

■ **Topic of the month: The law of 5 March 2007 law on the prevention of delinquency in the communication sector – what are the stakes?**

The media focus surrounding Law No. 2007-297 of 5 March 2007 "on the prevention of delinquency" brought to light just a few controversial issues including: "road rage", socio-educational measures, sanctions and prevention of drug misuse. Yet significant legal measures have also been taken in the media and communication sector, particularly to ensure increased protection for minors.

■ **The range of offences for which the press can be sanctioned has been broadened**

Public Prosecutors were already able *ex officio* to prosecute a person making slanderous or insulting remarks about a person or group of persons on the grounds of their origin, ethnicity, nationality, or religion. Now any person who makes remarks about the sexual preferences or disability of a person or group of person can also be prosecuted *ex officio*.

■ **Obligations to make use of warning signs have been increased**

Signs intended to warn minors – and their parents – away from certain content are given an important place in the law; in fact the title of the law "on the prevention of delinquency" hardly seems appropriate here. The 17 June 1998 Law on the prevention and repression of sex offences and the protection of minors has been amended: now, when a "document" that is available on line or on another medium (videocassette, DVD, etc.) constitutes a danger for young people because of its pornographic content, both the medium and each unit of its packaging must display in a visible, legible and non-erasable manner the words "Not authorised for minors", meaning that to offer, give, hire or sell the product concerned to minors is prohibited.

For "documents" containing material that poses an equivalent danger, but this time because of references to crime, violence, incitement to use, hold or traffic in drugs, incitement to consume excessive amounts of alcohol or incitement to discrimination or hatred against a given person or group of persons, a "specific" warning sign must be placed on the medium on penalty of a one-year prison sentence and a 15,000 euro fine. The wording of this article is surprising: does this mean it would be possible to broadcast content containing an incitement to discrimination, hatred, etc. provided that the consumer is warned? Note that these provisions do not apply to documents reproducing a complete cinema film which has obtained its licence number (except for pornographic films or films containing an incitement to violence).

In any event, it is the publisher, or failing that the distributor, of the "document" in France, which according to the law will have to assume the obligation to affix the warning notices. Finally, the law specifies that the administrative authority (i.e. the Minister of the Interior) can also prohibit any person from: offering, giving, hiring or selling such "documents" to minors, or displaying them in public view in any place whatsoever (except in places that are not accessible to minors), or advertising these "documents" by any means whatsoever.

■ **The prevention and repression of sex offences**

▪ **Propositioning a minor**

A new criminal offence has been created in the law of March 2007 namely: propositioning a minor. Under new Article 227-22-1 of the Criminal Code, an adult who propositioned i) a minor (of 15-years or less) or ii) a person claiming to be a minor; using an electronic communication (particularly via a chat system) can be sentenced to a maximum of two-year prison term and a 30,000 euro fine; when this propositioning leads to an encounter, these penalties are increased to a maximum of five-year prison term and a 75,000 euro fine.

▪ **The investigative powers of the police**

To adapt the methods used by the police to those of potential sex offenders, law enforcement agents or officers are now authorised, during the course of an investigation or on the basis of letters rogatory and on conditions to be determined by decree, to take part in electronic conversations using pseudonyms. They may use this means of communication to be in contact with persons who are suspected of being potential sex offenders, and to extract, transmit in answer to an express request, acquire or keep, unlawful content, according to the conditions fixed by decree (Article 706-35-1 of the Criminal Procedure Code).

Practically speaking, the police authorities will be able to take part in chat rooms and discussion forums and exchange e-mails, etc., if necessary paying for access to these services. However, the law takes care to regulate the use of these new investigative powers strictly, they are to be exercised in a way closely resembling conditions when law enforcement agents go undercover. Only the "cyberpolice" given a special authorisation and under the control of a judge are allowed to use these methods.

In addition, in accordance with one of the fundamental principles of criminal procedure, police who use these methods cannot be prosecuted for incitement to commit a crime and they must only use them in answer to an express request. Without a doubt the way the law itself is written offers a "readymade" defence as, practically speaking, there is a very fine line between incitement and answering an express request.

▪ **Application in summary proceedings to end an on-line communication service**

An Article 50-1 has been added to the law of 29 July 1881: when the commission of a crime or misdemeanour or the commission of a crime against humanity has been provoked by messages or information published on line and constituting a manifestly unlawful disturbance, the judge in summary proceedings can order the an on-line communication service to be shut-down at the request of the public prosecutor and any individual or legal entity having standing to act.

■ **Modification of the Law on Confidence in the Digital Economy (LCEN) of 21 June 2004**

▪ **Combating the broadcasting of unlawful content**

Article 6 of the LCEN already provided that Internet Service Providers (ISPs) and hosting providers had an obligation to give Internet users the means to denounce content that is paedophilic, pornographic or an incitement to racial hatred. Now content inciting violence or violations of human dignity are also targeted.

▪ **The control of prohibited lotteries, gambling and betting**

The law goes further in the matter of the prevention of prohibited lotteries, gambling and betting: Article 40 of the law of 5 March 2007 introduces an obligation for ISPs and hosting providers to set up an easily accessible and recognisable system to notify their subscribers of on line communication services considered unlawful and inform them of the risks they incur if they take part in gambling or betting in breach of the law. In practical terms, these operators could be forced into a specific obligation of supervision, which would have wide-ranging technical and legal consequences.

▪ **The fight against happy slapping**

Finally, the law innovates where it encompasses a new practice namely: happy slapping. Article 222-33-3 of the Criminal Code now provides that recording images of the commission of intentional attacks against a person's physical integrity [...] is deemed to be complicity in such acts (and is punishable by the penalties set out in these articles). Broadcasting the recorded images is punishable by a 5-year prison term and a 75,000 euro fine. Nevertheless, this article will cease to apply where the recording or broadcasting is part of the normal exercise of a profession whose purpose is to inform the public or is to be used as legal proof. This latter notion, which is obscure to say the least, will no doubt be a source of considerable debate...

## NEWS FLASH:

### View-on-Demand (VoD): 15 February 2007 judgment

By an agreement signed on 12 October 1999 between the SACD, the CSPEFF (Association of Producers and Exporters of French Films), the UPF (Union of Film Producers) and the SPI (Association of Independent Producers), authors were to receive a percentage of the price paid by a television viewer to watch the film of his choice. Essentially this provision targets Pay-Per-View and View-on-Demand services. Authors receive a minimum 1.75% of the before tax price paid to the audiovisual communication service provider by the public to view the cinema films. The audiovisual communication service provider pays these sums directly to the SACD. Audiovisual production contracts must therefore contain a specific clause providing the author's assignment to the producer, of the right to exploit the work by any telecommunication means allowing the public to have access to them by the payment of an individual price, particularly for Pay-Per-View and View-on-Demand. This agreement was subsequently supplemented by an agreement of 5 February 2002, in which the USPA (Audiovisual Production Union) participated and which extended its scope to all cinema and audiovisual works in the SACD's repertoire. Then a 12 April 2002 agreement made a further extension to animated films. Finally, by an agreement of 17 February 2004 the API (Association of Independent Producers), agreed to participate in the 12 October 1999 and 5 February 2002 agreements. The 15 February 2007 decree extending these above agreements now makes all these contractual provisions compulsory for all companies in the cinema production sector and the audiovisual production sector. It is therefore now clearly established that authors of cinema and television works which are exploited via Pay-Per-View, View-on-Demand or any electronic communication method must be remunerated.

### The prohibited video game "Desperados"

The 20 February 2007 judgment of the French Supreme Court provides the opportunity to recall the particular rules regarding the protection of well-known trademarks, which in this case were applied to the semi-figurative trademark "Desperados" filed by Brasserie Fischer to designate beers. Brasserie Fischer successfully sued Infogrames Europe, now called Atari Europe, for infringement of its well-known trademark: the latter had registered the denominative trademark "Desperados" to designate video games and reserved the domain names "Desperados-game.com" and "Desperados-game.net".

When comparing signs, the holder of a well-known trademark is protected not only against use of a sign which is identical to its trademark, but also against use of a similar sign. In this case, Infogrames claimed that the figurative element of the prior trademark was what distinguished it from its own denominative trademark. However the Supreme Court rejected this argument on the grounds that Infogrames had raised the opposite argument before the judges of the merits when it denied that the figurative element was distinctive. For the domain names, the Court approved the judges of the merits when they held that the term "game" was descriptive and thereby deprived it of any effect. The use of the word "Desperados", which was therefore the essential element of the domain names, infringed the well-known trademark. The risk of confusion ground of objection is upheld more strongly for well-known trademarks. In this case, the judges felt that the targeted public, composed of young adults, would be likely to believe the two trademarks were associated in a partnership arrangement or have the same origin.

However, mere use of a sign that is sufficiently similar to a well-known trademark, so that the public makes a connection between them, is not sufficient to be able to benefit from the particular rules governing the protection of well-known trademarks. The use of the sign must also be potentially be prejudicial to the holder of the well-known trademark or constitute its unjustified exploitation. In this case, the Court approved the judges of the merits and they upheld the finding that the well-known trademark "Desperados" had been trivialised thereby causing harm to its holder. They also found that Infogrames had unjustifiably exploited the "Desperados" trademark, attempting to gain an advantage from the fact that it is well-known. While the judges of the merits did not need to substantiate this reasoning by acknowledging that the fact that the trademark was well known would actually have benefited Infogrames, the Court nevertheless noted that by imitating the "Desperados" trademark, Infogrames was intentionally looking to gain an advantage from the fact that the trademark was well-known.

Finally, the French Supreme Court approved the Court of Appeal for having annulled Atari's "Desperados" trademark for fraudulent filing. The judges held that Atari, which before filing the trademark had participated with Brasserie Fischer in a communication based on a video game and another brand of beer, could not have failed to know about the "Desperados" beer and made the fraudulent filing with the aim of preventing Brasserie Fischer from filing the same sign to designate video games.

Atari was therefore prohibited from using the name "Desperados" for its video games.

### "Paris 2016", "Paris 2020", "Paris 2024" and "Paris 2028": The French National Olympic Committee recovers its trademarks

Trademarks today are extremely important for the financial success of sporting events, which are partially funded by the issue of trademark licences to companies marketing all different kinds of products or services. This is why any sign that can establish a connection with a prominent sporting event is a source of considerable profit.

So the French National Olympic and Sports Committee (the Cnosf) and the City of Paris were understandably very annoyed when a third party filed and reserved the trademarks "Paris 2016", "Paris 2020", "Paris 2024" and "Paris 2028" and the domain names "paris2016.com", "paris2016.fr", "paris2020.com", "paris2020.fr", "paris2024.fr" and "paris2028.fr".

These registrations were made between 2003 and 2005 at the same time as Paris was a candidate to organise the 2012 summer Olympics. The Cnosf and the City of Paris, the organisers of this important sporting event, sued the third party for fraudulent filing and infringement of the prior trademark "Paris 2012" held by the Cnosf. The Paris First Instance Court found for them in a judgment dated 14 March 2007. The judges annulled the filing of the trademarks "Paris 2016", "Paris 2020", "Paris 2024" and "Paris 2028", holding that the defendant had filed these trademarks in an attempt to appropriate for itself the benefits deriving from the fact that this sporting event would attract public attention and it had therefore acted to defraud Cnosf's of its rights. The decision essentially recognises that the trademarks "Paris 2016", "Paris 2020", "Paris 2024" and "Paris 2028" are well known and grants ownership to the Cnosf, even though they have not been exploited. The Court, for those same reasons, held that the reservation of the domain names "paris2016.com", "paris2016.fr", "paris2020.com", "paris2020.fr", "paris2024.fr" and "paris2028.fr" was fraudulent. The judges also accepted the claims regarding infringement, finding that the third party's trademarks and domain names were unlawful imitations of the prior trademark "Paris 2012". The Court's reasoning regarding the domain names is nevertheless surprising. Noting that the prior trademark "Paris 2012" had never been filed to designate amongst other things services of "computer aided communication and transmission of messages and images", included in class 38, the Court deduced that the products and services concerned were similar. However, the French Supreme Court recently recalled that merely making a filing in class 38 is not sufficient to allow the trademark's holder to object to the subsequent registration of a domain name that is identical or similar to its trademark (Cass. Com., 13 December 2005, No. 04-10.143). An objection can only be made if the site is exploited and offers products and/or services that are identical or similar to those referred to in the trademark registration.

### The trademark protection of a sequence of animated images

As a reminder, valid trademarks can be any distinctive sign capable of constituting a graphic representation. Relying on this broad definition of a trademark, companies are now constantly searching for new ways to differentiate their goods and services from those of their competitors. So, having had the three-dimensional trademark, the sound trademark and the olfactory trademark, we now have the animated trademark which is the new precious corporate asset, particularly for companies operating in the media sector. Animated trademarks in fact attract consumers' attention much more easily than classical two-dimensional or non-animated trademarks, particularly on electronic communications networks.

Nevertheless a certain number of precautions must be observed when registering these trademarks to guarantee their attention. Particular attention should be paid to the description and representation of the animated trademark. For example, when Microsoft or Yahoo! filed Community trademarks that were intended to designate software, they took great care to provide a meticulous description of the entire animated sequence, giving details of each graphic representation of the trademark. It is also worth including a medium (CD, DVD, etc.) with the registration application on which the animated trademark is reproduced.

These animated sequences of images can be accompanied by sounds, which can also be filed as a trademark. However, here again, sounds can be valid trademarks only if their graphic representation is sufficiently precise. For example, the graphic representation of a sound trademark can take the form of musical notes, curves, spectrograms or oscillograms, which show the precise duration, speed, resolution and frequency of sound waves.

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