

■ **Topic of the month: A NEW FRAMEWORK FOR DOMAIN NAMES**

Domain names have now a legal framework. Its latest addition comes from a decree dated on February 6, 2007, No. 2007-162 "on the allocation and management of Internet domain names and amending the Post and Electronic Communications Code". It implements the law on electronic communications and audiovisual communication services from July 9, 2004. Its main points are as follows:

■ **The Republic of domain names**

In these frenzied election campaign times, the decree cannot truly be said to be without any political overtones. The name of the French Republic, its national institutions and its national public services can only be registered as domain names by these institutions or services. The same applies to names of local government authorities (even though a recent case law has shown some flexibility. For instance, a judge ruled that the name "levallois.tv" could be registered by a person other than the municipality of the same name, since there was no risk of confusion on the site). In addition, the names of individuals elected to public offices combined with words referring to the office they hold, can be registered by these individuals as a domain name which, as the Internet Rights Forum was quick to point out, will raise sensitive "same-name" issues.

■ **The domain name registries**

Until the actual implementation of the decree, the system of allocating and managing domain names in France was handled by the AFNIC which is the naming authority for domains in the .fr zone. It accredits registrars and manages access to the "Whois" data. The AFNIC, created in 1997, has for main task to manage the .fr and .re extensions. But it does not act as registrar since it does not sell domain names but merely manages the database. The decree from February 6, 2007 brought some changes: Article R.20-44-35 introduces a bidding system prior to the registries being appointed by a decree of the Minister for Electronic Communications. The acknowledged aim of this system is to guarantee transparency since the new powers conferred to the registries and registrars must have full and complete legitimacy.

■ **An a priori control of domain name**

One of the most important changes brought about by the decree is that now the registries will have a right of examination and even a power of censure over the domain names submitted to them. This is what is highlighted in Article R.20-44-47 of the Post and Electronic Communications Code (CPCE), which states that "Each registry informs immediately the competent government authorities of the domain names (...) which shows an unlawful nature or is contradictory to public policy, which it has observed or would have been notified to it (...)".

Is this not reminiscent of the prescriptions concerning the Law on Confidence in the Digital Economy (the LCEN) of June 21, 2004, which contains a similar requirement for companies hosting Internet sites? As a reminder to this issue, the French Constitutional Council noted in its decision of June 10, 2004 that for Internet Service Providers, the content in question had to be "obviously" unlawful or contradictory to public policy. We can bet that the prescriptions of this decree will be interpreted the same way than the latter, since the appreciation of "mere" unlawfulness has to be interpreted subjectively and is in any case risky from a liberties standpoint.

Moreover, the Article R.20-40-49 is even more striking since that it provides that "The registries can take the initiative to delete or transfer domain names when the holder does not meet the criteria for eligibility defined in the directions determined when the registry is appointed, or when the information provided by the holder for its identification is inaccurate". This article has to be read in conjunction with Article R.20-44-48 providing that the registries will have to collect and keep the identification data of the individuals and of legal entities holding domain names, and set up a public database of such names. Here again there is a connection with the case law on the application of the LCEN. In the case of Tiscali Media against Dargaud Lombard and Lucky Comics from June 7, 2006, rendered by the Court of Appeal of Paris, the company hosting a site editing counterfeiting contents has been sanctioned because it did not checked the accuracy of the identification data provided by the content's editor.

While in the cases just mentioned the deletion or transfer of the domain names is merely an option for the registry, it becomes an obligation when there is a decision following a judicial or extra-judicial dispute resolution procedure (i.e. after arbitration), or when it is observed that a domain name has been registered in breach of the decree's provisions. In this case, as the FDI highlighted in its commentary of the decree, the applicants holding a trademark imitated by a domain name that is not exploited, will gain by being able to take their case to the registries to obtain a transfer rather than to go to court...

■ **Priority and domain names**

Numerous conflicts between trademarks or family names, and domain names have already been settled by case law; judges adopt a classical approach to apply the rules of hierarchy between trademarks, family names and domain names, depending on whether there are any priorities.

The decree formalises this case law: from now on, the CPCE provides that "a name identical to a family name cannot be chosen as a domain name, unless the applicant has a legitimate right or interest to assert over this name and is acting in good faith". The decree goes even further, with the generality of the terms used: "Art. R.20-44-45. – A name that is identical to or likely to be confused with a name over which an intellectual property right is granted by the national, or Community rules or by this Code, may not be chosen as a domain name, unless the applicant has a legitimate right or interest to assert over this name and is acting in good faith".

The intention is commendable, but how would it be possible in practice to guarantee that an intellectual property right will not be infringed? While it is easy to implement in systems where registration is compulsory (trademarks, domain names), how is it possible to know whether a domain name will conflict with, for example, a title insofar as literary and artistic property rights arise on the date of creation, without any particular formality being required? There is no doubt that judges will have an important role to play in the implementation of this new regulation.

In terms of fundamental rules, nothing in the decree from February 6, 2004 is very innovative. The text reproduces classical principles of intellectual property law, which it transposes to domain names. Nevertheless, there are some concerns that legal security will suffer on account of the fragmentation of the power to sanction, which judges must now share with organisations holding their authority from the regulation – and therefore the executive – and not the law. According to what guidelines and under what control? This must be taken into consideration and we should keep a close watch on this issue.

■ **NEWS FLASH:**

■ **The January 3, 2007 Circular: the return of graduated sanctions against peer to peer**

On January 3, 2007, the Minister of Justice sent to public and to magistrates a circular explaining the criminal provisions of the law on copyright and performing rights in the information society (DADVSI) dated on August 1, 2006. The circular, which is not binding, was intended to give recommendations to judges concerning the application of sanctions for unlawful peer to peer downloading.

The circular invites magistrates to apply a system of graduated sanctions, even though the Constitutional Council censured this aspect on July 27, 2006 when the law was being examined.

The circular defines three degrees of liability for unlawful exchanges of protected works on the Internet: unlawfully offering the means to make the works available to the public, unlawfully making the works available and finally using the downloaded works.

The first degree of liability targets editors and distributors of file exchange software whose obvious intention is to infringe copyrights. The penalties here will have to be extremely dissuasive (the principal penalty can be a fine up to 300,000 euros and a 3-year prison term) and the additional penalties will have to be adapted. The circular pinpoints particularly the confiscation of the earnings following from the unlawful activity, the judicial publication of the judgment, if necessary the closing down of the establishment used to commit the offence or even finally the prohibition to edit or distribute software.

Concerning the second degree of liability, which is the making of files available, the circular suggests a graduation distinguishing by a decreasing order the seriousness of the following types of conduct: making counterfeit works available before their official release and then making them available after their official release. Finally, when the works in question are not recent, the offence must be deemed to be less serious.

Regarding the third degree of liability, namely unlawful downloading, the circular considers that purely pecuniary sanctions are sufficiently appropriate. However, the fine will have to be adjusted depending on the following aggravating circumstances: it is not a first offence, a high number of works were downloaded, the works were downloaded before they were officially released and finally, the downloading is followed by the possibility of an immediate and accessory use thereby increasing the extent of their unlawful distribution.

The circular strongly incites magistrates to adapt the array of sanctions when dealing with the various types of conduct under the umbrella of unlawful exchanges of counterfeiting works on the Internet.

■ **Failure to respect "day one" and "eye-catching" price: disruption of the organisation of the video games Internet market**

In its summary order dated on October 17, 2006, the Commercial Court of Paris enjoined Babelstore, the editor of the "Price Minister" site, to make inaccessible on its site announcements proposing the sale of the video game "Pro Evolution Soccer 6" before the date of its official release decided by its editor and supplier, Konami, at a lower price than the editor's selling price.

The Court considered that the failure to respect "day one", the date of the video game's official release, and its sale at a lower price than the original price decided by the editor, constituted a manifestly unlawful disturbance likely to cause imminent damage to operators on this video game market.

When considering its decision, the Court made a very concrete analysis of the particular features of the Internet market of video games. It was able to see that a very high number of video games are likely to be sold on the same day as their official release and in the few days after. This circumstance must be combined with the fact that the Internet gives an opportunity for a massive distribution of products at a price which is also more attractive in this case than the editor's price.

The Commercial Court considered that these elements, which are likely to prompt a massive influx of consumers on the Internet to the detriment of resellers of video games proposing conditions consistent with those defined by the designer and distributor of the product, could disrupt the video game market and cause harm to all those involved.

■ **Term of copyright protection**

In two judgments dated on February 27, 2007, the French Supreme Court put an end to ten years of discussion on the extensions of copyright protection time limits, due to war.

These "war extensions" provided for in Articles L.123-8 and Article L.123-9 of the Intellectual Property Code, are intended to compensate authors for their loss of earnings during the wars and provide that protected works during the first and second World Wars were to be granted, respectively, 6 and 8 additional years of protection.

The French Supreme Court, which interpretes the provisions of the Intellectual Property Code in light of the European directive of 29 October 1993 harmonising the term of protection of copyright and certain related rights, considered that the legal term of protection of 70 years post mortem included the war extensions which should not therefore be added to it.

This decision was not a foregone conclusion insofar as these extensions were not eliminated when the 1993 European directive was transposed by the law of March 28, 1997, increasing the legal duration of protection from 50 to 70 years post mortem. The issue that arose at the time, was to find way to combine these war extensions with the new legal term of protection.

Case law was divided on this issue. For example, the Court of Appeal of Paris has recently adopted two contradictory judgments. In its January 16, 2004 judgment, the Court held that war extensions did not have to be added to the legal duration of protection, considering that they had already been taken into account in the 70 year post mortem period. Yet the same chamber but a different section of the Court of Appeal of Paris considered on October 12, 2005, that the war extensions had to be added to the legal 70 year term, considering that they were acquired rights, which could not be called into question.

The French Supreme Court decided to end this contradictory case law on the same day with its decisions based on the appeals brought against these two judgments.

These two judgments of the 27th of February 2007, also have the merit of clarifying the situation of heirs and successors in title of the authors concerned, to the disadvantage of some, who discovered that their rights were extinguished. This is the case particularly of the successors in title of Claude Monet, who learned on February 27, 2007 that the works of the artist, who died in 1926, had already entered the public domain.

■ **Focus on the "Television of the future" law adopted on March 5, 2007**

After a visit to the All-Party Mixed Chamber and the Constitutional Council, the draft bill on the modernisation of audiovisual broadcasting and the television of the future was finally adopted on March 5, 2007.

The transition from analogue to digital television is to start from March 31, 2008 and will be completed by November 30, 2011.

The launch in the summer of 2007 of the two other components of TNT was also adopted. It concerns on one hand, high definition (HD) television, for which three frequencies are available, one pre-empted by the State for France Televisions and the other two to be awarded after a bidding procedure, and on the other hand mobile TV (TMP), in other words channels accessible via portable video players or mobile telephones.

Other provisions have already been denounced by some players on the market. For example, the "bonus" channel granted to the historical operators TF1, M6 and Canal+, as compensation for the end of their analogue broadcasting authorisation, has been strongly criticised by certain independents. Furthermore, the contribution that Internet Service Providers as distributors of audiovisual programmes have to make to the COSIP (aid fund for audiovisual creation) has also been condemned by many and has already been renamed by some the "Internet tax".

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