

In this issue:

- A new Judgment on Websites posting links that facilitate downloads.
- Assignment of exploitation rights of a film.
- The consent of the parties in Remote Agreements.
- The promotional brochure as a binding contractual offer.
- L' Oreal Vs. Ebay.
- Companies joint assets and liabilities in Bankruptcy proceedings.
- Annulment of the Section 10 b) of the Spanish Data Protection regulation.
- Legal concept of the human embryo.

A new Judgment on Websites posting links that facilitate downloads.

A Judgment issued by the Regional Court of Vizcaya on September 27th, 2011 has admitted the appeal filed against the Judgment issued by the Criminal Court in Baracaldo (Vizcaya) on February 11th, 2011 that we discussed in our last issue.

The Judgment rendered by the Court of First Instance acquitted of a copyright offense against the defendants who ran a website where links appeared allowing downloads of content protected by copyright. The argument was that providing links to download pages is not a crime according to Section 17 of the Electronic Commerce Act provides that such behaviour does carry no liability if operators do not have knowledge about the fact that the links might damage Intellectual Property Rights.

This regulation has been interpreted broadly when applied by the Criminal Courts, for instance, the in the Regional Court of Madrid as per its Judgment dated March 8th, 2011.

However, the interpretation of the Court of Bilbao is stricter. It is based on the premise that the provision refers to an effective unawareness of the illegality of the content of links. For instance, in those cases of searching engines or in the case of web sites of links leading to other sites with xenophobic content that violates the honour of the person. Section 17 exempts them from liability if the operator has no actual knowledge that the link content is unlawful.

Nevertheless, in this specific case, the Court considers that the defendants log into the file sharing site and extract the file link movie or music taking it out from a sharing site context to make it a direct download file elsewhere. That is, they did not run a p2p file sharing site, which is permitted, but an activity that allows downloading of content protected by Intellectual Property Act.

In general terms, what is punished is the involvement in a direct activity of works' indexing and classification, and not a mere intermediary actuation.

Furthermore, the Judgment states that the fact that the defendants obtained indirect benefits through advertising on their website which depended on the number of hits posted on their website, determines the fact that the activity was geared to get a profit and, therefore, the defendants had a profit-making intention with such activity.

Fernando González

Assignment of exploitation rights of a film

On February 9th, 2012, the Court of Justice rendered its decision on Case C 277/10 regarding a preliminary ruling on the interpretation of the European Regulation considering if the National Regulation of an specific Member State is entitled to assign the rights to exploit a film and granting the rights to the film producer solely.

The reference arose from a proceeding dealt by the Austrian Courts which was failed by the principal director and author of the screenplay of a documentary film against the film's producer.

The parties had entered into a Directing and Authorship Agreement. According to the mentioned agreement, the director had assigned to the producer all copyright and/or related rights held by him in the film. However, that assignment excluded specifically certain methods of exploitation, namely making the film available to the public on digital networks and broadcasting it by closed circuit television and by pay TV.

The claim was filed because the producer posted the film object of the case making it available on the Internet and the film could thus be downloaded from a website by means of video on demand.

The director brought proceedings against the producer for breaching the contract and applied for the half of the statutory rights to remuneration.

The producer argued in response to those arguments that, on the basis of the Austrian legislation, all exclusive exploitation rights of the film object of the case vest in him as the producer of the film and therefore, any agreements diverging from that rule or any disposition with the same effect shall be considered as null and void. Moreover, the producer asked for all the statutory rights to remuneration.

Before taking a decision, the Austrian Court considered that the Austrian legislation based on the Berne Convention, which states that the original and direct rights of exploitation shall be assigned solely to the film producer, would be contrary to European Union legislation, and decided to refer the case to the Court of Justice for a preliminary ruling.

The Court of Justice analyzed the EU regulation and considered that according to the European regulation in force, the exploitation rights of the film shall be granted to the Director as he acts as author of the cinematographic work.

Afterwards, the Court of Justice stated that in those cases when a Member State is allowed, but not obliged to apply an International Agreement entitling the Member State to adopt measures which appears to be contrary to European Union law, the Member State must refrain from adopting such a measure. In this manner, when, as a result of a development in European Union legislation, a legislative measure adopted by a Member State in accordance with the power offered by an earlier International Agreement appears contrary to European Union law, then, in such case, the Member State concerned cannot rely on that agreement in order to exempt itself from the obligations that have arisen subsequently from European Union legislation.

Given the reasons mentioned above, since the status of author has been confirmed as the principal director of a cinematographic work, the fact of denying the exploitation rights to the creator shall be considered incompatible with the aim pursued by EU regulation.

In the light of what has been stated, The Court of Justice considered that the principal director of a cinematographic work must be considered as having lawfully acquired, pursuant to the European Union law, the right to own the intellectual property in that specific work. In those circumstances, the fact that national legislation denies him the exploitation rights at issue shall be considered as depriving him of his lawfully acquired Intellectual Property Right.

The Court answered the question submitted stating that rights to exploit a cinematographic work vests, directly and originally, in the director. The Member States have the option of laying down a presumption of transfer, in favor of the producer of a cinematographic work, providing always that such a presumption is not an irrefutable one precluding the principal director of that work from agreeing otherwise.

Moreover, the Court stated that, in his capacity as author of a cinematographic work, the director thereof must be entitled, by operation of law, directly and originally, to the right to the fair compensation, and that the Member States are not allowed to apply for the option of laying down a presumption of transfer, in favor 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.

Jesús Carrasco

The consent of the parties in Remote Agreements.

The Judgment issued by the Regional Court of Seville No. 258/12010 dated September 17th, 2010, states the requirements and time-scale applied to remote Agreements. More specifically, concerning the case under discussion, the Judge of the Court of First Instance sustained the claim of the plaintiff, and considered

valid the first remote agreement entered between the parties for the sale of 8 laptops for a price of 288€. This amount was the result of an erroneous price posted on the website of “El Corte Inglés”. In this Court of First Instance, the Judge dismissed the execution of a second sale agreement of 7 laptops due to the fact that the Claimant never received from the Offeror the automatic confirmation reply by e-mail.

“El Corte Inglés” appealed the Judgment issued by the Court of First Instance, as this party considered that there was no consent provision on their part by the sole acceptance of the website offer. The Claimant also appealed the Judgment requesting the execution of both Agreements.

Firstly, in regards to the acceptance of the Agreement the Court defined Remote Agreements -electronic agreements-, which is specified in paragraph h) of the Act 34/2002 July 11th of Electronic Commerce and Information Society Services (hereinafter LSSI as per its Spanish Acronyms):

“Every Agreement in which the proposal and the acceptance are transmitted by means of electronic equipment of data processing and storage which are connected to a telecommunications network”.

In the case under discussion, the offer was posted on the website of “El Corte Inglés” and the acceptance by the company was made by means of the available tools included in their own website intended for making purchase orders. It is worthy to take into account that these kind of remote Agreements are considered valid and in force without need of prior agreement between the parties in regards to the use of the mentioned automatic means. Therefore the significant requirement for the validity and effectiveness of a remote Agreement is the consent and agreement for the objet and price pursuant to Section 1450 of the Spanish Civil Code.

The Court established the difference between remote Agreements and those ordinary Agreements which are entered when both parties in the contract are not present in the signing act. In ordinary Agreements, the contract is considered accepted upon the consent and acceptance by the parties. Remote Agreements are enforceable upon the acceptance of the online offer of the Agreement pursuant to Section 1262 of Spanish Civil Code.

For such reason, Court of Appeal dismissed the arguments of “El Corte Inglés”. “El Corte Inglés” argued that a simple remote order cannot presume the acceptance of the Agreement because this is subject to a later acceptance on their part. In this case, as well as it happens with an ordinary sale Agreement, the Court considered that the acceptance is proven regardless the fact that the automatic replying e-mail with the reference purchase and delivery number from “El Corte Inglés” was not sent as it happened in the first order of 8 computers, thus, considering irrelevant whether the replying e-mail was sent or not to prove the acceptance of the Agreement. These kind of emails are just a mere procedure included in the Section 28 of the LSSI, as a formal requirement for acknowledging the receipt of the acceptance by the distributor. However, this obligation is subsequent to the improvement of the Agreement.

Anyway, the acceptance of the two different orders of 8 and 7 laptops, respectively, is confirmed when the client clicks in "buy" at the web site and therefore, it is irrelevant whether the Claimant has received and automatic confirmation email or not.

Secondly, the defendant argued an infringement of good faith requirements and abuse of rights, for trying to oblige "*El Cortes Inglés*" to execute both Agreement for the sale of 15 laptop for a price of 36 € per unit.

The Court states that is necessary to check the factual circumstances case-by-case. In cases of obvious mistakes with ridiculous prizes, the argument of the buyer shall not be accepted if his only purpose is to take advantage of the error.

However, The Court assumed that the rapid obsolescence of hardware, software and IT equipment leads to substantial prices reductions. This is why it is not considered proven that the buyer was conscious of the error and in addition the order of 15 equipments does not seem to be out of proportion so there was not any intention by the buyer to take advantage of an error. Furthermore, the Court states that the good faith is presumed and the bad faith must be proven which did not occur in this case.

Given all the reasons mentioned above, the appeal of "*El Corte Inglés*" was rejected, and the Court declared valid the contract for the sale of 15 laptops, and condemns the seller to deliver the equipment in consideration of the agreed price.

Ignacio Triguero

The promotional brochure as a binding contractual offer

The High Court has ruled on the value to be given to the promotional brochures when buying an off-plan real estate property.

The High Court states that these brochures shall be considered as an actual contract offer, and that they should help to interpret and integrate the contract according to the consumers regulation and the regulation on good faith in contracts.

The lawsuit refers a case involving a huge number of people who purchased a house based on planes and brochures that led them to acquire the property as they included references to golf courses, mountain and sea views which finally did not correspond with reality.

The purchasers brought an action seeking to terminate the contract and be refunded with the amounts already paid.

Whereas the Judgments issued by the Court of First instance dismissed the lawsuit as it was considered that there is not breach of contract in place, the Regional Court admitted the appeal and ruled that the contract shall be considered terminated condemning the Developer to refund the amount paid plus interest and court costs.

The Regional Court concluded that there was a breach of contract because they offered views which actually did not exist in the property, taking into consideration that the brochures

included that the views were possible as consequence of the topography and characteristics of the project as well as it was possible thanks to the slope existing, which does not appear in the off-plan of the property annexed to the Agreement.

The developer appealed that decision by means of extraordinary procedural infringements, namely, Section 218 of the Act on Civil Proceedings (hereinafter LEC, as per its Spanish Acronyms) and also appealed based on violation of Section 1124 and 1256 of the Spanish Civil Code. The first one was not admitted, ruling the High Court on the second one as it is set hereinbelow.

It highlights the scope of the brochure. They discussed if the brochures should be considered as a mere advertising promotion intended solely to attract the purchaser to enter a business, as it is supported by the defendant, otherwise, if those shall be considered as an actual contractual offer.

The High Court dismissed the action based on the actual offer and its impact on the formation of consent. It considers that given that the property was acquired off-plan, it was not possible for the purchasers to check the lack of faithfulness of the brochures.

The characteristics stated on the brochure had a decisive influence on the acquisition, the claim from purchasers responds to objective and reasonable circumstances, and the principle of good faith requires a reasonable behaviour according to the trust created in traffic which is not observed when offering a house which does not correspond with the actual properties.

The breach of contract is considered severe enough to state the termination of contract given that the lack of view frustrates the expectation of purchasers, and therefore, it is not enough to provide the purchasers with an economic compensation.

In general terms, there is a problem with the faithfulness of the offer and contrary to the principle of good faith which confirms the rejection of the appeal at the last court stage.

Silvia Ara

L'Oreal vs Ebay

A Judgment issued by the Court of Justice on July 12th, 2011 has provided an important doctrine in the matter of the sale of branded goods on the Internet through the electronic market and deals likewise about the liability of the operator of the electronic marketplace.

The issue under discussion arose by a preliminary ruling from the High Court of Justice (England and Wales) as a result of a lawsuit filed by L'Oreal and its subsidiaries companies, Lancome and Garnier against eBay in regards to the marketing of L'Oreal products through eBay without the consent of L'Oreal.

The lawsuit faces the way of marketing L'Oreal products, through a closed distribution network, and by the eBay model, through which L'Oreal products are sold on the eBay website by

individuals who offer such products to other individuals who can access through searching engines.

L’Oreal sued eBay to prevent such sales in territories for which they were not authorized by L’Oreal, in this case, the European Economic Area (EEA). Furthermore, L’Oreal opposed to the marketing of samples or products without the authorized L’Oreal packaging.

The High Court of Justice referred to the Court a number of questions which hereinbelow summarized:

- Whether if it is possible to sell product samples without authorization from the manufacturer.
- Whether if it is possible to sell unpackaged products without the consent of the trademark holder.
- Whether if it is lawful to use the representative symbol of a trademark by an unauthorized third party when the use occurs by the appearance of the representative symbol in a searching engine like Google.
- Whether if shall be considered lawful that products are marketed by eBay in a different market from the intended market to which the products were addressed to initially.

The Court stated:

- The holder of a trademark may be opposed to the sale of products supported by its brand in different territories for which they were authorized.
- That the supply of products samples shall not be considered as marketing of the product itself.
- That the resale of goods without the official packaging authorized by the trademark holder is not lawful if this involves that essential information as the name of the manufacturer is not included or that by removing the packaging damages the brand image.
- That the holder of a trademark may prohibit the use of its brand appearing in a searching engine installed on the website of an operator of an electronic market where the consumer might believe that such use constitutes an authorization from the trademark owner.
- That the electronic operator may be liable for an unauthorised use of the trademark made by the people that can use its web site.

Fernando González

Companies joint assets and liabilities in Bankruptcy proceedings

The matter subject to this analysis is decision taken by a Bankruptcy Administration dealing with three companies of the same company group which are involved in a bankruptcy proceeding. Given the situation and in response of the confusing information of assets, the Administration under discussion decided to gather the three companies joining all their creditors in a sole debt pooling and besides, joining all the rights and assets of the three companies.

Against this decision, two of the creditors involved in the bankruptcy proceedings have contested the list of creditors in the Company Court No.4 of Barcelona which dismissed the application to contest the list, ratifying the decision to gather assets and liabilities which had been applied by the Bankruptcy Administration.

Against such rejection, the creditors filed a writ of appeal as a result of which, it was issued a Judgement by the Court of Appeal of Barcelona dated June 28th, which is the Judgement object of this analysis.

The Court of Appeal begins its Judgement by analyzing the legal regulation of the accumulation of bankruptcy proceedings and their effects, declaring that these are very limited and specific. Accordingly, the Court of Appeal establishes that the legislation does not state at any stage, the prospective gathering of assets and liabilities and prohibits the joint treatment of bankruptcy proceedings as if it was a sole bankruptcy proceeding. Therefore, the Court limits the effects of the accumulation allowing the appointment of a common insolvency receiver and to the joint performance of assets whose ownership is common.

According to the Court of Appeal this prohibition to joint assets responds to the requirement in regards to the different legal form of the different companies involved, as well as the preservation of the rights of minority partners and creditors, since otherwise the collection rights of the later could be limited.

However, further to this legal analysis on the gathering of bankruptcy proceedings and their effects, the Court declares that bankruptcy proceedings could be dealt jointly in certain exceptional occasions in the same way that in the course of an extrajudicial claim may apply the legal figure named “lift of veil” which is applied in case of confusion of assets of a company.

According to the above, the Court of Appeal considers the specific case and after studying the different facts that were taken into account by the Court of First Instance, the Court of Appeal confirms the gathering of assets and liabilities in this case.

Therefore the Court of Appeal considers applicable the gathering of the three insolvent companies and its joint activity as if they were only one sole company, taking into account that the companies share the same partners, develop the same activity, share the same corporate image, the same workers and the same equipment, as well as the Department of administration, in those cases when there are financial irregularities registered in all the companies.

In conclusion, insofar the three companies acted as if they were one single company, with the same real and personal elements and there are no difference amongst them, the Court decides to apply the “lifting of the veil” and consolidates into one single group all the assets and liabilities of the three companies.

Paula Casado

Supreme Court decision dated February 8th 2012 on personal data

The Spanish High Court has declared the nullity of Section 10.b) entitled “Cases which confirms the processing or assignment of

data” of the Royal Decree 1720/2007, of December 21st, which approves the regulation implementing Organic Law 15/1999, of December 13th, on the protection of personal data, which states the following:

“The aforesaid notwithstanding, processing or assignment of personal data shall be possible without the data subject’s consent when: (...)

b) The data object of processing or assignment are in sources available to the public and the data controller, or in those cases when the third party to whom data has been communicated, has a legitimate interest in their processing or knowledge, providing always that the fundamental rights and liberties of the data subject are not breached.

Notwithstanding the foregoing, the Public Administrations may only communicate the data collected from sources available to the public to the data controllers of privately owned files, when they are so authorised by a regulation having the force of Law.”

This decision has been adopted in view of the Judgment issued by the European Court of Justice dated November 24th, 2011 which rules about the interpretation of Article 7(f) of Directive 95/46/EC dated October 24th 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Article 7(f) states as it follows:

“Member States shall provide that personal data may be processed only if processing is necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests for fundamental rights and freedoms of the data subject which require protection pursuant to Article 1 (1).”

Specifically the ECJ considered that Article 7(f) of Directive 95/46 “*must be interpreted as precluding national rules which, in the absence of the data subject’s consent, and in order to allow such processing of that data subject’s personal data as is necessary to pursue a legitimate interest of the data controller or of the third party or parties to whom those data are disclosed, it is required not only that the fundamental rights and freedoms of the data subject are respected, but also that the data should appear in public sources, thereby excluding, in a categorical and generalised way, any processing of data not appearing in such sources.*”

Therefore Spanish High Court has considered that Section 10.b) of the Royal Decree 1720/2007 should be precluded as it includes the requirement that “the data object of processing or assignment shall be achieved from sources available to the public” to allow the processing of data without the data subject’s consent.

There are two controversial aspects about this decision:

1º It was only necessary to eliminate the sentence underlined herein below, and not the Article 10.b) as a whole, so it shall state as it follows:

“The aforesaid notwithstanding, processing or assignment of personal data shall be possible without the data subject’s consent when: (...)

b) The data object of processing or assignment are in sources accessible to the public and the data controller, or the third party to whom data has been communicated, has a legitimate interest in their processing or knowledge, providing always that the fundamental rights and liberties of the data subject are not breached.

2º Accordingly, the High Court should have erased also Article 6.2 of the Organic Law 15/1999 dated December 13th, on the protection of personal data, which states the following:

“2. Consent shall not be required in those cases in which the personal data is collected in the execution of the respective functions in the Public Administration within the scope of their responsibilities; In those cases in which they relate to the parties to a contract or preliminary contract for a business, employment or administrative relationship, and are necessary for its maintenance or fulfilment; those cases in which the purpose of data processing is to protect a vital interest of the data subject pursuant to the terms of Article 7(6) of this Act, or in such cases in which the data is contained in sources available to the public and their processing is necessary to satisfy the legitimate interest pursued by the controller or that of the third party to whom the data is communicated, unless the fundamental rights and freedoms of the data subject are jeopardised.”

In conclusion, the requirement that the data object of processing or assignment shall be achieved from sources available to the public and the data controller, is not any longer a requirement for the processing or assignment of personal data without the data subject’s consent.

Ignacio Gurpegui

Legal concept of the human embryo

The Court of Justice rendered its Judgement dated October 18th, 2011 in response to the preliminary ruling issued by the Bundesgerichtshof (Germany) in the proceedings between Oliver Brüstle and Greenpeace eV.

This petition was submitted within the scope of the proceedings brought by Greenpeace applying for the annulment of the German patent held by Mr Brüstle, in regards to neural precursor cells and the processes for their production out of embryonic stem cells as well as for its use for therapeutic purposes.

This reference for a preliminary ruling aimed to make an interpretation of Article 6(2)(c) of Directive 98/44/EC on the legal protection of biotechnological inventions.

In the first place it was raised to the Court what is meant by the term “human embryos” according to the aforementioned Article. The Court responded that ‘human embryo’ shall be considered as any human ovum:

- after fertilisation,
- Non-fertilised into which the cell nucleus from a mature human cell has been transplanted,
- Non-fertilised whose division and further development have been stimulated by parthenogenesis.

Likewise, the Court established that the corresponding national Court shall be responsible to ascertain, in the light of scientific developments, whether a stem cell obtained from a human embryo at the blastocyst stage shall be considered as a 'human embryo'.

In second place, it was raised to the Court what is meant by the expression "uses of human embryos for industrial or commercial purposes" as these ones are not subject to be patentable. In response to this matter, the Court established that the mentioned term includes scientific research purposes. Therefore it is considered that it shall just be patentable in those cases when they are intended for therapeutic or diagnostic purposes which might be applied to the human embryo and which might provide a benefit for it.

In third and last place, the Court was asked if technical information is not subject to be patentable even if the use of human embryos does not make part by itself of the technical information claimed jointly with the patent, but is a necessary requirement for the request of that information because the patent concerns a product whose creation requires the prior destruction of human embryos, or because the patent concerns a process for which such a product is needed as base material. The Court in response established that a creation is excluded from patentability in those cases in which the technical information which is the subject-matter of the patent claim requires the previous destruction of human embryos or their use as base material, regardless the stage at which the process takes place and even if the explanation of the technical instruction claimed does not refer to the use of human embryos.

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