April 2008

à la une

IP / IT / Media Department

December 11, 2007 Directive: the new regulatory framework for European audiovisual media services.

Converging technologies, the emergence of new broadcasting services and the changes in television viewers' habits have prompted the Community authorities to make a further revision of the so-called "TSF" Directive dated October 3, 1989.

The revision process, started by the Commission in June 2005 with the aim of modernising the legal framework applicable to audiovisual media services, has just resulted in the adoption this past December 11, 2007 of the Directive 2007/65/EC, known as the "Audiovisual Media Services" Directive.

The new Directive's ambition, applying the principle of technological neutrality, is to cover all audiovisual media services, in which a distinction is made between linear services and non-linear services.

Linear services are the programmed services which users receive passively ("push content").
The Directive contains a reference to traditional television services. Although not expressly mentioned, this definition seems to include "IPTV" (Internet Protocol Television) and also "TMP" (Mobile Television), which are both dedicated to broadcasting television programmes, one over the Internet, the other via mobile telephones.

These classical broadcasting services, already covered by the "TSF" Directive, have their regulatory framework relaxed somewhat by the new European regulation.

As an example, the new provisions give more flexibility to the insertion of advertising rules by giving broadcasters the opportunity to select the most suitable moment to insert advertisements in programmes.

On the other hand, the Directive provides that cinema works, children's programmes, news and political information programmes should not be interrupted more than once during each thirty-minute segment.

Also, access to short excerpts (limited to 90 seconds) – not limited to sports programmes – is regulated.
However, the major contribution of this new set of rules is that essentially they take account of the new broadcasting services, i.e. non-linear services.

As opposed to linear services, non-linear services are on-demand services (especially on-demand video and television), which users freely choose to watch outside of any programme schedule ("pull content").

It can then be supposed that they include "Interactive Television", where the user can interact with the content of a television programme using a remote control, a fixed or mobile telephone or the Internet network.

As indicated earlier, linear services benefit from a more flexible regulatory framework. For the non-linear services, the Directive imposes a nominal number of rules: protection of minors, promotion of cultural diversity, prohibition of contents inciting to religious or racial hatred.

Similarly, while the quota system of European works to be broadcast and produced by the traditional television services remains unchanged, the Directive contains provisions adapted to non-linear services, which have an obligation to promote European works only "*when this is practicable*".
There are common provisions, applicable indiscriminately to both linear and non-linear services.

This is the case particularly of the principle of the sequence of film distribution by the various media, which defines the order and length of time to be respected by the various types of exploitation of cinema films.

The rules on product placing are also applicable to all the audiovisual media services: this advertising technique is authorised by the Directive (except for children's' programmes, news programmes and documentaries), provided an advertisement can be clearly identified as such by an express message.

Yet although the European Institutions tried to create a framework for the modernisation of television broadcasting activities, attempting to encompass all the new broadcasting methods, they have nevertheless left out some audiovisual services, such as content sharing sites and private websites. In addition, they have left great latitude to the member States, who have two years from December 2007 to transpose the Directive into their own legislation. To be continued…

NEWS

EMI sanctioned to pay nearly one million euros to the rapper Doc Gynéco

The Paris Court of Appeal judgment dated December 13, 2007 considered that EMI Music had abusively terminated the contract it had with Doc Gynéco.

In May 2004, qualifying the singer's attitude during an interview as gross misconduct, EMI Music warned Doc Gynéco that it intended to put an end to their contractual relations.

Asserting that the record company had allegedly used the excuse of falling sales of his records to rid itself of him, Doc Gynéco brought an action before the Paris Employment Tribunal on the grounds of the abusive breach of his employment contract. On January 14, 2005 the record company lost in the first instance and appealed the judgment.

The Paris Court of Appeal confirmed the Employment Tribunal judgment, except for the fact that it had requalified the recording contract as an indefinite term contract, whose breach in the absence of gross misconduct entitled the employee to compensation.

In this case, the appeal judges set aside the gross misconduct qualification applied to the singer, noting that the dismissal came too long after the remarks complained of were made. In fact, according to the Court, the singer's remarks were justified by the climate of tension which reigned at the time of the interview with the producer.

It is worth noting that to calculate the very substantial sum of 943,663 euros which the Paris Court of Appeal ordered the record company to pay Doc Gynéco, it took into consideration the remuneration that the singer should have received until the end of the contract, including the royalties for the two remaining albums.

First application of Article 1 of the LCEN: The disclosure of confidential information, a restriction on the freedom of trade union expression on the Internet

Can the freedom of trade union expression on an Internet site be restricted?

The social chamber of the French Supreme Court has just ruled on this question in a decision of 5 March 2008, declaring that the trade unions' right of expression can be restricted "to avoid the disclosure of confidential information causing prejudice to third party rights".

In the case concerned, the CGT federation of project research companies had put information on line on its site about a company called Secodip: reports of appraisals, minutes of salary negotiations, etc.!

Considering that this information was confidential, Secodip applied to the Presiding Judge of the Bobigny First Instance Court in summary proceedings to obtain the withdrawal of these publications. This request was granted by an order of 11 March 2005.

The trade union then decided to appeal. In its 15 June 2006 judgment, the Paris Court of Appeal overturned the first instance decision, recalling that the members of a trade union are not bound by the legal obligation of discretion or confidentiality, unlike works council members or trade union representatives.

However, in its 5 March 2008 judgment, the French Supreme Court censured the judgment rendered on appeal on the grounds that a trade union's freedom of expression on an Internet site can be restricted to protect the confidentiality of information whose disclosure infringes third parties' rights.

The Court based its judgment first on Article 10 §2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which authorises restrictions on the freedom of expression whenever they are necessary, "particularly for preventing the disclosure of information received in confidence".

In addition, it relied on Article 1 of the Law for Confidence in the Digital Economy of 21 June 2004, which was applied for the first time, and which authorises the restriction of the exercise of electronic communication "particularly for the protection of freedom and the property of others".

Note that for the future the restrictions on free electronic communication laid down by this judgment are likely to be applied elsewhere than just in the framework of trade union expression.

The editorial responsibility of the free content site "fuzz.fr" upheld for invasion of privacy

Among the free content sites, there are so-called "Digg-Like" sites where users can share and promote web pages with other users of the service.

However, in view of the sometimes contradictory case law concerning the actors of Web 2.0, one can legitimately ask the question of what status to apply to the managers of these sites whose contents are "posted" by third parties.

By a summary order dated March 26, 2008, the Presiding Judge of the Paris First Instance Court recently qualified the manager of just such a site as a publisher, in view of the contents posted by its contributors.

In this case, the actor Olivier Martinez decided to bring an action in summary proceedings for invasion of privacy following the publication on the Internet site "fuzz.fr", published by bloobox.net (which is no longer on line as of today), of a link to a blog which mentioned the actor's relationship with the singer Kylie Minogue.

Bloobox.net's defence argument was its capacity as a technical service provider (therefore hoster), whose liability can only be incurred when it has not taken prompt action to remove or prevent all access to content which it knows is obviously unlawful. Case law in principle retains the qualification of hoster when the site's activity is limited to storing contents supplied by the users themselves; unlike a publisher, defined as "the person who is personally at the origin of the publication" (cf. "Dailymotion" decision of July 13, 2007 of the Paris First Instance Court).

However, the judge in summary proceedings in this case did not uphold the qualification of hoster but rather publisher, considering that the defendant had made a genuine editorial choice by referring Internet users to a blog and using a headline in bold characters. The judge therefore completely passed over the fact that the content in issue had been "posted" by an Internet user.

P.D.G.B Société d'Avocats
174, avenue Victor Hugo
75116 Paris
Tel. : 00 (01) 44.05.21.21
Fax : 00 (01) 44 05 21 05
www.pdgb.com

Julie JACOB - Benjamin JACOB - Sandy HERVÉ
Sandy BRUMBERG