



# Intellectual Property newsletter

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# Introduction

**Welcome to the new edition of the KPMG Intellectual Property newsletter on developments in the world of copyright, patents, trade marks, designs, domains and other Intellectual Property rights (“IPRs”).**

Once again, we have collected a variety of interesting articles from all over the world. KPMG firms are proud of their global network of IP lawyers, enabling KPMG professionals to offer an international service to clients in this area.

We start with some insights into the digital world. The metaverse poses a whole new universe of chances and challenges. In this edition, we analyze some of them with regard to legal and tax aspects.

The field of Intellectual Property is a rapidly changing one, with governments trying to set a framework for further growth. Therefore, it is not surprising that laws are constantly revised or newly enacted. In this edition, we highlight the planned amendments to the Polish Industrial Property Law, the amendments to Vietnamese IP law, which were already ratified and will come into force in 2023, as well as the new General Audiovisual Communication law recently published in Spain. A major step regarding the international protection of designs was implemented with China’s accession to the Hague

System. We take a closer look on what this means to you.

As always, we report on important court decisions from various jurisdictions and analyze their impact, whether it is the CJEU’s ruling on the Passenger Name Record Directive, the conflict between the right “to be forgotten” and “freedom of speech” that the Argentine Supreme Court had to deal with, or various rulings on copyright protection and color trademarks, to name only a few.



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# Metaverse: a universe of legal and tax challenges DE

"Metaverse" is the latest buzzword spreading across the internet – the idea of a networked 3D virtual world where users can work, play and socialize is exciting for many. As early as 1992, Neal Stephenson foresaw the "Metaverse" in his novel "Snow Crash". It has attracted great public interest when big Internet companies increased their investments in creating their own virtual worlds in 2021 and other first-movers started presenting themselves in the Metaverse, such as leading international luxury fashion and sportswear brands producing Non-Fungible Token ("NFT"), avatar clothing and accessories, as well as automotive companies collaborating with Metaverse platforms to showcase their vehicle concepts. The metaverse is ushering in a new era of technology that also raises myriad legal and tax issues.

## What is the Metaverse?

The term metaverse is a composite of the two terms "meta" (beyond) and "universe" (universe). The

metaverse is not a new concept – preliminary versions have existed for several decades. Metaverse is a kind of digital parallel universe or social network composed of 3D virtual worlds. With individual avatars, users can join a virtual world, network, do business or attend events from home. The Metaverse has tremendous potential to change the way online meetings and virtual events are conducted. Because of its immersive and extensible nature, the Metaverse could be used for events of all sizes and types, from small office meetings to large conferences. In the future, we may choose to abandon traditional conference platforms in favor of virtual environments where we will interact with other attendees' avatars. The idea is that all the digital and web-based applications and platforms will eventually converge, such as games, commerce, social media and virtual reality. Especially the use of VR glasses and augmentation reality is supposed to enable the quasi-seamless transition between the real and virtual worlds.



# Metaverse: a universe of legal and tax challenges DE

## Legal challenges and issues in the metaverse

The European legal framework for the digital economy has been sharpened by the drafts of the Digital Services Act, the Digital Markets Act and the Artificial Intelligence Act, as well as by the Directive on Copyright in the Digital Single Market and the Online SatCab Directive. Building on this, further thought can be given to the legal framework for the evolving metaverse.

First and foremost, the question arises as to which legal system is applicable at all in a virtual, internationally networked parallel universe. Furthermore, legal relationships can be structured contractually, for example in a metaverse user contract that must be concluded and adhered to by each user. This would enable the creation of a separate legal framework for the metaverse within the legal parameters. Many legal questions will be raised in connection with the Metaverse, particularly in the areas of copyright, data and youth protection and competition law. Personal rights and the protection of digital identity play a major role just like contract law and general civil law. How are contracts effectively concluded in the Metaverse, and which courts have jurisdiction?

For the metaverse to succeed, trust in digital platforms is necessary to create social acceptance. Data protection plays a decisive role here. But who is responsible for which situation, e.g. for fulfilling information obligations? And who is responsible for prosecuting violations?

Design or trademark law applies when real objects, such as sneakers protected by design rights, are modeled as 3D objects in the metaverse and transferred virtually.

Which is the legal nature of purely software-generated goods under civil law? In the absence of real physicality, they are not things as defined by Section 90 of the German Civil Code. And in the absence of personal intellectual creation by a human being, they are not works protected by copyright. NFTs are an example that illustrates the complexity. They raise a number of questions, particularly from a copyright point of view, e.g. who is allowed to imprint NFTs and whether it is a public reproduction of the underlying work (Section 15 (2) German Act on Copyright and Related Rights). How can the author defend himself against unauthorized "third-party embossing" and what rights of use does the buyer acquire in the original? It is particularly important to communicate transparently to the buyer exactly what rights he acquires with the purchase of a digital object and what restrictions exist on its use.

## Tax challenges and issues in the metaverse

But there are not only many unsolved legal questions, but also many open tax questions:

A prime example of the challenges facing tax teams is – similar to law – also the question of which jurisdictions have the authority to tax digital transactions, as well as the complex and evolving tax treatment of cryptocurrencies that serve as consideration for the purchase of digital assets. The complexity and speed of metaverse adoption will likely exacerbate existing issues related to the digital economy and add to the complexity and uncertainty already experienced in the marketplace.

A case in point is pop singer Ariana Grande's multi-day "tour" last year that aired on a gaming platform. Those shows were viewed by millions of paying customers worldwide, with Grande – according to Forbes – reportedly earning more than \$20 million from the performance, including merchandise sales. At issue is who has the right to tax such activities – the jurisdiction where Grande performed, or the location of each member of the audience?

There are many other unresolved issues, including, for example, indirect taxation in the Metaverse. For example, if a property with NFT real estate is purchased in the Metaverse using a cryptocurrency, should that transaction be subject to VAT or is it an exchange transaction that triggers an income-based (capital gains) tax? In Germany, the statements of the Financial Court Cologne (FC Cologne of 13.8.2019 – 8 K 1565/18) and the Federal Fiscal Court (FFC of 18.11.2021 – V R 38/19) in connection with a game in which players can cooperate and create a virtual world have recently caused a stir from a VAT perspective, which may also provide conclusions for the future tax assessment of transactions in the metaverse.





# Metaverse: a universe of legal and tax challenges DE



But there are further unresolved questions: It is interesting and questionable whether these statements can be transferred to the real estate transfer tax. This is because the real estate transfer tax factually requires a domestic property (Section 1 of the Real Estate Transfer Tax Act) and NFT properties or virtual land that exist solely on a blockchain would therefore probably not (yet) be covered by the material scope of the Real Estate Transfer Tax Act.

The Organization for Economic Cooperation and Development (OECD) is currently in the process of potentially creating a common crypto tax framework to build consensus among jurisdictions, but it remains to be seen how long this process will take and how many countries will ultimately do so. The metaverse may present significant tax challenges. But they also hold the potential to provide tax practitioners with exciting new tools that will make it easier for everyone involved to collect the right taxes at the right time and in a much more efficient and cost-effective manner.

Ultimately, it is probably more important to ask which legal and tax questions do not actually arise in the metaverse. The metaverse offers companies a completely new way of marketing their products and services. For a legally and tax compliant technology design, it is therefore necessary for computer scientists and lawyers to work together on the challenges presented by the metaverse.



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# Planned amendments to the Polish IPL

## Introduction

The Polish Ministry of Development and Technology prepared a draft Act amending the current Industrial Property Law dated 30 June 2000 (hereinafter the “**Draft**”; “**IPL**”). The Draft is currently at the stage of collecting opinions of the various commissions and other participants to the legislative process.

The main assumption underlying the preparation of the Draft is the simplification of the current IPL, which as of its adoption in 2000 has been amended over 20 times and is perceived as a complicated and hardly legible act. There are views according to which the above drawbacks might have at least indirectly contributed to the low participation of Polish entrepreneurs in the creation and acquisition of rights in intangible goods, covered by the IPL.

The Draft provides for significant amendments in a number of areas, in particular with regard to inventions, trademarks, industrial designs, trade secrets and procedural issues.

In this article we focus on the projected amendments in the scope of trademarks and industrial designs.

## Trademarks

In respect of the trademarks, one of the planned amendments is the change in nomenclature. This change aims to distinguish the procedure covering only trademarks and taking place before obtaining the exclusive right from the procedure adopted for other industrial property rights, which takes place only after their registration. The purpose of the above is to prevent their misidentification.

Furthermore, the period for filing the current “opposition” has been shortened to 2 months from the date of publication of the information on the trademark application, what should contribute to the acceleration of the procedure. In this context, it should be noted that according to the official justification of the Draft, in 2020 only 4,5% of the applications were opposed, in 2019 – only 4%. Therefore, the 3-month deadline does not seem necessary. The obligatory 2-month settlement period for the parties in the course of the adversarial proceedings (opposition) was abandoned as well.





# Planned amendments to the Polish IPL



What is more, the Draft provides for the elimination of the possibility of obtaining so-called trademark collective protection right. Given the fact that the Directive (EU) 2015/2436 of the European Parliament and of the Council of 16 December 2015 to approximate the laws of the Member States relating to trademarks does not provide for such a category of law and the co-ownership has been already regulated by the Civil Code, it has been stated that there is no need to maintain this institution.

It is also worth noting that due to the resignation from maintaining the Patent Office Bulletin, trademarks' publications will be made public at the stage of registering the trademark on the website of the Patent Office of the Republic of Poland.

The core purpose of the above-mentioned changes is to accelerate the procedures related to obtaining trademark protection and make them more transparent and understandable for the interested parties.

## Industrial designs

As regards the industrial designs, in the Draft, their definition has been aligned with one included in Article 1 of the Directive 98/71/WE. In particular, the legislator excluded from the definition the conditions of protection pertaining to new and individual nature of the design (these conditions, however, have been moved to another article).

Also, certain facilitations in the scope of examination of industrial designs applications have been introduced. In particular, a possibility of collective applications has been provided for (pertaining to more than one industrial

design). Upon registration, each of the designs covered by the collective application will be subject to separate protection.

Furthermore, in consideration of the modern techniques, the possibility to submit the illustration of an industrial design in the form of a computer visualization, has been expressly provided for. An obligation to present an industrial design in a form allowing to unambiguously and precisely determine the scope of protection, has been also introduced.

## Summary

In general, the intended amendments should be assessed positively. They should contribute to a simplification of the current complicated wording of the IPL. It is possible that thanks to these changes entrepreneurs will be more inclined to make use of the institutions provided for in the IPL (even without assistance of professional attorneys). As regards trademarks, the important change consists of the significant reduction of opposition period (from 3 to 2 months). Considering the low popularity of opposition institution, the above should facilitate the procedure. Also, the amendments in the scope of industrial designs, should be interpreted as aimed at the adaptation of the respective provisions to the modern techniques and expectations from the business (in particular as far as the new institution of collective applications is concerned).



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# 2023 – A year of change in Vietnamese IP law

## 2023 will be a year that will mark the important and prominent amendments to Intellectual Property law in Vietnam

The Amended Intellectual Property Law (“**Amended IP Law**”) was ratified by Vietnam’s National Assembly on 16 June 2022. The Amended IP Law will take effect on 1 January 2023, except for the provisions of sound trademark which have an effective date of 14 January 2022, as well as the provisions of test data protection for agrochemicals which have an effective date of 14 January 2024.

Intellectual Property Law was enacted in 2005 (amended twice in 2009 and 2019) and is no longer consistent with practice, nor compliant with the international treaties and agreements (such as the EVFTA and CPTPP) that Vietnam has entered into. Therefore, the Amended IP Law is an urgent requirement for the economic and social development of Vietnam.

The Amended IP Law includes more than 100 articles. Some key points are as follows:

### 1. In terms of copyright and related rights, the Amended IP Law amends the provisions regarding the following:

- More specific provisions regarding rights holders (authors, co-authors) in the case of assignment, and licensing of copyright and related rights;
- The transfer of some moral rights by agreement (such as the right to change the work’s title);
- The supplementation of some copyrights’ and related rights’ exceptions and limitations to ensure the balance between the interest of copyright holders and those individuals/organizations using and/or exploiting works;
- The rights and responsibilities of intermediary service providers on the Internet and in the telecommunications network environment;
- The supplementation of provisions to handle the conflict between copyright, related rights and trademarks.

### 2. The Amended IP Law supplements several regulations relating to trademarks to align with the practice in Vietnam:

- A prominent point of the Amended IP Law is the addition of provisions on the protection for sound trademarks. Although there will be some challenges as to the protection for sound trademarks, these provisions are consistent with the international provisions Vietnam entered into. Moreover, the

protection for sound trademarks will add an additional effective way to protect Intellectual Property assets in the era of information technology development.

- For the first time, a third party can file an opposition against a trademark application on the grounds of “Bad-faith”. This means that a pending trademark **application** can be denied based on Bad-faith as opposed to the current regulations, where the term “Bad-faith” was applied for the cancellation of a **registered** trademark.
- ### 3. Some new points relating to administrative procedure:
- A number of regulations have been enacted to simplify the administrative procedure, namely:
    - i. Although the rights of rights holders (authors, co-authors) are automatically established without registration, the process of copyright, related rights registration is simplified (i.e., online registration of copyright and related rights);
    - ii. The industrial design description is simplified;
    - iii. The publication of an industrial design application can be delayed;
    - iv. The security control on patents is limited.



# 2023 – A year of change in Vietnamese IP law

- Any third party is entitled to submit the request for opposition against a pending application before the date of issuance of a decision granting a protection title. However, the Amended IP Law sets time limitation for oppositions (such as 5 months from publication date for trademark opposition, 9 months from publication date for patent opposition, 4 months from publication date for industrial design opposition, 3 months from publication date for geographical indication opposition).
  - Administrative sanctions will remain as one of the measures to deal with IP infringement, contrary to a publicly disclosed previous draft.
  - The Amended IP Law supplements a number of specific regulations relative to the complaint settlement process.
4. The Amended IP Law encourages the creation, exploitation and dissemination of inventions, industrial designs, layout designs and plant varieties resulting from scientific and technological (S&T) research tasks using the State budget. Accordingly, the Amended IP Law gives the right to the host organization to automatically register inventions, industrial designs, layout designs and plant varieties resulting from the

S&T tasks using the State budget, without reimbursement, and sets a mechanism for reasonable distribution of profits between the State, the host organization and the author.

5. The Amended IP Law supplements the right to proactively apply control measures at the customs border if, during the process of inspection/supervision, clear evidence has been found to suspect that imported and exported goods are IP counterfeit goods.

Before the effective date, guidance on the implementation of the Amended IP Law will also be issued; the first of which being the amendment of some of the Government Decrees, such as Decree No. 103/2006/ND-CP on industrial property, Decree No. 105/2006/ND-CP on state management and protection of IP rights, etc.



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# New General Audiovisual Communication Law

**The purpose of the new Spanish General Law on Audiovisual Communication is to regulate the audiovisual sector at a national level and to establish rules applicable to new players such as providers of video-on-demand services and video-sharing platforms, all of this without prejudice to the autonomous and local competencies in their respective areas.**

On 8 July 2022, the Official Gazette of Spain published the Law 13/2022, of July 7, General Law on Audiovisual Communication, which transposes into Spanish legal framework, with a delay of more than one year and a half, the amendments made to Audiovisual Media Services Directive by Directive (EU) 2018/1808 of 14 November 2018 and repeals the Spanish Law on Audiovisual Communication 7/2010 in view of the changing market reality, where new players and audiovisual services are emerging in the framework of digital technologies.

This law seeks to adapt to a new audiovisual reality by including general principles applicable to the whole audiovisual field such as human dignity, the protection of users from content that violates the dignity of women, the obligation to convey a respectful and appreciative image of persons with disabilities, the promotion of linguistic pluralism in Spain, and the truthfulness of the information. This Law also promotes self-regulation and co-regulation in the audiovisual field.

Another of this legislative proposal's main objectives is to increase minors' protection by forcing all providers,

including video-sharing platforms, to provide information on the content that may be harmful to them by means of age rating systems for their programs, among other measures. Programs rated "not recommended for children under 18" may only be broadcast between 10 pm and 6 am.

In order to increase the accessibility of contents for all citizens, providers must guarantee the quality of content by complying with the Centre for Linguistic Standardization of Spanish Sign Language criteria or equivalent bodies of the Autonomous Communities with their sign language. The National Markets and Competition Commission (CNMC) will be the single point for accessibility complaints by users.

Another of the priorities is to promote European audiovisual works by extending, for the first time, the obligation to reserve quotas on their catalogue to on-demand audiovisual media services providers as well as the obligation to financial contribute to the production of European works to on-demand audiovisual service providers established in other EU member states targeting Spanish marketing based only on the revenues earned in Spain. In this sense, following the new shares laid down by the Audiovisual Media Services Directive, the new Spanish Law obliges on-demand audiovisual media service providers to secure, at least, a 30% share of European works in their catalogues as well as, provided that their revenues are higher than 10 million euro (€10,000,000), to financial contribute to the





# New General Audiovisual Communication Law



production of European works with a five per cent (5%) of their revenues.

In addition, the General Law on Audiovisual Communication seeks to promote European audiovisual works of independent producers by increasing investment obligations and it will also encourage the production of works directed or produced by women. To foster linguistic pluralism, the law foresees the possibility of establishing aid programs for subtitling or dubbing audiovisual works in these co-official languages.

Finally, we would like to highlight the regulation introduced by this Law for the first time, for influencers, vloggers and opinion prescribers, all of them defined as *"users of special relevance who use video-sharing services through a platform"*. In this sense, influencers that meet a series of requirements will be considered as audiovisual communication service providers for certain purposes. The requirements include the duty to register in the National Registry of Audiovisual Communication Service Providers and to comply with several of the obligations aimed at protecting minors.

Although this Law entered into force last 9 July 2022, some of its provisions are not yet in force as they will enter into force three months or, even, one year later, such as some of the specific obligations applicable to video-sharing service platform providers, the obligations to secure some quotas to European works or to financial contribute to them or the obligations applicable to influencers which will not enter in force until the approval of the corresponding regulation which has to specify the criteria to be deemed an user of especial relevance.



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# Design Law: China joins the Hague System

**This step opens up many opportunities both for expansion of foreign companies into the Chinese market and for Chinese companies into foreign markets.**

According to statistics of the World Intellectual Property Organization (WIPO) more than half of all design applications filed worldwide in 2020 were applied for in China.<sup>(a)</sup> Moreover, applicants from China were among the top 10 applicants for International Designs under the Hague System<sup>(b)</sup> – even though the country itself was not a Contracting Party at the time.

On February 5, 2022, China became the 68<sup>th</sup> Contracting Party and the 77<sup>th</sup> member of the Hague Union. China's accession to the Hague System for the International Registration of Industrial Designs is a very significant step to both local Chinese companies and multinational foreign enterprises. The Agreement has entered into force with respect to China (excluding the Special Administration Regions of Hong Kong and Macao) on May 5, 2022.

The Hague System, as the Hague Agreement Concerning the International Deposit of Industrial Designs is also called, provides a mechanism for obtaining registration of industrial designs in up to 94 countries or regions with a single application submitted in a single language. The treaty is administered by WIPO, which is also responsible for the examination of formalities.

In respect of substantive examination and granting of protection, this is carried out separately by each country according to the domestic requirements and regulations. The design owner therefore does not receive a "universal" design, but a bundle of national design rights.

In relation to the protection period, an international design is initially valid for five years and can then be renewed for another five years at a time. How often a renewal can be requested is subject to the regulations of the Contracting Parties. The Hague System provides for a minimum requirement of two renewals, so that the protection period is thus at least fifteen years in total, provided the fees are paid.

## What does China's accession to the Hague Agreement mean to you?

First, China's accession to the Hague Agreement will provide filers around the world with a simpler and more cost-effective procedure for obtaining protection of designs. A single application will also make maintenance and renewal easier in different countries.

Secondly, China's newly amended Patent Law officially came into force, which increases the design patent term from 10 to 15 years. This amendment enables China to

sign on to the Hague Agreement, which requires a 15-year term for designs.

Thirdly, filers should still be mindful of specific substantive requirements for registration. While the Hague System allows filers to apply for up to 100 designs in a single application, provided they belong to the same product class, China deposited a declaration requiring unity of design. This condition is not unique to China, but also applicable for example in the United States. Unity of design means that it is not possible to file applications for differing designs, for example for different types of furniture. If the application for an international design covers more than one design, it is possible to file national divisional applications for the additional designs. However, these are then national IP rights that must be administered and renewed locally.

It is therefore worthwhile to consider in the planning phase of a design application in which countries protection is to be claimed, so that the respective requirements can be specifically taken into account in the drafting of the application documents. Given the different substantive requirements for registration, it is advisable to consult a local counsel to make sure that the design will not be objected when it is examined locally.

In short, China's joining of the Hague System provides a great option for foreign designers seeking protection in China, as well as for Chinese designers seeking international protection. This also marks a significant progress in the global Intellectual Property ecosystem.

Notes: (a) World Intellectual Property Organization (WIPO) (2021). IP Facts and Figures 2021. Geneva: WIPO, p. 32

(b) Ibid, p. 37



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# CJEU on the Passenger Name Record Directive

**The beginning of the holiday season brings the Court of Justice of the EU's ruling ("CJEU") regarding air transport, artificial intelligence technology, personal data protection and the prevention of terrorism. CJEU primarily dealt with the validity of the Passenger Name Record (PNR) Directive and the compliance of the processing of personal data of air passengers with EU law. The CJEU concluded, inter alia, that EU law precludes national legislation which requires systematic processing of passengers' personal data in the absence of a genuine and present or foreseeable terrorist threat. The CJEU also stressed that competent authorities may not use artificial intelligence technology in self-learning systems ("machine learning") in the preliminary assessment of PNR data.**

The PNR Directive allows for systematic personal data collection of passengers carried on flights entering and leaving the EU. The purposes for such a collection are the prevention, detection, investigation and prosecution of terrorist offences and serious crime ("terrorism"). Such personal data include, for example, name, contact details, date of issue of ticket, seat number, baggage information

or even frequent flyer information of the passenger.

According to its Article 2, Member States can also extend the application of the PNR Directive to intra-EU flights. This happened in the case in question where Belgian law required air carriers to collect passengers' personal data also for intra-EU flights. According to the League of Human Rights, such an extension of the PNR Directive's scope may violate the right to privacy and protection of personal data. Furthermore, it can also indirectly restore border controls and therefore disrupt the free movement of persons within the EU.

The CJEU has acknowledged that the PNR Directive entails serious interferences with the rights guaranteed by the EU Charter of Fundamental Rights (especially a continuous, non-targeted and systematic surveillance regime that includes automated assessment of personal data of every person using air transport services). According to the CJEU any interference with such rights by a Member State must comply with strict conditions.

A Member State may extend the application of the PNR Directive to all intra-EU flights only on condition that:





# CJEU on the Passenger Name Record Directive



- i. it is confronted with a genuine and present or foreseeable terrorist threat which is, based on sufficiently solid grounds, shown to be genuine and present or foreseeable;
- ii. processing of such passengers' personal data is proportionate to the potential threat and at the same time
- iii. does not exceed the limits or time for what is strictly necessary to combat terrorism.

In the absence of such a threat, the system for the transfer of passengers' personal data would have to be limited to certain routes, travel patterns or certain airports for which there are certain indications of possible existence of such a threat. Hence, the processing of passengers' personal data will not be possible, for example, for the purpose of detecting ordinary criminal activity or in principle, six months after they have been handed over by the air carrier to the competent authority.

In addition, CJEU dealt with the use of machine learning in connection with preliminary assessment of PNR data. The competent authorities may not use machine learning technology for the purpose of identification of persons who should be further screened before arrival or departure. The reasons for such conclusions are that without human intervention or review this technology could modify the assessment process, assessment criteria as well as weighting of those criteria. Automated processing of PNR data is also related to substantial error rates and number of falsely positives outcomes.

Regarding the CJEU's conclusion, it should be emphasized that when processing passengers' personal data both air carriers and the competent authorities of a Member State must not only comply with aviation legislation (it is primarily the Civil Aviation Act in the Czech Republic), but also comply with EU legislation and case law on personal data protection. Otherwise, they may face severe fines for violating privacy rules.



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# “Right to be forgotten” vs. “freedom of speech”



## The Supreme Court of Argentina considered that the right “to be forgotten” is limited by the exercise of freedom of speech.

On June 28, 2022, the Argentine Supreme Court of Justice (the “CSJN”) ruled against the right “to be forgotten”.

It was debated whether the plaintiff, a public person involved in a matter of public interest, had a right to request her name to be unlinked from certain online content about her, on the grounds of having a right “to be forgotten.” The plaintiff alleged that the published content was inappropriate regarding her current perception of her identity, violating her rights to honor and privacy.

The CSJN rejected the plaintiff’s claim on the understanding that matters of public interest constitute the limit of the right “to be forgotten”. In this regard, the CSJN understood that the challenged online content was protected by the right of freedom of speech, which *“not only concerns the individual right to broadcast and express thought, but also the social right to information of individuals living in a democratic state”*.

Also, in the opinion of the CSJN, the plaintiff not only voluntarily exposed herself to the publication of the content, but also failed to prove the unlawfulness of the content and the damage suffered. Therefore, the claim for the injunctive relief related to the published material was not justified.

Insufficient arguments were provided to demonstrate the right to limit access to truthful information of a public

figure. The CSJN concluded that allowing the restriction of public information without further ado would be detrimental to the debate that freedom of speech is intended to protect.

Lastly, the ruling pointed out that the problem of search engines should be addressed in the future and stressed the fact that search engines should become more understandable and transparent for the end users.



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# Proof of originality in copyright protection



also states that it is not possible to find the alleged frame in (plexi) glass (which was one of the copyright claims of the artist) in any of the photographs submitted by the artist. The Court is of the opinion that the artist has **failed in his burden of proof and did not show** the originality of **one** specific work.

Furthermore, the artist also argued that the product offered by the furniture manufacturer is "a machine-made copy of the artist's 'oeuvre'". According to the Belgian dictionaries, "oeuvre" means the **collective work** of an artist or scholar. The Court concludes that the artist fails to prove the elements that would make a specific work original but sticks to a claim to the **protection of a style/concept/method** of a series of works, which falls outside the scope of copyright.<sup>(a)</sup>

## Conclusion

This ruling by the Court of appeal of Ghent reaffirms the importance of the burden of proof of the originality of a specific work, which implies that the author must prove sufficiently that his works are the expression of his intellectual effort.

**On 7 February 2022, the Court of Appeal of Ghent ruled on a case concerning an alleged infringement of an artist's copyright by a furniture manufacturer and distributor. The Court confirmed the burden of proof on the author of a work and reiterated that copyright protection does not extend to ideas, procedures, methods, or mathematical concepts as such.**

The facts underlying the case were as follows: An artist filed a claim against a Belgian furniture manufacturer and distributor. In his claim, the artist stated that the furniture manufacturer was infringing his copyright by offering an (alleged) illegal reproduction of a work by the artist for sale. The artist claimed the (alleged) original work is characterized by a creation and processing of folded strips of paper, which are brought together in a certain configuration and arrangement in a (plexi) glass frame.

The judge at first instance (Commercial Court of Ghent) ruled in favor of the furniture manufacturer and dismissed the claim. The artist lodged an appeal against this judgment.

In its ruling, the Court of Appeal reiterated that for the artist to enjoy copyright protection on his work, it is necessary for him to **prove** that his creations are the **expression of his own intellectual creation**.

In this case, the Court ruled that the artist was not claiming copyright protection for one specific work, but for a **series of works** in the same line. The Court of Appeal

Note: (a) Article 9.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 15 April 1994 states that copyright protection extends to forms of expression and not to ideas, procedures, methods of operation or mathematical concepts as such



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# 10 Color trademark protection: "Jaune-orangé"

The Court of Turin, in judgement no. 1347 of March 29, 2022, ruled with reference to the well-known issue of the so-called "color trademark," in relation to a case of infringement and unfair competition in violation of the exclusive rights to the renowned color trademark so-called "Jaune-orangé" (i.e. a particular shade between yellow and orange called in French, precisely, "Jaune-orangé") used by a well-known winery to distinguish its products.

With reference to the so-called "color trademark," by which is to be understood the registration as a trademark of a specific color, it should be recalled that the Court of Justice of the European Union has stated the possibility of registering a specific monochromatic shade as a trademark, provided that such shade met specific requirements, including

- i. the color must represent a business communication tool;
- ii. the color must serve to distinguish the products of a particular enterprise.

The case submitted to the attention of the Turin court

originated from the breach of a settlement agreement signed between the parties of the dispute.

In that transaction, the defendant acknowledged that the complainant party held specific exclusive rights to the color mark at issue, "Jaune-orangé" and undertook (i) not to use a similar color on its products and (ii) to use another color (in this case Pantone 143C) as a substitute.

The legal case at stake was brought as a result of the defendant's breach of the terms of the settlement.

The Court of Turin, in the ruling under review, reiterated that even a color mark (i.e. a mark without any denominative or figurative components) can constitute a validly registrable mark, consequentially identifying the plaintiff's mark as a valid color mark.

The Turin court in coming to this decision reiterated that:

- according to Article 7 c.p.i., "*any signs capable of being represented graphically, in particular ... color combinations or shades, may be the subject of registration as a trademark, provided that they are capable of distinguishing the goods or services of an enterprise from those of other enterprises;*"



# Color trademark protection: "Jaune-orangé"



- Article 4 of EU Reg. 1001/2017 establishes the possibility of registering the colors of goods or their packaging as trademarks, provided that such colors are found to be suitable for "a) *distinguishing the goods or services of one undertaking from those of other undertakings*; and b) *being represented in the register of trademarks of the European Union in such a way as to enable the competent authorities and the public to determine clearly and precisely the subject matter of the protection granted to their owner*;"
- the EUIPO, in its decision of February 25, 2015, rejected an application for invalidity of the plaintiff's European Union trademark n. 747 949 (again, the color mark in question), filed by a third competitor, and again, the EUIPO, in its decision of November 12, 2018, rejected a new application for invalidity of the aforementioned European Union trademark, thus confirming on more than one occasion the validity of the plaintiff's registration;
- in a judgment dated September 15, 2021, the General Court of the European Union affirmed that the plaintiff's trademark registration concerns a pure color mark, and not a figurative mark, thereby confirming the validity of the plaintiff's color mark.

Having said that, the Court of Turin subsequently affirmed that the defendant's challenged conduct constituted:

- a serious breach of the obligations assumed by the defendant through the intervening settlement, and
- the performance of acts of unfair competition by confusion with the plaintiff's well-known trademarks and consequently professional misconduct, and
- a case of infringement of the plaintiff's trademark "Jaune-orangé."



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# USB audiobooks – piracy in Vietnam

In recent years, readers have tended to favor listening as opposed to reading, for the sake of convenience in fast-paced lives, leading to audiobooks becoming the rage in Vietnam. In addition to a few copyrighted audiobook applications in Vietnam, there are several individuals or enterprises commercializing audiobooks, and selling them in packages on USB keys, the so-called “USB Audiobooks”.

Conducting a quick search on search engines with the keyword “Audiobooks”, we easily come across several websites publicly advertising USB Audiobooks on various websites and platforms such as social platforms, and e-commerce platforms in Vietnam. These attractive advertisements offer consumers a low price, ranging from VND 400,000 to 500,000 (approx. USD 17-22), to own a USB Audiobook storing up to 100 best-sellers.

Audiobooks are deemed to be derivative works in the form of recordings and may have been stored in the USB without permission from the authors and copyright holders. Accordingly, these subjects are entitled to exclusively exercise the rights of making derivative works or may grant other persons the right to exercise such rights pursuant to the provisions of Vietnam Law on Intellectual Property (“**Law on IP**”). Hence, the USB Audiobooks can be perceived as infringements of copyright in accordance with Articles 28.7 and 28.10 of

the Law on IP, more specifically by making derivative works for commercial purposes without obtaining permission from the authors, copyright holders and by producing copies, distributing works to the public via communication networks or digital means without permission from the copyright holders.

It is worth mentioning that the text-to-speech technology allows artificial intelligence to read books out loud, automatically turning pages and converting them into audiobooks. Copyright infringers can make use of this technology to create a series of audiobooks with minimal effort. Adding to the challenge, it is difficult to uncover such copyright infringements on network and digital environments as these audiobooks are in the form of recordings, which is dissimilar from the common form of books, i.e., paper books or electronic books.

Given the above, the authors and copyright holders should be proactive in identifying and preventing infringements by applying self-protection measures; notice and takedown mechanisms and even other measures such as site-blocking measures; administrative, civil or criminal measures as deemed necessary. Accordingly, these subjects should opt for the appropriate measures to ensure efficient deterrence of infringements, as each measure may lead to a different consequence for the alleged infringers.





# USB audiobooks – piracy in Vietnam



Taking administrative measures for the purposes of illustration, for the above-mentioned violations, a monetary fine of up to 140 million Vietnam Dong (approx. USD 5,950) can be imposed to entities and the infringers could be obliged to implement remedial measures, such as being forced to remove infringing works in electronic form from network and digital environments, or being forced to destruct material evidence of violation for such act.<sup>(a)</sup> Prior to choosing any course of action, authors and copyright holders should consider if the related penalties and remedial measures to such course of action can act as an effective deterrent against this copyright infringement.

In conclusion, the authors and copyright holders may seek the following practical enforcement actions to protect their legitimate rights:

- Proceeding with an amicable warning; applying notice and takedown mechanisms for violations on social or e-commerce platforms; and
- Site-blocking measures; administrative, civil, and criminal measures.

Though there are various available courses of action, the key to obtaining the desired result is a coalescence strategy of appropriate measures. As a result, it is recommended to consult with local IP agents and lawyers to understand the local markets, and the emerging tendency of copyright infringements, liaise closely with competent authorities and have a proper strategy for tackling this kind of infringement thoroughly.

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Note: (a) Article 2, 12, 15 and 17 Decree No. 131/2013/ND-CP on sanctioning administrative violations of copyright and related rights modified by Article 3.2 Decree No. 28/2017/ND-CP on amending the Government's Decree No. 131/2013/nd-cp dated 16 October 2013 on penalties for administrative violations of copyrights and related rights and the Government's Decree No. 158/2013/ND-CP dated 12 November, 2013 on penalties for administrative violations of regulations on culture, sports, tourism, and advertising.



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# 12 CZ Supreme Court on sharing platform's liability

**The Czech Supreme Court has confirmed that a major Czech online file sharing platform (the “platform”) must remove several Czech movies from its website. At the same time, the Czech Supreme Court ruled that the platform is not liable for unauthorized sharing of the files protected by copyright by its users to the public.**

The platform allows its users to share (upload and download) files and is open to the public. The platform hosts a great number of movies, books, or songs, etc. which are protected by copyright. At the same time, it is no secret that violation of copyright occurs on the platform because the protected files are uploaded without necessary consents of the right holders and are available to be downloaded by the public.

In the case in question, a collective administrator of copyright filed an action against the platform because of copyright infringements in relation to several movies (including a popular Czech movie *Pelíšky*). While deciding on the merits of the case, the Supreme Court considered the case law of the Court of Justice of the European Union and in this light assessed the operation of the platform and the services provided in relation to making the protected works publicly available.

It was not established that the platform actively supported its users in unauthorized sharing of the files or that services of the platform were provided with such an intent. On the contrary, the platform tried to prevent such behavior by enabling the users to report concerned files and the platform took actions to remove such files itself. In this connection the Supreme Court reminded that the platform and providers of similar services, however, must not be active in choosing the available files or they must not provide means for the unauthorized sharing of authors' works. Interestingly, according to the Supreme Court neither knowledge of breaching the copyright law by the users of such platforms nor profitable nature of provided service is sufficient reason for liability of such platforms.

In this respect, the Supreme Court ruled that the nature of the service provided by the platform does not contribute to unauthorized use of the protected works and therefore the platform is not liable for breaching the copyright law. The liability for unauthorized sharing of protected works lies with the users of the platform.

Although the platform was not held to be liable for breaching the copyright law, it was obliged to refrain from enabling public downloading of particularly movies. The Supreme Court stated that the platform services enabled the users to breach the copyrights to these movies and in this extent the platform should refrain from providing such

services. Given that the platform had been notified multiple times of the unauthorized availability of the concrete movies and the platform did not react to take down the content in question and ensure it would stay down, the Supreme Court held that such an obligation does not amount to imposing an obligation of general oversight (which is restricted by law).

In this sense, the Supreme Court was convinced that there are several technical options which can be implemented to prevent such breaches of the law. In the eyes of the Supreme Court such an obligation does not impair the platform's provision of services compliant with law and is not disproportionate in comparison to ensuring protection of Intellectual Property rights.

Furthermore, the Supreme Court declared that the collective administrator is allowed to exercise the right to information in connection to the authors' works and the service providers cannot refuse to provide the requested information. In this case, the collective administrator exercised its right to information by using a search engine on the platform website to discover how many times the movies in question were uploaded or downloaded. Followingly, the platform limited the number of searches the collective administrator could perform. The Supreme Court held that such searching operations do not constitute an abuse of law and the limitation of searches as exercised by the platform is contrary to law.

Overall, the Supreme Court confirmed a significant copyright decision of the appeal court and presented several interesting thoughts with respect to direct liability for content shared on the online sharing platforms. At the same time, it refused the applicant's motion to further restrict the operations of the platform.



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## Illegal invocation of the Grana Padano PDO

In a recent decision dated May 25, 2022, the Specialized Section of the Court of Venice (Italy) upheld the appeal filed by the Consortium for the protection of "Grana Padano DOP" against an Italian company engaged in the production and trade of dairy products.

The appeal was based on the use of the term "Grana" in association with the products of the defendant, whereas the defendant offered on the European market a cheese of its own production – a cheese called "Gran Moravia", that was made in Eastern Europe – in association with wording such as "Grana", thus ingenerating confusion into the customer as to whether the defendant's cheese was traceable to the well-known Italian PDO.

The Court of Venice, at the end of the proceeding, ruled that the use of the term "Grana", as used by the defendant in its communications to third parties, in relation to its own cheese "Gran Moravia," constituted an infringement for unlawful evocation of the P.D.O. "Grana Padano," as well as an act of unfair competition under Article 2598, third paragraph of the Italian Civil Code.

It is important to remember that Article 2598 of the Civil Code, third paragraph, states that "[...] performs acts of unfair competition anyone that:

i. uses names or distinctive signs likely to produce confusion ex art.2564, with the names or distinctive

*signs legitimately used by others, or slavishly imitates the products of a competitor, or performs by any other means acts likely to create confusion with the products and business of a competitor;*

ii. *spreads news and appreciation about a competitor's products and business, which is likely to bring them into disrepute, or appropriates merits of a competitor's products or business;*

iii. *directly or indirectly makes use of any other means that do not conform to the principles of professional fairness and are likely to damage another's business."*

The Court of Venice, therefore, ordered the defendant to cease the use of the term "Grana" in its communications to third parties, including web or social networks, in reference to their cheese "Gran Moravia," as well as to remove from its websites promotional and advertising material bearing the term to indicate its product.

The Court established a penalty against the defendant for each day of delay in removing the recalled advertising and promotional materials and ordered the defendant to pay in favor of the consortium the damages identified in the case.

*Michele Luigi Giordano and Alessandro Legnante, Studio Associato Consulenza legale e tributaria*





# News

## No copyright protection for design of ski jackets

**On 9 June 2022, the Court of Appeal of Brussels ruled that the ski jackets of an Italian brand do not qualify as an author's own intellectual creation and are therefore not protected by copyright.**

The dispute is pending between a Swiss manufacturer and distributor of ski jackets on the one hand, and two retail clothing stores that distribute similar jackets under another brand in Belgium.

In 2020, the manufacturer sued the two Belgian retail stores for (alleged) copyright infringements, but this claim was rejected by the court of first instance (Commercial Court of Brussels).

The manufacturer filed an appeal with the Court of Appeal in Brussels who confirmed the judgment of the Commercial Court. The manufacturer argued that it made free and creative choices regarding (i) the contrasting horizontal rectangular band on the ski jacket and (ii) the Norwegian flag depicted on the jacket. Since the manufacturer only claimed copyright on these two elements, the Court of Appeal stated that, only these two elements are the subject of the infringement investigation.

According to the Court of Justice of the EU, designs may be protected by copyright provided they can be classified as a work within the meaning of Directive 2001/29/EC. The existence of a work presupposes the existence of an original object – being an author's own intellectual creation. Hence, the qualification of 'work' is reserved for elements that are the expression of such a creation.

**Only a work expressed in a specific and concrete form** can be protected by copyright. The Court of Appeal specifies that it does not extend to an idea or concept, which is not expressed in any form, nor to a style, fashion, or genre, which is merely the expression of general aesthetics, confirming case law of the Belgian Supreme Court from 2017.

Considering the above, the Court of Appeal ruled that the copyright claims of the manufacturer did not reveal the own intellectual creation of the author. Therefore, the Belgian retailers did not copy the visual elements in similar proportions as the jackets from the Italian Brand. The mere reproduction of these elements does not constitute a reproduction that would infringe alleged copyright on the ski jackets.

*By Frank Cleeren, Tim Fransen and Laura Vanuytrecht,  
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## Short summary of EU decisions

**ECJ, judgment of 23.2.2022 – T-185/21:** A figurative mark containing word elements is visually similar to a word mark if the marks have a significant number of letters in the same position and if the word element of the figurative mark is not highly stylized, even if the letters are graphically represented in **different fonts**.

**ECJ, judgment of 30.3.2022 – T-35/21:** If the coinciding elements of two signs have only a weak distinctive character and the other elements of the signs have an even weaker distinctive character, the coinciding elements are to be considered.

**ECJ, judgment of 23.2.2022 – T-198/21:** Even if the average consumer regularly perceives a mark as a whole and does not pay attention to the various elements, when he perceives a word sign, he will nevertheless break it down into the word elements which convey a specific meaning to him or which are similar to words which he knows.

**ECJ, judgment of 2.3.2022 – T-125/21:** Elements with only weak distinctiveness must also be taken into account when assessing the likelihood of confusion.

**ECJ, judgment of 2.2.2022 – T-694/20:** If the goods claimed are mainly sold orally, greater weight is usually to be attached to a phonetic similarity of the signs.

**ECJ, judgment of 23.3.2022 – T-146/21:** The use of a colored word and device mark with a ® reference can constitute a right-preserving use of a word mark.

**ECJ, judgment of 10.3.2022 – C-183/21:** Incompatible with Article 19 of the Trademark Directive (lack of genuine use as a ground for revocation) is a procedural rule which, in proceedings relating to an application for revocation of a trademark based non-use, requires the plaintiff to carry out a search of the market for possible use of that trade mark by its proprietor and, as far as possible, to submit substantiated evidence in support of its action.

*By Hendrik Schödder, KPMG Law  
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## New rules (and sanction regime) on consumer matters

**On 28 May 2022 entered into force the changes made to Spanish Consumers Law, Unfair Competition Law and Retail Trade Law by Royal Decree 25/2021 which transposed to the Spanish legal framework the EU Directive 2019/2161 of 27 November 2019 for the better enforcement and modernization of union consumer protection rules known as “Omnibus Directive”.**

As main novelties on the Spanish Consumers Law, highlighting the following ones:

- i. the strengthening of the sanctioning framework as the sanctions may now reach up to one million euros (€1,000,000) and, in the event of widespread infringements with a European Union dimension, up to 4% of the trader’s annual turnover in the member states concerned or to two million euros (€2,000,000), whichever is higher;
- ii. new previous information to be provided to consumers and users regarding consumers reviews as well as by online marketplaces, or
- iii. the extension of the withdrawal period to 30 days for contracts concluded in the context of unsolicited visits by a trader to consumer’s home.

Regarding the changes on Unfair Competition Law, main developments are the introduction of new unfair competition acts such as the inclusion of false reviews by e-commerce sites.

Lastly and in relation to the obligation set forth by the Omnibus Directive to homogenize on an EU level the obligation to introduce on any announcement of price reduction the lowest price applied by the same trader during the previous 30 days, we would like to highlight that it has not implied significant changes to Spanish Retail Trade Law as Spain already had this provision. In this sense, the only changes are the clarification made to the non-applicability of this rule for goods which deteriorate or expire rapidly as well as the clarifications made by the European Commission on its Guidance<sup>(a)</sup> on the interpretation of this rule and which has clarified some doubts that this new rule raised.

*By Noemí Brito, Eric Romero and Mireia Paricio, KPMG in Spain*

Note: (a) [https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52021XC1229\(06\)&from=ES](https://eur-lex.europa.eu/legalcontent/EN/TXT/PDF/?uri=CELEX:52021XC1229(06)&from=ES)





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