLICATIONS

This decision heralds a significant change in US law as previously patents could be obtained for naturally-occurring substances as long as they were isolated from nature. This qualification has now been removed at least for human genes, creating a misalignment for the patentability of genetic material in the US on the one hand and other regions of the world, especially Europe (i.e. the European Patent Convention contracting states) on the other. In Europe, an isolated DNA sequence may be unpatentable as a discovery but only insofar as the patent relates to the discovery as such. In practice therefore, in Europe the biggest hurdle for the patentability of isolated gene sequences is that of inventive step.

In parallel litigation in Australia, in *Cancer Voices Australia v Myriad Genetics* [2013] FCA 65, the Australian Federal Court recently confirmed that isolated genes and other biological materials constitute patentable subject-matter insofar as they are the result of some human intervention – physical or chemical change during the isolation process is not necessary. There is no "product of nature" exclusion under Australian patent law.

Clearly, these jurisdictional challenges make it difficult for biopharmas to navigate around the conflicting case law and implement a cohesive international patent and business strategy.

It is important to note however that the US Supreme Court did not consider any method claims, new applications of knowledge about the BRCA1 and BRCA2 genes, or DNA sequences in which the naturally occurring nucleotides have been altered. However, the US decision has been heralded as opening up competition by lifting the barrier to entry for diagnostic companies, with several companies revealing plans immediately to launch competing BRCA testing at a much lower price than Myriad. Although the majority of Myriad's patents remain enforceable because they have claims that include cDNA, most of these product patents expire in 2015.

Could the inability to patent isolated gene sequences in the US reduce the incentive of biopharmas to carry out further research into DNA sequencing? In our opinion, this is unlikely as new testing methods such as whole-genome sequencing (includes introns) are replacing the Myriad method and synthetic sequences (e.g. cDNA) made in the laboratory are more commonly used in diagnostic tests.

Click here for the US Supreme Court decision of 13 June 2013

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THE CONTRADICTORY WORLD OF SPANISH LAW AGAINST LATE PAYMENT

By Paula Gonzalez

In recent years, Spain has been trying to fight abusive payment terms in commercial transactions among companies. In 2004, Act 3/2004 was published, providing for measures against late payment in commercial transactions. Later, in 2010, upon the poor results achieved by the first version of Act 3/2004, and with the aim of drastically shortening payment delays or extensions, Act 3/2004 was amended by virtue of Act 15/2010. The result was a consolidated version of the Spanish Law against Late Payment. However, the said consolidated version has been recently further amended, as explained below.

Under the consolidated Spanish Law against Late Payment, companies had 60 days in which to settle their trade debts. Such period was reduced to 30 days for certain produce (fresh and perishable food produce) and sectors (the public sector).

The wording of the Law raised certain questions as to whether or not contracts executed prior to its enforcement remained valid. In this regard, the Law envisaged a transitional period for the fulfilment of its objectives which ended on 1 January 2013. Therefore, from 1 January 2013 onwards, once the transitional period had lapsed, the maximum payment term for all commercial transactions should have been, in principle, 60 days.

In addition to a maximum payment term and a transitional period, Act 15/2010 included other important and interesting provisions, as follows:

- in principle, clauses establishing longer payment terms should automatically be rendered null and void;
- parties shall not be entitled to extend payment terms, but only to shorten them;
- upon the breaching of any agreed payment term, debtors shall be in default and will be required to pay the relevant default interest, as agreed in the contract or under the Act 15/2010, without the need for any notice of failure to pay.

It is noteworthy that we have used the expression "in principle 60 days" because, in February 2013, the Spanish Law against Late Payment was amended for the third time by means of a Special Measures Act (Spanish Royal Decree-Law 4/2013). This third amendment was intended to implement the latest EU Directive on these matters. The main change in this latest legislation is the shortening of the 60-day period mentioned above to 30 days. This amendment included not only this shorter payment term, but also certain limitations:

(i) parties may agree (whether verbally or in writing) to extend the standard payment period up to a maximum of 60 days; and

(ii) parties may also agree longer payment terms by contract (although this option is vaguely drafted).

The result of such successive amendments is that the legal framework defined by the Spanish Law against Late Payment is not as consistent as would be desirable. Within the same regulation, we can find, on the one hand, sections establishing that any contractual clauses accepting longer payment terms, or seeking to override default obligations to pay interest, should be rendered null and void (section 9) and, on the other hand, provisions granting the parties the power to agree longer payment terms (section 4).

In this scenario, could it now be argued that clauses establishing payment delays longer than 30 days are automatically null and void? In principle, not automatically (particularly, not now that the law admits such possibility). But they may be declared void by a judge upon request from the creditor, provided the creditor is able to prove that the provision is abusive to its detriment, in particular, if used by the debtor to obtain additional liquidity at the creditor's cost.

We believe that with this third amendment of the Law against Late Payment, apart from implementing the latest EU Directive on such matters, the Spanish Government has granted companies the possibility of derogating from the "mandatory maximum 30-day payment term" by contract. Nevertheless, since other contradictory provisions remain in force, the predictable outcome is that part of the market will argue that longer payment terms are acceptable, in so far as they are expressly stated in the contract. Furthermore, creditors may try to challenge this approach in the Courts, by arguing that clauses establishing payment terms exceeding 30 days should be considered void. Given that it may take several years for the Spanish Courts to issue any decision in this regard, it may be several years before clear guidance is available.

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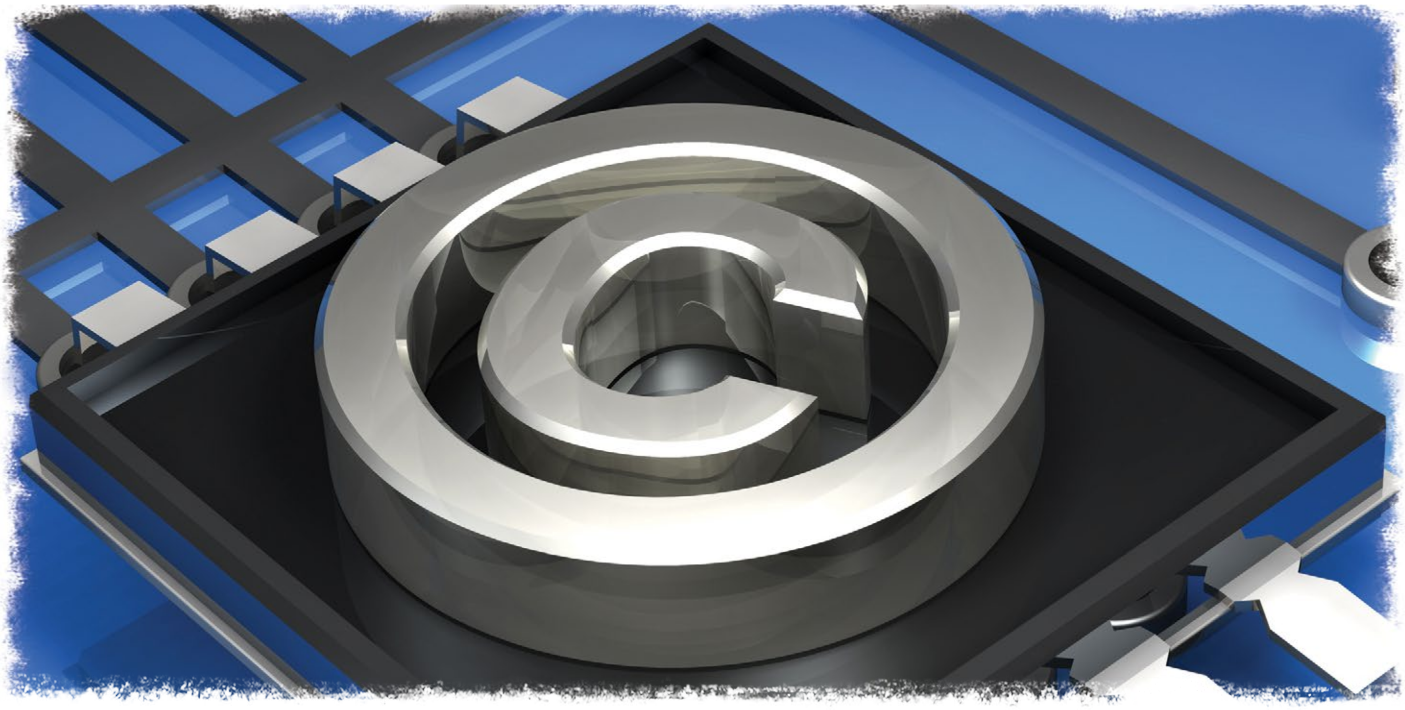

WEBINARS AT DLA PIPER

We pride ourselves on giving clients valuable information from across the globe – this is why our webinar series is so important to us.

Recently we hosted a Reverse-Payment Patent Settlements webinar. The EU/US was based on the landmark decisions almost simultaneously adopted by the US Supreme Court and the European Commission, which establish that "reverse-payment patent settlements" require antitrust scrutiny and affect the way in which companies can exercise their IPR in the life sciences and technology industries in particular. Reverse-payment settlements are one way to end lengthy and uncertain patent disputes. They typically allow for generic entry prior to the patent's expiry and involve a payment from the pharmaceutical pioneer to the generic manufacturer. For the settling parties, they are a legitimate commercial arrangement. For other parties, they are "pay for delay". While the US Supreme Court applies the "rule of reason" test, the European Commission considers these agreements to be unlawful per se. A panel of DLA Piper competition law and patent litigation partners from both sides of the Atlantic explained the key features of the rulings, placed them in context, assessed the fall-out for industry practice, and provided an outlook on the devaluation of IPR by encroaching antitrust scrutiny.

Our next webinar is on TV Format Rights on Monday 23 September.
To register your interest contact events@dlapiper.com.

To view previous webinars visit: http://www.dlapiper.com/dla-piper-webinar-recordings/

A EUROPEAN LEGAL FRAMEWORK FOR THE INFORMATION SOCIETY: TOWARDS A LEGISLATION 20?

By Patrick Van Eecke

Bill Gates once said that "*(t)he day is quickly coming when every knee will bow down to a silicon fist, and you will all beg your binary gods for mercy.*". Although this may be somewhat of a witticism, no one doubts that technological evolution plays a substantial role in everyday life. Just to name a few, the rise of social media, smartphones and tablets and the apps that are designed for them indeed creates new possibilities on an almost daily basis whilst simultaneously posing social, economic and political questions. At least as important are the legal issues related to this evolution.

With the changeover to the new millennium, and in the aftermath of the dot-com hype, a legal framework was created on a European (and subsequently national) level in order to allow governments, civilians and undertakings to act within the virtual environment. Examples are the legislation on electronic commerce, electronic invoicing, e-privacy, e-money and electronic signatures. As it turned out that the proposed measures were soon outdated by new technological evolutions, the EU legislator has been required to frequently adapt the existing framework on a case-by-case basis, resulting in a patchy legal framework.

Recent technological evolutions and trends, some of them discussed below by way of example, bring along new legal concerns which are not yet addressed and do not fit within the legal framework currently in force. The EU legislator tries to tackle some of these issues on an "ad hoc" basis, e.g. the recent legislative requirements on the use of cookies on computers or other devices, but a global policy did not exist until recently. As such, there was an element of truth in Mr. Gates' quote as the EU legislator now seems to be huffing and puffing to catch up with and to regulate trends which have often already existed for quite some time.

The European Commission is aware of this problem and has prepared an action plan, called the Digital Agenda for Europe, with the intention of presenting a global strategy and which must ultimately result in a boost and further development of digital technologies. This strategy includes a modernization of the currently existing legal framework. The Digital Agenda for Europe is discussed in brief further below.

SOME RECENT ICT TRENDS AND LEGAL CHALLENGES

According to Neelie Kroes, Vice-President of the European Commission and responsible for the Digital Agenda, "*(a)n Internet of Things with intelligence embedded into everyday objects is the next big thing*", which the EU should support. Internet of Things refers to the evolution whereby more and more daily objects are being equipped with electronic technology which allows these objects to capture data about the real world and to output such information. A car telling its owner that the car should be maintained, a fridge reporting that you've ran out of milk, etc. Although the development of the Internet of Things is supported on an EU level, the Digital Agenda mentions several concerns including privacy, liability and (internet) security. Ethical questions are raised as well as more and more personal data become public good, as a result of which the border between private and public spheres becomes blurred. On the subject of Internet of Things, several initiatives have already been launched by the European Commission, such as a Communication (with an action plan) and a Recommendation (on privacy and data protection principles in applications supported by radio-frequency identification), both issued in 2009.

The coming into existence of new internet intermediaries is an important trend as well. Telecom operators allow the user to make a physical connection with the network, whereas internet access providers identify the user with an IP address and give the user access to the internet. On a third level, several intermediaries are active who offer internet services (e.g. hosters and caching providers). Recently, the intermediaries of the third level are accompanied by internet giants such as internet search engines, social media providers, retailers, auction sites and online encyclopedias. These new intermediaries and the role they fulfill raise questions concerning liability regarding incorrect information, placement of content which violates intellectual property, liability for user generated content, the applicability of the liability exemptions under EU law to these intermediaries, etc. Such issues also bring along concerns relating to applicable law and competent courts.

When discussing recent ICT trends, cloud computing cannot escape mention. Being one of the most eye-catching buzzwords of recent years, cloud computing refers to a form of computing allowing access to applications and data through the means of intermediaries that offer services over the internet. Cloud computing offers advantages such as scalability, economics of scale and the use of the internet to optimize solutions. Although undoubtedly advantageous for users (often businesses), cloud computing also entails certain challenges on the level of data protection, liability in the event of loss, confidentiality, data portability, vendor "lock-in" and others. On a European level, there have been several initiatives to deal with such issues. In May 2011, the European Commission launched a public consultation on cloud computing of which the findings were presented in a report of December 2011. Working Party 29, an advisory body for the European Commission with respect to data protection legislation in the EU, also issued an opinion on cloud computing.

A visual example of the digitalization of the production process is 3D printing. With a click on the computer mouse, a digital file is sent to the 3D printer (as is the case with a 2D printer) which then prints layer by layer until a tangible object is created according to the computer model. Several personalized accessories (e.g. a hearing aid which must be tailored to specific personal features) are already manufactured in this way. The exploded Aston Martin 1960 DB5, a rare and expensive model, in James Bond's newest Skyfall was a 3D printout of the original. But this new production process raises a lot of questions too. Intellectual property on the product manufactured for one. Product liability may pose legal challenges as well, as several entities are involved (manufacturer of the printer, the product with which the object is made, the manufacturer itself selling on the manufactured goods, etc.).

DIGITAL AGENDA FOR EUROPE

The purpose of the Digital Agenda is to tackle new legal issues, some mentioned above, in a way more holistic than the ad hoc approach that has been generally the case up until now. The Digital Agenda consists of seven "pillars" and an international aspect, each containing several action points (101 action points in total). The first pillar is the establishment of a "Digital Single Market", including several propositions of changes to the existing legal framework. These include amongst others the adaptation of the Privacy Directive which resulted in a proposed Regulation, currently being discussed in the European Council and expected to enter into force around the end of 2014. The Directive on Electronic Commerce is likely to be changed as well, by means of which the Commission intends to boost consumer trust in cross-border purchases of products and services. Another point of attention is the establishment of a Single European Payment Area and further facilitation of electronic invoicing. Other points of attention are the simplification of a pan-European license on online works, the proposition of a Charter of EU online rights, a proposal on online dispute resolution platforms, etc.

The second and third pillars are "Interoperability & Standards", including technical and operational action points which must lead to a better framework for normalization, standardization and interoperability, and "Trust & Security" with a particular emphasis on fighting cybercrime and to support cyber safety. "Fast and ultra-fast Internet access" and "Research and innovation" are pillars four and five. Action points on "Enhancing digital literacy, skills and inclusion" (pillar six) are intended to tackle issues related to the digital divide and place emphasis on enhancement of skills, introducing people to the digital world, education, etc. Pillar seven, "ICT-enabled benefits for EU society", is intended to support the role of ICT in reducing energy consumption, supporting aging citizens' lives, revolutionizing health services and delivering better public services.

In December 2012, the European Commission distilled from its 101 action points seven priorities for the digital economy and society, to be achieved during the years 2013 and 2014. From a legislative point of view in particular, it is important to note that the Commission proposes to deliver a strategy and draft Directive on cyber-security. Further, it intends to promptly commence the updating of the EU's copyright framework.

CONCLUSION

The currently existing legal framework needs a thorough update. so as to avoid it losing its relevance in an ever-changing technological environment. The European Commission tries to upgrade the legal framework to a version 2.0 by revising several existing legal instruments and proposing new initiatives. Respecting policy principles such as technology-neutral legislation and co-regulation must ensure the long-term validity of the legal provisions. However, the question arises whether maintaining a dual legal regime for the offline and online world is still necessary, given the ongoing convergence between these two worlds. Separate legal conditions for online electronic contracts, signatures, payments and other online matters seems to be a sign of an out-of-date view on reality, neglecting to take into account the increasing convergence between these two worlds. In our view, we are likely to expect within a few years a legislation 3.0, acknowledging such convergence.

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