

# à la une

## Intellectual Property Department / NICT / Media

The month of August tends to become the period of choice for passing new technology laws. This year it is the copyright law and neighbouring rights in information society that finally came in force putting to an end the long process of implementation of directive of May 22<sup>nd</sup>, 2001. Our *A la Une* suggests your coming back to some of the numerous aspects of this law commonly called "DADVSI". Its other main provisions in our further editions...

Enjoy your reading!

Finally passed on June 30<sup>th</sup>, 2006 the DADVSI law caused ultimate development after having been submitted to the Constitutional Council who substantially modified the Government bill in its decision of July 27<sup>th</sup>, 2006. Here are some of its pieces:

### ■ Failure of the « scaled up answer » :

The vote in favour of global licence in 2005 stirred much controversy about unlawful downloading of works via the net. Being contrary to the government's will, the solution was rejected.

In order to pacify the minds Culture Ministry suggested a scaled up answer system. It was planned that downloading and putting a work at the user's disposal on a non commercial purpose by means of P2P software would be punished by a fine of the amount ranging from 38 to 150 euros.

Far from leading back to peace and quiet this mechanism stirred much criticism too. One of its aspects pointed out that the system led to a rather incoherent situation: the same behaviour (downloading or putting at the user's disposal) was more severely punished according to whether or not it had been committed by means of P2P software. In a word, an email user risked a 3 years imprisonment while a P2P user only incurred the payment of a fine.

The Constitutional Council in its decision of July 27<sup>th</sup>, 2006 has censored this provision because it ignored the constitutional principle of equal rights in front of the criminal law. Downloading and uploading on P2P networks obey the infringement law rules (a 3 years imprisonment and a 300 000 euros fine),... subject to the recent developments of case law!

### ■ Consecration of Digital Rights Management (DRM)

DRM was to be covered by an "adequate legal protection". The legislator chose to qualify the avoidance or the neutralisation of this protection as an offence moderating this principle by "interoperability exception". This exception was abolished by the Constitutional Council.

From now on two distinct forms of behaviour are considered to be an offence:

Firstly, the breach of a DRM measure without any technological application assistance is punishable by a 3 750 euros fine, while the author of the same behaviour assisted by this means incurs a 750 euros fine (this provision is to be inserted in the law by a further decree)

Secondly, the fact to obtain or to offer consciously a technical means which involves the breach of a DRM measure is punishable by a 6 months imprisonment and a 30 000 euros fine.

The exception limiting the application scope of the above mentioned offences remains the hypothesis in which the acts are committed for the sake of information security, though its application scope was not specified.

Finally, the law creates a new independent administrative authority: The Technical measures regulation authority (ARMTP in French). Its mission will consist in making sure that DRM measures do not lead the rightholders to "involving, while using a work, of some more limitations independent of those expressly decided".

### ■ Extension a minima of the legal licence

If there are no more questions regarding the application of the legal licence system in relation to radio simulcasting, this subject was more delicate when it concerned the application of the legal licence for webradios which use the internet as the only broadcasting means.

The opportunity of the extension of the legal licence to the webradios was not taken; after Senate's rejection of the amendment proposing the extension, Culture Ministry declared that: "*Maintaining an exclusive right seems necessary to master this new exploitation means, the contours of which are not very well defined. A contractual approach is quite conceivable (...)*".

The webradios which broadcast on the net only will have to continue negotiating case by case with the collective management companies in charge of these rights.

The fact remains that the application scope of the legal licence has been somehow extended to specify that from now on it applies as much to the reproductions made by the audiovisual communication companies who mean to add music to their audiovisual programs, as to those made by third parties on the account of the above mentioned companies, which should give more legal security to the broadcasters.

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The DADVSI law was to modify deeply our "droit d'auteur". If the revolution that made up the "scaled-up answer" was dismissed by the Constitutional Council, the passed provisions contain enough new rules and let hang over enough uncertainty to busy lawyers and courts.

## ■ **NEWS :**

### • **Anti-virus and decompilation software**

The decompilation of a program in order to inform the public about the program's flaws, in case of absence of user licence, constitutes an infringement unsusceptible to involve the application of the exception of "decompilation made for the sake of interoperability".

This principle comes from the decision of the Court of Appeal of Paris dated February 21<sup>st</sup>, 2006 (*CA Paris, 13<sup>ème</sup> Ch., 21 février 2006 Guillaume T. / Eyal D., Tegam International*).

In this case Guillaume T. had carried out the decompilation of an anti-virus software in order to publish afterwards on the net the security flaws inherent to the said software.

This latter, a searcher in the United States, had recognized "*having acted from simple intellectual curiosity having never worked for the competing Tegam Company (the software's editor) and having never sought any profit.*"

The judges of the Court of Appeal confirm the primary jurisdiction's decision having checked whether the provisions of article L. 122-6-1 IV of the Intellectual Property Code could be applied. This provision is exempting for anyone who carries out a software reproduction or its translation without authorization when this decompilation is essential to obtain the information necessary for the interoperability.

Now, from Parisian judges' point of view, it is the matter to remind that decompilation is only legitimate in the hypothesis of the above mentioned article and to state that this act constitutes an infringement "*as soon as, like in this case, the author of the manipulation who is not the rightholder does not act for the sake of the interoperability and puts the obtained information at the disposal of the third party (the net surfers)*".

Without defining the notion of interoperability this decision has the merit of not making an extensive interpretation of it.

### ■ **Application of the termination of an exclusive recording contract concerning a music issue**

In its decision of July 5th, 2006 the Cassation Court decided that the termination of an exclusive recording contract does not imply the retroactive termination of the assignments which took place earlier (*Cass. 1<sup>ère</sup> Civ5 juillet 2006 SARL Editions du Felin Sony Music c/ Guest P. et autres*).

In this case it was the matter of specifying the application of the judgment which decided the termination of an exclusive recording contract concluded between an artist and his record company.

In this matter, the Court of Appeal of Paris decided in its judgement of May 15th, 1999 the termination of an exclusive recording contract binding the producer to the artist. They arranged that when the contract expired the producer would remain the assignee of all the rights related to the artist's performance.

Now, after this decision the producer put on the market a compilation which contained a song sung by the artist. Considering that this compilation intervened as a complete breach of his rights the artist issued a writ against its record company.

The claim was accepted by the judges of primary and appeal jurisdictions considering that the termination of the contract had led to the termination of the assignment of the rights granted by the artist. The exploitation of the records in the form of compilation cannot take place without misjudging the rights provided by article L.212-3 of the Intellectual Property Code.

The Cassation court censors the previous decision on the ground that the judicial termination applied to the future only taking care to point out the terms of the recording contract according to which the producer remained the assignee of the artists' patrimonial rights as it is expressly stipulated.

### • **Trademark infringement and « Adwords »**

Two recent decisions have just convicted the service of Google's "sponsored links" (called "Adwords").

In fact, this company offers two services of advertisement referencing: "Adwords and "Premium Sponsorship Advertising".

These services enable Google's clients to link one or several keywords to their advertisement, this advertisement being shown

then in the margin of the list of the so-called "standard" answers when the user proceeds with a search implying one of the keywords.

In the first case the Court of Appeal of Paris has confirmed the primary jurisdiction's decision convicting Google's search engine for infringement, unfair competition and deceptive advertising (*CA, 4<sup>ème</sup> ch. 28 juin 2006 - Louis Vuitton Malletier / Google*).

In the primary proceedings Louis Vuitton Malletier company had it certified that the new Google's services "Adwords" and "Premium Sponsorship Advertising" permitting to show the sponsored links in the margin of the user's search, directed the user, when the keywords "Vuitton" or "LV" were activated, to the sites which sold the goods infringing the famous trademark

The court of first instance of general jurisdiction of Paris in its decision of February 4<sup>th</sup>, 2005 convicted Google on the basis of three distinct grounds which are trademark infringement, unfair competition and deceptive advertising.

On the basis of the fact that Google does not limit itself to store the advertising information provided by the advertisers, but has an advertising company's activity, the Court of Appeal of Paris dismissed the appellant reproaching the first judge for having not used the special liability of hosting service providers as it follows from the LCEN (the Law for "Trust in electronic economy") of June 21<sup>st</sup>, 2004.

Following the postulate that Google acted as an advertising company, the publisher of an eponymous search engine is convicted on the three grounds held by the primary proceedings.

The Court of Appeal pointed out that it was up to "*Google France and Google Inc. to implement pertinent technical means in order to avoid the recorded excesses, especially because the conception and the contents of the suggesting keywords device were strongly incentive for carrying out the acts of infringement*".

Now, it is on the similar ground that the court of first instance of general jurisdiction holds Google liable in the second case which opposed it to an association of household appliances makers (*TGI, 12 juillet 2006 – Gifam / Google*) reproaching it for breach of trademark rights held by the members of the association.

However, unlike the previous decision, the judges dismiss the trademark infringement ground and hold the search engine liable rejecting the ground of special liability of hosting service providers, again, because of the advertising character of the activity developed by Google.

The decision joins in the ground of the Court of Appeal expressed some days before it and concludes that: "*Google in having not implemented a device to control the legitimate use of the names of trademarks as keywords in "Adwords" system by the advertisers, committed a tort to the applicant companies and breached collective interests of the profession of industry and of domestic electrical appliances.*"

Besides, the two of these decisions join each other once again on the ground of deceptive advertising.

Reading these two decisions and notwithstanding the difference of qualification in regard to the infringement, it can be concluded that Google's advertising services will have to be adapted for the French territory.

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