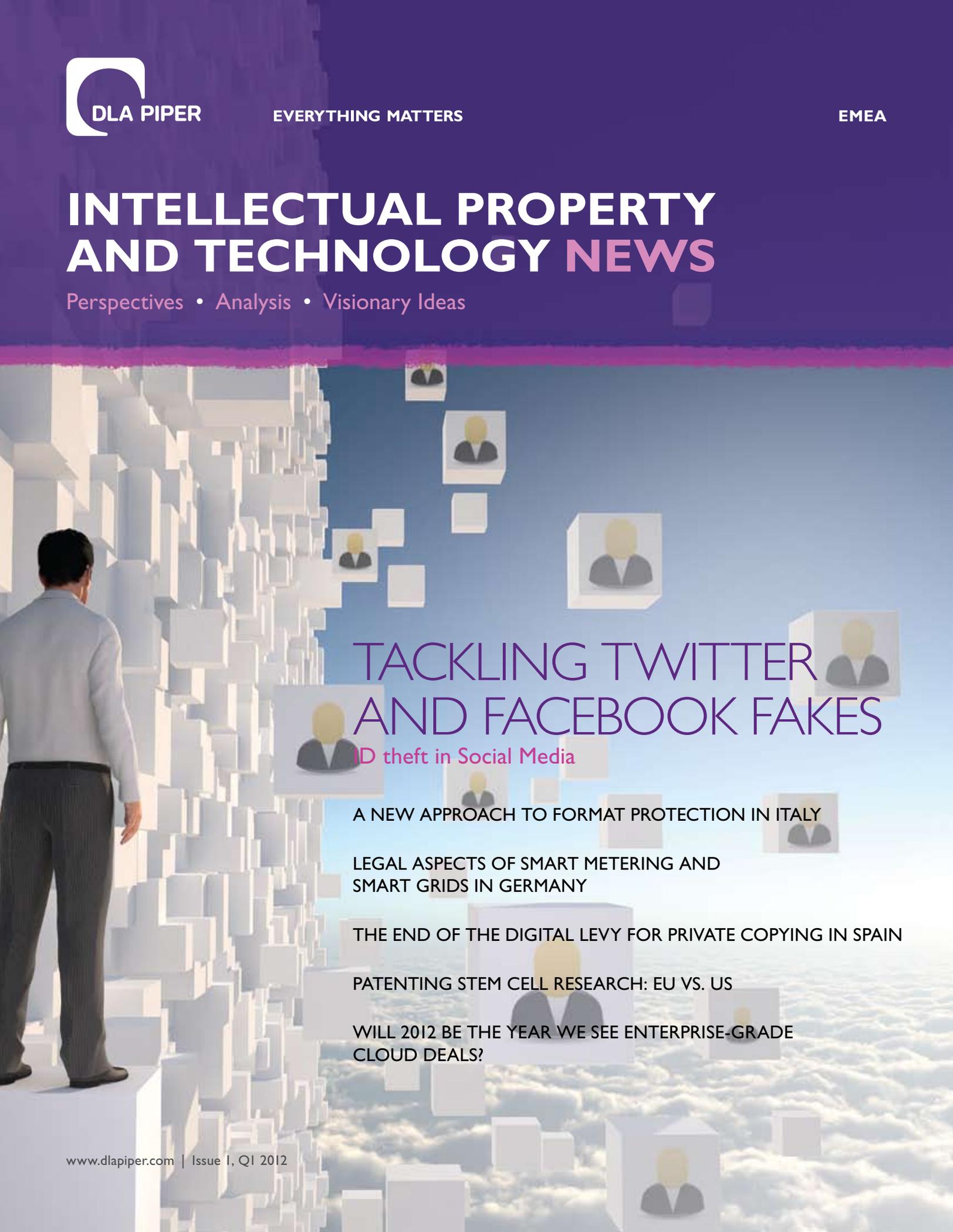


# INTELLECTUAL PROPERTY AND TECHNOLOGY NEWS

Perspectives • Analysis • Visionary Ideas



## TACKLING TWITTER AND FACEBOOK FAKES

ID theft in Social Media

A NEW APPROACH TO FORMAT PROTECTION IN ITALY

LEGAL ASPECTS OF SMART METERING AND  
SMART GRIDS IN GERMANY

THE END OF THE DIGITAL LEVY FOR PRIVATE COPYING IN SPAIN

PATENTING STEM CELL RESEARCH: EU VS. US

WILL 2012 BE THE YEAR WE SEE ENTERPRISE-GRADE  
CLOUD DEALS?

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The award-winning *Intellectual Property and Technology News* is now published in the United States, Asia Pacific and EMEA regions. Find all current and past editions of the *IPT News* here: [www.dlapiper.com/ipt\\_news](http://www.dlapiper.com/ipt_news).

## Welcome



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It gives me great pleasure to welcome you to the latest edition of IPT news, and the first one covering the EMEA region. We already have newsletters covering the US and Asia Pacific regions, and adding EMEA to that completes the picture to enable our clients to see how the world of IP, technology, media and sport is developing around the world.

As I write, it occurs to me how global the commercial world has become. No longer can IP rights just apply in a commercial context on a territorial basis. Smartphone manufacturers want content as well as functionality, and content providers are just as much concerned with the technical mode of delivery as they are on the content itself. Nowhere can this be seen more than the effect of the rise of Asian economies on those in EMEA. My group co-chair, John Allcock, and I have just completed a trip to China and Hong Kong, where every day there are press reports of the investment in technology being made by Chinese companies and investors in Europe, not to mention the 66,000 IP cases which were litigated in the Chinese courts last year!

There is no doubt that convergence, both technological and geographic, has truly arrived. Much of this is reflected in the content of IPT News on topics as varied as social media, the cloud and life sciences. I hope you enjoy this edition, and those in the coming months from the US and Asia-Pac.

Simon Levine

## Editor's Column

This inaugural edition of EMEA IPT News provides a cross-section of cutting edge issues in the ever-more convergent fields of IP, technology, media, and sport.

A recurrent theme is the way laws protecting individuals' privacy and identity are coping with technological change. This issue underlies Alexander's insightful piece on the issue of ID theft in Social Media. But it has also been a significant concern for those involved in the roll-out of smart meters, as Hans Peter Wieseemann describes in his piece on the German approach to that area. It is also one of the key potential barriers for those considering switching to cloud-based IT solutions; Mark O'Conor's update on this area asks whether 2012 will be the year we see enterprise-grade cloud deals.

Elsewhere, Alessandro Ferrari reports good news from Italy for TV format owners, Sandrine Rambaud reflects on differing approaches of the English and French courts to similar IT disputes, and specialists from our Life Sciences group compare the approach on both sides of the Atlantic to patentability of stem cell research.

We hope you enjoy the publication, and would very much welcome any comments or suggestions.



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# PT INSIGHTS

## INTELLECTUAL PROPERTY

### CZECH REPUBLIC, JANUARY 2012

#### THE TRADEMARK “BUDWEISER BIER” SOLD TO ANHEUSER-BUSCH INBEV

The American company Anheuser-Busch InBev bought the smaller of the two breweries from the Czech town Ceske Budejovice. This brewery is the authorised proprietor of the trade mark “Budweiser Bier”. Anheuser-Busch, the authorised proprietor of the trade mark “Budweiser” seeks to gain by this acquisition the upper hand in the long-lasting dispute between them and the Czech company Budejovicky Budvar, the authorised proprietor of “Budweiser Budvar”, by suing to prevent use of trade marks including “Budweiser”. However, we suspect that since this wording is a mere territorial description such as “Londoner” or “Hamburger”, it cannot be excluded from use in that way.

### NORWAY, JANUARY 2012

#### DIAPER DRAMA

The Norwegian committee for the control of unfair competition has in a recent statement dealt with a dispute between the diaper producers SCA Hygiene Products AS and Procter & Gamble. The Committee unanimously found that SCA’s advertising for its Libero diapers was misleading and in breach of good marketing practice. It was emphasised that comparative marketing requires that the advertiser exercises due caution both with respect to choice of words and mode of expression. The Committee concluded that SCA’s advertising implied that diapers with lotion (e.g. P&G’s Pampers diapers) can easily provoke allergies or sore skin. SCA could not prove this however. Furthermore, the Committee found that

SCA deliberately had chosen wording which conveyed the impression that it is irresponsible for parents to use diapers with lotion. Thus, the advertising was deemed to create uncertainty and anxiety among parents.

### HUNGARY, FEBRUARY 2012

#### INTERNET HOTLINE RECEIVED 553 FORMAL COMPLAINTS

An “internet hotline” launched by the Hungarian National Media and Infocommunications Authority in late 2011 that allows the public to report infringing websites has reported significant take up in its first few months. Infringements falling within its scope encompass unauthorised use of content (such as images, videos, audio files, or other personal data but excluding intellectual property), sites promoting paedophilia, harassment, racism, violence, drug abuse, terrorism, as well as phishing, virus, spyware or other worm infected sites, and any other sites that are harmful for minors. The Authority observes the sites and transfers information to the police as necessary. The hotline service is in cooperation with INHOPE (International Association of Internet Hotlines), enabling faster responses for the elimination of harmful websites. As of mid-February 2012, the hotline service has more than 6000 visitors, with 553 formal complaints, of which 135 cases have been upheld so far.

### POLAND, EURO 2012

#### POLAND’S CHANCE FOR ENHANCING ITS IMAGE IN RELATION TO INTELLECTUAL PROPERTY PROTECTION

During its candidate phase, Poland undertook to protect EURO 2012-related intellectual property rights and to take actions aimed at prevention of so-called “ambush marketing”, i.e. the advertising of goods and services on the basis of underlying associations with EURO 2012, and the usage of UEFA’s trade marks for commercial purposes on websites or in internet domain names. The Polish Patent Office has already introduced fast-track registration of UEFA’s trademarks. More than 50 trademarks related to Euro 2012 have already been registered by UEFA within the territory of Poland. Although there has been no specific legislation to protect EURO 2012 trademarks, the prosecution of infringements has already intensified – mainly on grounds of the EC Regulation 1383/2003. Recently, Polish customs authorities have seized two large transportations of counterfeited products bearing the Euro 2012 registered trademark.



## TECHNOLOGY AND SOURCING

### BELGIUM, FEBRUARY 2012

#### SOCIAL NETWORKS CANNOT BE OBLIGED TO INSTALL GENERAL FILTERS PREVENTING UNLAWFUL USE OF MUSIC AND MOVIES

In the Belgian case between Sabam, a Belgian right holders society, and Netlog, a European social network, the Court of Justice of the European Union decided that the owner of an online social network cannot be obliged to install a general filtering system, covering all its users, in order to prevent the unlawful use of musical and audio-visual work. Such an obligation would not be respecting the prohibition of a general obligation to monitor nor the requirement that a fair balance be struck between the protection of copyright, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.

### UK, FEBRUARY 2012

#### LEAN SOURCING

The Cabinet Office has now launched its Lean Sourcing methodology to reduce the duration and cost of procurement, and is now in the process of promoting it with central government departments and agencies. The methodology provides a step-by-step repeatable process for use with open, restricted or competitive dialogue procedures. It also sets out a series of activities and outcomes to guide procurement specialists within the public sector but falls short of providing template documentation to assist them. The methodology is intended to resolve some of the wasteful processes that have historically been employed by some contracting authorities, to improve project management and to prevent the misuse of the procurement procedures. The Lean Sourcing methodology, including products, is available to contracting authorities through the

Civil Service Live Network. Training is also available from the Cabinet Office ERG team that developed the methodology.

## SPORT

### EUROPE, MARCH 2012

#### FOOTBALL FIXTURES CAPABLE OF IP PROTECTION

The Court of Justice of the European Union (“CJEU”) delivered a much-awaited judgment in the case of *Football DataCo and Others v Yahoo! UK Ltd and Others*. The judgment confirmed the English High Court’s ruling that football fixture lists are capable of database copyright protection, and also provided important clarification of the test for originality for copyright. Following a reference by the English courts, the CJEU confirmed the test applied by the English Court, commenting that the “*criterion of originality is satisfied when, through the selection or arrangement of the data which it contains, its author expresses his creative ability in an original manner by making free and creative choices.*” The CJEU also concluded that the issue of whether football fixture lists satisfy this test is a matter for the national court based on the evidence before it. The case will now return to the English Court of Appeal for the CJEU’s ruling to be applied to the facts.

## MEDIA

### TURKEY, MARCH 2012

#### TURKISH GOVERNMENT ENCOURAGES AUTHORS

A new regulation regarding financial support for “authentic” literary works was published by the Turkish Ministry of Culture and Tourism and announced in the Turkish Official Gazette on 14 March. Under the regulation, financial incentives shall be offered to candidates who apply to the relevant commission for support.

In order to be eligible for the financial support offered, a number of criteria must be satisfied, including the literary work must be culturally, artistically and aesthetically authentic; the project should introduce new dimensions to literature; and the project should not have received financial incentives and/or support from other funds. The Ministry’s intention and the aim of this regulation is to increase the creation and publishing of Turkish literary works.

## GAMBLING

### EUROPE, FEBRUARY 2012

#### EUROPEAN ONLINE GAMBLING REGULATION TIP-TOES TOWARDS HARMONISATION

All 27 EU Member States were represented at a meeting in Brussels between gambling regulators and other stakeholders, all trying to progress towards much needed harmonisation of online gambling regulation. Michel Barnier, the EU Commissioner for the Internal Market, has previously intimated the European Commission would follow up last year’s Green Paper with a concrete proposal on how to facilitate the establishment of EU-wide standards of regulation, technical standards and social responsibility requirements. Following on from the rapid move towards regulation in a number of Member States, the Commission is acting to prevent the continuation of inconsistency throughout the EU which only serves to weaken regulatory regimes and strengthen the increasingly successful black market. We expect further developments before the summer, by which time things may also become clearer within the German market as it moves from the prohibition of online gambling towards regulation of sorts.

### TECHNOLOGY & SOURCING WEBINARS

DLA Piper’s Global Technology and Sourcing Team are running a series of 45 minute web based seminars presented by a multi-jurisdictional team providing insights in negotiation and management strategies for complex projects. The webinars are provided free of charge and the training is delivered to your desk without the need for travel.

- **Cloud Computing update** – 25 April 16.30 – 17.15 GMT
- **Contracting for Partnership – What does it mean in practice?** – 6 June 16.30 – 17.15 GMT
- **Charges master class** – 12 September 16.30 – 17.15 GMT
- **The new world order of public sector procurement** – 10 October 16.30 – 17.15 GMT
- **Managed service Outsourcing of telecoms networks** – 28 November 16.30 – 17.15 GMT

To register for any of the webinars, please contact [natalie.davis@dlapiper.com](mailto:natalie.davis@dlapiper.com)



# A NEW APPROACH TO FORMAT PROTECTION IN ITALY

By Alessandro Ferrari

“ Following the decision of the IP Court of Rome, the question “*Why pay for a TV format if you can imitate it for free?*” is no longer going to be rhetorical. ”

On February 2012, the IP Court of Rome issued a decision that will have the effect of significantly strengthening copyright protection for TV formats and shows. This is a breath of fresh air for owners of valuable formats, in light of the widespread copycatting practice that had emerged in the market, and had also been endorsed by court decisions which effectively permitted plagiarism of TV programmes.

Following the decision of the IP Court of Rome, the question “*Why pay for a TV format if you can imitate it for free?*” is no longer going to be rhetorical.

## THE THRESHOLD FOR FORMAT PROTECTION

TV formats enjoy copyright protection under the laws of many countries, including Italy. However, it is a fact that, for one reason or another, decisions granting remedies against format plagiarism can be counted on the fingers of one hand.

In Italy, IP Courts tended to apply a restrictive approach to format protection based on the following two principles: (i) copyright does not protect mere ideas but only the expression of ideas; and (ii) formats, just like any other work, attract copyright protection to the extent they are based on creative or new elements, as distinct from existing formats and TV programmes.

It does not take a course in copyright law to realise that the threshold for copyright protection set out by the above principles would hardly be met by a vast number of the formats that circulate in the market. This is even more true when considering, for instance, talent show formats that, albeit very much loved by the public and hence valuable, are often centered on basic features common to many other shows. In principle, only highly innovative formats (for example, Big Brother) would satisfy such requirements.

In addition, the Italian copyright law, like the copyright laws of virtually all other countries of the world, does not contain specific provisions governing “format rights”; nor is there in Italy a commonly accepted definition of “format” (although there have been attempts to produce a definition by the Italian Media Authority and the Italian collecting society).

As a result of this approach, in most cases the Italian IP Courts denied protections to TV formats, maintaining that (i) format bibles represented more an idea for a programme than a finished programme scheme; and (ii) the setting, characters’ role, characteristics of the contestants, contestants’ selection criteria and structure of the programme, were too vague or not sufficiently described, leaving too much to improvisation. In some other cases, IP Courts stated that the elements of the format were not new, in that they were commonly used in existing programmes. For example, IP Courts deemed the following format elements incapable of attracting copyright protection: the mechanism whereby a contestant is eliminated each week; the concept that all contestants live in the same place; contestants’ interviews; and televoting.

## THE NEW APPROACH FOLLOWED BY THE IP COURT OF ROME

In its February 2012 decision, the IP Court of Rome reversed the approach described above.

The claimant was BBC Worldwide which is the BBC exclusive licensee for the very well-known format “Strictly Come Dancing”. Based on such a format, eight series of a successful TV program named “Ballando con le stelle” have been produced in Italy since 2005. The basic features of the format are: (i) a weekly knockout dance competition between couples comprising a celebrity and a professional dance partner; (ii) each couple dances one after the other and is judged by a panel of judges; (iii) each week a couple is eliminated; (iv) each episode comprises rehearsals filmed during the previous week; and (v) viewers can vote and their vote is combined with the judges’ votes.

The claimants commenced injunction proceedings against, among others, RTI, an Italian broadcaster, and Endemol, which launched a TV dance competition entitled “Baila!” based on a Mexican format named “Bailando por un Sueno”. The defendants’ show had the above features although with some differences in the selection of the contestants, dancers’ roles, composition of the panel of judges and televoting mechanism.

Predictably, the defendants claimed that the BBC format could not be protected because it was based on elements widely used in other shows.

The IP Court of Rome took a drastically different approach, which favoured the rightsowners. The Court maintained that the concept of “novelty” has no basis in copyright law. As a result, it is immaterial, from a copyright perspective, whether or not the elements of a format are new: the only question to be answered is whether the combination of all such elements has a level, albeit limited, of creativity. The court found that the claimant’s format satisfied this test. In addition, as to infringement, the Court maintained that the differences between the defendants’ show and the claimant’s format were irrelevant as the defendants’ show appeared, in the eyes of the public, an imitation of the show “Ballando con le stelle” based on the claimant’s format.

The Court enjoined the defendants from producing programs based on the “Bailando por un Sueno” format, set a penalty of €500,000 for each violation of the injunction and ordered the decision to be published in four newspapers.

Whether this approach will be confirmed more widely by the Italian courts remains to be seen. A positive indication comes from the fact that, on October 2011, the IP Court of Rome already took this new approach in another copyright dispute in the context of TV show rights. If confirmed, such a new approach will no doubt make Italy a leading jurisdiction to litigate over TV formats.

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**DLA Piper acted for the claimants in the Ballando con le Stelle case.**

## GETTING CLOSER? US VS. EU, POST-PATENT REFORM

What are the international ramifications of the America Invents Act for companies based within and outside of the US? A recent panel discussion hosted by DLA Piper explored this subject.

The panel, composed of DLA Piper partners as well as academics from Bucerius Law School, sought to compare US patent law post-reform with current patent law in Europe. Panelists noted that changes the AIA is bringing to the US patent system are likely to affect businesses worldwide because the US has the world’s largest number of yearly patent filings – half filed by foreign entities. With the US adoption of a “first to file system” (starting March 15, 2013) inventors, the panelists surmise, will try to win the race to the patent office by filing earlier. The overall number of applications filed is likely to increase, as are prosecution costs.

Unlike the European Patent Office, the USPTO will accept pre-issuance submissions of prior art by third parties. Further, a limited nine-month post-grant review is provided, similar to the EPO opposition period. However, the US

review period is followed by an inter-partes review opportunity. Overall, these procedures are designed to maximise prior art available to the patent office and provide early, non-litigation opportunities to challenge issued patents, aiming to improve the quality of patents granted.

Finally, the panel discussed the most popular European patenting destinations: Germany, France and the UK. On the litigation side, the panel noted the complex European patent litigation system. The UK offers the speediest nullity (invalidity) rulings and Germany, where infringement and validity are determined by different tribunals, is the quickest jurisdiction for obtaining an infringement ruling. This means a litigant can obtain a ruling on infringement before validity is decided.

The panel was organised by the American Friends of Bucerius and DLA Piper as part of a joint IP lecture series project in the US and Germany, with the German American Chamber of Commerce Inc., Office for the Western US and the German American Business Association acting as co-sponsors.

Taking part were Professor and Dr. Hermann Puender, Vice President of the Bucerius Law School, who opened the proceedings, and panelists (and DLA Piper partners) Timothy Lohse (Silicon Valley and Washington, DC), Julia Schoenbohm (Frankfurt and Munich), and Brent Yamashita (Silicon Valley). Professor; and Dr. Dana Beldiman of the Bucerius Law School and Carroll, Burdick & McDonough LLP served as moderators. Present, and the source of valuable comments, was Claire Bennett of DLA Piper’s London office.



By  
Hans Peter Wiesemann

# LEGAL ASPECTS OF SMART METERING AND SMART GRIDS IN GERMANY

**In 2009, the European Parliament and Council approved the EU climate and energy package on the “20-20-20” targets. One of these ambitious targets (which have since been made even more ambitious) was a reduction of greenhouse gas emissions of at least 20%. Another target was the fulfillment of at least 20% of the EU energy demand from renewable energy, e.g. wind or solar power.**

Due to natural changes in the weather, renewable energy production is subject to sudden fluctuations. These fluctuations have to be counter-balanced as the electrical grids need to have a near-constant voltage level. The use of information technology and software solutions is one of the keys to not having to rely on expensive and polluting control power plants for this. Such technology and solutions can help to match not only energy production to consumption, but also to match energy consumption to production. Processes which consume a high level of energy could automatically be shifted to times of the day when the grid offers a lot of “clean” energy. This management of the demand-side does not only stabilise the grids. It also creates new business opportunities for IT and software companies. In the long term, it can reduce industrial energy costs by up to 20%.

To enable such demand-side-management, the energy grids have to become even smarter. One step is the further roll-out of smart meters. In order to provide at least a legal framework for this evolving market, the German legislator invented new rules for smart meters that could become a guideline and benchmark for legislators throughout Europe.

## WHAT MAKES A METER ‘SMART’?

Two characteristics make a meter ‘smart’: first, the metering of energy consumption in very short intervals (or even on a real-time basis) and second, the connection of the meter to a network. In terms of network connection, the meter can submit data online. It can also receive data and can be controlled remotely. By means of a connection to a local area network, the meter can even automatically control the energy consumption of other devices to some extent.

## THE GERMAN LEGAL PROVISIONS ON SMART METERS

In August 2011, the German legislator reformed the German Law on the Energy Industry (‘Energiewirtschaftsgesetz’), to provide a legal framework for smart meters. In various areas the legislator empowered the Federal Ministry of Economics and Technology to further complete this framework by means of regulations.

### Installation Obligations

To promote the further distribution of smart meters, the legislator defined several cases in which the installation of smart meters is now compulsory. These range from installation in new buildings to installation for those who consume more than 6,000 kWh per year, or who run renewable power plants that have an output of more than 7 kW of energy. In addition, the German legislator reserved its right to regulate that – from a future date to be confirmed – all new energy meters installed in Germany must be smart meters.

### Data Protection

Nearly every activity of the modern individual is linked to energy consumption. The high granularity of data collected by or in connection with smart meters enables detailed consumer profiles to be created. Therefore, the legal framework focuses especially on protection of personal data. It defines special cases in which the processing of such data is allowed, e.g. energy billing or the analysis of the status of the electrical grid.

### Security Standards

Finally, smart meters are part of the electrical grid, and hence part of important national infrastructure. They have to be kept secure from unlawful remote access and control. To create a minimum level of security, the German authorities have established a protection regime and technical guidelines for the communication interfaces of smart meters. To ensure that the meters used comply with these prerequisites, they have to be certified.

## CONCLUSION

The IT based processes in the area of smart metering create various new business opportunities for IT and software companies. All other energy consuming industries can also benefit from the energy savings made through the use of smart meters. The German legislative framework can serve as a potential benchmark and guideline for legislators throughout Europe.

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# TACKLING TWITTER & FACEBOOK FAKES

## ID theft in Social Media

By Alexander Tsoutsanis

With over 300 and 500 million users across the globe respectively, Twitter and Facebook are in high demand. Equally demanding are the legal challenges both companies face. Much of the legal discussion around these sites today focuses on a key concern: fraud.

Although many users are voluntarily tweeting and posting on their daily lives, this sometimes occurs involuntarily. In growing numbers, people find themselves exposed to fraudulent behaviour, with others impersonating them on Twitter and Facebook through fake accounts.

This article briefly explores how to take action against fake social media accounts and also touches on recent developments in the Netherlands, the United Kingdom and the United States.

### TWITTER AND FACEBOOK'S OWN POLICIES

Fake accounts crop up so often nowadays that Twitter has adopted its very own *'Impersonation Policy'*. According to Twitter, *'You may not impersonate others through the Twitter service in a manner that does or is intended to mislead, confuse, or deceive others.'* Violation of this rule may result in permanent suspension of the account. Individuals are obviously only able to obtain such suspension if they file a complaint with Twitter first.

As part of its user agreement, Facebook also prohibits users from creating an account for someone else without permission. Providing false personal information is also expressly prohibited. Violations can be reported through Facebook's standard reporting policy.

### NETHERLANDS

There are countless examples of fake accounts in social media. For example in the Netherlands, the Dutch Prime Minister found himself unpleasantly surprised by a Twitter account run by a

student, disseminating tweets which were, to say the least, politically unhelpful. The Prime Minister subsequently requested that Twitter remove the account.

Another example involved a well-known Dutch lawyer who did not want to be on Twitter, but one day found that she was, much to her own dismay. The lawyer, Benedicte Ficq, filed a complaint with Twitter to shut down the fake account. However, she also filed her own legislative proposal to prevent such forms of identity fraud on the Internet. Ficq's proposal was launched in January 2012 and has been submitted to Dutch parliament for further consideration. The bill aims to introduce additional provisions in the Dutch Criminal Code prohibiting so-called forms of *'identity theft'*. The proposed sentences are steep, with a maximum of 4 years imprisonment or a €19,000 fine.

There has been some criticism of the new proposal.<sup>1</sup> It is for example unclear whether there is any added benefit in introducing new legislation on *'identity theft'*. For most individuals falling victim to fake social media accounts, existing provisions appear to already provide protection, even if they cannot rely on a trade mark. Use of someone's personal name without consent is already prohibited in the Dutch Civil Code (art. 1:8). In addition, the use of someone's picture on e.g. a fake Twitter account, is a clear-cut violation of image rights. Both grounds enable a victim of such a fake social media account to obtain an injunction and monetary compensation. Although those grounds are readily available, filing a complaint with Twitter and Facebook is often sufficient to remove or suspend the fake account involved.

### UNITED KINGDOM

In most cases, users will only go to court in cases where such fake accounts cause serious damage. A telling example can be found in the United Kingdom. In 2007, a false profile of businessman Matthew Firsh was anonymously created in June 2007, which wrongly said he was signed up to gay groups, and made false and defamatory allegations concerning the ability of Mr Firsh and his

<sup>1</sup> Tsoutsanis, Alexander, *Wet Draait Door: 'Wetsvoorstel' FICQ tegen Neptweets geen Goed Idee* (Why FICQ's 'Legislative Proposal' Against Identity Theft on Twitter and Other Social Media Is a Bad Idea) (February 1, 2012). *Mediaforum*, Vol. 2, p. 37, 2012. Available at SSRN: <http://ssrn.com/abstract=2004720>.



“If the fake account causes severe damage, the developments show that users have various options for taking action.”

company, Applause Store Productions, to pay their debts. This case went on to be the first successful defamation and privacy law case involving Facebook in the United Kingdom.<sup>2</sup>

In order to bring a claim against Raphael, Firshat had first to identify the maker of the statements. He did this by applying to court for an order compelling Facebook to disclose the registration information and IP address of the user who created the fake profile and the group, and details of activity on Facebook undertaken from that IP address. The disclosure revealed the perpetrator to be a Grant Raphael, who was exposed as a liar in court and ordered to pay £15,000 libel damages to Mr Firshat, £5,000 libel damages to Applause Store, and £2,000 damages for the separate claim of breach of Mr Firshat's privacy. He was also ordered to pay indemnity costs, with an interim payment of £30,000 costs within 14 days. This was obviously not a standard case, as it did not only involve the misuse of personal information, but also defamation and libel. The case does show however that existing remedies are readily available and able to crack down on fake social media accounts, provided that the victim is willing to go the extra mile and turn to the courts instead of only turning to Facebook.

#### UNITED STATES

Apart from requiring victims themselves to take action against fake social media accounts by filing complaints or bringing a claim before the courts, recent developments in the United States show that legislators also consider this a matter of public interest. For example, in California, the home turf of Twitter and Facebook, a new bill was enacted in 2011 specifically aimed at preventing fake social media accounts. Pursuant to the provision in art. 528.5 of the Californian Penal Code it is a misdemeanor for any person to knowingly and without consent credibly impersonate another actual person on

the internet for the purposes of harming, intimidating, threatening, or defrauding. The penalties involved boil down to a maximum of one year imprisonment and/or a fine of \$1,000. The requirement of 'credible impersonation' aims to ensure that 'parody accounts' are still permissible, provided it is clear to users that the account is a 'fake' or 'parody' and not the real deal. A similar requirement is also imposed by Facebook and Twitter themselves, which do allow "parody accounts", but require the user to not use the exact name of the person involved, and add a qualifier, such as "not...", "fake", or "fan".

#### TACKLING FAKES – HOW TO

Regardless of the available legal grounds, the biggest hurdle for victims is to obtain the true identity and proper address of the holder of the fake account. Legal remedies are only effective if those remedies can be enforced. Enforcement generally requires knowledge of the true residential address of the 'infringer'. While law enforcement officials are able to obtain such information fairly quickly (e.g. through IP addresses), injured right holders or individuals are not.

This is why in most cases victims tend to only submit a complaint at e.g. Twitter or Facebook, requesting them to remove the fake account. Although this has hardly any deterrent effect, it does allow for a quick and effective resolution of most complaints.

If the fake account causes severe damage, the developments above show that users have various options for taking action. It also shows that remedies tend to vary between countries. In practice which option to take generally depends on whether the victim is a natural person or a legal entity and also on the extent of the damage caused by the fake account.

<sup>2</sup> High Court 24 July 2008 [2008] EWHC 1781 (*Applause Store Productions Ltd and Matthew Firshat v Grant Raphael*).

In case a business falls victim to a fake social media account, existing laws provide sufficient remedies. Provided that it does involve use in the course of trade, most businesses are able to rely on infringement of their trade name or (registered) trade mark. In such an event, IP laws provide for effective remedies. Depending on the nature of the contents disseminated by the account, claims based on misleading advertising or defamation are also possible. The same applies to general provisions of tort, passing off or unfair competition. In case of a parody, the cause of action of the right holders is likely to be balanced against free speech and the extent to which the average user is liable to be confused.

Except for celebrities, most individuals are unlikely to have registered their name as a trade mark. However, under many local laws (UK law being a notable exception) ‘personal names’ are expressly protected by specific provisions, prohibiting others from using such name without consent. In the Netherlands, Germany and Switzerland for example, such provisions are expressly provided in the civil code.<sup>3</sup>

Where the fake account has caused little damage, it is recommended to only file a complaint at Twitter or Facebook. If the damage is more severe, individuals should consider a two-track strategy: first, it is best to file a complaint with law enforcement officials (e.g. citing ‘identity fraud’). Although this does not always result in actual prosecution, lodging the complaint alone often serves as a useful deterrent; second, following advice by local counsel, bringing a claim in the civil courts should be considered, seeking an injunction and monetary compensation. The *Firsht* case above shows that such remedies can be quite effective. Whether or not such civil action makes sense, obviously depends on the damage and costs involved.

<sup>3</sup> Art. 1:8 BW; art. 12 BGB; art. 29 ZGB.

## FUTURE DEVELOPMENTS

On both platforms, the real cause of fake accounts is the low threshold to obtain such an account and the absence of proper verification of user identities. The identities of the vast majority of users on Twitter are not verified. Twitter’s public verification program is closed. Verification only happens for selected users, advertisers and partners. Facebook’s efforts in verifying the true identity of users are also fairly limited. Recently, Facebook announced that it will be offering a ‘Verified Accounts’ program for selected users. This is however limited to prominent public figures and is not open to ordinary users. From a policy perspective, one can wonder whether internet companies like Facebook or Twitter should have a fiduciary duty to (more closely) verify the identities of their users. Given the impact of social media today, there is much to be said in favour of such an obligation. In absence of proper verification, Twitter and Facebook fakes are here to stay.

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For more information on Social Media, read our [New Laws for New Attitudes](#) report.

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# One case, two legal views, a few observations

By  
Sandrine Rambaud

Compelling evidence of the uncertainty of IT litigation was given by the stark difference between the decision of the Tribunal de grande instance of Niort,<sup>1</sup> and that of the Court of Appeal of Poitiers,<sup>2</sup> in the recent case between the insurer Maif and IBM.

Maif and IBM concluded an agreement for the integration of a piece of customer relationship management software; the terms included a fixed price, and a firm schedule of delivery dates. The project was soon delayed, leading the two parties to sign successive related agreements (“*Protocols*”). As the project could not be completed in accordance with the original schedule, IBM then offered an alternative arrangement with a significantly increased budget, which was refused by Maif. Maif finally gave notice to IBM, requiring it to comply with its initial contractual obligations, and then requested the appointment of an expert by a judge.

On 14 December 2009, the *Tribunal* ordered IBM to pay around €10 million to Maif, for fraudulent misrepresentation. To our knowledge, this was the first time that the French courts had made a finding of fraudulent misrepresentation in an IT case. The Tribunal held that in such cases, limitation of liability provisions do not apply. This was bad news for IT suppliers. It is worth noting that at the same time, the English Technology and Construction Court ordered EDS to pay at least £200 million to BSKyB for fraudulent misrepresentation as well.

In November 2011, the Court of Appeal of Poitiers overruled the decision of the *Tribunal*, concluding there was no misrepresentation, and no breach of contractual obligations by IBM.

## NO MISREPRESENTATION AND NO BREACH OF OBLIGATION TO INFORM

Under French law, a contract can be void for fraudulent misrepresentation if the party making the misrepresentation:

- is one of the parties to the contract;
- has a fraudulent intent; and
- has deceived the other party, and without this deception the latter party would not have entered into the contract.

The Tribunal decided that there was a misrepresentation since IBM, as a professional, violated industry standards by agreeing to a fixed price and a schedule of delivery dates before the end of the design phase, and by remaining silent as to the risks of overrun of the budget and delay. In addition, IBM acted fraudulently when they signed the two *Protocols*.

This case differed from the English *BSkyB v EDS* case, in that BSKyB had been able to prove that one of EDS’ senior officers had lied. In the IBM case, there was no evidence which would have established IBM’s fraudulent intent, and the Court could simply sweep this point aside.

The Court also considered that there was no breach of IBM’s obligation to inform Maif of the risks of performance being delayed. Maif could not be considered a layman, the risk of delay was mentioned in the agreement, Maif decided the fixed price, knew the risks of failure of the project since a previous project with Siebel had already failed, and by the signature of the *Protocols* Maif had agreed to modify the initial project. Therefore,

Maif had the skills and the information from which it could have comprehended the risks by itself.

## IMPOSSIBLE TO RELY ON THE INITIAL CONDITIONS

Maif had agreed that IBM had breached its fundamental obligation to deliver the services ordered, but the Court rejected this argument. Indeed, since Maif agreed to modify its initial obligations, Maif could not rely on them. The parties had taken a practical approach to prioritise the success of the project, to the detriment of the strict application of the contract, depriving Maif of the rights initially negotiated.

Finally, the Court decided to look at the circumstances surrounding the suspension of the project, and considered the project would have been viable if a new agreement could have been found. The decision to suspend was only the consequence of a disagreement between the parties over new conditions. Therefore Maif should solely bear the consequences of the suspension.

## THE END OF THE STORY?

This decision of the Court of Appeal of Poitiers should give IT suppliers some reassurance. Maif may well seek to appeal further to the highest French court, but this decision is very factual, so it is likely to be hard for Maif to demonstrate that there are sufficient legal grounds for such an appeal.

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<sup>1</sup> TGI Niort, 14 Dec. 2009, Maif v. IBM France and BNP Paribas Factor, RG 09/00580, published on the website [www.legalis.net](http://www.legalis.net)

<sup>2</sup> Court of Appeal Poitiers, 25 Nov. 2011, Maif v. IBM France and BNP Paribas Factor, RLDI 2011/77 n° 2568

# PATENTING STEM CELL RESEARCH: EU VS. US

By  
Dr. Lisa Haile  
Aaron Fountain  
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and  
Grant Strachan

The Court of Justice of the European Union (CJEU)<sup>1</sup> has ruled in *Brüstle v Greenpeace* that processes involving the derivation of stem cells from a human embryo at the blastocyst stage, entailing the destruction of that embryo, cannot be patented.

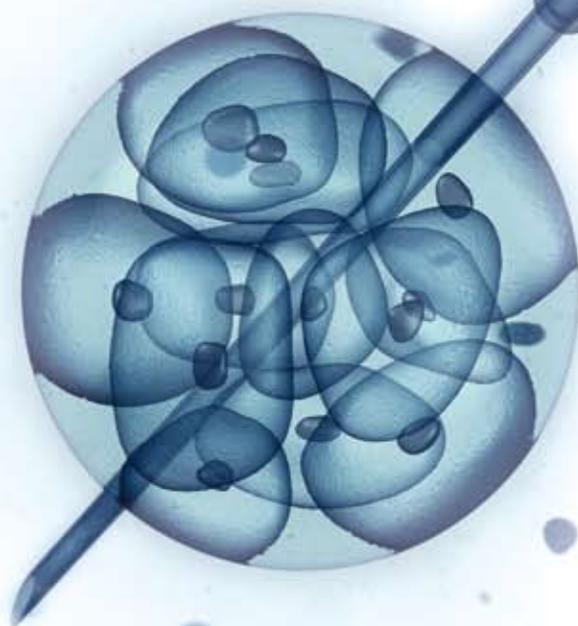
This article briefly sums up the CJEU decision of October 2011 and compares the different approaches to patentability of stem cells being taken in Europe and the US. We also consider the implications of these differences on the future of research involving human embryonic stem cells (hESC) in Europe and the US.

## STEM CELL PATENTABILITY IN THE EU

Central to *Brüstle* was the interpretation given to Article 6(2)(c) of Directive 98/44/EC (the Biotechnology Directive),<sup>2</sup> which excludes the patentability of inventions involving “the use of human embryos for industrial or commercial purposes.”

The CJEU held that the concept of “human embryo” must be understood to encompass any ovum once fertilised, including whether created by transfer of a nucleus from another mature cell or stimulated to cell division by parthenogenesis. The court added that the exclusion from patentability concerning the use of human embryos for industrial or commercial purposes set out in Article 6(2)(c) of the Biotechnology Directive also covered the use of human embryos for scientific research.

However, the court did provide a carve-out from this exclusion, stating that use of a human embryo for therapeutic or diagnostic purposes which were applied to the human embryo and were useful to it are prima facie patentable. This exception is narrow – for example, when the purpose is to correct a malformation and to



improve its chances of survival. In *Brüstle*, using human embryos for scientific research was indistinguishable from industrial and commercial use and was, thus, unpatentable.

Last, the court found that where an invention does not itself “use” human embryos, but relates to a product whose production necessitates the prior destruction of a human embryo or a process which requires a base material obtained from such destruction, that invention would not be patentable because it would constitute use within the meaning of Article 6(2)(c) of the Directive.

## STEM CELL PATENTABILITY IN THE US

Efforts affecting stem cell research in the United States have focused largely on government funding rather than the legal scope of patentability. Since 1996, US federal appropriations bills have included the Dickey-Wicker Amendment, a rider explicitly prohibiting use of government funds to create human embryos or for research in which human embryos are destroyed or discarded. Human embryos are broadly defined to include “any organism... derived by fertilisation, parthenogenesis, cloning, or any other means from one or more human gametes or human diploids.”

The National Institute of Health interpreted Dickey-Wicker as not applying to hESCs because hESCs are not organisms as defined in the Act.<sup>3</sup> In 2009, NIH issued new guidelines for funding hESC

research that distinguished between the destruction of human embryos to derive hESCs and the use of hESCs in research not involving embryos or embryo destruction.

Despite the events surrounding federal stem cell research funding, US patent law has long recognised the patentability of stem cells and stem cell research tools. In the recent Myriad decision,<sup>4</sup> the Federal Circuit affirmed that biologically pure compositions that do not occur in nature are patentable. The USPTO's official policy has been that stem cells and methods of making or using stem cells are patentable. Examples include US Patent No. 5,843,780 (issued 1998) directed to primate (including human) embryonic stem cells; US Patent No. 7,682,828 (issued 2010) directed to induced pluripotent stem cells; and US Patent No. 7,732,202 (issued 2010) directed to parthenogenetically derived stem cells.

## THE FUTURE OF PATENTABILITY

Under current law, hESCs and parthenogenetic stem cells and methods of making or using such cells are patentable in the US, but not in the EU. This difference may require research institutions and companies to re-examine their IP, regulatory and commercial strategies on a jurisdictional basis.

In Europe, institutions may seek to protect hESC and parthenogenetic stem cell innovation through the non-disclosure mechanisms of confidentiality and trade secrets. These institutions will need to carefully evaluate the suitability of seeking patent protection in the US, where the disclosure requirements of the patent system stand in conflict to the non-disclosure principles of trade secret and confidentiality.

In the US, institutions seeking patent protection for these same innovations will have to consider the absence of prohibition on others reproducing that work in Europe.

Thus, these institutions will also need to consider the potential for global protection afforded by confidentiality and trade secrets. It remains to be seen whether investors will favor the potentially broad geographic protections of confidentiality and trade secrets or the geographically localised protections afforded by the public disclosures of the patent system.

Efforts currently under way in the US would redefine “embryo” under Dickey-Wicker so technologies such as parthenogenesis would fall outside of the definition. Similar efforts in Europe may allow stem cell technologies aside from embryonic stem cells to gain patent protection.

Currently, only a limited number of companies are true stem cell players in the global market. However, the EU is an important market. If the EU decision holds, and stem cell R&D for hESCs, SCNT and parthenogenesis does not enjoy legal protections under EU patent laws, then companies and investors may be less likely to proceed with their research. This would affect the future of regenerative medicine on a global basis for years to come.

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<sup>1</sup> Formerly the European Court of Justice, known as the ECJ.

<sup>2</sup> Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions.

<sup>3</sup> See Section 509 of the Omnibus Appropriations Act of 2009.

<sup>4</sup> Ass'n for Molecular Pathology v. U.S. Patent & Trademark Office, 653 F.3d 1329 (Fed. Cir. July 29, 2011).

# Will 2012 be the year we see **ENTERPRISE-GRADE CLOUD DEALS?**

Certainly recent press coverage will have you believe that this is the case. As reported previously in this newsletter, much of the blockers to the enterprise-grade uptake of cloud computing related to 'FUD' (Fear, Uncertainty and Doubt) and the perceived lack of relevance for customers in regulated sectors (such as pharma, financial services or the public sector).

As we have seen however, cloud vendors have been turning their attention to specific regulated sectors (for example, the Salesforce offering last year which was compliant with the US health information law, HIPAA) and now it would seem that financial services organisations are moving from initial 'toes in the water' (virtualisation and limited, low grade cloud solutions) to more serious adoption.

The newswire is buzzing this week with the news that Spanish bank BBVA will replace its current corporate Intranet with the full suite of Google applications, including email and calendars. Some 110,000 employees will be able to work jointly on internal memos and contracts using Google Docs, and will have their own BBVA social network, also housed on Google servers.

Tech Europe (January 11th) estimates this deal to be worth €4.4 million per year (way more than the apocryphal 'typical cloud deal size' thought currently to be in the region of only £250,000), based on a seat price of €40.

It is still interesting to read that the fears (whether real or perceived) persist, so much so that BBVA's director of innovation, Carmen Herranz, stressed (as reported by the BBC on 11 January) that all customer data and other key banking systems would "stay in our own data centres" and be completely separate from the cloud solution. This need to head off likely criticism illustrates the continuing concerns regarding security and location of data.

So could this be the start of a trend? Or is this not really as newsworthy as it seems? Will banks, or other regulated entities really ever put themselves in a position where anything other than

peripheral (perhaps communication) systems are in the cloud? It seems unlikely (at least for now) that a banking platform (for example) would be cloud based in the truest sense of the word (and without getting into a debate as to the meaning of 'cloud!').

Certainly 2012 will see another shift in gears as cloud goes further mainstream. The European Commission's recent Public Consultation Report, published on 5 December 2011 by DG Information Society and Media thinks so. The report concludes that the existing confusion (as to rights, responsibilities, data protection and liability, model terms and service levels) could be resolved (in whole or part) by the public sector. Key to this resolution would be certainty regarding security standards, interoperability and data portability, thus (they say) stimulating rapid deployment. At a national level the rapidity of deployment is debatable, but nonetheless the first OJEU process for cloud services in the UK public sector continues. The call to market closed recently with 500+ responses and the Cabinet Office in the UK is now faced with the task of assuring some 1,300 individual service offerings. The framework was due to commence by the end of January 2012. It will be interesting to see the extent to which the public sector embraces this new framework, pushing the adoption of cloud in the UK (in a regulated sector) and thereby encouraging the financial services sector and other regulated industries to follow suit.

A key determinant will be the terms and conditions on which cloud vendors are willing to sell, and regulated customers are willing to buy. The delta between these two camps still remains the battleground, and unlocking this issue (as we have said before) will be the only way to truly allow cloud computing to spread.

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# THE END OF THE DIGITAL LEVY FOR PRIVATE COPYING IN SPAIN

By  
**Bartolome Martin**

EU copyright law allows Member States to provide a defence for individuals who copy privately for non-commercial purposes, provided that they ensure that rightsholders receive fair compensation. Many EU Member States have sought to provide such compensation by way of a levy on the sale of media and devices which enable copying.

Recently-approved legislation aimed at correcting the public deficit (Royal Decree-Law 20/2011 of 30 December 2011) has brought about the expected and much called-for suppression of the digital levy on private copying in Spain. Notably, however, the system intended to replace the digital levy, announced by means of this law, has sown a seed of uncertainty in the Spanish market. It is not only an undefined system that requires immediate clarification, but it is already (before implementation) being accused of having the same incompatibility with the EU legislation as its predecessor.

Reactions to the suppression of the system itself, and especially to the manner in which it was brought about, have certainly been varied, from genuine joy among consumers and levy payers to deep distress among the rightsholders. Users and levy payers feel that an injustice has been partially corrected (they still claim reimbursement of part of the amounts paid under the previous system though). The rightsholders are astonished and concerned at the “solution” announced by the government. One feature of the new system is intended to be that compensation will be paid out of the general Spanish State Budget.

Digital levy systems have been largely accused of being inadequate for their intended purposes, as well as blatantly unfair, particularly for consumers, over the last decade. Indeed, huge sectors of society, Internet users’ associations and, especially, levy payers (manufacturers, importers, intra-community acquirers, distributors), not only in Spain but also around Europe, had fiercely opposed these types of compensation systems (which are generally applied on equipment and digital media, with storing, copying and/or playing functionality).

Spain is no exception in this respect. The requirement to pay the digital levy to copyright collecting societies has been challenged in court under varied grounds. The most significant and recognisable

example of this hostility is the dispute between SGAE (Spanish collecting society for songwriters and music publishers) and Padawan (a company marketing digital media and MP3 devices), which gave rise to the ruling of the Court of Justice of the European Union (CJEU), in Padawan (Case-467/08). This ruling stated that the indiscriminate application of the digital levy in Spain was incompatible with the Information Society Directive (2001/29), a position afterwards endorsed by the Provincial Court of Barcelona deciding on the case.

“ While Padawan was the death blow, we could say that the Spanish levy system was already mortally wounded because of public pressure. ”

The very considerable challenges of the levy approach in today’s digital economy (which devices should attract a levy? How can “fair” compensation be calculated? What about the differentials between levies in different Member States?) have led some Member States to avoid the levy approach altogether. It is notable that in their current consultation on copyright reform, the UK government have endorsed the idea of introducing a defence for private non-commercial copying, but have refused to entertain the idea of a levy.

While Padawan was the death blow, we could say that the Spanish levy system was already mortally wounded because of public pressure (certainly fed by a disastrous media strategy by the previous administration). Nevertheless, rightsholders have been left in an unacceptable position at the moment. They cannot prevent users from making private copies of their works but, contrary to the provisions of the Information Society Directive, they are receiving no compensation (at least temporarily) for this limitation of their rights.

Moreover, when we analyse the decision made by the recently appointed Spanish government, many questions rapidly come to mind. Was this suppression totally necessary? Is the new system compatible with the Information Society Directive? Will the rightsholders be given a say in the definition of the procedure to estimate damage and calculate the fair compensation their works deserve? Will the implementation of the new system be retroactive? Will a new tax be created to fund the rightsholders’ compensation? Can the rightsholders do anything now to protect their rights? We do not have all the answers to these questions for the time being, but it seems inevitable that an immediate reaction of the rightsholders would play a very important role in shaping some of the answers. The legal options for rightsholders wishing to make their views known are limited, but they should be aware of missing out on this opportunity to shape the new regime.

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# SHIFTING LANDSCAPES

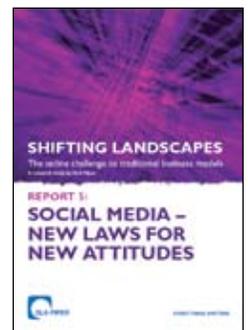
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