

Draft bill on the modernisation of audiovisual broadcasting and the television of the future

The 30 September 1986 law on freedom of communication has been amended many times over the last 20 years to keep pace with the technological advances made in media.

It was amended in 2000, to integrate the regulation of on-line information, and also in 2004, to transpose the European directives on electronic communications, known as the "2003 telecom packet", into French law. And now it is going to be amended again with the advent in France of terrestrial digital television.

Under the draft bill adopted on first reading by the Senate on 22 November 2006 and presented by Renaud Donnedieu de Vabres, Minister for Culture and Communication, analogue broadcasting will be phased out gradually to be replaced by digital television. As certain editors of services have expressed concerns and also their dissatisfaction, various compensations have been devised. The amendment of the 1986 law has also become necessary to encompass two important technological developments, i.e. high definition television and mobile TV.

- **The changeover from analogue to digital television.**

The first article of the draft bill organises the end of analogue television by 30 November 2011. The changeover to digital will take place zone by zone from 31 March 2008 onwards, following a timetable drawn up by the CSA (Superior Audiovisual Council).

A set of measures will be introduced to protect viewers' interests. The changeover to digital television does not imply that users will have to take out a new subscription or buy new equipment. An information campaign is also to be launched. Finally, as soon as the bill becomes law, equipment manufacturers and distributors will have an obligation to display clearly and comprehensively on their equipment whether it is capable of transmitting digital signals, particularly high definition. However, the production or sale of television receivers which are not compatible with digital signals will not be prohibited. The objective is to give people changing their televisions the opportunity to buy a digital television receiver directly. What remains to be seen is just how useful the information provided to consumers will be and what must be understood by the term "high definition" (are they "HD Ready", "Full HD" or "True HD" television receivers?).

The first consequence of the introduction of TNT (Terrestrial Digital Television) was the increase in the number of channels. And following on from that, the question then arose of the selection of these new channels. In addition, for all channels, analogue television will not exist after the end of 2008, and it will be phased out gradually before that date, but not necessarily at times corresponding to the date of the channels' broadcasting authorisation granted by the CSA.

- **The anticipated compensations.**

The draft bill authorises the initial broadcasting authorisation to be extended in certain cases. Channels already authorised for analogue broadcasting will be automatically authorised to continue their broadcasts in digital mode. In addition, the editor of the national unencrypted television service will be

allowed a 5-year extension of its digital broadcasting authorisation when analogue broadcasting ends.

The historical private channels will be granted a 5-year extension, to allow them to edit a new service for each frequency when analogue broadcasting ends.

As another legal compensation, the Government will grant authorisations to TF1, M6 and Canal+ for the same duration as the TNT channels, i.e. a further 5 years. Finally, new Article 104 grants a special privilege to registered national television channels making analogue broadcasts: their editors can ask to be allocated a bonus channel as soon as terrestrial analogue broadcasting ends.

- **The advent of HD and mobile TV.**

Title II of the draft bill authorises the CSA to issue calls for bids for the HD broadcasting of television services or the broadcasting of mobile TV services. For HD broadcasting, it is anticipated that preference will be given to digital broadcasting to take over from the services already authorised for terrestrial analogue broadcasting. Article 9-8 also adds that the editor's production and its capacity to make HD broadcasts will be brought under scrutiny.

Mobile TV is a response to a new mode of television consumption, i.e. a mobile one, like third generation mobile telephone services or digital music players. Under the draft bill, 20 to 25 mobile TV channels will be created and auctioned off to television and telecommunications operators. For the allocation of the mobile TV frequencies, the draft bill contemplates "*an allocation procedure of the radio facility to distributors of services*". This provision is a source of some concern for the A.C.C.e.S. (the Association of Registered Service Editing Channels), which believes that the distributors of services could use this allocation of frequencies to extricate themselves from the CSA's control, which would be detrimental to the obligations of the diversity of programmes and the contribution to the development of French production.

The draft bill also contains a guarantee that key events would be broadcast on all media. A television service will not be authorised to refuse the "full and simultaneous" takeover of its service by another electronic communication network, even if it can produce proof that it has an exclusivity agreement. It should be noted however that the draft bill does not give any definition of a "key event".

The draft bill should be examined by the French parliament on 30 January 2007, as announced by the Chairman of the Cultural Affairs Commission, Mr. Jean-Michel Dubernard, UMP member of parliament. If the draft bill were to be adopted, the amendment of the law would bring France into line with the other European countries. The European Council's conclusions of 1 December 2005 invited the Member States to complete the transition to digital as far as possible before 2012 and to publish their proposals on the subject before 2006. The Netherlands is the good pupil of the class, since it was the first to "unplug" analogue television on 11 December of last year.

However, some kinds of channels, such as speciality channels, have concerns about the current wording of the draft bill and are afraid that when analogue disappears, so will they. To be continued...

■ **NEWS FLASH:**

■ **Termination of an exclusive recording contract (Johnny Hallyday / Universal case).**

Johnny Hallyday, in a recording contract he signed in 1961, granted his producer exclusive recording rights. He had assigned his rights to his performances to the producer for a royalty based on the revenues from the exploitation of these recordings.

In 2002, "the teenagers' idol" once again signed up for the production of 6 new albums, assigning his rights to the producer by the signature of an exclusive recording contract.

The parties then reciprocally decided to terminate the contract between them by an agreement in which the performer would only have one album to record (instead of 6 initially) before the final termination on his contract with the producer.

After the termination of the contract, the performer instituted proceedings before the Employment Tribunal to have the assignments of his performing rights declared invalid.

On 2 August 2004, the Employment Tribunal ordered Universal to return all the master tapes of his songs right from the beginning by 31 December 2005 at the latest. The Tribunal also acknowledged the singer's resignation and its acceptance by Universal from 31 December 2005. The producers had difficulty in swallowing this judgment.

On 12 April 2005, the Court of Appeal reversed the Employment Tribunal judgment, finding that the producer as assignee of the performer's rights could validly continue to exploit his records.

The French Supreme Court confirmed the Court of Appeal judgment on 20 December 2006. It held that, unless the agreement between the parties contained a provision to the contrary, the termination by mutual agreement of the exclusive recording contract it was only applicable to future events and could not have the retroactive effect of cancelling prior assignments relating to recordings made during the term of the contract. The termination also cannot have the effect of cancelling the provisions that are intended to govern the relations between the performer and the producer once the contractual period of recording has ended.

As a result, the producer still owns the master tapes of the rock star's recordings and has kept its exclusive right to exploit them.

With this ruling, the Supreme Court adopted the principle of legal security: the security of the investment, which is the producer's protection. However, it should not be forgotten that the producer also holds the performing rights.

■ **Data files: distinction between personal files and business files.**

The 18 October 2005 judgment (Jérémy L.F. / Techni-Soft) of the social chamber of the French Supreme Court provided clarifications regarding the concept of employees' personal data files and thereby completed the swing in case law which started with the famous *Nikon* judgment of the French Supreme Court in 2001.

As a reminder, the French Supreme Court in its 2 October 2001 judgment had introduced the concept of the employee's "personal life", to describe the employee's privacy in the company. As a result, the employee has the right, even during working hours and on company premises, to the respect of his right to privacy. Therefore, an employer which opens his employees' emails when identified as being "personal" is guilty of a breach of the secrecy of correspondence (a part of privacy). The principle was laid down and all that remained was to define its contours.

On 17 May 2005, the French Supreme Court further clarified the rules relating to personal data files: after recalling that personal data files can only be opened by the employer if the employee is present or has been duly summoned, it nevertheless introduced the following exception. If there is a particular risk or event (mainly concerning paedophilia or harm to property), the employer can open the files without the employee's presence.

This judgment therefore added the final touch to the swing by tackling the issue of the fate reserved to business files, which were debated after the *Nikon* judgment.

The present case concerned an employee who had been fired because he encrypted data on his computer terminal which he had created using the computer tools made available to him by the employer.

The French Supreme Court recalled, on the one hand, the concept of the "personal space" of the employee in the company. Files are personal when the employee has identified them as such. Without this identification, the file is deemed to be a business file. The ground of the decision is unequivocal: "*files and folders created by an employee using the computer tool made available to him by his employer to carry out his work are presumed to be of a business nature, unless the employee identifies them as being personal.*"

In this connection, the Senate presented a bill on 13 June 2006 aimed at defining the term "business e-mail".

Furthermore, the French Supreme Court defined the regime associated with business files. It explained that the employer has access to business files, even without the employee's presence.

The Court reinforced the employer's right of access to the employee's business files when it approved the sanction applied by the employer (dismissal for gross misconduct) against the employee who deliberately blocked access to the files on his computer terminal.

Finally, it should be noted that the ground of the Supreme Court's decision leads *a contrario* to the reasoning of the 17 May 2005 judgment.

These two judgments recall the importance of setting up a computer charter in a company, in which the employer can indicate the language that employees must use to identify their personal files and therefore avoid any sanction by the courts.

■ **One euro in damages awarded to Nissan Europe after libellous and insulting remarks were made publicly in a personal blog.**

The 16 October 2006 judgment of the 17th Chamber of the Paris First Instance Court ordered the author of a blog, a former employee of Nissan Europe, to pay the company damages of one euro for using libellous and insulting language in her blog and to remove certain passages from the blog.

Libel is defined as being *the imputation of an act to a person or body which causes harm to the honour or consideration of such person or body* (Article 29 of the law of 28 July 1881 on the freedom of the press).

The content of the blog concerned the defendant's parental leave, where she complained of what she considered to be discrimination. After her return to work at the end of her parental leave, she was dismissed for gross misconduct. In her blog, which starts with the headline "*Maman in Nissan Europe, equal opportunities flouted*", the defendant proposes to "*reveal [her] eventful return to Nissan after parental leave, which led [her] to the employment tribunal*". The Court held that the accusation of discrimination is *a precise act contrary to honour and consideration, since it is likely to constitute a criminal offence*, and therefore constitutes libel.

The blogger claimed that she was protected by freedom of expression. The Court made the distinction in this judgment between the user of a blog, in other words a "*personal on-line journal where the author relates his experiences and opinions subjectively*" and a professional journalist. When the professional journalist uses libellous language, he is required "*to have first carried out a serious investigation marked by an effort to remain objective*" for his words to be protected by the freedom of expression. The non-professional blogger on the other hand is only required to "*have reliable information giving some credit to his statements*". This distinction is made because readers of a blog know that the words used are a unilateral expression of opinion, as opposed to a professional journalist's text, whose mission is to inform the public. However, the Court did note that the author of the blog did not claim she was expressing anything other than her personal point of view about the acts of which she considered she was a victim.

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