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à la une

IP / IT / Media Department

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Development and protection of cultural works in the new communication networks

The terms of the 26 July 2007 mission letter which the Ministry of Culture and Communication sent to Denis Olivennes (FNAC) were very clear: find an agreement between professionals of creation (audiovisual, cinema, literature, music, etc.), the authorities and the Internet services providers to develop legal offers on the Internet and intensify the fight against piracy.

The agreement reached on 23 November 2007 was signed between the Internet services providers (France Télécom, Iliad, Neuf Cegetel, etc.), the authors' rights societies (SACEM, SCPP, SACD), the television channels (TF1, France Télévisions, Canal+, etc.) and the rights holders (ALPA, USPA, SNEP, etc.) and contains commitments made by all the signatories, namely:

- **Commitments by the authorities**

The authorities undertook to propose measures to encourage accountability in subscribers for the fraudulent use of their Internet access (Article L.335-12 of the Intellectual Property Code) through the creation of an independent administrative authority. When a complaint is made by a rights holder, this public authority will step in to issue a warning in the form of an e-mail sent by the Internet service providers. A graduated sanction will be applied in three stages: first a warning e-mail; then suspension of the Internet connection; and finally termination of the Internet access subscription.

However, the question still remains of the method that will be used to identify the pirates, since the IP address (identifier number of each computer connected to the Internet network) is in most cases deemed to be personal data and therefore its collection must first be authorised by the CNIL (French Data Protection Authority).

Moreover, a national directory of subscribers whose contracts have been terminated will be able to be created, following a declaration to the CNIL to obtain its opinion. Also to be noted is that on 8 November 2007, the CNIL authorised SACEM (French society of music authors, composers and publishers) and SCPP (French society of music producers) to implement an automatic detection system of infringements of the Intellectual Property Code and to make a note of the IP addresses of the pirates.

Finally, the authorities undertook to submit a request to the European authorities for a reduction in the VAT rate, resulting in a fall in selling prices which can then be passed on directly to the public.

- **Commitments of the rights holders**

The audiovisual, music and cinema rights holders and the TV channels undertook to hold consultations with the hosting and content sharing platforms to introduce the use of marking technologies (fingerprinting or watermarking), so that the sources can be made available to create catalogues of references.

These marking techniques consist of integrating digital codes in the works to be protected to control their traceability on the Internet. Their only interest is as a control "after the fact" (to identify the infringers), but they do not lock the works. This is not then an anti-copying system which will be put in place.

Another item of interest is that the cinema rights holders reached an agreement on the "chronology of the media", since they undertook to align the VOD broadcasting window on that of the physical video (i.e. 6 months from its public release).

Attractive legal offers can now be developed for the VOD broadcasting of cinema works. The same applies to audiovisual programmes which will be exploited on-line earlier after their first showing.

It should also be noted that the rights holders undertook to provide catalogues of French musical productions without any DRM in the year following the application of the above warning and sanctioning system, which will also encourage an interoperable environment for works to be broadcast.

- **Commitments by providers of technical services**

The distinction must be made between Internet service providers and hosting and content sharing platforms.

Internet service providers undertook to send the warning messages issued by the administrative authority and to collaborate with the rights holders to introduce network filtering methods.

The platforms undertook to collaborate with the rights holders to agree on the lawful use of the content they propose and to make filtering systems more general.

However Dailymotion and Youtube are resistant to signing this charter as they say they are just hosting providers.

Whatever the situation, given that filtering software are not infallible, they will doubtless be insufficient to regulate Internet content.

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This temporary agreement (for one year) is one of a kind since both creatives and providers of technical services are involved; it is revealing of a real intention to find a solution, since it privileges on the one hand informing users by dissuasion rather than repression, and on the other hand putting all content on line, whether musical, cinema or audiovisual, but doing so in the respect of existing rights and recognised exclusivity. Now we just have to wait for the implementing decrees…

- **A further extension of the remuneration for private copy**

Since 12 November 2007, the remuneration for private copy has to be paid on external multimedia hard disks.

This new remuneration varies from 7 Euros before tax (80 Gb) to 23 Euros before tax (more than 400 Gb) depending on the storage capacity of the hard disk. This means that the remuneration for private copy is also now due for set-top boxes for televisions or channels integrating a hard disk and playback functions, with which MP3 or dviX can be played and listened to without a computer.

After "taxing" USB keys (flash drives), memory sticks and external hard disks (the appeal is pending before the "Conseil d'Etat", France's highest administrative court), it is now the turn of external multimedia hard disks to be "taxed"… with the perspective of a potential extension to multimedia mobile telephones (iPhone for example) or game consoles.

This new remuneration will be applicable one month after the publication of the 12 November 2007 decision of the Albis Commission in the Official Journal. It seems to be a foregone conclusion that consumers will not benefit from this new remuneration being passed on to selling prices.

- **Anti-virus solutions: who is liable?**

Even though they are what their business is built on, the unceasing multiplication of computer viruses which abound on the networks could be a cause of concern for publishers and suppliers of anti-virus solutions. Despite the never-ending updating of the solutions they propose, no one is really safe from infection, whose consequences can be serious in terms of damage. However, publishers and suppliers of anti-virus solutions cannot always be systematically held liable.

The 4 May 2007 judgment of Paris Court of Appeal provides an illustration.

In this case, a company had taken out a subscription for an anti-virus protection system, which unfortunately had been unable to prevent the servers it was supposed to protect from being contaminated, seemingly after certain employees logged onto sites not related to the company's business, thereby allowing the unlawful downloading of software which were apparently infested with viruses.

The 2 November 2005 judgment of the Paris Commercial Court found that the supplier of the anti-virus solution was liable, declared that the contract was terminated for breach by the supplier and ordered it to pay damages. The Court reasoned that, while the supplier of the anti-virus solution has a "best efforts" obligation when it comes to new viruses, it has an obligation to achieve a specific result for viruses that are known, which was the case of the virus in issue.

The Paris Court of Appeal went much further, as it took into consideration where the virus came from to rule out the liability of the anti-virus solution supplier. The Court decided that the supplier did not have to provide protection against viruses present on websites that were not related to its customer's business or were even illegal. The Court then found that because the customer allowed its personnel to log onto these sites, it was the customer which had made the anti-virus solution ineffective by its own fault so that the liability of the solution's supplier was not upheld.

This reasoning can be seen as surprising as it implies that the liability of the supplier of an anti-virus solution cannot be incurred if it can be shown that its user frequents sites which are not related to its business.

It is something which strictly limits the liability of suppliers of anti-virus solutions and should encourage the installation of filtering systems.

- **Web 2.0: the liability of providers of technical services**

The case law battle about the liability of Web 2.0 platforms continues with the summary order of the Paris First Instance Court dated 29 October 2007. The on-line encyclopaedia Wikipedia was being sued for libel and invasion of privacy because of an article revealing the homosexuality of three individuals, who considered that the site manager had incurred his liability as hosting provider by not acting quickly to remove the unlawful content of which he had been informed by two e-mails.

The judge in summary proceedings considered that the formalism of the notification required by Article 6.1.5 of the LCEN of 21 June 2004 had not been respected and that as a result Wikipedia was not deemed to have been aware that the article in question was unlawful.
It was therefore judged that the co-written Wikipedia site as hosting provider was not liable for the content placed on line by the Internet users.

In this case, there was no discussion about the qualification to be given to the platform as the claimants failed to mention the application of the rules governing publishers' liability.

Even though it is not a decision on the merits, this summary order follows the tradition of the most recent "Google Video" and "Dailymotion" case law, both of which were qualified as hosting providers. It therefore appears that in principle, companies which merely provide a structure for Internet users to put content on line (encyclopaedia articles in this case) are not qualified as publishers.

On the other hand, it would be interesting to see whether Wikipedia's liability as hosting provider would have been incurred if the claimants' notification had been valid. This would have led to greater certainty about the liability rules actually applying to hosters of Web 2.0 services (particularly if the site manager is a non-profit making foundation).

As a reminder, recent judgements have placed a general obligation of surveillance on hosting providers, which put to profit the content posted par Internet users, based on a presumption that they know their platform is hosting unlawful content.

What is to be retained from this decision is the importance of the notification sent to the provider. It has to indicate the date of the notification, the full identity of the claimant and the recipient, the description of the facts in issue and their precise location, the reasons why the content must be removed (with the reference to the relevant legal provisions) and the copy of the correspondence sent to the author or publisher of the information or activities requesting they be stopped, withdrawn or modified, or proof that the author or publisher could not be contacted. If this formalism is not respected, there is a risk that the request for withdrawal will be completely ineffective.

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