

IAEL Update Seminar

What you need to know in 2010

FRANCE

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INTRODUCTION (1)

Social and economical issues

- New ways of consumption in the music industry (free-immediacy-atomization)
- An illegal dominance (P2P, streaming on line)
- News actors – news liabilities ?
- Injuries to the economy of creation
- The decrease of the music's market in comparison with 2008 : decrease of the physical music's market (-11,4%) / increase of the digital music market (+3,5%)

INTRODUCTION (2)

Legal issues

- Fight against infringements on the Internet
- Contracts / relationship between Performers / Producers / Users
- Emergence of new economic models ... which legal frame ?

INTRODUCTION (3)

In France in 2009

An intense activity :

- Legislative work : 2 laws, 2 decisions of the french Constitutional Court, several decrees, 1 collective agreement
- Case law : more than 7 significant judgments from the Supreme Court
- Reflexions about the future ...

INTRODUCTION (4)

I. The legal provisions

II. The case law

III. The future ...

I. THE LEGAL PROVISIONS

1. HADOPI

1.1. The law « HADOPI I » dated June 12th, 2009

- The « three-strikes » proceedings (« riposte graduée »)
 - two ranges of notifications against the Internet access' holder
 - After those two ranges of notifications, the HADOPI agency may pronounce the Internet access' suspension
- The HADOPI agency is entitled to send notifications to the alleged infringers and to pronounce sanctions such as the suspension of access to Internet

1. HADOPI

1.2. The decision of the French Constitutional Court dated June 10th, 2009

- The censorship of HADOPI law I
 - Invalidation of the HADOPI agency's power to suspend the Internet access as a sanction.
Indeed, this sanction has to be pronounced by a judge
 - Invalidation of Internet access suspension as a sanction / View as a violation of the presumption of innocence

1. HADOPI

1.3. The law « HADOPI II » dated October 28th, 2009 named « criminal protection of literary and artistic property on the Internet »

- Its main aim was to rebuild the criminal part of the HADOPI law I
- Its scope has been enlarged : new rules settled for any infringement to copyright perpetrated on the Internet

1. HADOPI

- New redaction of the criminal part of the HADOPI I
- Regarding the « three-strike » proceeding, the role of the HADOPI agency has changed : power of investigation, recommendations, collect and transmission of information dealing with infringement to the judge. At the same time, it can not pronounce sanctions anymore and it does not have the power to settle out of Court internet users
- HADOPI agency is still entitled to send notifications against the owner of the Internet access for not having supervised his connection
- Only judicial judge may pronounce the suspension of Internet access

1. HADOPI

- Introduction of new criminal proceedings for infringement to copyright perpetrated on the Internet
- The infringements to copyright made on the Internet (and only them) can be ruled upon by a single judge
- Those infringements can also be judged under special and simplified proceedings (criminal order / “ordonnance pénale”)
- The judge will render his verdict without due hearing of the defendant. (But an “opposition” can be made by the defendant)
- Those new criminal proceeding are supposed to be quicker and simpler than the previous ones.

1. HADOPI

1.4. The decision of the French Constitutional Court dated October 22nd, 2009

- The major part of the law has been declared conform with the French Constitution
- Invalidation of the provisions concerning the opportunity for a victim to claim for damages during procedure of criminal order (for lack of precision within the law)

1. HADOPI

1.5. In 2010

- Waiting for decrees (after the decree dated December 29th 2009 dealing with the agency's organization and the decree dated December 23th 2009 dealing with the appointment of the Agency's members)
- First e-mails warning should be send between April and July

2. Collective agreement of the phonographic publishing

2.1. Convention signed June 30th, 2008

- The end of long-standing conflicts and debate
- Its scope has been enlarged to all the record companies by the decree dated March 20th, 2009 and applicable since April 1st, 2009
- The principals signers are the SNEP, UPFI, SNAM, SFA
- This text concerns record producers, publishers and distributors
- This text deals with remunerations in compensation with the assignment of performers' rights
- 3 annex concern full-timer employee, performers and technicians

2. Collective agreement of the phonographic publishing

2.2. The SPEDIDAM's reaction

- The decision of the higher French administrative Court (Conseil d'Etat) dated on July 8th, 2009
- SPEDIDAM claims for the suspension of the decree dated March 20th, 2009 which enlarged the collective agreement
- Denial of SPEDIDAM's claim by the Court
- But SPEDIDAM will continue trying to obtain the annulment of the agreement

3. Decree determining Intellectual property Court's jurisdiction

- **Decree n°2009-1205 dated October 9th, 2009**
 - Only nine specialized Court of First Instance will have jurisdiction over IP issues
 - The first step for a copyright's Court ?

4. The « L.214-4 CPI Committee » responsible for compulsory licence

4.1. The decision of the Committee dated September 17th, 2008

- Dealing with the remuneration owed by the public organisms for broadcasting
- This text is applicable since January 1st, 2009

4. The « L.214-4 CPI Committee » for compulsory license

4.2. The decision of the Committee dated on January 5th, 2010

- New reckoner for compulsory license owed by public places in which music is broadcasted
- This text will be applicable in February 1st, 2010
- Complete application in January 1st, 2013

5. The « L.311-5 CPI Committee » in charge of the private copy remuneration

5.1. Decree dated June 19th, 2009 concerning the organization of the Committee instituted by the article L.311-5 of the French IP Code

5.2. Decree dated December 15th, 2009 determining the Committee appointment

5. The « L.311-5 CPI Committee » in charge of the private copy remuneration

5.2. The decision of the Committee dated December 17th, 2008

- Mobile phone liable for private copy remuneration since January 1st, 2009
- Industrial union discontent

5. The « L.311-5 CPI Committee » in charge of the private copy remuneration

5.3. The decision of the Committee dated December 17th, 2008

- The amount of private copy remuneration in most of digital support applicable since January 1st, 2009
- Reckoning mode ruling out part of estimating copy made from illegal origin (CE, July 11th, 2008)

6. Directive of the european parliament and Council modifying the « paquet Telecom »

6.1. The «Paquet Telecom»

This project, nick-named « Paquet Telecom » refers to community texts which have been adopted in 2002

Its aims is to define a legal structure for regulation and control of communication network and electronic communication services

6. Directive of the european parliament and Council modifying the « paquet Telecom »

6.2. Directive 2009/136/CE dated November 25th, 2009

Change the Directive 2002/22/CE about the universal service and users rights dealing with communication networks and electronic communication services

6. Directive of the european parliament and Council modifying the « paquet Telecom »

6.3. Directive 2009/140/CE dated November 25th, 2009

- Modification of the Directive 2002/21/CE about mutual regulation for electronic communication service and network
- Modification of the Directive 2002/19/CE about electronic communication network access
- Modification of the Directive 2002/20/CE about approval of electronic communication network and service

II. CASE LAW

LAST MINUTE !

TISCALI vs DARGAUD

January 14th, 2010

A NEW DECISION !

0. TISCALI vs DARGAUD

- This is the first case of the « Cour de Cassation » / French Supreme Court which deals with the Web 2.0
- Offering to a user the possibility to create his own personal page with his own content **and to propose at the same time to put some advertising on those pages**, is more than just providing hosting services. Therefore, the exception of liability applicable to Hosting providers is no longer applicable. The Hosting providers that provides such services can no longer claim for the protection of the hosting providers' status.

0. TISCALI vs DARGAUD

- Legal ground : the law dated August 1st, 2000 / the e-commerce European directive dated June 8th, 2000
- The remaining question: Is this decision applicable to the latest definition of the hosting provider set in the law of June 21st 2004 named LCEN which implements the e-commerce directive?

1. Supreme Court

1.1. Moral right's strong protection

1.1.1. Cass. 1^{ère} civ. April 2, 2009, Universal Music France vs M. Barbelivien, M. Montagne and others

- Use of an adaptation of a musical work in a commercial
- Inalienability of the author's moral right
- Assignment's nullity of the provision leaving the exclusive appreciation of uses, diffusions, adaptations, additions...

1. Supreme Court

1.1. Moral right's strong protection

1.1.2. Cass. 1^{ère} civ. June 11th, 2009, “I muvrini”

- The collective name of a music group as an undivided property
- Separation of the music group
- The music group's name belong to the members which carry out the best, the artistic project

1. Supreme Court

1.1. Moral right's strong protection

1.1.3. Cass. 1^{ère} civ. July 9th, 2009, M. Aznavour vs Jacky Boy Music

- Exploitation of the performer photography for the promotion of his interpretation of recording which are in the public domain
- Reproduction of the performer photography on the CD's cover
- Required performer's authorization for the photography's use in spite of the fact that there is no damage to private life of the artist ... based on image rights

1. Supreme Court

1.1. Moral right strong protection

1.1.4. Cass. 1^{ère} civ. September 24th, 2009, H. Salvador c/ Jacky Boy Music

- Exploitation of the performer's photography for the promotion of his interpretation of recording which are in the public domain
- Moral rights' Infringement because :
 - Compilation sell at a low price
 - The quality of the recording is very bad (even if it is the "original")
 - Selling as a product for big distribution company, not related to "artistic area"...

1. Supreme Court

1.2. Decline of patrimonial rights' protection

1.2.1. Cass. Soc. January 13 th – “Bernadette”

- Contract with a global earning for 1) salary 2) fees for performers' rights in a audiovisual work
- The Court of appeal decided that this is not legal insomuch as the remuneration should have been separated
- The Supreme Court has decided that the contract is valid and therefore bound the parties

1. Supreme Court

1.2. Decline of patrimonial rights' protection

1.2.2. Cass. soc. February 4th 2009, Universal Music vs M. Gerald De Palmas

- Artist vs. Producer
- Recording agreement is a temporary contract, even if it can run during 19 years, as soon as the object of the contract is determined (5 albums)
- Recording agreement is not a Open-ended contract, so there is no possibility for the artist to terminate his recording agreement

1. Supreme Court

1.2. Decline of patrimonial rights' protection

1.2.3. Cass. soc. July 1st, 2009, EMI Music France vs M. Beausir, « Doc Gyneco »

- Performer vs. Producer
- Termination of artist's contract by the Producer
- Damages' evaluation
- Royalties are not included in the base of damages' evaluation
- Result : low costs to fire an artist !

1. Supreme Court

1.3. Video game and music

Cass. 1^{ère} civ. June 25th, 2009, Lefranc vs Sesam

- Musical work incorporated in a video game
- Is a video game a collective work ?
- If yes, is SACEM able to exercise rights on the music ?
- Distributive qualification of the video game
- Musical work autonomy
- Perception of mechanic reproduction rights by Sesam

2. Court of appeal

CA Paris. 4^{ème} Ch. Sect. B. February 13th, 2009, M. Despres vs Universal Music Publishing MGB France

- Exploitation mode of the musical work
- Medley
- Damage to the author's moral right due to the lack of authorization for the incorporation of his work in the medley

3. Decisions of the « Courts of first Instance »

3.1. TGI Paris, 31^{ème} ch., September 3rd, 2009, SCPP vs Jean Louis and Benoît T.

- First application about the new incrimination for software providers introduced by the law dated August 1st, 2006 named « DADVSI law »
- The conviction of the music on demand web site named « Radioblog » for counterfeit
- Application to the streaming's software
- 1,089 Millions Euros of damages for SCPP and SPPF
- Have to be compared to « deezer.com » which has concluded an agreement with the SACEM for the use of its music list in 2007

3. Decisions of the « Courts of first Instance »

3.2. TGI Paris, September 2, 2009, SPPF vs CANAL +

Probate of an agreement signed between Canal + and several SPRD dealing with compulsory licence application for video and music

3. Decisions of the « Courts of first Instance »

3.3. TGI Paris, January 15th, 2010, SPEDIDAM vs Fnac Direct, Ecompil, Itunes, On demand Distribution, Sony Connect, Virgin Mega – communicate by Eric Lauvaux

- SPEDIDAM claims against digital platforms – the authorization for “phonogram” only concern media as CD and can not applies to digital downloading
- The tribunal answered that a phonogram is still a phonogram, whether on CD or on a digital format...

IN 2010

1. ZELNIK report

1.1. « Mission ZELNIK »

Objectives

Facilitate the legal offer of cultural data on the Internet,
finding creation financing and sharing value ...

1. ZELNIK report (and HADOPI III ?)

1.2. The 9 offers dealing with music area

- The « online music card » for the 15 to 24 years old internet users
- The online music webpromotion
- Setting up of an ambitious communication campaign
- Extension of the compulsory licence system for webcasting
- Creation of a voluntary collective gestion managment

1. ZELNIK report

- Raising of the equitable remuneration and creation of a mechanism of guarantees
- Renewal and improvement of tax credit for musical production
- Improvement of the « IFCIC » interventions means

2. Single market of digital creative resources online's study

The European Commission reflection dated October
22nd, 2009

- Issues about the creation of a digital music's single market
- Dealing with the holder rights, the consumers and commercial users
- The benefits of the single market creation

3. The endeavor of an improvement of the online music opportunities for the european consumers

Roundtable dealing with online music organised by the European Commission

- With : Amazon, BEUC, EMI, iTunes, Nokia, PRS for Music, SACEM, STIM et Universal
- Signature of a mutual declaration for the creation of new european platforms including licences with music list of SGC
- Reflection about rights'holders' guarantees

4. Extension of the performer' rights protection by the European parliament ?

Proposition of the European parliament dated April 23th, 2009

- Dealing with the increase of the artist's rights protection length until 70 years in music area
- With a starting point as from the first bring out music or scene execution of music
- Dealing with a better protection for the artist ...

THANKS !

ALL THE BEST on 2010

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