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SPANISH LEGAL UPDATE

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Consent by the addressee to authorize the use of cookies

The Royal Decree-Law 13/2012, 30 March, which amended several articles of the Law 34/2002, of 11 July, services of the society of the information and of electronic commerce, was published in the Official Gazette of 31 March 2012, in order to adapt its regime to the new wording of Directive 2009/136/EC, to the Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

The aforementioned Royal Decree-Law 13/2012 came into force on April 4th, 2012, and its article 4 includes the modification of article 22.2 of the Law 34/2002, of 11 July, of Services of the society of information and electronic commerce concerning cookies.

The new wording of article 22.2 requires as a novelty with respect to the previous, the consent of the recipient of a service for the use of devices for storage and retrieval of data on their computer terminals (i.e. cookies) by the providers of such services. Previously, it is mandatory that service poviders still facilitate clear and complete information on the use of these devices including the purposes of the treatment of the data obtained.

The new article 22.2 includes a new second paragraph specifying that when it is technically possible and effective, the consent of the recipient to accept the treatment of the data may be supplied by using the appropriate parameters of the browser or other applications. In order for this procedure to be valid, the user must proceed with the configuration of these parameters, allowing cookies at the time of installation or update of the browser through an express action wih this purpose.

The question that arises now is how the provider must obtain the consent of the recipient of a service for the use of cookies, since it is not specified that it should be an explicit consent. In that regard, we understand that in theoryservice websites would comply with this rule by including in the legal noice on their website, in a specific section for it, or in the general conditions of contracting of the service, the warning of the use of cookies in the website, informing about the purposes of the treatment of the data obtained.

In the case of the Internet browsers is different as the Law requires that the recipient of the service expressly perform an action, at the time of the installation or upgrade of the browser, allowing the service provider to use t cookies.

Ignacio Gurpegui

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Trade Marks: Clarity and accuracy to describe goods and services

The Judgment dated June 19th issued by the Court of Justice (Grand Chamber), 2012, ruled a pre-trial motion in regards to the interpretation of Directive 2008/95/EC issued by the European Parliament and by the Council dated October 22nd 2008 to approach the legislations of the Member States concerning trademarks.

On October 16th 2009, the Chartered Institute of Patent Attorneys applied to register the designation “IP TRANSLATOR” as a national trade mark, using the general terms of the heading of Class 41 of the Nice Classification (common classification of goods and services to Register a trade mark which is managed by the World Intellectual Property Organization) to identify the different services within that Registry.

The Registrar, pursuant to the Communication no 4/03 of the Head of the Office for Harmonisation in the Internal Market (OHIM) dated June 16th 2003 (by virtue of which the use of all the general indications included in a specific class within the Nice Classification constitutes a claim for all the goods or services included in that particular class), refused that application as it was considered that it does not just cover services of the kind specified by the applicant, but also every other service included in Class 41 of the Nice Classification, including translation services, thus concluding that for these latter services the designation IP TRANSLATOR lacked distinctive character and was descriptive.

The applicant appealed against the mentioned decision to the referring Court who decided to put the proceedings on hold and to refer the case to the Court of Justice for different preliminary ruling:

It was raised if it was necessary to identify within a certain degree of clarity and precision all the different products or services for which it is applied a trade mark according to the European Directive and in such case, which shall be such degree.

It was also questioned whether it is permissible to use the general words of the class headings of the Nice Classification for the purpose of identifying the various goods or services covered by a trade mark application; and finally, whether it is necessary or permissible for such use of the general words of the Class Headings of the Nice Classification to be interpreted pursuant to the aforementioned Communication No 4/03.

In regards to the first matter set, The Court (Grand Chamber) ruled that the Directive 2008/95/EC must be interpreted to require that the goods and services for which the protection of the trade mark is applied, must be identified by the applicant with sufficient clarity and precision to enable the competent authorities and economic operators, solely on that basis, to determine the extent of theprotection conferred by the trade mark. In this sense, the financial operators must be able to acquaint by themselves, with clarity and precision those applications already registered or those applications in process of registration which may be submitted by their current or potential competitors, and thus obtaining relevant information about the rights of third parties.

Secondly, it was stated that Directive 2008/95/EC must be interpreted as meaning that it does not preclude the use of the general indications of the class headings within the Nice Classification with the aim of identifying the goods and services for which the protection of the trade mark is applied, providing always that such identification is sufficiently clear and precise.

Finally, an applicant for a national trade mark who may use all the general indications of a particular class heading of the Nice Classification to identify the goods or services for which the protection of the trade mark is applied, must specify whether its application for registration is intended to cover all the goods or services included in the list of that class or only some of those goods or services named in the heading. In the event that the application concerns only some of those goods or services, it is necessary to specify which of the goods or services in that class are intended to be covered by the protection of a trade mark.

Silvia Ara

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Unfair consumers' clauses and payment procedures

This article is intended to analyse the Order issued by the European Union Court of Justice deciding on the preliminary question raised by the Regional Court of Barcelona in relation to the existing conflict between EU law in regards to the protection that should be granted to consumers in professional commercial relations and the Spanish law that does not entitle judges to declare ex oficio payment procedure, and in limine Litis, the nullity of clauses that may be unfair to consumers.

The origin of the question arose from the payment procedure initiated, upon the request of Banco Sabadell, against a consumer for a failure to comply with the payment of a loan granted by the bank to buy a vehicle.

In the mentioned claim it was requested the payment of the remaining balance on the loan and the agreed late payment interest which were agreed at 29%.

The judge in the Court of First Instance, taking into account the EURIBOR and ECB interest rate, declared ex oficio the clause of interest penalties to be null and void for being abusive and fixed the interest rate on arrears at 19% based on the legal interest.

An appeal was submitted in the Regional Court of Barcelona against the Court of First Instance raising a question on the ruling.

The Regional Court first reviewed the Spanish regulations in regards to consumer and user interest protection, as well as the European regulation on payment procedure. They observed that in neither case exists the ability of judges to assess, in limine Litis, the abusive clauses within the payment procedure.

In contrast, the Regional Court highlighted the case law of the EU Court of Justice that has interpreted Article 6, paragraph 1 of Directive 93/13 stating the obligation for national judges to examine, ex oficio, the nullity and inapplicability of abusive clauses, even when the parties have not requested such examination.

Given such a legal discrepancy, the Regional Court of Barcelona raises two questions to the EU Court of Justice:

1) Is it contrary to EU law, especially the Law on consumers and users, that a National judge makes a pronouncement, ab limine Litis, at any stage of the proceedings, on the nullity or the integration of an interest clause on a consumer loan?

2) How should Article 6, paragraph 1 of Directive 93/13 and Article 2 of Directive 2009/22 be interpreted in relation to Article 83 of Royal Legislative Decree 1207 that permits national judges to modify the content of an abusive clause?

These issues were raised before the Court of Justice which states in regards to the first matter raised, that the aim of Directive 93/13 is to balance situations of inequality existent between consumers and professional services providers, with a positive intervention from a source other than those parties to the contract.

The mentioned positive intervention has come from the national judges that not only should rule on the possible abusive nature of contractual clauses, but they also have the obligation to examine by the Court's own motion these questions and to do so according to the relevant evidences.

Therefore, regardless whether or not the parties apply for opposition to the claim, the national judge should, for the purpose of consumer protection, examine, ex oficio, clauses that might be considered abusive.

In regards to the second question, regarding the interpretation of Directive 93/13, the Court of Justice responded that Article 6 precludes application of Member State legislation, as is the case of Article 83 of Legislative Royal Decree 1/2007, that attributes to the national judge the ability to revise the content of contracts, modifying clauses that have been declared abusive.

Therefore, national judges, dealing with any judicial proceeding, should examine ex oficio abusive clauses for consumers, declaring them null, ex oficio and in limine Litis, but they may not

revise the content of a contract to modify the subject abusive clauses.

Paula Casado

Credits for supplies accrued before the declaration of bankruptcy: preferential credits

On March 21st, 2012 the Spanish High Court rendered its Judgment in which stated that credits for supplies accrued before a company has been stated in bankruptcy, have to be paid as preferential credits, this means that they shall have priority over the rest of the credits, in those cases in which the Court who is dealing with the bankruptcy proceedings had ordered the supplier to continue with the respective supply in the interest of the bankrupt company.

The reference has been made in the course of proceedings brought by the Spanish energy supplier IBERDROLA against a company that upon the declaration of bankruptcy by the Court, the mentioned company owed IBERDROLA more than six million euros for energy supply.

IBERDROLA filed a claim before the Commercial Court which was dealing with the bankruptcy proceedings applying for the termination of the contract of energy supply with the bankrupt company and, subsidiarity, applying the Court to confirm that the contract remained in force, asking the Court likewise to consider those credits accrued before the declaration of bankruptcy proceedings as well as those accrued later on, as preferential credits.

The Commercial Court rejected the claim because the termination of the energy supply would stop the working activity of the factory, and stated that the credits for supplies accrued before the company was stated in bankruptcy shall be considered as ordinary credits, without any preferential treatment.

IBERDROLA appealed the Judgment before the Appeal Court who rejected the appeal claim, and one more time before the Spanish High Court which admitted the claim.

The High Court considered that, even taken into account that it is difficult to interpret the respective Section 62.3 of the Spanish Bankruptcy Law, the fact that the energy supplier was obliged by the Court to continue with the supply in the interest of the bankrupt company, was detrimental to the supplier, and deprived it to terminate the contract even the other party was had failed to comply with the agreement. Therefore, IBERDROLA should have more guaranties to obtain the payment for its credits.

For such reason, the High Court considered that both, credits accrued before and after the company was stated in bankruptcy, must be considered as preferential credits over the rest of the credits.

Jesús Carrasco

Consumer information on e-commerce

The European Union Court of Justice [1] has recently decided on the issue on consent from consumers to enter an agreement by an internet access hyperlink on the website of the seller.

Specifically, the subject matter is whether it is considered sufficient that the information on the right to terminate a contract should be accessed via a hyperlink to the website of the seller in which it is posted a text in which the consumer should confirm that it is agreed to initiate a contractual relationship by checking a box.

The dispute was raised by an Austrian Consumer Defence Office in regards to an English company that provides online services on its web site from which free programs or trial versions of pay-per-view programs can be downloaded.

[1] Court of Justice, Section Third, July 5th, 2012

In order to be able to use the site, consumers must fill out a registration form accepting the conditions of sale and waiving their right to terminate the agreement by checking a box on the registration form. The mandatory information on the right of withdrawal is not shown directly but can be checked by clicking on a link in the form. After registration, the consumer receives an email that contains the passwords but including no information concerning the right of termination. The information on this right can only be achieved by a link posted in the mentioned email.

Then, the consumer receives a bill for the access to the Internet content for twelve months in which it is indeed stated that the consumer has waived its right to the termination and, therefore, the user has no longer the right to terminate the contract.

In order to take a decision on this issue, the Court considers in the first place, that Article 5 of Directive 97/77 on the protection of consumers in distance contracts states that the consumer must receive, whether in writing or by durable medium, a confirmation of relevant information with enough time in advance, unless this has already been transmitted prior to the execution of the contract in writing or in any similar medium.

According to the mentioned rule, the Court considers that when a professional makes certain information available to the consumer prior to the execution of the contract in a way that is not in writing or on a durable medium, the professional service provider must confirm the relevant information whether in writing or by any other similar medium.

According to the mentioned Court, the purpose of the Directive is to allow consumers to have full protection in distance contracts in order to prevent that the use of distance communication means decreases the information provided to the consumer.

Therefore, the Court concluded that in those cases in which the information is only accessible through a hyperlink it shall not be considered as provided to the consumer or received by him/her.

Secondly, the Court examines whether a website whose information is accessible to consumers through a hyperlink should be considered durable according to the Directive.

Accordingly, the Court states that the paper might be substituted for any other mean complying with the requirements of consumers' protection providing always that it meets the same conditions than the paper.

The Court considered as a durable mean the one that allows the consumer to store information addressed personally to him, guaranteeing that the content will not be altered as well as its accessibility for an appropriate period and offering consumers the ability to reproduce it identically.

In this sense, the conclusion reached by the judgment is that the link that is provided to the consumer in this case does not allow that the consumer can access and reproduce it for a suitable period, excluding any possibility of unilateral modification by the seller.

Therefore, the Court concluded that the way in which information is provided to the consumer in this case cannot be considered durable.

In summary, the Court finds that it is not enough that the information is accessible through a hyperlink as the one offered in this case, but it is also necessary to allow the consumer to store that information for long time enough for the consumer to examine it.

From all this it shall be considered that a seller who uses technical means of distance selling must allow the consumer to have sustainable access to their general conditions to consider that the consumer has had long time enough to provide informed consent to the contractual relationship. The mean used in this case is not considered sufficiently guarantee for the consumer rights.

However, it is worrying that from the judgment is not possible to conclude which is the right way to provide the information since when considering that a hyperlink it is not the right way, then, it is difficult to imagine another way to provide this information on the Internet that meets the requirements of the Directive. The Judgment is unclear at this point and it shall require a subsequent clarification.

Fernando González

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Personal liability of the Internet forum masters.

The judgment under discussion issued by the Provincial Court of Toledo (First Division) dated June the 1st, 2012, is an appeal by the condemned as a result of slanderous allegations against a public official in an internet forum, and also submitted by the moderator of such forum who was also condemned by virtue of the same judgment.

Specifically, this judgment is specially interest because of the Court's reasoning on the issue of the civil liability of website administrators. This article is intended to break down the reasoning of different recent case law on this issue.

In this case, the administrator and creator of the Forum was condemned in the Court of First Instance as being guilty of civil solidarity with the author of the libel, on the basis of Section 212 of the Criminal Code, which declares civil liability on the "director of the medium" who spread the slander or insult. On his part, the appellant argue that the imputation of such liability is contrary to several dispositions included in the Law of Information Society Services (hereinafter referred to as LSSI).

Despite Section 13 of the LSSI considers the civil, criminal and administrative liability of the service providers of an information society, the appellant alleges that Section 16 raises an exception to this responsibility as, according to his understanding, there is no liability for information stored when: a) the actor does not have actual knowledge that the activity or information stored is unlawful, or that the act injured the rights or property of a third party to a degree for which there are actual civil damages, or b) that if they do, that they may act with diligence to remove the data or make the access impossible.

We shall understand actual knowledge in those cases when a competent body has declared the data illegal, ordered for its withdrawal or impossible access, or when the existence of the injury has been declared and the service provider was aware of the respective Court decision.

However, the Court, in keeping with most recent case law (See, Judgment from the Spanish Supreme Court no. 72/2011 of February – Case SGAE v. "Alasbarricadas.org" – and Judgment from the Provincial Court of Madrid of 31 March 2011 – "merodeando.com" –), does not consider that these are the only means of actual knowledge but also when the service provider was aware of the illegality without having to wait for such a declaration from the Court. In this case the Moderator of the forum noted that the author of the libel had many problems with previous content published on the forum and had asked the author to modify his posts in different occasions. Therefore, there existed a duty upon the moderator to exercise vigilance in regards to this user, and to remove such content without need of a prior judicial ruling. The court went on to say that it would have been reasonable to prevent this user from having access to the forum. Therefore, the Court dismissed the appeal made by the Forum Administrator, as there was in place joint and several liability under Section 212 of the Criminal Code.

Therefore, consolidating this string of cases (contra previous case precedent of Provincial Court of Madrid in no. 181/2010 from 13 April 2010 – "Rankia" –, Spanish Supreme Court Civil Chamber no. 316/2010 from 18 May 2010 – "Roboskizo S.L." – among others) after which it is understood that the moderator has actual knowledge when he/she is made aware of the wrong, by any means, and such wrong is obvious (not only when it is so declared by a competent authority).

Finally, and as a result of this recent case, it is appropriate/prudent to warn administrators of such forums about the importance of updating their respective contact information, including the "Whois" facts or web information provided to users, specifically those affected, who want to report abuses to the administrator yet do not succeed due to a passivity or negligence on the part of the administrator in keeping current his/her information—such missed communication, due to inaction on the part of the moderator, is not an adequate defence to the "actual knowledge" prerequisite (Judgment from the Spanish Supreme Court, no. 72/2011 from 10 February –SGAE v. "Alasbarricadas.org" –).

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The remaining problems to be solved in these cases arises firstly when it is necessary to prove that a Forum Administrator was aware of illicit content (which shall be considered in those cases where there is no complaint by the affected party or judicial recognition test made) and; secondly, by identifying the role that judges are assigning to a Forum Administrator in being familiar with the limits of the right to freedom of expression (while still honouring it) and, if applicable, implementing the common sense when removing content, which sometimes may not coincide with the judge's opinions. Additionally, it is also worthy to mention the high cost for complying with all these requirements for this kind of websites which have a high number of users and traffic.

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