

**Topic of the month: How private copies are going to be paid for?**

The payment of a private copying levy is an issue that has been discussed at large in 2008; especially through two court decisions by which the judge proved how much he was strongly committed to a just retribution of copyright holders. In addition, the Albis Commission has been pursuing the extension of a private copying levy to a great number of cell phones (to which besides could be added the television tax fee).

Let us remind here that the private copying is an exception in French copyright law by which anybody may copy a work for its own personal use only; the private copying levy due by consumers is the compensation paid to authors, composers, performers and producers.

**■ Wizzgo: the digital on-line recorder is not submitted to the private copying regulation.**

Wizzgo, by putting inline a digital recorder is allowing internet users to obtain free copies of television programs on their computer following their broadcasting on the DTT.

The November 25, 2008 decision rendered by the Court of First Instance of Paris has given a deadly blow to the on-line digital recording service by sentencing Wizzgo to the payment of 440.000 euros damages to the companies operating M6 and W9 TV channels.

The amount of the fine is such due to the application of article L.331-1-3 of the Intellectual Property Code by which judges may allocate as damages a lump sum that cannot be lower than the amount that would have been paid if the offender had applied for a licence.

The Court of First Instance of Paris decided that the private copying exception right evoked by Wizzgo was not applicable. On the contrary, the Court was of the opinion that the company was guilty of counterfeiting infringements in reproducing and distributing to the public, without authorization, TV programs produced and broadcasted by M6 and W9 TV channels.

The Court dismissed the private copying exception right on the basis that the copy made by the service provider had its own commercial value since it was the basis of Wizzgo's business plan. The situation therefore was not compatible with the private copying exception.

In addition, the Court rejected the argument in defence of Wizzgo according to which the lawfulness of the digital recorder is based on the fact that the two successive copies were made by two different persons (the company and the user).

According to the judges the private copying exception right can only be evoked by the copyist for its personal use. The Court considered that Wizzgo was the copyist, and not the user: the private copying exception can therefore not apply.

It must be pointed out here that the proposed service was directly competing with « *catch up TV* » services on the websites of certain TV channels such as M6 which are based on streaming only.

It must also be noted that the "TéléObs" website offered digital recording services against payment, without download (streaming only). However the service was stopped after the Wizzgo case.

**■ Extending the application of the private copying levy to mobile phones**

The Albis Commission met on December 17<sup>th</sup>, 2008 and adopted a new decision subsequently to the Conseil d'Etat (the French highest administrative Court) July 11, 2008 decision instructing the Commission to change its method of calculation of the private copying levy, which included losses from piracy.

Following the decision of the Conseil d'Etat, the Commission excluded from its calculation the share resulting from piracy, but took into consideration the increase of compression capacity. Consequently, the amounts hardly changed. It must be noted that the Commission has not yet retained the 15% increase claimed by the beneficiaries. The main point of the December decision lies in the extension the private copying levy to certain mobile phones as from January 1st, 2009 (date of its first enforcement). The Commission decided to submit « *all mobile phones which allow listening to phonograms or viewing video recordings* » to the levy. Up to now only smartphones (including the iPhone) were subject to the levy.

It must be reminded that the Secretary of State, Mr Eric Besson, in his « 2012 Digital Economy Development Program » recommended reforming the Commission in order to obtain more transparency in the methods of calculation of the private copying levy.

**■ European cyber merchants and the payment of the private copying levy**

The Company « Rue du Commerce » had brought in an action against several European cyber merchants for unfair competition accusing them of selling blank CDs to French Internet consumers without informing them of their obligation to pay the private copying levy. In this "grey market" case, a distortion of competition is unveiled since European e-merchants are subject to various regulations on the private copying levy. Many EU countries are not subject to such fee and when they are, the fee is quite lower than the French one.

In a decision rendered on November 27<sup>th</sup>, 2008, the French Supreme Court ("Cour de cassation") partially overruled the March 22<sup>nd</sup>, 2008 decision of the Court of Appeal which had dismissed the claims of "Rue du Commerce".

The Higher jurisdiction first delivered a decision in favour of the judgment of facts in relation to paying the private copying fee reminding that according to article L.311-4 of the Intellectual Property Code only the manufacturer, the importer or the person achieving community acquisitions is subject to the payment of the private copying levy. European cyber merchants do not have any of such three qualities and thus are not obliged to pay the private copying levy. But, on the other hand, the higher magistrates indicated that foreign cyber merchants who wish to enter the domestic market must imperatively inform French consumers of their obligation to pay for a private copying. This obligation to inform consumers at least will help to avoid too unfair competition.

It must be reminded that as for the aforesaid « 2012 Digital Economy Development Program » recommends that the private copying fee amount be posted on price tickets.

Last, it should be noted that a Spanish company has submitted questions to the European Court of Justice with regard to the harmonisation of the private copying levy. To be continued...

■ **Lafesse vs./ Youtube: Applying the status of Host to video sharing site.**

After a little hesitation, the French case study seems to confirm the hosting provider status of several online video sharing platforms such as Youtube.

In this case, in a decision delivered on November 14, 2008, the Court of First Instance of Paris sentenced the American Company Youtube to the payment of damages to the French Humorist Jean-Yves Lafesse for not withdrawing some video recordings that the humorist had previously indicated as infringing his rights. This decision brings out a clear distinction between the status of hosting provider and that of publisher in relation to web 2.0 services.

The Court of First Instance starts by reminding that the hosting provider is defined in article 6.1-2 of the June 21, 2004 Law on Confidence in the Digital Economy, as being *“the person who makes available to the public, through public online communication services, storage services of written material, images, sounds or messages of any nature supplied by end-users of the services”*. But above all, the Court brings a definition of the website publisher, which has not been provided given by any enactment. It defines the publisher as the person who determines the contents made available to the public from the service it created or is in charge of. This solution applies to those acting in the quality of professionals and to non-professionals as well.

The Court thereby considers that Youtube acts as Host since it determines the contents made available to the public. Thus, Youtube can in no way be fully responsible for the contents uploaded on its site by end-users.

As a result, internet users who upload videos on sharing sites are considered as publishers. This means that Youtube in its quality of hosting provider has to collect any data that may allow it to identify any person that has contributed to the creation of a hosted content, since the Law on Confidence in the Digital Economy has made this an obligation for the hosting provider. In this specific case, Youtube was sentenced for not having kept any information that could have been used to identify any internet user who would have put online illegal videos, such as last name, first name, address and telephone number.

The Court also reminds that once the hosting provider is informed by the copyright holder of the illicitness of the contents uploaded, the hosting provider must act promptly to withdraw the material or bloc the access to such content. To have the hosting provider avoid the content from being uploaded again, the copyright holder must describe the litigious facts, their precise localisation, and the reason why the content must be withdrawn.

The description requirement is in straight line with the “2012 Digital Economy Development Program” in which it is recommended that the status of hosting provider be secured and responsibilities shared in accordance with the provisions of the Law on Confidence in Digital Economy.

■ **Pursuing the action against American Software editors**

The American companies Shareaza, Limewire and Vuze were taken to Curt in 2007 in an action entered into by SPPF, an independent producers' collecting society. This society accused the peer-to-peer software publishers of encouraging piracy. It wishes to receive compensation for the damages by the independent producers therefore.

The SPPF thus based its action on the “Vivendi amendment” of the DADVSI law, entered in the Intellectual Property Code under article L.335-2, which provides for a three year imprisonment sentence and a 300.000€ fine against anyone who knowingly edits, makes available to the public or communicates to the public, in any form whatsoever, any software obviously made to place at the disposal of non authorized people copyright works or material. By three court orders of September 10, October 15 and October 29, 2008, the Paris Court of First instance dismissed the exception of lack of territorial jurisdiction advanced by the three American companies. Judges thus gave their consent to pursue the action in France.

These court orders fall within the scope of the draft bill “Creation and Internet”, currently under discussion before the French Parliament. The purpose of this law is to fight copyright piracy by setting up a mechanism gradual sanctions and to favour the development of legally offered material. *To be continued...*

■ **The Sequel to the famous book « Les Misérables » by Victor Hugo: the liberty of creation prevailing over an author's and his heirs moral rights.**

The writer François CERESA was the author of two literary works entitled « Cosette ou le temps des illusions » and « Marius ou le fugitif », published by the editor PLON. These works had been presented as being a sequel to the work of Victor HUGO. M. Pierre HUGO, heir of the renowned writer had brought an action in court against M. CERESA and the editor under the grounds that it violated the work of his ancestor. The SGDL (French Professional association of men of letters) took part in this action with Mr Pierre HUGO.

The March 31, 2004 decision rendered by the Court of Appeal of Paris considered that there could be no sequel to a literary work such as « Les Misérables », a genuine masterpiece of world literature, without infringing the moral right of Victor HUGO. Consequently, the editor PLON had been sentenced to pay the symbolic amount of 1 euro to Mr Pierre HUGO and to the SGDL

Further to this decision, the editor PLON filed an appeal and on January 30, 2007 the French Supreme Court overruled the decision delivered by the Court of Appeal of Paris under the grounds that *“subject to the observance of the law in relation to the name and the integrity of the adapted work, the liberty of creation is opposed to the fact that the author or his heirs may prohibit that a sequel be written after the copyright monopoly they enjoyed, has expired”*. The Supreme Court considered that the Court of Appeal had not examined the litigious works to discover any probable infringement to the moral right of the author. The Supreme Court ruled that the sole fact of writing a sequel to the literary work could not constitute a moral infringement.

The Court of appeal of Paris held a new decision on December 19, 2008 indicating that no author may based on the attributes of moral right, prohibit that his work be subject to any adaptation and especially of any sequel of the same nature. The Court of appeal also considered that in this specific case, the litigious works did not flaw the general spirit of the work of Victor HUGO and thus the infringement of the moral right of the author could not prevail. Works are nurtured on passed works...

■ **Are we heading towards a better protection of blog hosts?**

A person affected by slanderous statements on a blog linked to the website 20 Minutes introduced an action against the slanderer, the managing editor of the website and the host, namely the company 20 Minutes. The latter was summoned to withdraw the slanderous content. In a decision delivered on October 13, 2008, the 17th chamber of the Court of First Instance of Paris dismissed the action brought against the company 20 Minutes on the grounds that the said company *“was the host of the blog, the content of which is not the result of any specific editorial choice of the host and on which it does not exercise any a priori or a posteriori control on.”*

The company 20 Minutes enjoyed thereby the status of host.

To hold a hosting provider responsible, the illicit content must be fully described. If someone wishes to inform a host of any illicit content he must do so in accordance with the rules provided for in the Law on Confidence in the Digital Economy, i.e. in a very meticulous presentation of the illicit aspect of the content. The purpose of this strict requirement is to quell the great number of abusive demands sent to hosting providers. Observing such formalities is the only way that judges may look into the possible responsibility of the hosting provider if he has not withdrawn the content duly notified as unlawful.

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