

■ **Topic of the month: Television funded by Internet Service Providers**

The financial participation of Internet Service Providers (ISP) in audiovisual production has been finally confirmed with the voting of the 5 March 2007 law on the modernisation of audiovisual broadcasting and the television of the future, known as the "law on the television of the future".

Despite their fierce opposition to this new arrangement. As of Jan 1.2008 ISP will have to contribute to the COSIP (support fund for the audiovisual programme industry).

The COSIP fund, managed by the "Centre National de la Cinématographie" (national cinema centre), is intended to encourage the funding of audiovisual production. It allocates funds to a certain type of audiovisual works, such as fiction, animation, documentaries and live entertainment and only those produced by companies established in France.

■ **The application of the COSIP tax to the new audiovisual media broadcasting services**

In keeping with our French cultural tradition, distributors of audiovisual content must contribute financially to its creation. To ensure that ISP fulfil this obligation, the law explains that a distributor of television services is deemed a "publisher of television services financed by a remuneration paid by users, which collects directly the proceeds of the subscriptions paid by these users". Based on this definition, ISP can qualify as broadcasters of audiovisual content and is therefore subject to the COSIP tax in accordance with the French Tax Code, as amended by the law of 5 March 2007.

The new burden on ISP's was governed by a principle of fairness: professionals making profits from broadcasting audiovisual works must make a financial contribution to their creation. The law on the television of the future merely adapted the French audiovisual funding policy to the new technologies.

■ **A contribution suited to the services proposed by the ISP**

The rules governing this new contribution have been adapted to the services proposed by ISP, particularly when broadcasters give consumers access to other services than television, like the "triple play" offers, where consumers can also subscribe for the telephone and Internet. In this case, the new tax will be calculated based solely on television services. But for what price?

The law also determines that the contribution to be paid by the ISP is incremental in proportion to their turnover. The "traditional" television tax corresponds to about 5.5% of advertising revenues exceeding 11 million euros, whereas the ISP tax will be applied to an amount above 10 million turnover (before taxes through a progressive rate of the annual before tax turnover exceeding 10 million euros. As result ISP with a turnover of more than 10 but less than 75 million euros will have to pay 0.5% of the surplus above 10 million euros. The ratio raises to a maximum of 4.5% of the fraction exceeding 530 million euros.

■ **A fiscal counterpart: confirmation of a reduced rate of 5.5%**

In consideration for their contribution to the COSIP, ISP will be subject to a reduced VAT of 5.5% on their audiovisual revenues. The law transposed in the tax code confirms this reduced rate for distributors of television services. According to some, this reduced VAT rate will be set off against the COSIP and avoid it being passed on to consumers' subscriptions.

In addition to this direct advantage confirmed by the law, this financial participation in audiovisual production should have a positive impact on ISP.

■ **The impact of this new tax for ISP**

ISP's contribution to the COSIP tax should give them a certain influence in the audiovisual industry and encourage their cooperation with the rights holders and other players in the audiovisual sector.

This influence was felt in the current negotiations regarding video on Demand (VOD) and particularly on the issue of chronology of media. It is common knowledge that the cinema industry and the ISP did not manage to renew the inter-professional agreement signed on 20 December 2005, adopting 33 weeks as the waiting period between the public release of films and their broadcasting by VOD. The Canal Plus Group wants to maintain this period of time whereas the AFA (association of internet service providers) demands a shorter period of six weeks to make the offer attractive to Internet users and combat more effectively film piracy. The two parties were recently invited by Christine Albanel, Minister of Culture and Communication, to reach an agreement.

By contributing to the COSIP, ISP will also be investing directly in audiovisual production. This has advantages for them even beyond being able to benefit from the COSIP. By investing from the conception stage of audiovisual works, the ISP can freely offer a variety of their products on any medium, creating tailored audiovisual content and therefore evolve easily to new technologies. For example, the telephone operator Orange has already taken the plunge with the creation of its cinema production company "Studio 37".

ISP are encouraged to play a central role in audiovisual production, and funding of new services such as television and video on demand by ADSL and the Internet, or otherwise mobile TV, must be encouraged. During the legislative process on the law of the television of the future, it was suggested that the funds paid by ISP should be allocated, not to traditional sectors, but to the development of new digital audiovisual services. As a result, projects developed specifically for these new media, with the allocation of existing funds or the creation of new specific funds, would be eligible for the CNC aids. However no decision has yet been taken by the players on how the funds paid by ISP will be allocated, and the project is still in the pipeline.

In any event, ISP interested in the audiovisual industry should pay attention to the new European Directive on "Audiovisual media services without frontiers", about which the Ministers of Culture of the EU countries adopted a common position on 24 May 2007. These rules, which are to replace the so-called "Televisions without frontiers" Directive of 1989, are scheduled to be enacted by end 2007. The purpose of the new Directive, which is to cover all audiovisual media services, is to define the basic harmonised rules for all these services and adapt the existing rules regarding funding of audiovisual content (principally by advertising) in order that European television service providers be more competitive.

■ **After audiovisual production, will it be music production?**

Other sectors in particular the music industry are also impeded by the new financial ISP contribution. As soon as parliament adopted the contribution of audiovisual program, distributors to the COSIP, the latter were rapidly taken to task by the UPFI (union of independent French record producers), which demanded that ISP contribute to music production which suffers huge losses due to internet file sharing. UPFI was still firmly opposed to a blanket licence, which was rejected by the DADVSI law. The objective of the blanket licence was to authorize file sharing and file exchanges via peer to peer networks, whereas the ISP's financial contribution compensate for the losses suffered by music production. To be followed...

## NEWS FLASH:

### ■ Validity of the price comparison website "quiestlemoinscher.com"

The Paris Commercial Court judgment of 29 March 2007 brought good news for the price comparison website "quiestlemoinscher.com": after being prohibited by a summary order of 7 June 2006, the revised and corrected website was finally validated by the Paris judges.

The situation was that Carrefour accused the Cooperative "Groupements d'Achats des Centres Leclerc" (the "GALEC"), the publisher and operator of the "quiestlemoinscher.com" website, of unlawful comparative advertising and unfair competition. To support its claim, Carrefour complained that the site's message, that the Centres Leclerc were the cheapest, was deceptive as a generalisation and the methodology used by the GALEC lacked objectivity (the too long period during which prices were noted to give consumers relevant information in view of the extreme variability of prices practised by the large retailers, the contestable scope of the areas selected, the selection of products that were compared, etc.) and therefore the fact that the results obtained were incorrect.

The GALEC defended its methodology, pointing out that it was objective, verifiable and transparent.

As a reminder, the use of the technique of comparative advertising "*is lawful only if: 1°) It is not deceptive or likely to mislead; 2°) It concerns goods or services meeting the same needs or having the same objective; 3°) It makes an objective comparison of one or more essential, relevant, verifiable and representative characteristics of these good or services, one of which can be the price*" (Article L.121-8 of the Consumer Code).

Deceptive advertising is said to be *any advertising which, in one way or another, including through its presentation, misleads or is likely to mislead the persons to whom it is addressed or whom it reaches and which, because it is deceptive, is likely to affect their economic conduct or which, for these reasons, is likely to be prejudicial to a competitor.*

The GALEC's demonstration was effective: the Commercial Court emphasised the clarity and transparency of the information displayed on the site. It noted in particular that the website "quiestlemoinscher.com" precisely details the number of products under consideration, the number and the signs of the stores, and the number of prices noted. The Commercial Court acknowledged that consumers were indeed able to verify the GALEC's method. In addition, it recognised that the price comparison site, designed with the intervention of independent bodies, which incidentally Carrefour itself also uses, was totally and completely credible.

Regarding implementation of this methodology, and the choice made by the GALEC to publish only certain compared prices on its site, the Commercial Court followed strictly the guidelines of EU case law, unhesitatingly relying on the ECJ's interpretation (ECJ, 8 March 2003, C-44/01), to allow the advertiser to make its own choices as to number of comparisons of its products and those of its competition which pertains to his *economic freedom* to pursue its and its own *commercial strategy*: to the extent it relies only on accurate and verifiable data, the advertiser can choose the most favorable parameters.

As for the slogan "*No distributor can claim it is the cheapest any longer without proving it*", which Carrefour accused of being a generalisation, the Commercial Court insisted once again on the transparency of the advertisement and which followed the slogan with an explanation "in very legible characters" of the "quiestlemoinscher.com" website.

While recalling that emphasis is perfectly acceptable in advertising, whose aim is to promote the advertiser's goods and services, the Commercial Court made an analysis *in concreto* of the slogan and the explanations and once again set aside the qualification of deceptive advertising.

Carrefour was not followed by the Court on the issue of unfair competition: somewhat bitingly, the judges stated that "*in comparative advertising*" an advertiser's commercial strategy "*is not intended to please or flatter its competitors*".

A wind of freedom seems to be blowing through comparative advertising: the referee is now no longer the competitor but the consumer, who must be put in a position where he can make a reasoned purchase. But is this not making the consumer run another risk, that of confusing information and promotion?

### ■ The Conseil d'Etat (France's Supreme Administrative Court) rules on tracking unlawful downloading

In decisions of October 2005, the CNIL had refused to authorise the SACEM, the SDRM, the SCPP and the SPPF to set up automatic systems to search for perpetrators of offences on the so-called "peer to peer" (P2P) networks, considering that these systems were out of proportion with the goal sought.

According to the CNIL, they implied a massive and exhaustive monitoring of the P2P networks and lead to a massive collection of personal data.

The CNIL's decision may appear strange, as the societies which collect and distribute royalties and the holders of performance rights are expressly authorised by the Data Processing and Liberties law, as amended by the law of 6 August 2004, to set up such systems provided they obtain the CNIL's authorisation.

Very logically the *Conseil d'Etat* by its 23 May 2007 judgment therefore annulled these decisions. The royalties collection societies can now apply to the CNIL again to have their systems authorised, which there is no doubt will be put in place very quickly.

To annul the CNIL's decisions, the *Conseil d'Etat* found that the CNIL made a mistake when it believed that the systems concerned permitted an exhaustive and massive monitoring of P2P networks. On the contrary, the *Conseil d'Etat* noted that the systems relied on a title base containing considerably fewer titles than the repertoires of the rights management societies, and that only a few P2P protocols were monitored. For the *Conseil d'Etat*, these systems were therefore quite in proportion.

On the other hand, the *Conseil d'Etat* approved the CNIL's refusal to authorise access to personal data within the system of the "gradual response" of sending preventive messages, to downloaders since the purpose of the message was not leading to the pursuit of offences.

Cracking down on unlawful P2P should therefore be able to increase rapidly thanks to these systems. Prevention however will need to take another road.

### ■ The "no right, no action" principle applied to the private copy

The April 4, 2007 judgment of the Paris Court of Appeal ended the proceedings brought in 2003 relating to the technical protective device, (DRM) placed on the DVD of the film Mulholland Drive preventing the film from being copied.

In this case, the Paris Court of Appeal judgment of April, 22 2005 held that a private copy was not prejudicial to the normal exploitation of the work on DVD. This judgment was overturned by the French Supreme Court in a 28 February 2006 judgment, inviting the Court of Appeal to which it was referred back to appreciate the prejudice to the normal exploitation of the work in light of "*the risks inherent in the new digital environment*" and "*the economic importance that the exploitation of the work on DVD represents to recover the costs of the cinema production*".

The new decision of the Court of Appeal has just confirmed that the private copy "*is not a right but a legal exception to the principle of the prohibition of making any full or partial reproduction of a protected work without the copyright holder's consent*". The conclusion is therefore that a claimant cannot assert the private copy to support his claim, only a defendant can who is pursued for infringement for example.

The judges on a previous appeal held that the private copy was only a legal exception to copyright and not an absolute right recognised to users. However, the Court of Appeal drew even more restrictive conclusions for consumers, who are now only able to assert this exception in defence to an action, even through the Intellectual Property Code provides that the author "*cannot prohibit*" the private copy under certain conditions.

This difficulty may be submitted to the "Autorité de Régulation des Mesures Techniques" (technical devices regulatory authority) created by the DADVSI law of 1 August 2006, newly implemented by a decree of 4 April 2007.

The question of the interest of a reinforced and regulated protection of technical protective measures is still open at a time when many rights holders have chosen to distribute protected material without any protective system.

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