

DATA PROTECTION

EDPB on video surveillance

At the plenary session of 9-10 July 2019, the European Data Protection Board ("EDPB") held a public consultation regarding the [Guidelines 3/2019](#) concerning the processing of personal data made by video systems. The EDPB is seeking to clarify the rules applicable to the video surveillance sector. The guidelines cover both traditional and smart video devices. The issues addressed in the document concern, inter alia, the lawfulness of the processing, the disclosure of video footage to third parties, the processing of special categories of data, the rights of the data subjects and storage periods.

Italian DPA on video monetization of personal data

The Italian Data Protection Authority (the "DPA") has brought to the attention of the EDPB – the independent European body which contributes to the consistent application of data protection rules throughout the European Union – the [issue of the app "Weople"](#), which promises its members remuneration in exchange for the transfer of their personal data. The DPA has focused its attention, on two aspects in particular: proper application of the so-called right to "data portability" introduced by the GDPR and the issue of the "marketability" of data, involving the attribution of monetary value to personal data. The DPA has asked the EDPB to give its opinion on both issues. The DPA will therefore await the opinion of the EDPB before concluding its investigation of the app.

TRADEMARKS

ECJ on the invalidity of Red Bull's colour combination trademark

On 29 July 2019, the EU Court of Justice (ECJ) issued its judgement in [case C 124/18P](#) (*Red Bull GmbH v. the EUIPO, Marques and Optimum Mark sp. z o.o.*). The ECJ dismissed Red Bull's appeal against the decision issued by the General Court of the EU (GC) on 30 November 2017 in [case T 101/15 and T 102/15](#), in which the GC confirmed the EUIPO's decision that Red Bull's trademark (consisting of the combination of two colours not arranged in a predetermined form) did not meet the requirement for a valid registration. The ECJ, in rejecting Red Bull's appeal, reasserted the requirement that a combination of colours must be systematically arranged in a predetermined and uniform way, so as not to restrict the availability of colours for other companies offering similar services or goods.

PATENTS

Italian Supreme Court on doctrine of equivalents

On 14 August 2019, the Italian Supreme Court issued a judgment (No. 21405/2019) which clarified the scope of the doctrine of equivalents in patent infringement. The Supreme Court, overturning the decision of the Court of Appeal of Rome, held that the mere identity of the technical problem, if it is capable of being solved by various solutions, does not entail per se an infringement under the doctrine of equivalents, which requires that the solution to the technical problem be reached through elements equivalent to those claimed in the patent.

The Italian State Council ruling on access to a pharmaceutical file

On 21 May 2019 the Italian State Council issued a [judgment \(No. 3075/2019\)](#) on rights of access to a pharmaceutical file where the file contains trade secrets. The Council, upholding the decision of the Administrative Court of Lazio, held that the right of a third party to have access to the pharmaceutical file in order to verify the correct application of the relevant legislation concerning generics prevails over the interest of the filing party to protect its undisclosed know-how regarding the pharmaceutical manufacturing process.

COPYRIGHT

ECJ on copyright protection of design

On 12 September 2019, the EU Court of Justice (ECJ) issued its judgment in [case C-683/17](#) (*Cofemel Sociedade de Vestuário SA v. G-Star Raw CV*) ruling that the only requirement for copyright protection in designs is their originality. This decision confirms that Member States (contrary to what appears to be the case from the wording of Article 17 of [the Directive \(EU\) No. 71/1998](#) of 13 October 1998 on the legal protection of designs) have no freedom in determining the conditions under which designs are eligible for copyright protection. This ruling would, inter alia, impact on the requirement of "artistic value" currently set forth in [Italian copyright law](#) for designs to be eligible for copyright protection.

New criteria for copy levy exemptions

The Ministerial Decree of 20 June 2014 on the exemptions and reimbursements scheme for copy levies has been recently updated by (a) the [Ministerial Decree of 18 June 2019](#) and (b) the [Decree of the Director General of the Libraries and Cultural Institutes](#) of 30 August 2019. According to these laws, copy levies are not due in cases where the use of the recording media and devices is clearly unrelated to making copies of phonograms and videograms for private use, including exclusive professional use, exportation, exclusively for the performance of professional diagnostics in the medical field, recording devices where the duplication function is not included or has been technically inhibited, use by professionals to duplicate phonograms and videograms and relevant devices sold to public administration bodies. Moreover, the vendor and the importer of the relevant devices may request in advance that SIAE confirm whether a specific use falls under the exceptions referred to. A request for reimbursement of unduly paid copy levies - along with the necessary documentation specified in detail by the LCIGD Decree - may be filed electronically with SIAE within 120 days of the end of the calendar quarter in which the invoices pertaining to the relevant devices are issued.

FINANCE

The Reform of the Italian Insolvency System: relevant amendments to claw-back actions

The new code on businesses in distress or insolvency (the "[Insolvency Code](#)"), which revised the rules on pre-insolvency and insolvency procedures applicable to Italian companies (see [Our Echo no. 38 of February 2019](#)), amended, inter alia, certain provisions regarding claw-back actions (*azioni revocatorie*). The first innovation introduced by the Insolvency Code is that the periods for claw-back actions will be brought forward: under the Insolvency Code, claw-back periods will apply to (a) acts and transactions which took place prior to the submission of the application for a judicial liquidation and (b) to acts and transactions which took place after the submission of such application, when the latter is followed by the judicial liquidation of the debtor. The second innovation introduced to the Insolvency Code is that certain additional actions by companies (i.e. the repayment of certain shareholders' loans and the repayment of loans granted by the company which exercises direction and coordination over the debtor) will be considered ineffective by operation of law, with a claw-back period of one year. In accordance with Article 389 of the Insolvency Code, the revised rules will enter into effect on 15 August 2020.

INDUSTRIES

E-COMMERCE

Italian Council of State on unfair commercial practices and e-commerce legislation

On 25 June 2019, the Italian Council of State issued its decision ([No. 4359/2019](#)) in the case brought by Viagogo Ag - an Internet service provider ("ISP") hosting an online ticket resale marketplace - against the Italian Competition Authority (the "ICA"). The decision overrules the judgment of the Regional Administrative Court of Lazio concerning the penalty imposed by the ICA in relation to unfair commercial practice arising from Viagogo's failure to disclose, among other information, the ticket face value and the seat location to the users of its platform. In its decision, the Council of State held that Viagogo operates as a "passive" hosting provider, without either knowledge of, or control over, the information transmitted or stored by the users of its service. According to the decision, while an ISP may be deemed a trader for the purposes of the provisions on unfair commercial practices, the enforcement of those rules may not entail additional obligations for the ISP, other than those set forth in the e-commerce legislation. In this context, the ICA's imposition on Viagogo of an obligation to make available, on its online marketplace, information available solely to the sellers of the tickets (i.e. the ticket face value and the seat location), would result in changing Viagogo's business model from a "passive" to "active" hosting provider and, as a consequence, also its liability regime.

MEDIA

AGCOM starts evaluating the size of the Italia media market

On 18 July 2019, the Italian media regulator ("AGCOM"), acting as the antitrust authority in the media field, issued its [Decision No. 346/2019](#), to initiate the commencement of the process of assessing the size of the "media" market in Italy for the year 2018 (the "Integrated Communications System").

New programming and investment obligations for media service providers

[Legislative Decree No. 59/2019](#) (published on 28 June 2019) has amended Articles 44 and following of the Italian Audio-Visual Media Service Code ("[Testo unico dei servizi di media audiovisivi e radiofonici](#)"). In particular, the new Legislative Decree has postponed from 1 July 2019 to 1 January 2020 the application of the new programming and investment obligations for linear and on-demand audiovisual media service providers and lowered the quotas previously set for certain service providers.

FASHION

The Italian Supreme Court (criminal division) on parody of fashion trademarks

On 31 July 2019 the criminal division of the Italian Supreme Court issued its [judgment \(No. 35166/2019\)](#), in a case concerning the use of parodies of apparel fashion brands. The Court ruled that the commercial use of original images created through the "use" of known brands, not for "distinctive" - and therefore "imitative" - but rather for "parodistic" purposes, may not be deemed to counterfeit the parodied trademarks from a criminal law perspective. This is because the use of parodistic trademarks, being functional to an ironic reproduction of famous brands, is incapable of causing confusion to the public, which is a requirement for the application of criminal statutes on counterfeiting.

TECHNOLOGY

The Italian Government exercises its "golden powers" on 5G

On 5 September 2019, the newly installed [Italian Government](#) exercised its "golden powers" in relation to Linkem S.p.A., Vodafone S.p.A., TIM S.p.A., Wind Tre S.p.A. and Fastweb S.p.A. The business activities of the five Italian TLC companies under scrutiny relate to agreements between the latter and non-EU companies, such as Huawei and ZTE Corporation, for the development of 5G infrastructure in Italy. Under the law on golden powers relating to 5G, Italian TLC companies are required to report any agreements with non-EU parties regarding the purchase of goods or services relating to the design, construction or maintenance of infrastructure and the management of networks for 5G. The Italian Government may impose a ban on the business activities or specifications, prescriptions or conditions for their continuation.

ENTERTAINMENT

ECJ on sampling of phonograms

On 29 July 2019, the EU Court of Justice (ECJ) issued its judgement in case [C-476/17](#) (*Pelham et al. v Hütter and Schneider-Esleben*), clarifying that a phonogram producer's exclusive right to reproduce and distribute a phonogram allows the producer to prevent another person from taking a sound sample, even if very short, of the relevant phonogram and including it in another phonogram, unless the sample included is modified in such a manner as to make it unrecognisable to the ear, pursuant to Article 2(c) of [Directive \(EC\) No. 2001/29](#) of 22 May 2001 (on the harmonisation of certain aspects of copyright and related rights in the information society, the "InfoSoc Directive").

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