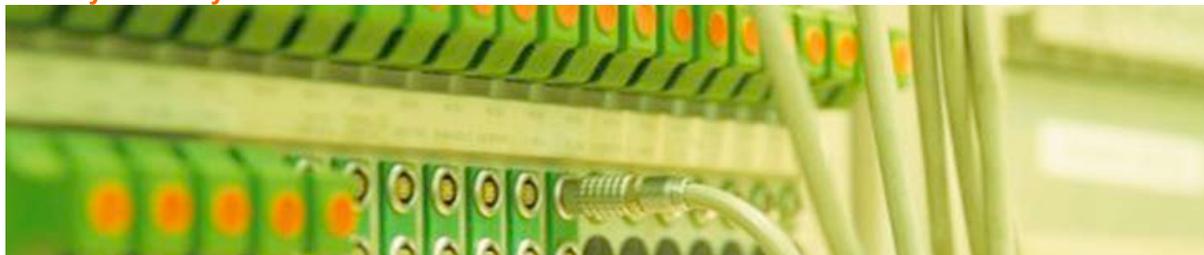


IP, IT and Media News

from Luxembourg

MOLITOR

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WHAT HAPPENED IN 2014 / WHAT TO EXPECT IN 2015?

2014 was a year of important changes and reversals in the IP, IT and Media fields. The beginning of this New Year gives us the opportunity to look back at the key legal developments of 2014 in these areas in order to be well prepared for the major projects that await us in 2015.

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WHAT HAPPENED IN 2014?

INTELLECTUAL PROPERTY

Trademark

EU – New round in Google adwords: The well-known case concerning the trade mark infringement action brought by Interflora against Marks & Spencer for the use of its INTERFLORA trade mark as a keyword is once again a topical subject (for the previous rounds in the Google Adwords battle, see our January 2014 newsletter).

With proceedings issued in December 2008, the case went to the Court of Justice and has already been to the Court of Appeal twice.

On 5 November 2014, the British Court of Appeal overturned the British High Court of Justice finding of trademark infringement and ordered a new retrial of the claims for infringement under Article 5(1)(a) of the Trademark Directive and Article 9(1)(a) of the Community Trademark Regulation.

The main reason of that overturn is the identification of various errors of law made by the trial judge, as it was not sure that the judge would have come to the same conclusions had the errors not been made.

Copyrights

EU – No copyright infringement when using embedding or hyperlinking for freely available works: The CJEU rendered two important decisions regarding the embedded linking of copyright protected work and on the scope of legitimate hyperlinking.

On 13 February 2014, in *Svensson and Others v Retriever Sverige AB* (C466/12), the CJEU decided that a website which redirects Internet users through hyperlinks to protected work which is already freely available online does not infringe copyright in this work.

On 21 October 2014, in the *BestWater International* case (C-348/13) the CJEU confirmed its approach by establishing that embedding or framing copyrighted content which is already freely available for anyone to access on the Internet also does not constitute in itself copyright infringement.

As a reminder, embedding requires merely the addition of a small (HTML) code linking to the video, enabling the end-user's web browser to display the website and the video as an integrated whole.

In its ruling, the CJEU argued that embedding a file or video is not a copyright infringement, as long as the message is not altered or communicated to a new public.

This decision does not change the copyright breaching status of the original upload, but ensures that an Internet user is not liable for embedding or framing a video or an image from another website, if the latter is accessible by the general public.

EU – Definition of “parody” by the CJEU: Parody is one of the exceptions to copyright infringement, contained in Article 5(3)(k) of Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. It means that a copyrighted work may be used without the consent of the author(s) for the purpose of caricature, parody or pastiche. However, the Directive does not expressly define the concept of parody.

In Luxembourg, the exception of parody is provided for under Article 10.6 of the Law of 18 April 2001 on Copyrights Neighbouring Rights and Databases as amended.

Under a decision dated 4 September 2014, the CJEU provided clarification of what is a parody and therefore, what is a permitted reproduction of a copyright work.

At the centre of proceedings was a calendar prepared by Mr Deckmyn containing a drawing which was a clear reference to one of the covers of a popular comic book *Suske en Wiske*, but with some xenophobic undertones.

The concept of parody is thus an autonomous concept of EU law that must be interpreted uniformly throughout the EU. Moreover, the Court held that the essential characteristics of a parody were the reference to an existing work whilst being different from it along with an expression of humour or mockery.

Nevertheless, a fair balance must be found between the freedom of expression of the user of a copyrighted work and the rights and interests of the rights holders to the original works being parodied when determining whether those works can be legitimately copied under EU copyright rules.

It is therefore up to national courts to determine, case by case, whether the modifications to a copyrighted work can benefit from the parody exception or not.

Luxembourg – SACEM webpage: More practical and dynamic, the new webpage of the SACEM Luxembourg, the collecting and management agency for musical works, offers both users and creators all the information they should need. You can also contact SACEM Luxembourg directly if you have any question. The website is available in French: <http://www.sacem.lu/contact/>

Tax

Luxembourg – Clarification of the regime of IP rights: The Luxembourg *Cour administrative* ruled on disputes relating to the application of Article 50bis of the Luxembourg Income Tax Act.

As a reminder, according to Article 50bis, Luxembourg companies and Luxembourg branches of foreign companies can benefit from an 80% exemption on net income (royalties) derived from certain IP rights and on capital gains resulting from the disposal of such IP rights, including copyrights on software, patents, trademarks, domain names, designs, models, acquired or constituted after 31 December 2007.

The Luxembourg *Cour administrative* delivered two decisions dated 30 July 2014.

In the *Zeit* case, the Luxembourg tax administration refused to grant the exemption for IP revenues derived from unregistered designs relating to cartoon characters. In the first instance, the Luxembourg *Tribunal administratif* referred to Article 1.2.a) of Regulation 6/2002 on Community designs which confers protection for unregistered designs from the moment they are made available to the public, holding that nothing in Article 50bis prevents an exemption being awarded to designs for which no application has been filed.

However, the Luxembourg *Cour administrative* overturned this decision stating that cartoon characters constitute copyright protected work rather than designs and therefore are excluded from the exemption's scope. The *Cour administrative* adopted a restrictive interpretation of a design, ruling that computer created characters are not products whose appearance could be protected as design work.

In the *Zinc Alloy* case, the Luxembourg tax administration refused to grant the exemption for revenues derived from a name and a logo

that was used before the 31 December 2007 and registered after that date.

The *Cour administrative* stated that the criteria of the “*creation date*” must be interpreted as from its legal registration date and not as from its effective use in practice. Therefore, an undertaking using a sign before 31 December 2007 but registering it after that date could benefit from the exemption.

The Court refused to apply the exemption for the trademark licensee as the licensee only affixes the trademark on goods and sells them on to the licensor and does not actually exploit the said rights in a given market.

INFORMATION TECHNOLOGY

Personal Data

EU – Data Retention Directive invalidated: On 8 April 2014, the Court of Justice of the European Union (the “**CJEU**”) declared invalid the Directive 2006/24/EC of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks (the “**Data Retention Directive**”).

The Data Retention Directive required telecom operators to store a certain number of data necessary to trace and identify the source of an Internet or telephone communication and its destination (e.g. date, time, duration, type of communication, traffic data, IP addresses, etc.) for between six months to two years and to make them available in the case of an investigation, detection or prosecution of serious crime by a public authority.

The Directive was adopted in the aftermath of the terrorist attacks in Madrid in 2004 and in London in 2005 in order to harmonise the European efforts to prevent, investigate, detect and prosecute, in particular, organised crime and terrorism.

The Data Retention Directive was challenged by the High Court of Ireland and the Austrian Constitutional Court, before the CJEU on the grounds of infringement of the right to private life and the right to the protection of personal data, as guaranteed by the Charter of Fundamental Rights of the European Union.

The CJEU observed that the retained data may provide very precise information on the

private life of the persons whose data are retained, such as places of residence, daily habits or information regarding their social relationships and their social environment.

For the CJEU, *“by requiring the retention of those data and by allowing the competent national authorities to access those data, the directive interferes in a particularly serious manner with the fundamental rights to respect for private life and to the protection of personal data”*.

This decision will for sure indirectly impact EU Member States national measures based on the Data Retention Directive.

Luxembourg Minister of Justice Félix Braz announced after the ruling in his statement dated 26 September 2014 that Luxembourg legislation has to be adapted with respect to the CJEU requirements, especially regarding:

- issues related to access to data by judicial authorities and to the definition of serious crime;
- the introduction of an obligation of irretrievable destruction of the collected data after the retention period; and
- the increase of the security measures regarding the collected data by the telecom operators.

Accordingly, a draft law modifying the Luxembourg Criminal Procedure Code and the Act of 30 May 2005 laying down specific provisions for the protection of persons with regard to the processing of personal data in the electronic communications sector as amended, was proposed to the Luxembourg Chamber of Deputies on 7 January 2015 by the Ministry of Justice.

EU – Right to be forgotten: A long-awaited judgment of the CJEU dated 13 May 2014 held that the giant search engine Google must give effect to a so-called *“right to be forgotten”*. According to the CJEU, Google (and therefore every search engine operator) is responsible for the processing of personal data appearing on web pages published by third parties and referenced by Google.

As a result, if, following a search made on the basis of a person’s name, the list of results in the search engine operator displays a link to a web page which contains information related to that person, the data subject may approach the operator directly, and under certain

conditions (where personal data storage is no longer necessary or is irrelevant for the original purposes of the processing for which the data was collected) may obtain the removal of the link from the list of the results. If the search engine refuses the request, the data subject may ask the relevant authorities to consider their case.

In consequence, Google had to implement a standard procedure to deal with such requests. The Google transparency report affirmed that the company had received more than 200,000 requests “to be forgotten” since the ruling.

As for Luxembourg, the national data protection authority (the *Commission Nationale pour la Protection des Données – “CNPD”*) published practical guidelines on its website on how data subjects may proceed to request the removal of links to web pages.

Luxembourg – Publication of guidelines on surveillance in the workplace: The CNPD and the Luxembourg Chamber of Employees published extensive guidelines about surveillance in the workplace in a brochure dated 7 October 2014. Very practical and useful, the purpose of this publication is to provide information on the rights and obligations of both employees and employers in this field.

The guidelines analyse the different existing forms of surveillance such as videosurveillance, surveillance of the usage of IT equipment, Internet usage and e-mail traffic, recording or tracing of telephone calls, biometric recognition systems, geolocalization (GPS) and supervision of electronic access and of working hours.

In particular, it details the conditions under which these different forms of surveillance may be used and the legal requirements the employer has to comply with (specific purposes, authorization of the CNPD, etc.).

E-commerce

Luxembourg – New consumer regulation: The Luxembourg government has adopted the Law of 2 April 2014 implementing Directive 2011/83/CE of 25 October 2011 on consumer rights and amending the recent Luxembourg Consumer Code.

This Law is of great importance for the Grand Duchy of Luxembourg as this new legal framework increases consumers’ rights.

The key changes are the following:

- extension of the withdrawal period to 14 days when contracting online (instead of 7);
- limitation of the refund period to 14 days by the traders after a withdrawal;
- clearer information on whether or not an online order is free of charge, with an explicit acknowledgement to consumers that the order implies an obligation to pay.

E-signature

EU – Adoption of the EU Regulation: On 23 July 2014, the Council of the European Union adopted a Regulation on electronic identification and trust services for electronic transactions in the internal market (the “**Regulation**”). The Regulation repeals the E-Signature Directive 1999/93/EC on Community framework for electronic signatures adopted in December 1992.

The Regulation intends to create an efficient and effective e-signature market in the EU to overcome the current differences in national laws and the lack of interoperability of e-signatures. The Regulation also lays down conditions for mutual recognition of electronic identification, sets rules for trust services, in particular for electronic transactions, and creates a legal framework for electronic registered delivery services and certificate services for website authentication.

This new framework is an important step towards the enhancement of a trustworthy online environment. Most of the provisions of the Regulation will only enter into force on 1 July 2016.

Cybercrime

Luxembourg – Ratification of the EU Convention on Cybercrime: On 18 July 2014, the Grand Duchy of Luxembourg ratified and implemented the Council of Europe Convention on Cybercrime, opened for signature in Budapest on 23 November 2001, and its additional protocol on Xenophobia and Racism signed in Strasbourg.

The Law also adapts the national substantive and procedural criminal law by amending the existing provisions of the Criminal Code and adding new offences (interception of computer data, misuse of devices, misuse of electronic signature).

Regulations in the Criminal Procedure Code on the prompt preservation of stored computer data and traffic data are also amended.

MEDIA

Audiovisual Production

Luxembourg – The Independent Audiovisual Authority of Luxembourg is operational: Created by the law of 27 August 2013, the Independent Audiovisual Authority of Luxembourg (“**ALIA**”) is fully operational. In late October 2014, the Luxembourg government approved the composition of its consultative assembly, whose purpose is to submit non-binding opinions to ALIA’s board of directors.

As of today, ALIA issued several substantive decisions, which you can consult on ALIA’s webpage (under construction): <http://www.alia.lu/>

WHAT TO EXPECT IN 2015?

INTELLECTUAL PROPERTY

General

Luxembourg – Creation of the Luxembourg Institute of Intellectual Property: Luxembourg’s government has for several years expressed its strong intention to solidify and expand Luxembourg as a key player in the field of Intellectual Property and ICT.

In addition to providing a favourable legal and tax framework, the Luxembourg Government approved, on 1 August 2014, the creation of the Luxembourg Institute of Intellectual Property (“**IPIL**”), an Economic Interest Group (“**EIG**”) whose objective is to bring together in a coherent manner both national and international expertise on intellectual property (identification, security/protection, exploitation, legal aspects) and to make this expertise available to all interested economic and institutional players.

The Government believes that intellectual property will thus become a key element of Luxembourg’s internal policy, increasing the visibility of Luxembourg as an ideal location for innovative companies. The services and support provided by Luxembourg in the field

of intellectual property will also be an incentive for companies to establish in Luxembourg not only their IP rights portfolio but also all types of innovative and entrepreneurial activities.

The IPIL will have the following duties:

- coordinating the implementation of public policy and unit stakeholders;
- developing and providing support services and support to businesses, research stakeholders, public institutions and other interested members of the public;
- developing and providing training and promotional activities and awareness; and
- conducting projects and studies to advise the Government.

The IPIL was expected to start its activities at the beginning of January 2015. The EIG is, however, not yet operational, but according to an official source it should be functioning within the next few weeks.

Trademark

EU – New regulation proposals: In March 2013, the European Commission presented proposals to revise the Community Trade Mark Regulation and Trade Marks Directive (see our January 2014 newsletter).

This reform of the current EU system will improve conditions for businesses to innovate and to benefit from more effective trademark protection. It also aimed at fostering innovation and economic growth by making trademark registration systems all over the EU more efficient and accessible to businesses.

On July 2014, the Council adopted its common position on the “*trademark package*” and mandated the Italian Presidency of the EU to enter into negotiations with the European Parliament in order to achieve an agreement on the reform.

“Despite the broad consensus on many aspects of the proposal the parties have considered that some additional time is needed in order to be able to arrive at a final conclusion on all essential elements of the package”, according to the joint statement by the European Parliament negotiating team and the Italian Presidency of the Council with regards to the trademarks package dated 7 January 2015. However, an agreement has already been reached on many issues,

particularly including the treatment of goods in transit and small consignments.

Copyright

EU – Revision of the EU rules on copyrights: Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (the “**Copyright Directive**”) is the subject of discussions and public debates.

In July 2014, the European Commission published the Report on the responses to the Public Consultation on the Review of the EU Copyright Rules.

Moreover, on the beginning of January, Julia Reda, a member of the European Parliament, tendered her draft report on evaluating the Copyright Directive in order to discuss what could be improved in the EU’s copyright legislation. According to this report, the Copyright Directive does not fit the current digital landscape and fails to establish harmonised copyright legislation across the European Union. As the next step, the plenary vote of the Parliament on the Report is expected in May 2015.

Patent

EU – New Unitary Patent: To recap, the European Parliament, after many years of discussion, voted positively on 11 December 2012 on two draft EU Regulations on a unitary patent for Europe.

The European Countries also agreed on an international agreement creating the Unified Patent Court (“**UPC**”), which is currently, ratified by all the Member States except Spain.

Spain claims before the CJEU that the content of the agreement on the UPC affects the Union’s powers and confers on a third party the power to determine unilaterally the application of the regulation.

However, on 18 November 2014, the Advocate General dismissed the Spanish claims. If the CJEU follows the Advocate General’s opinion, this would be a major step toward the creation of the unitary patent protection system.

As a final remark, the UPC agreement will enter into force after thirteen Member States

including UK, France and Germany ratify it. As of today five countries have ratified it.

INFORMATION TECHNOLOGY

General

Luxembourg – Grand Duchy of Luxembourg as the new digital Hub: In October 2014, Luxembourg's Prime Minister and Minister of Communications and Media, Xavier Bettel, presented the so-called "*Digital Letzebuerg*" in the Parliament and to the press.

This project aims at maintaining Luxembourg as an attractive place to do business, and to develop the Grand Duchy as a hub for all areas of IT and communications. Luxembourg's ambition is to focus on the new market opportunities to build and strengthen its competitiveness in the future.

The platform has been created to coordinate efforts between all the players involved and to try to promote Luxembourg as a destination for digital business from abroad.

As a result of this initiative, five areas of opportunity have been identified and are covered in the programme: eco-technologies, bio-technologies, logistics, the financial sector, and the traditional industrial sectors.

The project will follow an eight-step programme, the first step being to create an inventory of existing mechanisms and planned projects, and then to analyse and evaluate future areas of development and finally to define a global strategy.

The Prime Minister, the Minister of Economy and the Minister of Finance represent the executive committee of the strategy, which will coordinate the work and provide an inventory of progress.

Several working units have already been set up in the following fields: infrastructure, support of innovation, FinTech, e-skills, e-government and promotion and developing Luxembourg as a content hub.

Personal data

EU – The reform of data protection legal framework:

In January 2012, the European Commission presented the long-awaited proposal for a reform of the European data protection law,

which consists of a general data protection Regulation as well as a Directive (the "**Data Protection Regulations**").

On 12 March 2014, the European Parliament voted during its first reading by an overwhelming majority in favour of the Data Protection Regulations.

The regulations aim at reinforcing the rights of data subjects, enhancing the responsibility of data controllers and strengthening the position of supervisory authorities. '*Privacy by design*' and '*privacy by default*' will also become essential principles in EU Data Protection Regulations. Therefore, companies need to ensure that risk analysis is embedded into business processes.

The Data Protection Regulations move now to the Council of Ministers consisting of member states government representatives (of which Luxembourg will take the presidency from July 2015) and are subject to potential amendments.

Jan Philipp Albrecht, a vice-chair on the Parliament's civil liberties, justice and home affairs committee and rapporteur on the issue warned during a briefing in the European Parliament on 7 January 2015 that "*even if the council is ready to negotiate somewhere in June, it is not sure we will finalise a compromise before the end of the year*". He highlighted that "*Every day we postpone this procedure, the standards for the protection of personal data in Europe are endangered more and more.*"

E-commerce

EU – New rules on VAT: On 1 January 2015 new VAT rules took effect for telecommunications, broadcasting and electronic services, which will always be taxed in the country where the customer resides.

The new rules are enshrined in the 2015 VAT Directive which dictates that VAT collection on digital services will, from January 2015, be based on where the end consumer is located.

Before those rules, EU businesses providing telecommunication, broadcasting and electronically supplied services to EU final customers were obliged to charge VAT at the rate applicable in the country where the seller is established while non-EU businesses had to charge VAT at the rate imposed by the country of the final customer.

From 2015, service providers established in Luxembourg can no longer apply the low Luxembourg VAT to the services they supply to private individuals resident in another Member State. As a consequence, businesses providing such services will have to register in the Member States of their clients or apply the Mini One Stop Shop (MOSS) regime, which allows them to file only one VAT return in Luxembourg.

The government of Luxembourg has accordingly increased its key VAT rates by two per cent excluding the super reduced rate of 3%.

E-archiving

Luxembourg – Draft law on e-archiving:

Long awaited, the draft law on the dematerialisation and preservation of documents is still passing through the adoption process.

As a step toward the future, on 17 December 2014, the governmental council (*Conseil du gouvernement*) adopted the draft Grand-Ducal Regulation on conditions to be respected by the “providers of dematerialisation or storage services” in order to be certified by the Luxembourg Institute of Standardization, Accreditation, Safety and Quality of Products and Services (ILNAS), which should be submitted to the opinion of the Council of State afterwards.

The Luxembourg Chamber of Commerce welcomes the draft Grand-Ducal Regulation by stating that it will reinforce the attractiveness of Luxembourg which will become an “*Information Trust Center*”.

MEDIA

Labelling

EU – New rules on food labelling: 2015 is an important year for the Food Industry since on 12 December 2014 most of the provisions of the EU Regulation dated 25 October 2011 on the provision of food information to customers (the “**FIC Regulation**”) came into force across the EU countries. However, rules in relation to the provision of mandatory nutrition information will apply only from 13 December 2016.

Therefore, foods placed on the market after 12 December 2014 should be compliant with the FIC Regulation. In practice, transitional

measures are applicable, so products placed on the market or labelled before 13 December 2014 may be sold until the stocks are exhausted provided that there is no conflict with the labelling requirements of Directive 2000/13/EC.

The new rules are good news for customers as they will make food labelling clearer, and will improve the nutrition and allergen information provided with food. The key changes include: mandatory nutrition labelling on pre-packaged food, improved date marketing (including date of first freezing), clarity and legibility of food information and allergen information in a way that distinguishes it from the rest of the list of ingredients.

A specific provision of the Regulation concerns foods offered for sale by means of distance selling in which case the responsibility for providing mandatory food information before the purchase is concluded lies with the owner of the website.

Throughout 2015, the Luxembourg Chamber of Trades (*Chambre des Métiers*) is organising classes on labelling in general and more specifically on labelling of certain substances causing food allergies or intolerances.

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