

FRANCE

*Claire Vannini*¹, *Anne Servoir*², *Martina Isola*³, *Petar Petrov*⁴, *Guillaume Melot*⁵, *Marc Lauzeral*⁶,
*Annabelle Divoy*⁷.

1. Intellectual Property Rights in France

1.1 Overview of the different IP Rights in France

The French Intellectual Property Code (“IPC”) defines a list of intellectual property rights (“IP rights”), harmonized at the international level through international conventions or at the regional one through directives and regulations of the European Union.

*Trademark law*⁸ protects signs distinguishing specific goods and/or services. It grants trademark holders the exclusive right to use it and thereby protects them from any unauthorized use by third parties⁹ for a period of 5 years, indefinitely renewable. The essential function of trademarks is to ensure the origin and quality of the goods or services covered by the sign¹⁰ and can also constitute an important part of a commercial strategy¹¹.

In theory, a trademark enjoys protection only if it has been registered. Protection is then limited to the product(s) and/or service(s) referred to in the registration process. However, certain goods and/or services not designated in the registration may benefit from the protection, provided that they enjoy the reputation of the registered trademark¹². In addition, an unregistered but well-known brand for certain products and services will also benefit from protection¹³.

*Patent law*¹⁴ grants protection to inventions for 20 years provided that the applicant can establish novelty, inventive step and industrial application. The essential function of patents is to reward the creative efforts of inventors¹⁵. The specific subject-matter of patents is “the guarantee that the patentee has the exclusive right to use an invention with a view to manufacturing industrial products and putting them into circulation for the first time, either directly or by the grant of licenses to third parties, as well as the

¹ Partner, CMS Francis Lefebvre Avocats, claire.vannini@cms-fl.com.
² Partner, Hoyng Rokh Monegier Véron, anne.servoir@hoyngrokh.com.
³ Officer of the Market Access Department, Commission de Régulation de l’Energie, martina.isola@cre.fr.
⁴ Law Clerk, Willkie Farr & Gallagher, ppetrov@willkie.com.
⁵ Associate, CMS Francis Lefebvre Avocats, guillaume.melot@cms-fl.com.
⁶ Associate, Hoyng Rokh Monegier Véron, marc.lauzeral@hoyngrokh.com.
⁷ Associate, Hoyng Rokh Monegier Véron, annabelle.divoy@hoyngrokh.com.
⁸ Articles L.711-1 and following of the IPC.
⁹ ECJ, case 16-74, *Centrafarm v Winthrop*, ECR 1974 -01183; CA Versailles, 1st December 2015, RG 14/05712.
¹⁰ ECJ, case 119-75, *Terrapin v Terranova*, ECR 1976 01039.
¹¹ CJEU, case C-323/09, *Interflora*, ECR 2011 I-08625.
¹² Article L. 713-5 of the CPI.
¹³ Article L. 713-5 of the CPI and Article 6bis of the Paris Union Convention.
¹⁴ Articles L. 611-1 and following IPC.
¹⁵ ECJ, case 15/74, *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc.*, ECR 1974 -01147, point 9; J. Passa, *Industrial Property Law*, Volume 2, EDITOR? para. 525.

right to oppose infringements”¹⁶. In the pharmaceutical and phytosanitary fields, an additional protection certificate can extend the protection of patented product¹⁷. It takes over the patent at the end of the patent for a maximum period of 5 and half years. Inventions can also be protected through utility certificates, but for a shorter period¹⁸.

*Design law*¹⁹ protects novel and distinctive designs. If a design has not been registered, it is protected for 3 years unrenovable from the date of its first disclosure to the interested circle in the European Union. If a design has been registered, it is protected for 5 years from its filing and renewable up to a maximal period of 25 years.

*Copyright*²⁰ protects, without any form of registration whatsoever, the original creations of the mind by granting moral and economic rights to the author over his work²¹. Its specific purpose is to confer on the holder the right to reserve exclusive rights to the reproduction of the protected work. Copyright provides *sui generis* right²² to protect databases producer for a given period of 15 years maximum.

Both the IPC²³ with reference to the Consumer Code²⁴ and Regulation (EU) 1151/2012 contain provisions on the *protection of geographical indications*. Geographical indications serve an essential dual function²⁵: the protection of authorized users and production areas as well as the guarantee of the origin of the products and the is the product-specific features of s product result from its origin.

1.2 Infringement Acts and Enforcement Actions in respect of IP Rights

Each act that infringes the essential function or the specific subject-matter of an IP rights is deemed, *prima facie*, as constituting, a counterfeiting.

The IPC defines a list of infringing acts for each IP right, which includes but is not limited to:

- For trademarks²⁶:
 - for products or services identical to those designated in the registration, the reproduction, use or affixing of a trade mark, even with the addition of words such as “formula, manner, system, imitation, genre, method”, as well as the use of a reproduced trade mark, and the deletion or modification of a regularly affixed trade mark;

¹⁶ ECJ case 15/74, *Centrafarm BV and Adriaan de Peijper v Sterling Drug Inc.*, ECR 1974 -01147, point 9; J. Passa, *Industrial Property Law*, Volume 2, EDITOR? para. 525.

¹⁷ Article L. 611-2 IPC.

¹⁸ Article L. 611-2 IPC.

¹⁹ Articles L.511-1 and following IPC.

²⁰ Articles L.111-1 and following IPC.

²¹ CFI, joined cases T-70 and T-76/89, *TP v Commission*, 89, ECR 1991 II-575.

²² Articles L. 341-1 and following IPC.

²³ Articles L.721-1 and following IPC

²⁴ Articles L.431-1 and following of the Consumption Code.

²⁵ ECJ, case C-12/74, *Sekt and Weinbrandtaff* ECR 181; ECJ, case C-108/01, *Consorzio del prosciutto di Parma et Salumificio S. Rita*, ECR 2003, I-5121.

²⁶ Articles L.713-2 to L.713-4 IPC.

- for products or services similar to those designated in the registration, if such acts create a likelihood of confusion, the reproduction, use or affixing of a trade mark, as well as the use of a trademark reproduced, and the imitation of a trademark and the use thereof;
- For patents²⁷:
 - manufacturing, offering, placing on the market, using, importing, exporting, transshipping, or holding for such purposes, the product which is the object of the patent;
 - using a process which is the object of the patent and;
 - offering, placing on the market, using, importing, exporting, transshipping or holding for such purposes a product directly obtained by means of the process which is the object of the patent;
- For the design²⁸, manufacturing, offering, placing on the market, importing, exporting, transshipping, using, or holding for such purposes, the product incorporating the design or design which does not produce on the informed observer a different overall impression;
- For copyright²⁹, reproduction, representation or broadcasting of a protected intellectual work.

The IP right holder or its assignees may bring actions for infringement.

French law also enables other parties affected by an infringement to claim damages for any resulting prejudice. Indeed, pursuant to the IPC³⁰, exclusive registered licensees may launch infringement proceedings in case the owner of IP right does not initiate an action despite a formal notice from its licensee (and except if provided otherwise in the license agreement). Other licensees may only take part to the infringement proceedings and recover damages relating to their own prejudice. French judges tend to consider, however, that such intervention can only be grounded on unfair competition claim even if some isolated decisions recognize the right for the licensee to claim infringement.

In any case, licensees, exclusive or not, may initiate proceedings for unfair competition and parasitism, without registering any license agreement in a national register³¹. In addition, under case law, claims by exclusive distributors are traditionally upheld, the reasoning being that the infringement amounts to unfair competition vis-à-vis an exclusive distributor.

Intellectual property rights are obtained when the specific requirements for obtaining such rights are met, and are assessed by both by the French Intellectual Property Office and by the French courts if proceedings are launched before them:

- Trademarks are subject to protection if the sign is distinctive, licit (it means respecting public decency), available and non-deceptive³²;

²⁷ Article L.613-3 IPC.

²⁸ Article L 513-4 IPC.

²⁹ Article L. 335-3 IPC.

³⁰ Article L.615-2 CPI ; L.521-2 CPI : L.716-5 CPI.

³¹ Paris Court of Appeal, 22 September 2017, RG 15/09651.

³² Articles L.711-2 to L.711-4 IPC.

- Designs are subject to protection if the object of design is new and distinctive³³;
- Patents are protected provided that the applicant can establish novelty, inventive step and industrial application of the invention³⁴.
- Copyright is protected if a work is original and expresses the imprint of its author's personality³⁵. Anyone who claims title in a copyright has to prove the copyright's existence from its alleged date of creation.

In some specific cases, French courts found that a right holder or applicant tried to fraudulently restrict competition by diverting a right from its essential function/specific subject matter. For instance, a manufacturer held a patent on a bone cement which was obtained with a precise mix of compounds giving the material a specific pink color. At the expiry of the patent, the manufacturer registered three-dimensional mark covering the specific pink color. Nevertheless, competitors entered the market offering the same cement made with the same compounds and consequently of the same pink color. The first manufacturer sued one of them pretending the latter was infringing his three-dimensionnal mark. The action was dismissed for bad faith, because the manufacturer was held to have actually tried "*to perpetuate indefinitely the technical effect of the patent*" to prevent competitors from marketing similar products³⁶. In this case, the court also held that the manufacturer's action constituted an abuse of trademark law pursuant to general principles of law but did not grant the defendant any damages considering that the latter did not prove its prejudice.

Applications for patents or registrations of trademarks to limit the activities of the competitors or to unduly benefit from a competitor's reputation have also been considered as fraud³⁷.

In some specific cases strictly defined by the IPC, the IP right holder cannot enforce its right against an unauthorized use of it. For instance, these cases include:

- The non-commercial use of a trademark, invention object of patent, design or work protected by copyright;
- The unauthorized use of a patented invention for the studies and tests required to obtain a marketing authorization for a medicinal product;
- The reverse engineering of copyrighted software under some strict circumstances.

Also, the IPC provides a regime for two types of patent compulsory licenses:

- A judicial license which may be requested by a public or private person to the court (i) when the invention object of a patent is not exploited (or insufficiently exploited) in France or in the European Economic Area, or is not commercialized to satisfy the needs of the French market³⁸, or (ii) when two patents held by two different persons are dependant patents³⁹;

³³ Article L .511-2 IPC.

³⁴ Article L.611-10 IPC.

³⁵ Articles L.111-1 and following IPC.

³⁶ Regional Court of Paris, 22 February 2018, RG 14/05292.

³⁷ Paris Court of Appeal, 30 March 2018, RG 17/07421.

³⁸ Articles L. 613-11 *seq.* IPC.

³⁹ Article L. 613-15 IPC.

- An administrative license imposed by the relevant minister in the interest of (i) public health⁴⁰, (ii) “national economy”⁴¹, (iii) national security⁴² and (iv) farming⁴³.

However, compulsory licenses are rarely granted.

French law provides for the exhaustion of IP rights at national and EU levels. The requirements for exhaustion of IP rights at both level are the same.

1.3 “Level Playing Field” under French Law

We consider that the laws and procedures applicable to IP claims provide a level playing field for all economic agents, irrespective of their size or nature.

The French Commerce Code aims at protecting the weaker (contractual) party by prohibiting any forms of abuse of dominant position and abuse of economic dependence. The French courts and authorities being particularly active in this regards, large claimants with significant market power are imposed extra special duty of care when assessing the risks of launching enforcement proceedings. We regret, however, that no proceedings have still yet allowed French Courts to clarify the FRAND⁴⁴ regime (nature of the commitment, method of calculation of a FRAND rate, definition of a FRAND offer...). The much expected *Conversant Wireless v. LG* decision, handed down by the Paris Court of Appeal on 16 April 2019, would have been the first decision issued by a French court, on the determination of FRAND terms and conditions. Unfortunately, the court missed the opportunity to address this issue by judging the patents, on which the action was based, as non-essential.

French procedural rules also ensure a level playing field for all IP right owners/alleged infringers by providing for an equal access to courts (procedural costs for claims before lower instance courts fees irrespective of the size/nature of the claimant, reimbursement of part of the winner party attorney’s cost), and different speedy proceedings (preliminary injunctions, fast-track procedures).

2. IP Rights and Competition Law

2.1 Competition Law Policy-Makers and IP

The recent discussions in the French National Assembly in the context of the adoption of the so-called PACTE Law⁴⁵ provided an opportunity for legislators to recall, on the one hand, the importance of IP rights in protecting and promoting innovation (and thus the national economy) but also, on the other hand, the negative impact on the market of the grant of extensive IP rights.

Indeed, Article L. 611-10 of the IPC provides that new inventions involving an inventive step and capable of industrial application are patentable in all technological fields. However, in France, unlike

⁴⁰ Articles L. 613-16 and L. 613-17 IPC.

⁴¹ Article L. 618-18 IPC.

⁴² Article L. 613-19 IPC.

⁴³ Article L. 5141-13 of the Public Health Code .

⁴⁴ Fair, reasonable and non-discriminatory.

⁴⁵ Law No 2019-486 of 22 May 2019 on the growth and transformation of enterprises.

other European countries, it is not possible to reject a patent application that does not meet all three conditions, particularly in the absence of an inventive step or industrial application.

An amendment was therefore introduced by the PACTE Law to enable the French IP authority to examine all conditions for patentability and to dismiss non-compliant applications.

In the context of the discussions regarding this amendment, although competition law has never been explicitly referred to, the French legislator confirmed that this weak point of French patent law has serious consequences for companies, including “costly legal proceedings necessary to bring down an invalid patent *that unfairly blocks a market*”.

In addition, while competition law policy-makers have never referred to the preeminence of competition law over intellectual property law, some specific limitations to the exercise of IP rights have been introduced with regards to certain sectors.

For instance, as regards the car repair industry, Regulation 1400/2002⁴⁶ provides that refusal of access to technical information by a car manufacturer to independent repairers constitutes a hardcore restriction of competition which deprives such agreements of the exemption provided for by the Regulation. These provisions have also been complemented by Regulations No. 715/2007⁴⁷, No 692/2008⁴⁸ and No 566/2011⁴⁹, which make it impossible for manufacturers who refuse to share this technical information to obtain licenses for their vehicles.

Similarly, in France, visible spare parts (fenders, bonnets, bumpers, windscreens, lights, mirrors, etc.) are protected under design and copyright law. As a result, only the manufacturer can market these spare parts and repairers are required to obtain their supplies from the distributors in the manufacturer's network⁵⁰.

In the context of an opinion of 2012 on the vehicle repair and maintenance sectors and the manufacture and distribution of spare parts, the French Competition Authority (hereinafter referred to as “the Authority”) analyzed the impact of this legal protection on competition⁵¹: while the Authority considered

⁴⁶ Commission Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, OJ 2002, L 203/30.

⁴⁷ Regulation (EC) No 715/2007 of the European Parliament and of the Council of 20 June 2007 on type approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, OJ 2007, L 171/1.

⁴⁸ Commission Regulation (EC) No 692/2008 of 18 July 2008 implementing and amending Regulation (EC) No 715/2007 of the European Parliament and of the Council on type-approval of motor vehicles with respect to emissions from light passenger and commercial vehicles (Euro 5 and Euro 6) and on access to vehicle repair and maintenance information, OJ 2008, L 199/1.

⁴⁹ Commission Regulation (EU) No 566/2011 of 8 June 2011 amending Regulation (EC) No 715/2007 of the European Parliament and of the Council and Commission Regulation (EC) No 692/2008 as regards access to vehicle repair and maintenance information, OJ 2011, L 158/1.

⁵⁰ It may be stressed in this respect that there is no European harmonisation on this point since Directive 98/71/EC on the legal protection of designs simply that “Member States shall maintain in force their existing legal provisions relating to the use of the design of a component part used for the purpose of the repair of a complex product so as to restore its original appearance and shall introduce changes to those provisions only if the purpose is to liberalise the market for such parts”. Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs, OJ 1998, L 289/28, Article 14.

⁵¹ Opinion of the Authority No 12-A-21 of 8 October 2012 on the operation of competition in the vehicle repair and maintenance sectors and the manufacture and distribution of spare parts, points 148 et seq.

it appropriate to retain this protection for visible spare parts known as “original equipment”, i.e. parts intended for the assembly of new vehicles, it nevertheless proposed to the legislators to lift this protection for visible spare parts known as “second equipment”, i.e. parts intended for repair⁵².

Indeed, in the Authority's view, such withdrawal of IP rights protection (which should be introduced gradually and after an introduction phase) would have the effects of lowering prices for visible spare parts, making the sector more efficient and reducing the partitioning between manufacturers' and independent repairers' channels.

Recently, in a speech to the French Competition Authority⁵³, French Prime Minister Edouard Philippe advocated a reform of IP rights for visible spare parts to end the exclusive sales rights currently enjoyed by car manufacturers in France.

2.2 Balance between IP Rights and Competition Law

French law does not contain any specific provisions that define how competition law should be applied to IP right holders in the use of their IP rights. Consequently, the principles governing the application of competition law to IP entirely derive from the decision practice of the European Commission and the Authority, as well as from the case law of the EU and the French courts.

In context, it can be considered that the competent authorities and courts have managed to strike a fair balance between guaranteeing the rights of IP holders and maintaining effective competition.

Indeed, it is generally accepted that IP rights granted to the holder of a patent are not affected, in their very existence by the prohibitions laid down by Articles 101 and 102 TFEU and Articles L.420-1 and L.420-2 of the French Commercial Code⁵⁴.

However, it is settled case law that IP holders may be sanctioned on the basis of competition law if they abuse their IP rights, i.e. if they engage in conduct which is not intended to defend their rights in good faith, but which is intended to prevent the entry or maintenance of competitors on the market.

First, as for the prohibition of *cartels*, the Commission held in the *Grundig* case that IP rights granted by a Member State by a company do not have the effect of limiting the scope of Article 101 TFEU⁵⁵ (and therefore Article L.420-1 of the French Commercial Code).

⁵² This withdrawal of protection only for aftermarket parts is also called a “repair clause” and has already been adopted in several EU Member States.

⁵³ Speech by Mr. Édouard PHILIPPE, French Prime Minister, 10th anniversary of the French Competition Authority, Paris – Palais Brogniart, Tuesday, 5 March 2019.

⁵⁴ See, for example: Decisions No 01-D-57 of 21 September 2001 regarding a referral and a request for precautionary measures of Advanced Mass Memories (AMM) against IOMEGA Corporation and IOMEGA International and No 06-D-19 of 6 July 2006 regarding a referral of TNC Distribution concerning the wholesale of spare parts for automobiles The French Supreme Court also clarified rules on jurisdiction in cases involving competition law and IP rights: commercial courts have jurisdiction over unfair competition cases involving patents, only in cases where the validity or infringement of such patents are not called into question: *Sté de Trevillers cartonnages et al. c/ Sté Abzac gestion*, 16 February 2016, *Sté Enez Sun et al. c/ Sté Europe et communication et al.*, 16 February 2016.

⁵⁵ Decision of the Commission No 64/566, 23 September 194, *Grundig / Consten*.

Second, as regards *abuses of dominant position*, decision-making practice in France includes, like in Europe, many examples of sanctions against companies holding IP rights on the basis of Articles 102 of the TFEU and L.420-2 of the French Commercial Code⁵⁶.

Third, IP holder may be sanctioned on the basis of the French Commercial Code's and the French Consumer Code's provisions related to unfair competition and misleading practices.

This section examines the main circumstances under which the rights held by IP rights holders may be limited on the basis of competition law.

2.2.1 Essential Facilities Doctrine

Under the *essential facilities doctrine*, an undertaking in a dominant position, having a non-duplicable product or service to which other undertakings must necessarily have access in order to compete with the undertaking in a dominant position, must give its competitors access to that indispensable product or service on a fair and non-discriminatory basis.

This doctrine was first applied to IP rights in the *RTE and ITP* case in which the Court of Justice of the European Union ("Court of Justice") sanctioned on the basis of Article 102 TFEU the refusal by six television channels to communicate their program schedules (protected by copyright) to a company wishing to create a weekly TV guide covering all the programs of the six channels (it was then considered that these schedules constituted an essential infrastructure)⁵⁷.

In line with the case law of the Court of Justice, the Authority also considered, in an Opinion of 22 May 2002, that:

*"[...] there is nothing in principle to prevent an intellectual property right from being considered an essential facility"*⁵⁸

The limitation of the rights of IP holders is nevertheless strictly regulated, since the application of the essential facilities doctrine to IP rights requires that the following three conditions are met:

- First, the information covered by the IP right must be an essential facility whose refusal of access must prevent the emergence of a new product for which there is potential consumer demand;
- Second, such a refusal must lack objective justification; and
- Third, the refusal must be such as to exclude any competition on a derivative market.

⁵⁶ Opinion No 97-A-10 of 25 February 1997 regarding a request for an opinion from the Groupement des éditions et de la presse nautiques on competition issues raised by the editorial policy of the French Navy's Hydrographic and Oceanographic Service, p. 11: "[...] the exercise of an IP right cannot be tolerated by competition law if it would constitute an abuse of the dominant position".

See also: Decisions No 06-D-27 of 20 September 2006 regarding a request for provisional measures submitted by the Autodistribution and AD Net companies against practices implemented by Automobiles Citroën and No 07-D-31 of 31 October 2007 relative to practices implemented by Automobiles Citroën.

⁵⁷ ECJ, joined cases C-241/91 P and C-242/91 P, *Radio Telefis Eireann RTE) and Independent Television Publications Ltd (ITP) / Commission*, ECR 1995 I-00743.

⁵⁸ Opinion No 02-A-08 of 22 May 2002 regarding the request of the association for the promotion of press distribution.

However, the Authority like the Commission may not have, in the context of certain decisions, demonstrated absolute rigor in demonstrating the above criteria. For instance, companies have been sanctioned for refusing to provide licenses to their competitors, not because the refusal prevented the emergence of a new product, but because the refusal prevented other companies from effectively competing in the market in which the IP holder was active in several precedents⁵⁹.

2.2.2 Abuses Resulting from a Normalization Processes

EU competition law sanctions certain practices specific to patents in the context of standardization processes. To limit the risk of abuse by companies holding such patents, the Commission recommended the establishment of specific procedures within standardization bodies, including the obligation for the participants in the standardization process, on the one hand, to declare all patents they hold that could be essential for the implementation of the standard⁶⁰ and, on the other hand, to undertake to grant licenses to third parties on FRAND terms to their essential patents.

However, some companies refuse to grant these FRAND licenses, or hide their patent title so as not to have to grant them.

One example of abuse of dominant position in the context of standardization is the practice of *patent ambush*, whereby a company holding an essential patent participating in a standardization process voluntarily fails to disclose the existence of its right to other participants in the process, in order to reveal it once the standard has been adopted, and to impose high licensing fees (i.e. not FRAND). The Commission sanctioned this practice on the basis of Article 102 TFEU in a decision *Rambus* of 9 December 2009⁶¹.

A second example of abuse of dominant position in such a context of standardization is the practice of *patent hold up*, where a company participating in a standardization process reveals the existence of an essential patent but fails to provide to competitors a license on FRAND terms⁶².

2.2.3 Abusive proceedings

Like European authorities and courts and French competent bodies held that the legal actions initiated by IP holders lawsuits, such as counterfeiting accusations against competitors entering the market, may under certain conditions constitute an abuse of dominant position, when these lawsuits are part of a plan to eliminate competition through legal abuse.

⁵⁹ See, for example: Decisions No 06-D-27 of 20 September 2006 regarding a request for provisional measures submitted by the Autodistribution and AD Net companies against practices implemented by Automobiles Citroën and No 07-D-31 of 31 October 2007 relative to practices implemented by Automobiles Citroën.

⁶⁰ Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements, OJ 2011, C11, pt. 286.

⁶¹ European Commission, 9 December 2009, case 38.636, *Rambus*.

⁶² ECJ, case C-170/13, *Huawei v/ZTE*, pt. 477

For instance, in the Cegedim case, a plaintiff accused Cegedim, a company in a dominant position on the market for medical information databases, of having put in place a strategy to foreclose the market, notably through the introduction of multiple proceedings within a very short period of time.

In the decision, the Authority stated that the initiation of legal proceedings by an undertaking in a dominant position could indeed constitute an abuse under Article 102 TFEU and Article L.420-2 of the French Commercial Code in exceptional circumstances. However the Authority considered that, in this case, these circumstances were not met:

“Consequently, and notwithstanding the fact that Cegedim is in a dominant position on the market for medical information databases for pharmaceutical laboratories for the management of medical examinations and has been unsuccessful in its claims against Euris by the Versailles Court of Appeal, as indicated above, the case does not provide any evidence of abuse by the intellectual property courts.”⁶³

2.2.4 Unfair competition and misleading practices

IP holder may be sanctioned on the basis of the French Commercial Code’s and the French Consumer Code’s provisions related to unfair competition and misleading practices.

For instance, the French Consumer Code forbids and punish misleading practices (a commercial practice that causes confusion with the brand of a competitor).

In 2016, the French Supreme Court ruled on a case involving a municipality against holders of brands incorporating the name of that commune. Notably, the French Supreme Court ruled that the Court of Appeal had not determined whether the use of the name of that municipality was likely to mislead an average consumer, considering that the products in question have in fact been sourced from the territory of that municipality, and whether this was likely to make a significant difference in the behavior of this consumer, leading him or her to make a purchase decision that he or she would not have otherwise made⁶⁴.

Furthermore, the Authority dealt with cases of disparagement, regarding practices that aim to hinder the market entry of generic products. In two cases, the Authority fined originator laboratories for disparaging the generic version of their originator medicinal products⁶⁵. In both cases, the Authority found that the originator laboratories had abused their dominant position and consequently were in breach of article L 420-2 Civil Code as well as article 102 TFEU.

Also, in the Nespresso case⁶⁶, Nespresso had a dominant position on the market for coffee-machine and engaged in several practices of technical, legal and commercial nature aimed to incentive the users of

⁶³ Authority, decision n°14-D-06 of 8 July 2014 regarding practices implemented by Cegedim on the sector for medical information databases, confirmed by CA Paris, 24 September 2015, 2014/17586. See also: Decision No 01-D-57 of 21 September 2001 regarding a referral and a request for precautionary measures of Advanced Mass Memories (AMM) against IOMEGA Corporation and IOMEGA International.

⁶⁴ Cass. Com. 4 October 2016, 14-22.245, Commune de Laguiole v Lunette Folomi.

⁶⁵ Authority, Decision 13-D-11 relating to practices implemented in the pharmaceutical sector and decision 13-D-21 of 18 December 2013 regarding practices implemented on the French market for high-dosage Buprenorphine sold in private practices.

⁶⁶ Authority, decision 14-D-09 of 4 September 2014.

its coffee-machine to purchase its own-brand coffee capsules⁶⁷. In particular, on a technical level, Nespresso made several modifications to its coffee machines to render coffee capsules produced by competing manufacturers incompatible with the new model.

Following the complaint of two companies, the Authority required Nespresso to take several commitments designed to remove obstacles to the entry on the market and the development of competing capsules that would be compatible with the Nespresso machines. In this context, Nespresso undertook to notify competitors of information about any technical modifications of its coffee-machines that would affect the interaction between the machine and the capsule.

In another case, the Paris Court of Appeal quashed the FCA's f of an abuse resulting from the use of a brand. The FCA fined EDF EUR 13.5 million for having unjustly favoured its EDF ENR subsidiary that operates in the emerging market for photovoltaic solar power by making various resources available to it that could not be replicated by competitors⁶⁸:

- EDF Bleu Ciel brand as well as its resources for the prospection, promotion and marketing of photovoltaic offers via Conseil Energie Solaire;
- The brand image and reputation of EDF;
- EDF ENR logo and trademark, that are similar to those used by the incumbent operator; and
- The customer database of the former monopoly that contain more than 20 million names and addresses.

EDF thus created confusion among consumers regarding the distinction between its public service activity of electricity supply and the operations of its photovoltaic solar power subsidiary. Among other things, the FCA affirmed that EDF allowed its subsidiary EDF ENR to use the brand image and reputation of the incumbent operator, EDF, as well as its material and human resources, to market its solar power products. The resulting confusion in the minds of consumers with respect to the role of the various entities within the EDF group in the solar power sector and by allowing EDF ENR to take advantage of the reputation of its brand, EDF allowed its subsidiary to benefit from a competitive advantage that was non-replicable and was not based on its own merits.

However, the Paris Court of Appeal⁶⁹ held that the FCA's demonstration was not based on the use of the brand itself, but rather on market characteristics which, in the opinion of the FCA, increased the benefit of using the incumbent operator's brand, but which were not supported by evidence. Particularly, the Court of Appeal affirmed that the FCA did not demonstrate that competitors who did not enjoy brand awareness had difficulties to enter the market.

⁶⁷ Authority, Press Release, http://www.autoritedelaconurrence.fr/user/standard.php?id_rub=592&id_article=2418&lang=en.

3. IP Rights and other Branches of Law

3.1 Legal Restrictions on the Exercise of IP Rights under other Branches of Law

Additional legal restrictions on exercising IP rights may arise from other branches of law/sources of law, such as fundamental rights, torts, contracts, or consumer protection laws.

Fundamental rights may impose restrictions on the exercise of IP rights, especially the rights attached to copyrighted works. Fundamental rights principles have been uniformly and efficiently applied in France with respect to IP rights- While copyright is itself, a fundamental right, by its attachment to the right of ownership⁷⁰, its enforcement is balanced in light of other fundamental rights, in particular the freedom of expression (encompassing the freedom of speech, the freedom of the press and the right to information)⁷¹ and the right to privacy.⁷² In France, freedom of expression is always interpreted in a broad way by national courts and in particular extends to the parodic use of trademarks. For example, the French Supreme Court⁷³ authorized the parodic use of the *Camel* cigarette brand based on freedom of expression and the proportionate needs of public health. It also authorised the parodic use of the trademark “ESSO” and “STOP ESSO” under the modified form “E\$\$O” and “STOP E\$\$O” in relation to a campaign for environment protection. The Supreme Court found that such use was proportionated to the needs of the fight against pollution⁷⁴.

Specific *torts* may also lead to preventing an author from exercising her/his rights over her/his work. They include defamation,⁷⁵ injury,⁷⁶ public incitation to discrimination, hatred or violence against a person or group of persons based on their origin, ethnicity, race, gender, sexual orientation, religion,⁷⁷ apology of terrorism⁷⁸.

Other restrictions on exercising IP rights may arise from an *agreement* between the parties, such as covenants not to sue, covenants not to assert IP rights, coexistence agreements, licenses or assignments of IP rights, undertakings to grant licenses under certain conditions or certain rates. The latter finds particular application in the telecommunications sector where standardization requirements oblige operators to undertake granting licenses at fair reasonable and non-discriminatory terms (FRAND) to any operator willing to make use of the invention object of a standard essential patent (SEP)⁷⁹.

Consumer protection laws may complement IP laws, such as for instance, the provisions of the Trademark Act on fraudulent or deceptive signs (discussed above), by restricting the use of such signs

⁷⁰ As held by the French Constitutional Council in a decision of July 27, 2006, Docket n°2006-540 DC. The right of ownership is protected at the French level pursuant to Articles 2 and 17 of the Declaration of the Rights of Man and of the Citizen of 1789 (hereafter the “DRMC”) and at the European level by Article 1 of the Additional Protocol 1 ECHR.

⁷¹ Protected at the French level by Article 11 of the DRMC, and at the European level by Article 10 ECHR.

⁷² Protected at the French level by Article 9 of the Civil Code, and at the European level by Article 8 ECHR.

⁷³ French Supreme Court authorized, 2nd Civil Chamber, 19 October 2006, Docket n°05-13.489,

⁷⁴ French Supreme Court, Commercial Chamber, 8 April 2018, SA Esso c. Assoc. Greenpeace France Docket n°06-10.961.

⁷⁹ Please refer to section 2.2.2 above.

(and not only their registration as trademarks).⁸⁰ Consumer protection laws seem to have been uniformly applied in France.

Finally, the Court of Justice of the European Union has ruled that the EU treaties' provisions regarding the *free movement of goods* gave priority to certain IP rights over others. Thus, that the Court have ruled that the holder of an IP right on a product in the territory of a Member State may not oppose the import into that territory of that product, provided that it has been lawfully manufactured and marketed in the territory of another Member State by the person who, in that other territory, holds the right or has its authorization⁸¹.

This principle stems from the exhaustion of rights theory, whereby the Court considers that any person who has assigned or consented to the use by a third party of his IP right can no longer oppose such use and allows any legitimate holder of an IP right to exercise it to export his products without obstacle.

The application of this theory is, however, subject to conditions: the first commercialization of the product in the territory of a Member State must be lawful (i.e. the product should be put on the market in a lawful way) and such commercialization must be carried out by the holder of the right, or by a person authorized by him. Moreover, if the product was initially commercialized on the territory of a third country, its rightful owner must have put it onto the market. Moreover, in the latter situation, the holder of the rights in the Member State where the products are commercialized in the first place may oppose practices⁸². These nuances clearly show the territorial limit of the prerogatives of the Court of Justice as regards the free movement of goods and services, since it applies only between Member States of the Union and the European Economic Area, excluding third countries.

However, the principle of exhaustion of rights does not apply in the same way to all IP rights and does not find any application to some of them.

For instance, as regards copyright, in the case where a copyrighted work is made available to the public by representation, the principle of territoriality of rights is fully applicable, and the transfer of rights allows the prerogatives attached to this right to remain in the other territories of the Union⁸³.

The same applies to trademarks, in the event of the right of trademarks being fragmented in the territory of several States, the owner of the trademark in a given territory may oppose to the importation of the product into its territory⁸⁴.

As for patents, the principle of exhaustion of rights fully applies⁸⁵, except in the case where the circulation of the good takes place under a compulsory licensing mechanism⁸⁶.

⁸⁰ Articles L.121-1 *and seq.* (unfair commercial practices) and L.441-1 (fraud and deceit) of the Consumer Code.

⁸¹ In the field of copyright first: ECJ, 8 June 1971, case 78/70, *Deutsche Grammophon c/Metro*, ECR 1971-00487.

⁸² ECJ, 15 June 1976, case 51/75. *EMI Records v/CBS United Kingdom*, ECR 1976 -00811

⁸³ ECJ, case 62/79, 18 March 1980, *Coditel I.*, ECR 1980 00881

⁸⁴ ECJ 17 October 1990, *HAG GF*, No C-10/89.

⁸⁵ ECJ 31 October 1974, *Centrapharm c/Winthrop*, No 16/74.

⁸⁶ ECJ, 9 July 1985, *Pharmon v Hoechst*, No 19/84.

3.2 Remedies Available under other Branches of Law to Defendants in Unjustified IP Infringement Proceedings against Claimants

All remedies are equally applicable to all operators in the manufacturing/commercialization chain:

- IP rights holders will not likely get additional remedies by invoking other fundamental rights since in cases where their rights would conflict with other fundamental rights, such as the freedom of expression or the right to privacy, infringement claims by IP rights holders may be first dismissed (see above footnotes 43 and 44).
- Torts are subject to criminal sanctions and are detailed by the provisions enacting them⁸⁷. Particular attention should be paid to unauthorized use of a patented invention by a person who is not the manufacturer. In this case, patent rights will be considered as breached only if the patent owner proves that the alleged infringing acts has been consciously conducted⁸⁸. Thus patent owners usually send notice to the alleged infringer who is not the manufacturer of the product, to notify him of the grant of the patent and any potential breach. However, French courts are stringent regarding these letters, which may constitute acts of defamation⁸⁹ if they contain non-measured and threatening terms⁹⁰.
- IP rights restrictions arising from contractual provisions are sanctioned under the terms of the contract, or otherwise by the applicable provisions of French contracts law.
- Breaches of the French Consumer Code may be subject to a large number of sanctions and measures⁹¹.
- Addressees of abusive or dilatory claims of IP infringement may also more generally claim damages and interest from the IP right holder for abuse of process, and seek a fine of up to EUR 10,000⁹².

As for the legal counsels of the defendant, their civil liability cannot be engaged by third parties, except for cases of serious fault, i.e. infringement of professional conduct rules.

⁸⁷ Public defamation and injury may be punished by a fine of 12,000 euros, raised to a 1 year imprisonment sentence and a EUR 45,000 fine in some specific instances (Article 32 of the French Act of July 29, 1881, on the Freedom of the Press); public incitation to discrimination, hatred or violence against a person or group of persons on the basis of their origin, ethnicity, race, gender, sexual orientation or religion may be punished by a 1 year imprisonment sentence and a EUR 45,000 fine (Article 24 of the same Act); apology for terrorism is punishable by a 5 years of imprisonment sentence and a EUR 75,000 fine (Article 421-2-5 of the Criminal Code).

⁸⁸ Article L. 615-1 IPC.

⁸⁹ Sanctioned on the basis of Article 1240 of the Civil Code, applicable to the compensation of tortious actions in general.

⁹⁰ See for instance: French Supreme Court, 27 May 2015, 14-10800.

⁹¹ For instance, as set out by Articles L.454-1 and seq., the violation of Article L.441-1 is punishable by 2 years of imprisonment and by a EUR 300,000 e fine. This fine may be raised up to 10% of the annual average turnover made by the author of the infraction.

⁹² Article 32-1 of the Civil Procedure Code.

4. Restrictions and Remedies for Unjustified IP Claims

Unjustified IP claims and more specifically unjustified threats against alleged infringers are progressively becoming a common issue for businesses and private persons. While no legal framework has been adopted to address such practices, the latter have been subject to judicial review by the French courts.

4.1 The Absence of Specific Restrictions and Remedies under French Law

In France, there is no significant problem with claimant or defendant when asserting unjustified claims of IP infringement or having bullying behavior.

There is no list under French law of unjustified claims or procedural to deal with unjustified claims, i.e. via a first preliminary hearing for instance.. However, general civil liability principles⁹³ allow compensation for the damages caused by an abuse of process. This mechanism ensures protection against any kind of abusive procedural threat or behavior, before or after the claim has been filed. In addition, the French Civil Procedure Code⁹⁴ grants courts the discretionary right to order the payment, by the losing side, of the whole or, more often, part of the costs incurred by the winning side. In this regard, French courts tend to sanction frivolous claims with higher costs. This *ex-post* control usually suffices to deter unjustified claims or bullying behavior and offers the advantage, as opposed to, for instance, the introduction of a preliminary hearing, of not lengthening the procedure. Indeed, the more the winning party would have been obliged to incur internal and external costs to defend itself, the higher the “sanction” ordered by the Court would be.

Non-contradictory proceedings are also subject to a strict control. While theoretically provided by law, non-contradictory injunctions for IP matters are never granted in practice, given that the initiation of such proceedings requires extreme emergency. As for the preliminary seizure for infringement or “*saisie-contrefaçon*”, which can be very invasive for the defendant, they have been subject to stricter judicial control over the past few years both before (a minimum level of proof of the infringement is currently required) and after (if contested by the defendant) they are issued.

4.2 Example: Cease-and-Desist Letters

“Cease-and-desist” letters are letters in which a third party is asked by an IP rights holder to complete certain actions or to abstain from certain conducts as well as letters of knowledge by which recipients are informed of their existing rights. Although such letters are usually sent in an amicable setting, they may be interpreted as constituting abusive claims and sanctioned by French Courts.

Under French law, an infringement of IP rights may consist of offering, putting onto the market, the use, the holding for use or the sale of counterfeit products. Under Article L.615 (1) (3) IPC, such practices are deemed unlawful where they are committed with knowledge. Thus, to be able to launch infringement proceedings, IP holders must inform prospective buyers or distributors of the patent grant. Furthermore,

⁹³ Article 1240 of the Civil Code.

⁹⁴ Article 700

letters addressed to potential infringers must follow solely information purposes and their content must be “measured and objective” without any forms of menaces. Such letters should not be expedited prior to the IP right grant.

The Paris Regional Court ruled that a letter of warning which is knowingly addressed to a buyer of an allegedly infringing product, may be a source of liability.⁹⁵ For instance, it considered as wrongful the premature and systematic expedition of such letters prior to the publication of a patent grant in the European Patent Bulletin. As an aggravating circumstance, this court considered the fact that the letters in question had been sent to all customers of the company at whose seats counterfeit goods had been seized (referred to by the Court as “Company X”), in which they had been asked to verify whether the equipment they acquired from Company X does not infringe a patent not yet granted.

The Court noted that the addresses of this company’s customers had been obtained during the raid at its seat and that the company concerned by the counterfeit proceedings was IP holder’s main competitor. Taking into account these elements, the Court took the view that the conduct of the IP rights holder constituted an unfair trade practice vis-à-vis its main competitor or at least as a negligent fault. Considering the impact of the order cancellations on Company X’s activities, the Court applied the general provisions of the Civil Code on civil liability (Articles 1240 and 1241 Civil Code) and condemned the IP holder to the payment of damages and interest.

Although the IP holder was condemned to damages, this matter illustrates the loophole in French IP law with regards to specific provisions on abusive claims and threats of enforcement.

Indeed, while abusive threats may be interpreted as unfair commercial practices or abuse of dominance⁹⁶ under Article 102 TFEU and Article L.420 para. 2 of the French Commercial Code (please refer to section 2 of this Chapter), neither the French Commercial Code nor the Intellectual Property Code contain any specific provisions to sanction such practices⁹⁷ and the Paris court did not provide with any clarification as to the concept of “threat” and the conditions under which such threats may be considered legal.

That said, it would be useful to take into consideration the applicable legislative framework in other jurisdictions. In this respect, examples of national legislation dealing with abusive threats can be found

⁹⁵ Judgment of the Paris Regional Court (3rd Chamber, 2nd Section), case 2015/03165, 13 January 2017.

⁹⁶ A classic example for abusive practices by IP holders are actions for infringement launched by patent holders. In *Huawei Technologies Co Ltd v ZTE Corp*, the Court of Justice affirmed the right of an IP holder to launch infringement proceedings. The Court noted that holders of standard essential patents (“SEP”) may be able to prevent products manufactured by competitors from appearing or remaining on the market while reserving to themselves the manufacture of the products concerned (CJEU, case C-170/13, *Huawei Technologies Co Ltd v ZTE Corp*, EU:C:2015:477, pt. 52). In this sense, the refusal by SEP holders to grant licenses on fair, reasonable, and non-discriminatory (“FRAND”) terms “may, in principle, constitute an abuse within the meaning of Article 102 TFEU” (pt. 53). The SEP holder is required to alert the alleged infringer and present it with specific offer for a license on FRAND terms before bringing an action for infringement. Failure to take such measures can be considered as an abuse of dominance (pts. 63-67). In this judgment, the Court established a balance between the interests of the SEP holder and the SEP user. See further: Decision of the European Commission, 29 April 2014, case AT.39985, *Motorola-enforcement of GPRS standard essential patents*.

Article L.615 para. 1 ICP provides, however, that secondary infringers which do not directly manufacture the product) must be aware of the patent infringement and can be made aware of the infringement by a letter.

in this book. However, as German legislation is not covered in this book, we have carried out a comparative analysis of the provisions of German law on abusive threats below.

4.3 Unjustified Claims and Warnings – a Common Trend in other Member States?

Cease-and-desist letters are also a common practice in IP enforcement proceedings before German courts. Section 12(1) of the Act against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*, “UWG”) provides that such letters should be sent to the defendant prior to the initiation of court proceedings.

The German courts have ruled that claims for cease-and-desist may be initiated against an indirect infringer in the event of a violation of absolute rights if a party which is not considered as a perpetrator or an accomplice has intentionally and in an adequately causal way contributed to the violation of the protected rights. According to established case-law of the Federal Supreme Court (*Bundesgerichtshof*), the secondary infringer’s liability requires the violation of examination obligations. The extent of such obligations is determined by whether and to what extent the party against whom claims are asserted as an indirect infringer may, under the specific circumstances, reasonably be expected to carry out such examinations⁹⁸.

In contrast to the Paris Regional Court, the Federal Supreme Court has set certain legal standards as to the actual intention and knowledge of the infringer. However, it has not handled the question in how far enforcement threats may constitute an unfair trade practice or abuse of dominant position, nor has it considered an eventual “safe harbor” for such threats. In this sense, it remains open whether and to what extent the new framework on threats introduced in the UK may be used as a point of reference for any legislative initiatives at French or EU levels.

5. Other Legal or Policy Initiatives that Would Facilitate the Legitimate Enforcement of IP Rights while Restricting the Unjustified Assertion of IP Rights

As part of its Digital Single Market initiative, the EU co-legislators adopted the Directive on Copyright in the Digital Single Market (the “Copyright Directive” or the “Directive”)⁹⁹. This controversial EU initiative aims at updating copyright law in Europe.

The Directive aims at laying down a harmonized copyright framework across the EU and ensuring a higher level of protection for authors and performers deemed to be in a weaker contractual position when granting licenses or transferring their rights¹⁰⁰. The Directive further aims at guaranteeing that authors and performers are entitled to a fair remuneration corresponding to the *actual or potential economic value* of the licensed rights¹⁰¹. In addition, before implementing the transparency obligations

⁹⁸ Federal Supreme Court, April 30 2008, case I ZR 73/05, *Internetversteigerung III*, pt. 50; Federal Supreme Court, 12 May 2010, case I ZR 121/08, *Sommer unseres Lebens*, para. 19; Federal Supreme Court, 18 November 2011, case I ZR 155/09, *Sedo*, pt. 37.

⁹⁹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, OJ 2019, L 130, pp. 92-125.

¹⁰⁰ See Recital 72.

¹⁰¹ Recital 73.

contained in the Copyright Directive, Member States have to consider the specifics of the various content sectors to better assess the overall work or performance in question¹⁰², including through collective licensing¹⁰³. To prevent unfair practices, Member States must ensure that parties facing difficulties related to the licensing of rights for distribution of audiovisual works on video-on-demand services may rely on the assistance of an impartial body or mediators¹⁰⁴.

The Directive further confirms the principle of “appropriate and proportionate remuneration” to authors and performers. However, the Directive does not provide further details to specify the concept of “appropriate and proportionate remuneration” nor the method for calculating an adequate remuneration (e.g. based on a percentage of the total sales generated). It may be incomplete as to the fees to be paid by end-users and does not contain specific obligations on authors or performers to grant licenses. The Directive further fails to address the role of collecting societies which according to established case-law may constitute a monopoly or enter into anticompetitive agreements¹⁰⁵.

Although the Directive does not contain provisions regarding competition and fair-trade practices, it may have a significant impact as it contains provisions considered, in particular, likely to restrict consumers’ access to content and consumers’ choice by imposing new constraint on the Internet players. Indeed, the Copyright Directive introduce the so called “link tax” allowing publishers to charge Internet platforms such as Google News when displaying new stories (Article 15) and an “upload filter” (Article 17). Under Article 17, websites such as YouTube are imposed new duties to prevent users from uploading copyrighted content. There have been numerous criticisms¹⁰⁶ on the impact of those provisions, while the ability of such “upload filters” to scan user content prior to upload is also questioned.

The Member States have until 7 June 2021 to implement the Directive into their national legislations.

In May 2019, the French National Assembly voted for the adoption of a Law for the establishment of a neighboring right to the benefit of press agencies and press publishers¹⁰⁷. Published on 26 July 2019, this Law partially implements the Copyright Directive. The creation of this neighboring right aims at ensuring a remuneration for press agencies for the online use of their productions by information aggregators such as Google News or social networks¹⁰⁸. When fixing the amount of such remuneration, account is taken of various elements, such as the human, material, and financial investments made by

¹⁰² Recital 77.

¹⁰³ Article 12 (1) of the Directive.

¹⁰⁴ Article 13 of the Directive.

¹⁰⁵ See ECJ, case 262/81, *Coditel SA v. Cine Vog Films* (“Coditel II”), ECR 1982 -03381; ECJ, case C-403/08, *Football Association Premier League Ltd and Others v QC Leisure and Others*, ECR 2011 I-09083; see further: ECJ, case C-110/88, *François Lucazeau and others v Société des Auteurs, Compositeurs et Editeurs de Musique (SACEM) and others*, ECR 1989-02811.

¹⁰⁶ According to Poland’s Minister Jan Krzysztof Ardanowski, Article 17 “*establishes a very dangerous mechanism, which can lay foundations for introducing censorship of the internet in the future*” while the provisions of Article 15 could “*be very harmful to the circulation of information.*”, quoted by Samuel Stolton, “Censorship fears linger as copyright directive overcomes final hurdle”, in: *EURACTIV* (15 April 2019),: <https://www.euractiv.com/section/copyright/news/censorship-fears-linger-as-copyright-directive-overcomes-final-hurdle/>. Accessed 7 August 2019.

¹⁰⁷ Law Nr. 2019-775 of 24 July 2019 for the establishment of a neighboring right to the benefit of press agencies and press publishers, in: Official Journal of the French Republic 2019, Nr. 0172, Text Nr. 4, <https://www.legifrance.gouv.fr/eli/loi/2019/7/24/MICX1902858L/jo/texte>. Accessed 8 August 2019.

¹⁰⁸ Article L. 218 (4) IPC.

the publishers as well as the role of the press publications for the provision of information of political and general character and the importance of their use by online public communication services. In addition, the Law provides for “a fair and appropriate share” of the remuneration referred to¹⁰⁹. The Law does not contain any provisions regarding licensing obligations, collective bargaining or related to fair commercial practices. However, it aims at guaranteeing a balance between a fair merit for press agencies’ and publishers’ outputs, on the one side, and an open access to information, on the other.

¹⁰⁹ Article L.218 (5) (I) IPC.