

JULY 2017

INTELLECTUAL PROPERTY

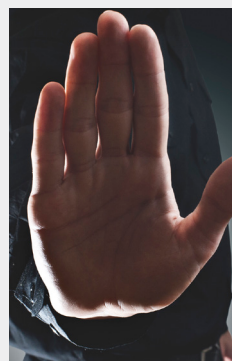
MARKS



### **THE PIRATE BAY SURRENDERS TO EUROPEAN JUSTICE**

According to the CJEU, making metadata available through The Pirate Bay so that users can access works protected by copyright is an unauthorized "communication to the public".

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U.S. Supreme Court declares law banning offensive trademarks unconstitutional in defense of freedom of expression.

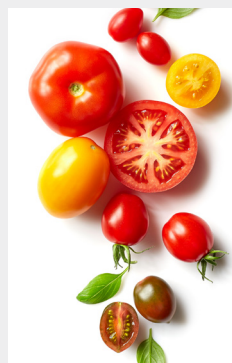
AGROALIMENTARY R&D



### **ARE ANIMALS AND PLANTS PATENTABLE?**

We all thought the question was redundant and that legislation in force provided a clear answer. European Commission concluded that Directive 98/44/EC was intended to exclude them.

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Patents, trademarks, designs and copyrights in a work are all concepts with which we are becoming ever more familiar.

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The CJEU examines how to balance the right to data protection and the principle of compulsory disclosure of companies.



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- A rectification document can include negative value judgments.

# ARE ANIMALS AND PLANTS PATENTABLE?

■ MÓNICA ARIZTI

We all thought it was a redundant question and that legislation in force since at least the transposition of Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions provided a clear answer:

However, after following an intense debate and having placed temporarily on hold the examination of all European patents related to the protection of plants and animals for the last seven months, the European Patent Office seems to return to normality. In any case, new restrictions to patentability should be introduced in the European Patent Convention implementing regulation.

The technical sector affected is mainly that of plants and animals obtained using essentially biological processes. These patent applications seek to protect plants and animals obtained through the process, and parts of those plants and animals, (i.e. seeds), as well as the fruit and/or processed products obtained through same. These patents therefore form part of the agricultural industry, in which technological breakthroughs have a huge economic and social impact.

In fact, the specific cases that aroused debate and consequently the conflict itself, involve patents that cover the fruits of the tomato plant, broccoli and barley with technically special characteristics. We are therefore talking about patenting food such as fruit and vegetables and drinks such as “beer”.

The background to this case goes as follows: Directive 98/44/EC of the European Parliament and of the Council on the legal protection of biotechnological inventions harmonizes national legislation on the patentability of inventions in this field, and for this purpose establishes the basic

principles that should prevail over the grant of an exclusive right in an invention related to plants and animals.

The European Patent Organization, which prior to the Directive already regulated in general terms the patentability of these types of inventions in the European Patent Convention, decided to include the main provisions of the Directive in its regulations implementing the Convention in 1998. The main practical consequence was that the provisions of both, i.e. Directive and Convention, are considered during the processing of European patents in this technical field.

Article 4 of Directive 98/44/CE establishes the prohibition on the patentability of plant and animal varieties and essentially biological processes for the production of plants or animals. Moreover, article 2 of the Directive defines “essentially biological processes” as processes that consist entirely of natural phenomena such as crossing or selection. However, the Directive does not clearly define the patentability of products obtained using essentially biological processes.

Article 53b of the European Patent Convention prohibits the patentability of plant or animal varieties or essentially biological processes for the production of plants or animals. However, as a result of several patent applications, the EPO has been forced to rule on specific issues related to these inventions, namely the patentability of products obtained using essentially biological processes.

An example of the conflict that has arisen is case EPI211926 regarding tomato plants bred to produce tomatoes with a reduced water content, essential for producing tomato-based products

such as pastas and sauces, or case EP1069819 regarding edible broccoli plants with elevated levels of anticarcinogenic glucosinolates, or case EP2373154 granted to Carlsberg and Heineken several months ago, for barley-derived beverages with reduced levels of dimethyl sulfide.

The European Patent Organization has ruled on various technical issues through the decisions reached by the Enlarged Board of Appeal of the European Patent Office. Of these, the following can be highlighted:

- G2/07 and G1/08, in which the Enlarged Board of Appeal ruled that a non-microbiological process for the production of plants which contains or consists of steps for the sexual crossing of the whole genomes of plants followed by the selection of plants was excluded from patentability because it was an “essentially biological process” within the meaning of Article 53(b) EPC.

In addition, the Enlarged Board of Appeal has considered that this exclusion from patentability extended to processes that included steps of a technical nature that serve to enable the sexual crossing and selection process such as, for example, techniques for selecting plants through the identification in the plant of specific genetic material.

If, however, the process contains steps of a technical nature that introduce a new genetic trait in the plant or modify an existing trait - i.e. genetic engineering processes - , then the process is not excluded from patentability.

Subsequently, in cases G2/12 and G2/13, the Enlarged Board of Appeal decided that the exclusion from patentability should not extend to plants and animals obtained through essentially biological processes even if such processes were excluded from patentability according to Art. 53b, if such plants and animals met the patentability, novelty, inventive step and industrial application requirements.

In short, until a few months ago, the European Patent Office had been granting patents aimed at



protecting plants and products obtained through essentially biological processes.

It is precisely this that led various sectors of the public and the agricultural industry to strongly object to the practice followed by the EPO, causing the European Parliament to adopt a decision asking the Commission to examine the scope of the exclusion from patentability contained in Article 4 of Directive 98/44/CE regarding the legal protection of biotechnological inventions. Specifically, the Commission was asked to rule on whether the exclusion from patentability of essentially biological processes should extend to products obtained through these processes.

The Commission issued its opinion in November 2016, which was contrary to the practice followed by the EPO, indicating that the purpose of the Directive was to exclude the patentability of products, plants and their parts obtained through essentially biological processes.

Consequently, the EPO has decided to finally introduce such exclusion to patentability in the European Patent Convention implementing regulation.

Therefore, the new game rules, which came into force last July 1, 2017, are set forth. Consequently, plants and animals obtained following an essentially biological proceeding would not be protected under patent rights.



# LICENSE TO OFFEND

CELIA SUEIRAS VILLALOBOS

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**On 19 June the United States Supreme Court delivered a judgment declaring the prohibition on potentially offensive trademarks to be unconstitutional; thus extending the scope of application of the First Amendment to trademark registration**

Some years ago, the US Patent and Trademark Office (USPTO) prevented *The Slants*, an Asian-American rock group, from registering their name on the grounds that it was offensive to Asian minorities. The subsequent appeal filed by the band was rejected by the USPTO. The Office based its decision on the famous “disparagement clause” pursuant to article 1052 of the Lanham Act. According to this provision, trademark applications which are deemed “immoral, deceptive or scandalous” are refused federal protection.

Simon Tam, *The Slants*' band leader, filed a lawsuit against the USPTO decision and after various proceedings, the case reached the Supreme Court. The musicians held that - far from wishing to offend anyone- their aim was to reappropriate a racial slur by removing its offensive connotations through their music.

Although the eight senior judges of the Supreme Court unanimously ruled in favor of the *The Slants*,

the grounds which led to the decision were in conflict, with two divergent groups of opinion.

On one hand, those who agreed with judge Samuel A. Alito Jr who considered that freedom of expression protected by the First Amendment also includes freedom to express “that which we hate”. In this regard, Judge Alito clarified that the clause in question in the Lanham Act “is not an anti-discrimination clause; it is a happy-talk clause.”.

Conversely, the second block of judges supported judge Anthony M. Kennedy's introspective and systematic interpretation of the First Amendment. These four senior judges considered that the Office's decision was anti-democratic and a case of “viewpoint discrimination”, a practice that the Court condemned.

In turn, the US government alleged in its defense that the registration of a trademark at the Office presupposes incorporation of the registered term in “public or governmental discourse” therefore

allowing it to block the ones deemed offensive. The Court unanimously ruled out this argument and indicated, not without some irony, the dangers of considering every proposal registered at the USPTO as "Government speech".

Thus, both the Court's final decision and the judges' arguments contain the proposal and response of US justice to the task of creating a balance in trademark registration matters between the legal principle of morality and public order on one hand, and the right to freedom of expression on the other; concluding that the latter takes precedence.

From a European perspective this debate is raised in different terms. In registration matters, the Regulation on the European Union Trademark ("EUTM") in article 7 (1)(f) prohibits registration of trademarks that are contrary to public policy or to accepted principles of morality. This provision was invoked by the General Court of the European Union ("GCEU") in its judgment of 9 March 2012 dismissing the appeal filed by the applicant for the trademark "HIJOPUTA" (*son of a bitch*) against the refusal decision issued by the European Union Intellectual Property Office ("EUIP"). Despite the fact that the applicant endeavored to argue that the aforementioned term, depending on the context, could have an amusing, even affectionate connotation, the GCEU held that the term "hijoputa" referred "essentially to an insulting expression" which was offensive and morally reproachable and which accordingly, should be refused registration pursuant to article 7(1)(f) of the EUTMR.

The decision refusing registration of the trademark "SUDACA" bears more similarity to the case of *The Slants*, as the EUIPO considered that the expression *sudaca* (derogative name for Latin Americans) was offensive and discriminatory for Latin American minorities, and therefore contrary to public policy or accepted principles of morality. Based on the same arguments, the EUIPO has refused registration of other trademarks such as "SCREW YOU", "BIN LADEN" and "COJONES".

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*We do not know if the conflict between freedom of expression and morality will be heard in the European Union courts. What is evident however, as the case of *The Slants* confirms, is that a trademark may in itself constitute a form of expression that, as such, merits protection.*

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Morality and public policy are concepts which are constantly evolving, so that what today is deemed offensive or in bad taste may not be considered as such in the future. However, the question of whether Registers should only admit trademarks considered to be "socially acceptable" is a matter for debate.

For the moment we do not know if the conflict between freedom of expression and morality will be heard in the European Union courts. What is evident however, as the case of *The Slants* confirms, is that a trademark may in itself constitute a form of expression that, as such, merits protection.

# PLANT VARIETIES:

## PROTECTION REQUIREMENTS



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### ISABEL PÉREZ CABRERO

Patents, trademarks, designs and copyrights in a work are all concepts with which we are becoming ever more familiar. But the possibility of obtaining legal protection for the creation and development of new plant varieties is an unknown option to the general public, just as to a large part of the business sector.

Considering the importance of the agricultural sector to the domestic economy, this is somewhat surprising. Although we are all used to finding our supermarket shelves stocked with seedless watermelons or grapes, out-of-season mandarins, or exceptionally flavorsome tomatoes, very few of us are aware that these products are actually the result of variety improvement programs that lead to more technologically advanced products.

Plant breeding, i.e. obtaining a variety with improved productivity, quality, presentation, color, duration, or resistance, tends to be a long and costly process in which the plant breeder invests large sums of money which, if it is granted an exclusive right to exploit the variety over a certain period of time, it is able to recover. The fact is that if the new plant variety is not properly protected, it can easily be reproduced by third parties, in which case the breeder will be deprived of any reward for the

effort and the investment made throughout the process.

The breeder may also be an individual who has simply discovered the variety by chance on land of his or her property. In this case, the exclusive right is not granted in order to reward such individual for the effort - labor and money - required to obtain a new plant variety, but to promote agricultural research and phyto-improvement.

New plant varieties that meet certain requirements - which we shall look at below - are currently protected by specific legislation applicable at national level (Law 3/2000 on the Legal Regime for the Protection of Plant Varieties) and at Community level (Regulation EC 2100/94 of the Council on Community Plant Variety Rights).

The requirements which must be met for a variety to be eligible for protection are the following

- **Novelty:** to be eligible for protection, a plant variety must not have been sold or delivered by the holder or by a third party with its consent for exploitation purposes, earlier than one year before the filing of the application for protection (in the European

Union if the application is for protection at Community level or in Spain if it is a national application), or earlier than four years before such date - six in the case of trees and vines - outside Spain or the EU, depending on the scope of the protection being sought.

The novelty requirement is clearly very different from that applicable to patents, since the very objective of this requirement as regards to plant varieties is to determine the time at which the plant variety for which protection is sought has been sold or assigned. Under no circumstances - unlike what we find with patents - is the objective to make any comparison between varieties.

- Distinction: a variety is considered to be distinct if it is clearly distinguishable from any other variety whose existence is a matter of common knowledge on the date of application.
- Uniformity: a variety is deemed to be uniform if, subject to the variation that may be expected from the particular features of its propagation, it is sufficiently uniform in the expression of those characteristics. The uniformity criterion is therefore not aimed at establishing absolute uniformity, and it takes into consideration the nature of the variety in question.

Stability: a variety is considered to be stable if its pertinent characteristics remain unchanged after repeated propagation or, in the case of a particular cycle of propagation, at the end of each such cycle. As in the case of the uniformity requirement, the aim of the stability requirement is to ensure that the identity of the variety, as an object of protection, remains unchanged over the period for which protection is granted.

Lastly, another requirement that must be met in order for protection to be granted is the denomination requirement. According to both national and Community legislation, the denomination given to the variety for which protection is being sought must meet the following requirements:

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*New plant varieties that meet certain requirements - which we shall look at below - are currently protected by specific legislation applicable at national level (Law 3/2000 on the Legal Regime for the Protection of Plant Varieties) and at Community level.* ”

- it must be different from any other denomination in use at national or Community level, depending on the scope of protection of the variety, in respect of the same species or one which is closely related.

The main aim of this requirement is to ensure that the variety is given a name through which it can be identified for marketing purposes and which serves as a common generic denomination which the breeder itself and third parties can use to refer to it in trading operations.

- it must not be liable to mislead or to cause confusion concerning the characteristics, the value or the identity of the variety, or the identity of the breeder:

If the variety is eventually found to meet all the aforementioned requirements and is registered, this confers on the holder, for a specified period of time ranging from 25 to 30 years depending on the type of variety protected, an extensive range of rights of exploitation of the variety, that covers from variety multiplication rights to its marketing.

In practice, the holder tends to license these exploitation rights to third parties in exchange for the payment of royalties.

New plant varieties therefore are eligible for protection and should be protected, since if a business successfully creates a variety that, for instance, is resistant to a certain pest (a topical subject bearing in mind the recent plague of potato moths or the “tea trips” plague affecting citrus fruits), this will not only increase its production but also give the business a competitive advantage that must be protected in order to obtain the greatest possible benefit.



# THE PIRATE BAY

SURRENDERS  
TO EUROPEAN JUSTICE

ANTONIO MUÑOZ-VICO / RICARDO LÓPEZ ALZAGA

**According to the CJEU, making metadata available through The Pirate Bay so that users can access works protected by copyright is an unauthorized “communication to the public”**

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On 14 June 2017, the Court of Justice of the European Union (“**CJEU**”) issued a *preliminary ruling* in the case of C-610/15 (“The Pirate Bay”), filed by the Supreme Court of the Netherlands on 18 November 2015. The ruling was required to interpret the concept of “public communication” contained in Directive 2001/29/EC, and in doing so the CJEU has extended the scope of the concept in regard to previous similar cases. With the new Court decision, the mere fact of “facilitating” access to protected works, despite not providing direct access to them, constitutes public communication requiring prior authorization. As a result, the continuance of some websites that facilitate data for exchanging files in P2P networks without the pertinent copyright holders’ consent - the most prominent example of which is *The Pirate Bay* - is now in considerable jeopardy.

## THE FACTS

In the original lawsuit, the Stichting Brein foundation requested the Dutch Courts to order internet access providers Ziggo and XS\$ALL to block The Pirate Bay (“TPB”) domain names and IP addresses, in order to prevent users of their services from collaborating in the systematic infringement of copyright.

For those unfamiliar with *The Pirate Bay*, it is sufficient to mention that it is a service providing

contact between users (known as *peers*) for transmission of torrent files. These files operate as links between users. On one hand, the user (*seeder*) who has content on his computer which could infringe copyright, uploads a torrent file to TPB platforms. This enables a second user (*leecher*) to access the work in the seeder’s system and download it using the Client-BitTorrent tool. Although the terminology and the technical procedures may appear confusing, basically the process boils down to a reciprocal exchange of protected content (films, music, books etc.).

In this way, TPB does not make the content available to the public –not directly - but simply limits its activity to managing the torrents (links) that the *peers* upload to the system. *A priori*, from a technical legal perspective, it was not so easy to implicate TPB in a case of possible copyright infringement. However, TPB also indexes and classifies the different *torrent* files uploaded to its platform so that it actively facilitates users’ access to the illegal contents.

Bearing in mind the characteristics of the TPB and contrasting them with the concept of public communication as addressed by the European Directive 2001/29/EC, the degree of cautiousness with which the Netherlands Supreme Court’s



approached the task of assessing whether *The Pirate Bay* was exploiting protected works, (which led to the preliminary ruling) was indeed understandable.

## THE CJEU'S OPINION

As the CJEU points out- the terms of art. 3.1 of Directive 2001/29/EC make it quite clear that authors possess an “exclusive right to prohibit possible communication to the public of their works. However, determining the content and scope of the expression “communication to public” is a complicated issue - one need only analyze the volume of case law in this regard – and one that the Court has been attempting to resolve for some time without any real certainty. In order to address this task, the CJEU takes into consideration the fact that the main objective of the Directive is to provide authors with a “high level of protection”, and to offer them “adequate compensation of the use of their work”.

The Court also values the presence of traditional elements of public communication: the existence of a work; carrying out an act of communication and communication to a (new) public.

The Court states that the user makes an act of communication with his intervention, in full knowledge of the consequences of its action, to give its customers access to a protected work. In this regard, the Court also pointed out that the lucrative nature of this activity also merits consideration. By using the term “public” it means, in line with established case law, a “large number of recipients” and regarding the act of “communication of a work”, it is necessary for the use of a new and specific technique or communication to a new public.

In assessing these three points, the Court of Justice of the European Union rules:

(1) That the operators of *The Private Bay* do not only manage and make available an online exchange platform containing works protected by copyright which are offered for sharing, but they also index and classify the works contained in those files, removing files and actively filtering some elements.

Therefore, unquestionably, they actively intervene, and are fully cognizant of the fact that they are making available protected works. Consequently, TPB without restraint and with full knowledge of its actions carries out a clear act of communication (this conclusion is supported by the considerable income from advertising earned by *The Pirate Bay* through this activity).

(2) That although the concept of “public” is subject to a certain *de minimis* threshold, in this case the sheer numbers of people using *The Pirate Bay* is evident. The statements of the operators are clear confirmation of this fact, as they themselves confirm that their on-line exchange platform has millions of “peers” (users).

(3) That finally, and in the light of the *Svensson* and *BestWater International* judgments of 13 February 2014 and 21 October 2014, respectively, the public is “new” - and as a result there is communication of a work- as this was not taken into consideration by the owners of the copyright when they authorized the initial communication.

In the light of the foregoing, the CJEU concludes by responding affirmatively to the preliminary ruling requested by the Supreme Court of the Netherlands. Effectively, the **concept of “communication to the public (...) includes making available and managing an online exchange platform which by indexing metadata relating to protected works and by providing a search engine enables users of that platform to locate said works and exchange them through a peer to peer network.”**

As a final comment, it is particularly interesting that the CJEU fails to enter into an evaluation of the full response given by the Attorney General Szpunar on the preliminary ruling. The Attorney General linked the existence of a public communication with the effective knowledge by the platform owner that its platform had been infringing copyright, thus deviating from the presumption of knowledge deriving from the existence of profit that the CJEU had mentioned in its Judgment *GS Media*, which was widely criticized (BERCOVITZ, 2016).

# THE CNMC APPLIES THE 'DRY LAW' TO THE INTERNET

CRISTINA MESA

The ban on advertising beverages with a high alcohol content – above 20% – on television has been in place a long time, since it was included in the original text of the General Advertising Law as far back as 1988. The reasons for such banning, i.e. public health grounds, are clear:

Almost thirty years later, the General Audiovisual Communications Law includes the same ban, which has even been extended to cover drinks with a lower alcohol content - such as wine or beer - in certain circumstances. The television broadcasting of commercial communications relating to alcoholic drinks is banned in the following cases:

- (i) In all cases, beverages with an alcohol content of more than 20%;
- (ii) Even when the advertised alcohol content is less than 20%, its advertisement is banned if broadcasted between 20:30 hours and 06:00 hours of the next day. An exception applies in cases in which the advertisement in question forms an inseparable part of the contents to be broadcasted, as in the case, for example, of product placement advertising; and
- (iii) In all cases, even when the alcohol content is less than 20%, when the advertisement is aimed at minors, when it encourages people to drink excessively, or associates consumption with enhanced physical fitness, popularity or good health.



It is clear that the General Audiovisual Communications Law imposes even greater restrictions on the possibility of advertising alcoholic beverages on television, since it bans even the advertising of beverages with low alcohol content.

However, the current regulatory framework fails to take into account the manner in which Spaniards in the 21st century - and particularly young Spaniards - consume contents, and contains no regulations whatsoever on the advertising of alcoholic beverages on the Internet. The Information Society Services and Electronic Commerce Law<sup>2</sup>, - referred to as the Internet Law - contains no provisions on this matter. On the other hand, both the General Advertising Law and the General Audiovisual Communications Law appear to relate to television advertising exclusively. It is therefore unclear whether advertising which is accessible via the Internet is subject to the same restrictions as television advertising. The Spanish National Markets and Competition Commission ("CNMC"), in response to a request by Autocontrol, has now ruled on this matter:

What the CNMC said is basically that the ban in question is equally applicable to contents broadcast via the Internet. The CNMC begins its ruling by acknowledging that the prohibitions set out in the General Audiovisual Communications Law do indeed appear to apply solely to "televised commercial communications", based on the provisions of its article 18.3, in which this is actually stipulated. According to the CNMC, however, the

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*The current regulatory framework fails to take into account the manner in which Spaniards in the 21st century - and particularly young Spaniards - consume contents, and contains no regulations whatsoever on the advertising of alcoholic beverages on the Internet.*

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term "television" should be understood in this sense to refer to any type of audiovisual content:

*"This ban on the television broadcasting of commercial communications related to beverages with an alcohol content in excess of 20% - which is clearly justified in order to protect the rights of minors - should be understood to be applicable also to commercial communications taking place through mobile television, i.e. applications or platforms for the viewing of programs on mobile devices. And it is for this reason that the term "television", as stipulated in article 2.2 of the LGCA, should be deemed applicable*

<sup>1</sup> "5. The advertising on television of beverages containing more than 20% alcohol containing more than 20% alcohol by volume is banned", article 5 of the General Advertising Law 34/1988 of November 11, 1988.

<sup>2</sup> Law 34/2002 of July 11, 2002 on Information Society Services and Electronic Commerce.

<sup>3</sup> The Ruling which responds to the request presented by AUTOCONTROL (the Spanish advertising self-regulatory body) in relation to the advertising of alcoholic beverages with an alcohol content above 20% via mobile applications. CNS/D TSA/17/AUTOCONTROL.ALCOHOLIC BEVERAGES, of May 9, 2017.

“ Several media entities affirmed that they had received internal communications explaining that this new interpretation of the LGCA does not apply to mere aggregators of contents hosted by users, establishing a clearer framework within which to determine what Internet advertising is acceptable, which should be based on the question of who the editorial responsibility for the contents in question corresponds to.

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*to all visual matter (whether viewed using a fixed device, a mobile device or on demand)”<sup>3</sup>.*

Is this conclusion supported by the text of the General Audiovisual Communications Law? Every indication is that it does support it, bearing in mind that according to its article 2.2, “audiovisual media services” should be understood to refer to services for which the editorial responsibility rests with a service provider, such as traditional television, television on demand, and mobile television<sup>4</sup>. The ban is therefore applicable to television contents irrespective of the means used by the viewer to access them (televisions, tablets, mobile phones, computers, etc.).

This is therefore a very broad interpretation which, by including on-demand contents, goes far beyond the traditional concept of television. As has been reported by the media, this ban would therefore also apply to the new contents platforms, on which it is the users who decide the contents they want to access and at what time.

Yet although the headlines appearing in some media affirm that the CNMC Ruling also applies to video aggregators, we have our doubts. Why? Because such aggregators have no “editorial responsibility” over the contents which they make available to the public, since such contents are published by the users themselves. The “editorial responsibility” requirement in the definition of the term “audiovisual media services” provided in the General Audiovisual Communications Law is not met in the case of a large majority of such aggregators, since these are platforms which act as mere “intermediaries” in relation to such services and they therefore fall outside the scope of the bans established in the General Advertising Law and the General Audiovisual Communications Law.

Following the initial confusion, several media entities affirmed that they had received internal communications explaining that this new interpretation of the LGCA does not apply to mere aggregators of contents hosted by users, establishing a clearer framework within which to

determine which type of Internet advertising is acceptable, which should be based on the question of who owns editorial responsibility for the contents in question. We will nevertheless have to wait and see how the rule is actually applied by Autocontrol (or the competent courts) in order to confirm this interpretation.

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<sup>4</sup>“Audiovisual media services: The following are to be considered audiovisual media services: services for which the editorial responsibility corresponds to a service provider; the principal purpose of which is the provision, through electronic communication networks, of programs and contents in order to inform, entertain or educate the general public and to broadcast commercial communications.

The forms in which audiovisual media services may be provided are:

- a) The television audiovisual media service, which is provided for the simultaneous viewing of programs according to a scheduled listing;
- b) The on-demand television audiovisual media service, which is provided for the viewing of programs and contents at the time chosen by the viewer; and at such viewer’s own request, based on a catalogue of programs selected by the media service provider
- c) The mobile television audiovisual media service, which is provided for the viewing of programs and contents on mobile devices”. Article 2.2. of the General Audiovisual Communication Law.

<sup>5</sup> [http://economia.elpais.com/economia/2017/05/29/actualidad/1496053864\\_881379.html](http://economia.elpais.com/economia/2017/05/29/actualidad/1496053864_881379.html).

The European Court of Human Rights (“TEDH”) reiterates its case law on the protection of private life in the case of Rubio Dosamantes (Paulina Rubio) vs Spain. The fact that someone enjoys media attention does not give television channels carte blanche to comment indiscriminately on an individual’s private life.



## NOT A SINGLE WORD... ABOUT MY PRIVATE LIFE

“THE RIGHT TO BE LET ALONE”

### CAROLINA PINA

In its judgment of 21 February 2017, the ECHR once again considered important fundamental rights which enter frequently into conflict, namely the freedom of speech and information, and personal rights such as personal honor and personal and family privacy, in this case ruling in favor of the latter.

#### BACKGROUND

In this case, Paulina Rubio alleges unlawful interference in her right to honor and privacy due

to a number of comments made by her former manager and some commentators on current affairs programs who had repeatedly discussed the singer’s sexual proclivities, a possible abortion, drug-taking and abuse of her ex-partner.

In Spain, successive courts rejected the claimant’s claim, both the Court of First Instance<sup>1</sup> and the Provincial<sup>2</sup> Appellate Court ruled that the comments made about her were not sufficient to be deemed unlawful interference with her right

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*Paulina Rubio alleges unlawful interference in her right to honor and privacy due to a number of comments made by her former manager and some commentators on current affairs programs who had repeatedly discussed the singer's sexual proclivities, a possible abortion, drug taking and abuse of her ex-partner.*

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to honor, and as a result the right of freedom of speech prevailed in this case.

The Court of First Instance declared that the statements corresponded to the singer's private behavior, which had for some time been in the public domain, a fact that she had never objected to previously.

Regarding the interference with her right to honor, the court held that comments about her sexual orientation did not imply any intrusion in respect of the interested party's honor insofar as an individual's homosexuality should not be seen as something dishonorable in this day and age, and, moreover, the claimant herself had encouraged speculation about her sexual orientation for promotional purposes.

This consideration goes against other rulings which have concluded that in specific circumstances, speculation about an individual's sexual orientation could negatively affect his or her honor<sup>3</sup>.

Finally, Spanish Supreme Court rejected the cassation appeal in an decision of 12 May 2009<sup>4</sup> - a case that was also appealed at the ECHR which, in its decision of 11 December 2012<sup>5</sup>, declared that *“the Supreme Court decision to declare the claimant's appeal inadmissible is not considered to*

<sup>1</sup> Judgment of the Court of First Instance no. 1 of Madrid on 19 February 2007.

<sup>2</sup> Judgment of the Provincial Appellate Court of Madrid no. 557/2007 of 28 October (AC\2007\2037).

<sup>3</sup> Judgment of the Provincial Appellate Court of Madrid, number 612/2003, of 19 November, confirmed by the Supreme Court Judgment number 1142/2008 of 27 November relating to the lawfulness of the speculation on the sexuality of the famous show performer Norma Duval

<sup>4</sup> Order of the Supreme Court (Civil Chamber, section one) of 12 May 2009 in cassation appeal no. 466/2008 (JUR\2009\268012).

<sup>5</sup> Decision of the ECHR of 11 December 2012 in the case of Rubio Dosamantes vs. Spain (ECHR\2012\116).

“

*The fact that the Spanish and Latin American press have dedicated so much space to comments on the singer does not justify the television channels having carte blanche to disseminate all types of remarks on her private life*

”

*be an infringement of her right to access to a Court”, postponing the decision relating to her right to privacy.*

#### **OPINION OF THE SPANISH STATE**

During the proceedings, in defending the prevalence of the right to information, the Spanish state referred to the considerable interest shown by the Spanish public for this kind of programs, to the little zealously with which the singer protected her private life, and to the Spanish public’s extensive knowledge of the singer’s private life, given that it was frequently led in the public eye. In short, the argument was sustained on the basis of art. 2.1 of the OL 1/1982 - the limits to which an individual establishes rights relating to personality through his/her own acts, as well as social customs -.

It is striking that in defense of its view, the Spanish state alleges public interest for this type of program. The Constitutional Court and the ECHR have declared on several occasions that the right to communicate and freely receive information does not protect mere satisfaction of the public’s curiosity, but rather the collective interest in accessing information, which should not be confused with the public’s morbid interest in the private life of others.

#### **ECHR CONCLUSIONS**

ECHR case law in this matter holds that the publication of photographs, and the dissemination of images, comments or criticisms on the private life of a person interferes with his/her right to intimacy, despite the fact of being a



public personality<sup>6</sup>. In short, “even when a person is known to the general public, he or she may rely on a “legitimate expectation” of protection of and respect for his or her private life”

The Court recalls that in this type of conflict, some criteria should be employed to guide the courts in their appraisal of the case: (i) contribution to a debate of general interest; (ii) how well known is the person concerned and what is the subject of the report? (iii) prior conduct of the person concerned; (iv) content, form and consequences of the publication.

The high court qualified the comments on the claimant as frivolous, and went on to apply the aforementioned criteria:

- *The contribution to a general interest debate:* it is considered that general interest cannot be construed as the morbid curiosity of a certain type of public.
- *How well-known the person is:* the CJHR considers that the claimant is known for her professional activity as a singer, which does not necessarily imply that her private conduct is relevant for the public interest.
- *The public figure’s previous conduct:* : the fact that the Spanish and Latin American press have dedicated so much space to comments on the singer does not justify the television channels having carte blanche to disseminate all types of remarks on her private life.
- *The content, form and consequences of the comments:* according to the CJHR the Spanish courts have not taken these elements into account when assessing the rights in conflict, therefore, it considers that the criteria employed by Spanish jurisdiction were not sufficient to adequately protect the singer’s private life. The indiscriminate dissemination of unconfirmed rumors and unrestrained remarks on any aspect of a person’s private life is not a minor incident but could actually be seriously detrimental to a person’s private life.

In short, the conflict between these types of right is frequent in specific areas of the media in which “gossip” programs investigate - unquestionably excessively- the private life of more or less famous individuals. While it is true that in this and other areas, freedom of speech and information enjoys an extensive and adequate scope of protection, nevertheless making wounding comments and accusations through this type of format cannot be tolerated without there being wider consequences. Any individual, no matter how famous, is entitled to be left alone. An individual’s dignity requires that a person should be entitled to a minimum degree of privacy because, to quote the Czech novelist Milan Kundera, “a man who loses his privacy loses everything”.

<sup>6</sup> See the ECHR judgment in the case of Von Hannover v. Germany (n° 59230/00, ECHR 2004-VI).



## COURT OF JUSTICE OF THE EUROPEAN UNION RULES ON PERSONAL DATA IN THE COMPANIES REGISTER

**The Court of Justice of the European Union ruled on the right to object to the processing of data entered on the companies register, rejecting that employers may ask for their name not to be linked to a certain company.**

*However, the European court does not rule out that in certain exceptional cases, once a sufficiently long period of time has elapsed after the dissolution of the company, the Member States may limit access to such data.*

**MAGDALENA COSTALES**

In its judgment of March 9, 2017, case C-398/15, Camera di Commercio, Industria, Artigianato e Agricoltura di Lecce - Salvatore Manni, the Court of Justice of the European Union (TJUE) analyses how to balance the protection of data of individuals whose names appear on commercial registries with the principle of compulsory disclosure applicable to companies.

The question was referred to the CJEU for a preliminary ruling in the context of a lawsuit between the Chamber of Commerce of Lecce (Italia) and Mr. Salvatore Manni, concerning the refusal by the Italian authorities to delete certain personal data relating to Mr. Manni from the companies register:

<sup>1</sup> <http://curia.europa.eu/juris/document/document.jsf?sessionId=9ea7d0f130d6464e0766df92490ea5affc0992077161>.

“

*The CJEU held that in order to determine whether the Member States are required to afford individuals in positions of responsibility in limited liability companies the right to apply to the commercial registry to erase, block or restrict access to personal data entered in that register after a certain period of time, it is first necessary to ascertain the purpose of that registration.*

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Specifically, Mr. Manni sought an order requiring the Chamber of Commerce to anonymize or block the data linking him to a building company that had been declared insolvent in 1992 of which he had been the sole director and liquidator. Back on the day when he filed the claim, Mr. Manni was the sole director of another building company which had been awarded a contract for the construction of a tourist complex. Mr. Manni considered that the properties in that complex were not selling because his reputation had been affected, since his link to the company that had been declared insolvent still appeared on the companies register, even though it had been struck off the companies register in 2005.

The CJEU held that in order to determine whether the Member States are required to afford individuals in positions of responsibility in limited liability companies the right to apply to the commercial registry to erase, block or restrict access to personal data entered in that register after a certain period of time, it is first necessary to ascertain the purpose of that registration. In this regard, the court underscored that the purpose of disclosure regulated in Directive 68/151 68/151 is to protect the interests of third parties in relation to joint stock companies and limited liability companies, since their assets are the only safeguards they offer to third parties. To that end, the concerned basic documents of the company should be disclosed so that third parties may be able to ascertain their contents and other information concerning the company, especially the particulars of the persons who are authorized to bind the Company, which means that all the relevant information should be expressly stated in the register.

When weighing up the general interest in accessing this information and the individual interest of the data subject, the European court is more inclined to consider that, in general, the general interest

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<sup>2</sup> First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community was repealed and replaced by Directive 2009/101/CE Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent.



and principle of disclosure on the register should prevail. In this connection, the CJEU observes that individuals who have voluntarily decided to participate in trade through such a limited liability company, are under the obligation to disclose the data relating to their identity and functions with that company.

Moreover, depending in particular on the limitation periods applicable in the various Member States, which are markedly different, questions requiring such data may arise for many years after a company has ceased to exist, since even after the dissolution of a company, rights and legal relations relating to it continue to exist.

In light of the above, the CJEU recognizes that it is impossible, to identify a single time limit, as from the dissolution of a company, at the end of which the inclusion of such data in the register and their disclosure would no longer be necessary.

However, this does not mean that the particulars of the directors and representatives of companies should be kept indefinitely, since every rule has its exception: the European court opens the possibility for the courts, following an analysis of the case, to determine the suitability of allowing the right to object in certain cases.

In this connection the judgment acknowledges that the possibility cannot be ruled out that there may be specific situations in which the overriding and legitimate reasons relating to the specific case of the person concerned justify, exceptionally, that access to personal data entered in the register is limited, upon expiry of a sufficiently long period after the dissolution of the company in question, to third parties who can demonstrate a specific interest in their consultation. As tends to be the case, the Court holds that it is up to the Member States to decide on a case-by-case basis whether there is justification to do so or not.



As far as Mr. Manni is concerned, the court considers that the fact that the properties in a tourist complex built by the company of which Mr. Manni is currently the sole director do not sell, supposedly because the potential purchasers of those properties have access to that data in the company register, cannot be considered sufficient reason, in view of the interest of those purchasers in having that information.

In light of the criteria established by the Court, we will have to wait for the Spanish authorities to determine the period of time that is considered sufficient in order to exercise the right to object in such cases.

In this regard it will be necessary to bear in mind, among other aspects, the statute of limitations on actions against members of the company's managing bodies or its liquidators, in cases, for example, in which the legality of an act performed in the name of said company while it was active is placed in doubt.

“

*The European court opens the possibility for the courts, following an analysis of the case, to determine the suitability of allowing the right to object in certain cases.*

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## TOPICAL LEGISLATION UPDATE

### **THE “PRIVATE COPYING LEVY” IS BACK**

On July 3, 2017 the Council of Ministers approved Royal Decree-Law 12/2017, amending the limitation on private copying and regulating fair compensation for such limitation – the “private copying levy”. Compensation paid out of the general state budget was rendered void by the courts and the new regulation has now gone back to the system that was in force until 2011. Under the former system, it was the manufacturers, distributors and importers of the equipment, devices and media that were capable of making private copies of protected works that had to pay the levy.

## RECENT CASE -LAW

### **A RECTIFICATION DOCUMENT CAN INCLUDE NEGATIVE VALUE JUDGEMENTS**

JUDGEMENT NO. 376/2017 BY THE CIVIL  
CHAMBER OF THE SUPREME COURT OF  
JUNE 14, 2017

(ES:TS:2017:2350)

The Civil Chamber of the Supreme Court has deemed valid a rectification document drawn up by a sergeant in relation to a communication published by the AUGC (Association of Civil Guards), which included negative opinions of him. The court ruled that the opinions were admissible because (i) they were put forward prudently and with restraint in comparison with the document that had led to the proceeding; and (ii) their relevance in the document overall was of minor importance.

### **LAWYERS' DOCUMENTS CAN BE PROTECTED BY THE SPANISH COPYRIGHT LAW ("SCL")**

JUDGMENT NO. 107/2017 BY PANEL ONE OF THE SALAMANCA PROVINCIAL APPELLATE COURT, OF MARCH 2, 2017 (APPEAL NO. 503/2016)

(Appeal no. 503/2016).

Salamanca Provincial Appellate Court has acknowledged that intellectual property legislation can be applied to professional legal documents. The plaintiff, a lawyer, asked her boss to act as counsel in a proceeding that she was involved in. The lawyer had previously prepared a draft of the complaint and although her boss changed it subsequently, she requested indemnification for plagiarism. Despite recognizing the complaint as an original work protected by copyright, the Court concluded that in this specific case, it was a composite work and that since it formed part of a provision of professional services, economic rights could not be claimed.

### **ONE OF THE FOUNDERS OF KUKUXUMUSU FOUND LIABLE OF INFRINGING THE COMPANY'S INTELLECTUAL PROPERTY RIGHTS**

JUDGMENT 52/2017 BY PAMPLONA COMMERCIAL COURT NO. 1, OF MARCH 10, 2017

(ES:JMNA:2017:18)

Navarra Commercial Court has ruled in favor of Kukuxumusu in a conflict with one of its founders. After leaving the company, one of its founders had assigned the rights over a series of drawings to the company in exchange for economic compensation. Kukuxumusu sued him for creating in his new company, drawings very similar to those covered by the contract, and using them in trade. The plaintiff did not seek to have the founder stop the use of his particular style, since it acknowledged that the defendant was one of its creators, asking simply that he should refrain from using this style in the drawings covered by the assignment contract.

### **"INFORMED USERS" IN RELATION TO DESIGNS, BETWEEN THE AVERAGE CONSUMER AND EXPERT IN THE INDUSTRY**

JUDGMENT NO. 275/2017 BY THE CIVIL CHAMBER OF THE SUPREME COURT DATED MAY 5, 2017

(ES:TS:2017:1658)

The Supreme Court has assumed the thinking of the CJEU in relation to industrial designs, establishing that informed users should be considered a concept halfway between someone who does not need to have any specific knowledge whatsoever and a professional with extensive technical skills.

### **PARTICIPATION IN AN ARCHITECTURAL PROJECT DOES NOT IMPLY PROTECTION BY INTELLECTUAL PROPERTY LEGISLATION**

JUDGMENT NO. 253/2017 BY THE CIVIL CHAMBER OF THE SUPREME COURT, OF APRIL 26, 2017

(ES:TS:2017:1644)

The Supreme Court has ruled that mere collaboration in an architectural project does not involve, per se, the collaborator being deemed an author on the terms of the Intellectual Property Law. To be recognized as such, the architect must "have created an original space and forms". Mere material participation in the work is not sufficient.

### **THE CORRECT COMBINATION OF TWO PRIOR REGISTERED PATENTS CAN BE USED TO PROVE THE ABSENCE OF THE INVENTIVE STEP REQUIREMENT**

JUDGMENT NO. 310/2017 BY THE CIVIL CHAMBER OF THE SUPREME COURT OF MAY 18, 2017

(ES:TS:2017:1937)

The Supreme Court reiterates in this judgment that the absence of one of the patentability requirements – specifically, the inventive step requirement - can be proven by combining two or more documents or prior rights, provided that such combination is suggested or is evident to an average expert.

## MORE INFORMATION: INTELLECTUAL PROPERTY DEPARTMENT

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