

FRANCE



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1. Legislation	
Topic:	A new law on online communication and e-commerce (<i>Loi pour la confiance dans l'économie numérique</i>)
Who:	French parliament
When:	June 21, 2004
Where:	France
What Happened:	<p>This law implements in particular two EU directives:</p> <ul style="list-style-type: none">- Directive on electronic commerce of June 8, 2000 (2000/31/CE)- Directive on privacy and electronic communications of July 12, 2002 (2002/58/CE) <p>The main provisions of this law are as follows :</p> <ul style="list-style-type: none">- <u>unsolicited electronic mail for the purposes of direct marketing</u>: the opt-in system required by the 2002 directive applies when the recipients are individuals (as opposed to companies). There is an exception in favor of sellers who want to send communications to their customers regarding products or services similar to those they purchased originally. Commercial communications should be fair and clearly identifiable. The French law-maker added a six-month transition period for opt-out personal data files to be made compliant with the new opt-in requirement.- <u>e-commerce</u> : the law implements the EU requirements applicable to online sales such as obligations of information prior to entering into the agreement, rules of offer and acceptance ("double click" system), liability principle of the seller towards consumers.- <u>online communication</u> :<ul style="list-style-type: none">(i) right of answer: the new law settles the question to know whether the 1881 law on the press or the 1982 law on the audiovisual system should apply to the right of answer on the internet, by creating a specific system whereby any person designated in a service of public online communication (e.g., a website) has a right of answer.(ii) statute of limitations for online slander and libel: the three-month period starts running from the date when the information was first made available to the public. This means that the system is similar to the one applicable to offline communication, thus ensuring that the same rules apply in all the media.- <u>ISPs' liability</u>: under the new law, hosting providers should not be held liable for the content posted on the websites they host in two occasions: (i) if they had no knowledge of the illegal content or (ii) if they withdrew the content at stake.- <u>other provisions</u>: the new law also includes provisions relating to security in the field of the digital economy (e.g., encryption), satellite systems and the development of information technologies.
Comments:	The law was referred to the <i>Conseil constitutionnel</i> , which is in charge of

	<p>verifying the compliance of new laws with the French <i>Constitution</i>. It requested modifications as regards the right of answer and the ISPs' liability, which the law originally dealt with differently from what is described above.</p> <p>As regards the right of answer, the modification requested by the <i>Conseil constitutionnel</i> means that the system applicable now is similar to the one applicable to offline communication, thus ensuring that the same rules apply in all the media, whether online or offline.</p> <p>On the contrary, the new system applicable to online sellers means that a stricter body of rules will apply to them in comparison with offline companies, thus creating a potential damage to French Internet companies who will have to comply with this regime.</p> <p>As regards the ISPs' liability, the <i>Conseil constitutionnel</i> decided that the law should be interpreted in order to avoid acts of censorship by ISPs: the hosting providers should not be compelled to check constantly their websites. Their liability should not be sought if they did not withdraw an element (<i>i</i>) that was not obviously illegal or (<i>ii</i>) whose withdrawal was not ordered by a judge.</p>
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2. Legislation	
Topic:	A new law on the protection of personal data replaces the 1978 law: the EU directive of October 24, 1995 is finally implemented into French law!
Who:	French parliament
When:	August 6, 2004
Where:	France
What Happened:	<p>This law implements EU directive 95/46/CE of October 24, 1995, 6 years past the deadline for transposition.</p> <p>The main provisions of this law are as follows :</p> <ul style="list-style-type: none"> - CNIL filing: prior to the collection and processing of personal data, a declaration will be necessary if the processing does not present specific risks of violation of the persons' rights. In other cases, an authorization will be necessary. - CNIL powers: the law reinforces the powers of the CNIL. For instance, in case of non-compliance with the legal requirements, the CNIL will be able to impose sanctions, to suspend or to terminate a processing of data. - The rights of the data subjects are reinforced as regards information and opposition to the collection and use of their data. - Creation of the position of correspondent in charge of personal data in companies or in public bodies, allowing to avoid formalities for non-sensitive files. - Private files recording offenses are possible with respect to the illegal downloading of music and movies on the Internet if they have been allowed by the CNIL. These files can be implemented by companies victim of such infringements.
Comments:	<ul style="list-style-type: none"> - The aim of this law is to simplify the applicable regulations, but it rather seems to create a multitude of different systems of declarations. - Defenders of public liberties criticize the position of correspondent in charge of data protection within companies. They are afraid that this system will mostly benefit larger companies, which will be able to avoid the control of the CNIL whereas such companies sometimes may present a larger risk in terms of

	use of personal data.
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3. Legislation	
Topic:	Trick or Treats !! Food products : Self-regulation is losing ground against the law-maker
Who:	French parliament
When:	August 9, 2004
Where:	France
What Happened:	<p>The new law amends the <i>code de la santé publique</i>. It requires that all advertising and promotion campaigns in favor of drinks with added sugar, salt or sweeteners and manufactured food products, published or broadcast from the French territory and received on the French territory, include a sanitary message.</p> <p>However, advertisers may choose to avoid this requirement, by paying a contribution to the French institute acting for health prevention and education. This contribution will aim at financing the creation and the broadcasting of actions of nutritional information and education, through the media concerned and through local actions. This contribution amounts to 1,5% of the amounts spent on the broadcasting and publication of the ads.</p> <p>This new law also provides for a prohibition of vending machines of food and drinks within schools as of September 1, 2005.</p>
Comments:	<p>A decree is still expected in order to determine the nature of the sanitary message, which is yet unknown.</p> <p>Advertisers had been fighting to leave advertising for food products within the self-regulatory system, but those in favor of self-regulation lost and a law was passed.</p>

4. Case Report	
Topic:	Olympic games, trademarks and tort : do not use trademarks inspired by the Olympics !
Who:	Leclerc's (for its use of the term Olymprix) v. Le Comité National Olympique et Sportif Français (CNOSF)
When:	July 2, 2004
Where:	<i>Cour d'appel d'Orléans</i>
What Happened:	<p>The French Olympics committee has been fighting for years against Leclerc which was using the term "Olymprix" for promotional campaigns, using it alone or on trolleys along with the terms "official transporter of the Olymprix".</p> <p>In 1999, the <i>cour de cassation</i> rejected the CNOSF's request that Leclerc's trademark be cancelled : while notorious trademarks are protected in all areas of activity, the court considered that the Olymprix trademark did not reproduce the notorious trademark since it merely imitated it.</p> <p>The <i>cour de cassation</i> then considered in 2003 that, if the use of such a notorious sign could not be challenged on the ground of trademark law, it could be challenged in tort. The case was thus referred back to a court of appeal that recently handed down its decision.</p>

	In its decision of July 2, 2004, the <i>cour d'appel</i> of Orléans followed the same path and sentenced Leclerc to pay 1 million euros in damages to the CNOSF, on the ground of parasitism, considering that the use of "Olymprix" caused a prejudice to the "Olympique" trademark that benefits from a high degree of recognition among the public.
Comments:	This decision shows how careful advertisers should be when contemplating an ad based on a reference to sports. The Olympic and the soccer organization committees are especially aggressive against any direct or indirect reference to their activities.

5. Case Report	
Topic:	Image rights: can advertisers use the photo of anything to promote their products ?
Who:	<i>Société de promotion immobilière SCIR Normandie v. société Publicis</i>
When:	May 7, 2004
Where:	<i>Cour de cassation, assemblée plénière</i>
What Happened:	<p>In this case, a property developer created an advertising leaflet that included the photography of a private building on the historical register. The owner of the hotel requested damages for the following reasons :</p> <ul style="list-style-type: none"> - on the ground of Section 544 of the <i>code civil</i>, which provides that : "Ownership is the right to enjoy and dispose of things in the most absolute manner, provided they are not used in a way prohibited by statutes or regulations." - The plaintiff considered in addition that the photo was being used for commercial purposes, without taking into account the fact that the plaintiff had spent substantial amounts of money to renew the building, thus causing him a prejudice. - Finally, the owner also claimed that he had expressed its will to keep an exclusive use of the image of his building by mentioning it on the back of the postcards he published. <p>The court explained that the owner of real estate did not have an exclusive right on the image of such. He may, however, oppose the use of such image by a third party if such use causes an abnormal disturbance. In this case, the court considered that the owner of the real estate had not evidenced the prejudice he allegedly suffered through the use of the image of his property.</p>
Comments:	This decision sets forth a new principle, since before that case-law used to grant to the owner of real estate a right to exploit, alone, the image of such, in any manner.

6. Case Report	
Topic:	The 5th Element and similarities...
Who:	Luc Besson & Gaumont v. SFR & Publicis
When:	September 8, 2004
Where:	<i>Cour d'appel de Paris</i>
What Happened:	<p>French advertising agency Publicis created for its client SFR, a mobile phone company, an advertising campaign launching new services where the main character was red-haired, dressed in white stripes and played by Milla Jovovich.</p> <p>Luc Besson, filmmaker of The Fifth Element, challenged the ad in court, claiming that it was infringing his copyright on the movie and that the ad constituted a parasitic use of the movie where Milla Jovovich, his ex-wife,</p>

	<p>played Leeloo.</p> <p>In March 2004, a first instance tribunal considered that while there was no copyright infringement the ad did constitute a parasitic use of the movie. SFR and Publicis were ordered to pay 300,000 euros to Gaumont, the producer of the movie and to cease the broadcasting and the posting of the campaign. This latter measure is seldom used by French courts.</p> <p>SFR and Publicis filed an appeal and were thus able to continue broadcasting and publishing the ads, as under French law the appeal suspends the enforcement of the court decision of the first degree of jurisdiction.</p> <p>On September 8, 2004, the Paris court of appeal handed down a decision against the advertiser and its agency. This decision drew the attention of the entire industry, because of the amount of the damages awarded. The court ordered SFR and Publicis to pay Gaumont and Luc Besson 2,750,000 euros for having made a parasitic use of, and infringed, the Fifth Element movie through their promotion campaign.</p> <ul style="list-style-type: none"> - On the ground of parasitical use, the court considered that the ad was taking advantage of the notoriety of the movie and that it was creating a deliberate confusion in the mind of the target audience, which is similar in both cases (<i>i.e.</i>, 25-34 year olds). - On the ground of copyright, the court considered that the ad was infringing the movie due to several similarities between important elements such as the main character, but also the settings and the atmosphere of the movie and of the ad. <p>SFR and Publicis were thus ordered to pay :</p> <ul style="list-style-type: none"> - 750,000 euros to Gaumont for copyright infringement, based on Gaumont's patrimonial rights on the movie ; - 1,000,000 euros due to the parasitic use of the movie ; - 1,000,000 euros to Luc Besson for copyright infringement, based on Luc Besson's moral right on the movie. <p>In addition, the court ordered that the advertiser cease any broadcasting and publication of the ads based on this campaign (approximately 3,500 broadcastings and 35,000 postings so far).</p>
Comments:	During a live television show on September 19, 2004, Luc Besson donated 300,000 euros of the damages he received in this matter to a charity and said he would be contemplating additional donations in the near future.

7. Case Report	
Topic:	Misleading advertising : prison sentences and prohibition of professional activities cannot be combined.
Who:	Société T., organizer of cruises
When:	May 4, 2004
Where:	<i>Cour de cassation, chambre criminelle</i>
What Happened:	Société T. organized a cruise and advertised it through a leaflet entitled "Le France, 51 st Cannes festival". It presented the cruise as including an invitation to climb the steps of the Cannes festival palace and a preview of the closing movie. In fact, this took place at 11.30 pm when none of the movie stars were around.

	<p>Disappointed clients took legal steps against the company organizing the cruise and the court of appeal sentenced the company director to eight months of suspended imprisonment and a three-year prohibition of the professional activity in the field of travelling, on the ground of misleading advertising and deceit.</p> <p>The <i>cour de cassation</i> confirmed the qualifications of misleading advertising and deceit, but it cancelled the court of appeal's decision as regards the sentence, considering that it is not possible to combine sentences of imprisonment and of professional activity prohibition.</p>
Comments:	<p>This decision, even though it will in the end lead to a different sentence, tends to show how French courts are willing to fight advertisements of a misleading nature.</p>

8. Self-regulation	
Topic:	<p>Liberalization of the ".fr" TLD : Asterix's village is finally doing what all other ccTLDs have been doing for ages !</p>
Who:	<p>AFNIC, the Domain Name Registry for the .fr ccTLD</p>
When:	<p>May 2004</p>
Where:	<p>France</p>
What Happened:	<p>The .fr TLD was among the last ccTLDs in Europe whose access was so strictly regulated. It was only possible to register a .fr domain name if one had a K-bis extract, the official document registering the company and its official name. Only such name could be registered for a .fr domain name.</p> <p>.fr registration has now been extended to various other right holders, such as for instance trademark owners, even if the trademark does not appear on the K-bis extract.</p>
Comments:	<p>The AFNIC faced a rush of registration requests in May, and cases of cybersquatting almost instantly appeared.</p> <p>In particular, the domain name michel-edouard-leclerc.fr was immediately registered by an individual who was neither related to Michel-Edouard Leclerc nor to the Leclerc group. The website corresponding to the domain name was linked to the pornographic website www.fatalgirls.com and the domain name was advertised as being for sale.</p> <p>On June 28, 2004, in emergency proceedings, the <i>tribunal de grande instance</i> of Paris held that this constituted an infringement of the Leclerc trademarks and that this went against the personality rights that individuals have on their own names. The tribunal thus ordered that the registration of the domain name be cancelled and that the defendant pay 4,500 euros to the plaintiff.</p> <p>In September 2004, the first WIPO UDRP (Uniform Domain-Name Dispute-Resolution Policy) decision was handed down in the area of the .fr, where WIPO ordered the transfer of the domain name back to the plaintiff.</p> <p>In conclusion, companies which conduct business in France and which were not, until now, able to register a .fr domain name, should take steps rapidly if they have not already done so, in order to avoid their domain names being cybersquatted in France.</p>