

The newsletter on intellectual property and information technology



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EDITORIAL

A HAPPY ENDING FOR NET NEUTRALITY AND NETWORKS?

Net neutrality is a much written-about topic involving various actors, including network operators, public authorities, service providers, content editors and, to a lesser extent, users. This debate has grown out of the rapidly expanding use of networks and the desire of the parties to ensure that they will be sufficiently dimensioned to guarantee non-discriminatory access for everyone.

The question of net neutrality would be fairly theoretical if mobile and fixed operators were unable to facilitate or, on the contrary, restrict access to some websites (particularly those with the most web traffic and videos) and the transfer of some types of data by blocking or degrading them, based on their own technical or financial interests.

This debate was further fuelled by a government report issued in July on *'La neutralité de l'internet, un atout pour le développement de l'économie numérique'* (Internet Neutrality: an Asset for the Development of the Digital Economy). The last contribution to date on this issue was that made by ARCEP (The French telecommunication agency) at the end of September.

Structurally, operators wish to be able to manage flows across networks and obtain a contribution to development from service providers and content editors, insofar as the latter are requesting non-discriminatory access to their products. The operator's main reason for this is the need to increase the dimensioning of their networks to continue increasing the number of users even though service providers do not contribute to the investments required for this.

On the other hand, service providers and content editors stress their contribution to such improvement and, in doing so, the development of networks, as justification that end users should pay subscriptions to access products. They also maintain that network operators are very often rivals and that any discrimination with respect to the contents and services offered by operators would amount to unfair competition. Moreover, service providers like Skype or Google are also able to offer services which can substitute those offered by network operators.

For their part, the public authorities are seeking to regulate practices to combat terrorism and child pornography or to ensure the filtering of some websites (for example, unauthorised online gaming websites). The government's position, as it is described in the report, relies in part on the need to ensure the flow of data through networks, which would mainly be effected by managing the content passing through them, creating a controlled neutrality of sorts.

The vision of the public authorities appears nonetheless to be reconcilable with that of operators. The internet already has restrictions in any case. Some operators group large bandwidth users through their distributors (DSLAMs) so that they can limit their usage and do not have to increase greatly the bandwidth made available to them. They can also use their routers to examine the contents of data passing through their equipment (deep packet inspections [DPI]). Mobile operators also limit their offers even though they advertise them as being “unlimited”. It is thus quite normal that access to data, depending on the type of subscription, may not be the same for any two subscribers. Nonetheless, the increasing number of means of accessing networks, particularly the internet through smartphones, tablet PCs, screens and other television terminals within the same household makes the question of dimensioning networks quite essential.

It is an understatement to say that the positions expressed in the government report were received badly and resulted in strong criticisms, particularly of the supervision measures.

The nine proposals made by ARCEP following a consultation of French players thus appeared reasonable and were able to restore the calm lacking in the debate.

It is quite evident that fixed and mobile uses of the internet will continue to grow and consequently the resources used will require new investments, for example, by using fibre optic networks to offer high-speed access. It is thus possible, and even desirable, to consider products with guaranteed access to high-speed and quality service networks. These products may be considered for internet and mobile access, hosting, electronic messaging services and even Voiceover IP. This would allow operators to increase their income or ARPU (average revenue per user) as well as their profits. The emergence of this type of offer would consequently allow services or content providers to continue developing their products.

It is thus essential that network operator clients are clearly and precisely informed of what they are entitled to under their telecom agreements. This is entirely up to telecoms operators, who must restructure their products, particularly those which are only “unlimited” in the advertisements used to promote them. The general terms and conditions of these operators will have to be reformulated to ensure they are understood by all.

Overall, the benefit of this debate on net neutrality is that it makes it possible to consider services based on the price paid by users rather than the nature of the content transferred or the websites they visit. Efforts must thus be made to maintain this neutrality so that the end user remains in control of sending or receiving the content it wishes or using the content or services of its choice via all methods of accessing them as it wishes without restrictions, except for legal purposes. It is at this price that networks may provide a space for considerable economic development for operators, service and

content providers by offering new services and content to their clients or users.

Emmanuel Sordet

1 - INTERNET - E-COMMERCE

GOOGLE SUGGEST: STILL A HOT TOPIC OF CONVERSATION

The Google Suggest functionality is back in the spotlight again, this time accompanied by the “advanced search” functionality.

Mr. X, sentenced by the Paris Court of Appeal on 5 February 2010 for the corruption of minors, stated that when his first name and surname were entered into the search bar in the Google search engine, ten suggestions were made to internet users, in particular, “*Mr. X raped*”, “*Mr. X, sentenced*”, “*Mr. X, a Satanist*” and “*Mr. X, prison*”.

He had also noted the same results when the same words were entered in a different order into “advanced search”.

Consequently, he brought a case against Google Inc., Google France and Mr. S., in his capacity as the managing editor, on charges of defamation.

As it has done in previous court cases, Google tried to invoke the “technological neutrality” of its tools. It also stated that there is a message on the www.google.fr homepage informing internet users of the terms of the use of its tools, such as it had been ordered to do in an earlier Paris Court of Appeal case.

Nonetheless, on 8 September, the 17th Division of the Paris Court of First Instance upheld the defamatory nature of the suggestions made by the Google Suggest and advanced search tools and consequently ordered Google Inc. and the managing editor of www.google.fr to pay one Euro in damages to Mr. X.

The court also ordered the managing editor and Google Inc. to take all measures to remove the suggestions in question.

The 17th Division of the Paris Court of First Instance thus upheld its position on the Google Suggest tool.

A SWORD OF DAMOCLES HANGING OVER .FR WEBSITES

On 6 October 2010, the Constitutional Council, in an important question of constitutionality put to it on 9 July by the Council of State, declared Article L. 45 of the French Post and Electronic Communications Code (CPCE) concerning the allocation and management of first level domain names (mainly .fr) by the bodies appointed by the government (currently the AFNIC) to be contrary to the Constitution.

The claimants maintained that Article L.45 of the CPCE does not set a minimum legislative framework and granted considerable discretion to the administrative authority and the bodies appointed by it.

The article in question simply stipulates that *“The allocation of a domain name is organised by these bodies in the public interest, according to non-discriminatory rules that are made public and which monitor compliance, by the applicant, with intellectual property rights”*, referring to a Council of State decree on the need to specify the terms of its application.

The legislator had thus entirely delegated the power to supervise the terms under which .fr domain names are allocated or can be renewed, refused or withdrawn.

No other legislative provisions establish guarantees that the freedom to operate and the freedom to communicate are not undermined.

While this decision does not question the allocation of previous .fr addresses, the immediate repeal of Article L.45 of the CPCE could lead to the freezing of the service to allocate .fr addresses. Thus, the Constitutional Council has postponed the deadline for the effect of its declaration of unconstitutionality and granted a six-month period, until 1 July 2011, for Parliament to enact a new legislative framework.

2 - COPYRIGHT

TO BE AN AUTHOR OR NOT TO BE AN AUTHOR ...

An employee was employed by a communications agency to create musical productions. Under the terms of his contract of employment, all original works he contributed to were collective works with the intellectual property rights belonging to the agency.

Following his dismissal, the employee brought a case before an Industrial Tribunal to have this clause voided, to have his rights as the author of the works created in performance of his employment contract recognised and to obtain payment in damages for infringement of his copyright.

Having had all of his claims dismissed in a ruling dated 14 May 2008, the employee appealed this decision.

In support of his claims, he argued that *“the definition of collective work does not apply to a musical work”* and, consequently, the intellectual property clause in dispute must be voided insofar as it provides for a total transfer of future works, a transfer prohibited by law.

On 8 September 2010, the Court also dismissed the employee's claims on the grounds that he had to establish that he alone was the sole author of the works created during the performance of his employment contract, of which he did not provide satisfactory evidence. It held that *“Mr. X's contribution to the creation of the music intrinsic to the performance of his employment contract was based on the collective work of other authors or employees working within the team managed by Mr. Y, the agency's legal representative,*

without it being possible to attribute to each of them a distinct right to the work created. It is thus deduced that the pieces of music created were a collective work, whose content and copyright belong to the company”.

This ruling reiterated that judges, in spite of there being a classification clause in the contract, remain free to assess the actual classification of a work and, in this scope, must solely assess the nature of the contribution made by participants in the work, regardless of the type of work it is.

TRANSFERS ARE NOT A GIVEN!

The artistic director of an art magazine brought a court case against the publishing company who employed her for infringement of her copyright by having distributed edition number 5 of the magazine without her permission. In particular, she accused it of not having paid her for the transfer of her rights to this edition.

On 15 September 2010, the Paris Court of Appeal upheld the court of first instance judgment by ruling that her capacity as an author, as the artistic director, was not in question, as this capacity was made clear from the name under which the work was disclosed. In this case, the court relied on the statement, in the masthead, of her pivotal role in the artistic production of the magazine, to attribute this status to her.

On the other hand, the ruling is interesting in that it reiterates the principle according to which a transfer of copyright is strictly interpreted and must necessarily be expressed; otherwise any distribution of the work is an infringement.

Effectively, according to the court, *“no element allows it to be held that there was an express transfer of Mrs. X's intellectual property rights, given that rights arising solely from providing the work carried out cannot be considered a transfer; in this respect, while it must be admitted that the fixed rate invoice mentioned by the appellant [the publishing company] transferred ownership of the actual materials produced, it did not establish that there was also a transfer of the rights to use the work delivered insofar as the assessment of such a transfer is subject to a strict interpretation”*.

3 - TRADEMARKS - PATENTS

IS THERE A PRESIDING JUDGE TO HEAR MY INFRINGEMENT CLAIM ?

On 9 March 2009, Milco was granted permission further to an order made by the first presiding judge of the Poitiers Court of Appeal to confiscate works at the premises of Jeca for infringement of its “Mousserelle” and “Mousserelle aux Trois Saveurs” trademarks, on the basis of Article L. 716-7 of the French Intellectual Property Code, even though a court action based on these same facts was pending before this court.

The order was then retracted on the ground that if Article L. 716-7 of the French Intellectual Property Code grants the presiding judge of the court of first instance the exclusive power to authorise the trademark holder to have works that infringe copyright confiscated, an application for the confiscation relating to an ongoing action must be presented to the presiding judge of the division in which the case is being heard under the provisions of Article 812 (3) of the French Civil Procedure Code.

The Court of Cassation quashed the decision, withdrawing the 9 March 2009 order on the ground that the provisions of Article 812 (3) of the French Civil Procedure Code only apply to cases pending at first instance, and in the case of cases pending before the appeal courts, only the first presiding judge has the power to order, pursuant to an application, the confiscation of the infringing goods.

Thus, a distinction needs to be made between an order for the confiscation of infringing goods made at first instance (French Civil Procedure Code) and before the Court of Appeal (French Intellectual Property Code).

4 - MEDIA - PUBLISHING

E-BOOKS HAVE A PRICE AS WELL

Since 2009, various reports on the situation of the book sector have highlighted the very positive results of the French Law of 10 August 1981 concerning the single price of books to maintain the diversity of the selection offered by publishers and bookshops.

The question of extending the provisions of this law to e-books has been raised through this analysis, as e-books are rapidly starting to face the same problems printed books faced by having too many distributors. Nonetheless, the major difficulty here was to bring e-books into the fiscal definition of books, on which the French Law of 10 August 1981 is based.

This problem was avoided through a draft law specifically on e-books submitted to the French Senate on 8 September of this year.

This text firstly proposes that e-books should be defined as being any book published in digital format and satisfies the principle of reversibility, meaning that it can be printed on paper. This definition thus covers digital formats that are as yet unknown, by distinguishing e-books from similar works (audiovisual works) subject to other laws, as was recommended by the French Competition Authority in its opinion of 18 December 2009.

Moreover, given the specific nature of the digital environment, the draft law provides that prices should be adjusted according to the content of the offer, i.e. taking into consideration the services proposed to access the offer (reading software, DRM, possibility of copying it).

Finally, while the text suggests that fixing the sale price of e-books creates a new legal obligation for publishers, subject to penalty, it provides that this obligation only

applies to publishers established in French territory and only with respect to distributors who are themselves established in France.

Unlike printed books, the international nature of the internet places a considerable restriction on the anticipated effects of such regulation and thus this law will not apply to the distribution of literary works in French via foreign websites.

ME, ME, ME!

Encyclopedia Universalis has granted Promotion Presse Médiasat (PPM) the right to manufacture, distribute and sell volumes of a specific collection of its encyclopaedias through the exclusive channel of press promotion. PPM agreed to sell these works only to the public and solely through a published newspaper or correspondence.

In application of this agreement, professional bookshops were not allowed, by the newspaper publisher, to sell units of these volumes. The French Booksellers Union thus brought a case against the newspaper publisher, PPM and Encyclopedia Universalis for breach of Article 1 of the French Law of 10 August 1981 according to which “*all retailers must offer the free service of unit orders*”, for illegal practices and acts of unfair competition due to sales of this collection having been exclusively reserved for the network of press distributors.

The Paris Court of Appeal, in a ruling upholding an earlier judgment on 9 September 2010, rejected the Union’s claim on the ground that Article 1 of the French “Lang” Law “*does not mean that all retailers are entitled to demand that a publisher supply books individually, however the customer insofar as the work is available for sale may order it without additional cost from the retailer selling it*”. Insofar as the retailer provides that “*all persons selling a book to a final customer*” and not a network of bookshops exclusively, the system in place in this case was perfectly consistent with this law.

Furthermore, the Court held that it was up to the author alone to choose the means of sale, distribution and circulation of the media for its work. Consequently, the network of bookshops could not, without breaching the principle of the author’s free disposal of their exclusive rights, object to their privileged status allowing them to sell all works available on the market, other than through a discriminatory practice, which has not been proved in this case.

The purpose of the “Lang” Law is clearly to protect the bookshops’ distribution network but does not confer on it the status of being the “official” distributor of books.

5 - AUDIOVISUAL - ADVERTISING

THE SUBTLE DEFINITION OF THE SYSTEM FOR ON-DEMAND AUDIOVISUAL MEDIA SERVICES

On-demand audiovisual media services cover catch-up television and on-demand video. Expressly provided for in the Audiovisual Media Services Directive of 10 March

2010, this must be further entrenched in French law through a specific regulatory body of laws.

On 27 September, the CSA (the French media Agency) thus had to give its opinion of the draft decree fixing, among other matters, the contribution on-demand audiovisual media services make to financing independent audiovisual production and the rules concerning advertising and sponsorship. Its opinion was not favourable.

The CSA was highly critical of the draft, as it would impose very high financial obligations on on-demand audiovisual media services provided in France, hindering their expansion and checking their creativity. In this field, there is a high risk of relocation.

While the CSA does not dispute the contribution rates stated, it nonetheless seeks that they be gradual and reassessed in 18 months, to study the impact of the measure on the sector. On the other hand, it is demanding a clarification and redefinition of the basic rate.

It also recommends that the granting of exclusive rights be strictly limited to prevent products offered legally being fragmented and subsequently losing their attractiveness.

Concerning advertising, the CSA approves the lack of rules on the volume of advertising, but states that there should be a clear division between advertisements and programmes. It would like the sponsorship framework to be closer to that for television and avoid any interference by the sponsor in the editorial content of programmes.

Although TF1 and M6's internet subsidiaries have agreed with the CSA's positions, representatives of producers, the SACD and the SCAM, have expressed their disagreement. The Ministry of Culture will have to settle the dispute.

6 - PERSONAL DATA - PRIVACY

NO REOFFENDING WITH THE CNIL

On 21 October, the CNIL (French data protection Agency) published a ruling that imposed a penalty against a reoffending company for the first time.

The company had sent commercial communications by fax. After having received around 40 complaints from recipients who had tried in vain to assert their right to object, the CNIL sent this company formal notice to cease all commercial solicitation of clients by fax, to remove the contact details of persons who had exercised their right to object and to provide a guarantee that in the future the rights of the persons whose data had been handled and in particular their right to object would be respected.

As the formal notice was not complied with, the CNIL handed the company a financial penalty of €5000 in November 2007.

In 2009 and 2010, new complaints, on the same grounds, were made to the CNIL which, in a ruling dated

17 June 2010, once again ordered the company to pay a fine, this time of €15,000 and ordered the publication of its decision to impose the fine on its website and on www.legifrance.gouv.fr

In its written comments, the company criticised the CNIL for not having complied with the terms of Article 45 of the French Law of 6 January 1978 by not sending it formal notice prior to sending the investigator's report whereas the abovementioned article provides that the CNIL may not impose a fine against a controller unless they do "not comply with the formal notice sent to them".

The CNIL held that it did not have to provide formal notice to the company prior to instigating the penalty proceedings, based on two decisions by the Council of State. In these decisions, concerning penalties imposed by the CSA following reoffending without a second formal notice, the Council of State held that penalties could be imposed without a new prior formal notice as the persons being penalised were able to assert their defence, which was the case here.

The CNIL effectively stated that the company had received the report providing the penalty as well as the file on the proceedings, had produced written comments and was heard by a small panel that imposed the penalty.

7 - IT - TELECOMS

THE GENTLEMAN TRADER CAUGHT WITH HIS FINGERS IN THE TILL

On 5 October, the Paris Criminal Court found Jérôme Kerviel guilty of forgery, the use of forged documents, breach of trust, and the fraudulent entry of data when processing personal data and sentenced him to five years in prison with two years suspended sentence as well as a ban on working in a profession linked, even indirectly, to the financial markets.

On the basis of Article 323-3 of the French Criminal Code, the trader was found guilty of having entered, modified and deleted data in an automatic processing system.

He was charged with having added and then removed from Société Générale's dedicated front office database "*fictitious transactions aimed at concealing both market risks as well as hidden profits of unauthorised directional positions*", "*sets of fictitious sale/purchase transactions for identical quantities of the same product but at a different price with the aim of redeeming a fictitious profit to make up for the actual profit made and thus bringing the net position to zero*" and "*provisions for profits recorded over the month allowing the cancellation and thus concealment of previous profits for this period*".

Moreover, the court held that these transactions were intentionally aimed at hiding open positions without authorisation and their profits to avoid possible checks of the service to integrate transactions and, consequently, "*these acts were part of the fraud system set up quite consistently by Jérôme Kerviel*".

The court dismissed the defence's argument that *"the techniques used could not have misled the bank's hierarchy or various departments"* on the ground that *"the fraudulent nature of the data input is independent of the innovative and complex nature of the techniques used, the evidence of the fictitious nature of the underlying transactions or the storage of this data in a buffer store for more than 20 days in some cases"*, thus reiterating that the very fact of modifying or deleting data fraudulently is suffice to constitute the offence in Article 323-3 of the French Criminal Code.

TRUST IN ME

In a dispute about the date on which a lessor gave his lessee notice to quit, the latter relied on an e-mail from the lessor informing him that he had accepted his notice to quit the property. The lessor disputed the validity of this e-mail and thus its admissibility as evidence of his agreement, claiming that he had not written it.

On 2 December 2008, the Dijon Court of Appeal ruled that the disputed e-mail should be admitted as evidence as the lessor *"had not communicated any document to rebut the presumption of reliability stipulated in Article 1316-4 of the French Civil Code"*.

On 30 September 2010, the Court of Cassation quashed this ruling on the ground that the presumption of reliability of e-mails only applies subject to the means used being considered as guaranteeing the identity of the signatory and the integrity of correspondence. Otherwise, the burden of proof is reversed and it is up to the party relying on it to show that the signature method is sufficiently reliable to allow the admissibility of the disputed e-mail as evidence.

The Court thus stated that in application of Article 287 of the French Civil Procedure Code, if the refusal of recognition concerns an electronic document or signature, it is up to the judge to verify, prior to admitting the electronic document as evidence, that the terms of Articles 1316-1 and 1316-4 of the French Civil Code concerning the validity of the electronic document and signature are met.

The Court of Cassation is critical here of the current confusion between the terms concerning validity and those concerning evidence.

8 - SPORT - ONLINE GAMING

DANGEROUS LIAISONS ONLINES

Having noted considerable recent growth in commercial practices using "generic brands" such as brand partnerships or affiliations by approved online gaming operators, on 23 September, ARJEL made a decision stating it would send all approved operators a letter (enclosed with the decision) reminding them of their legal obligations within the scope of the use of the abovementioned practices.

In the case of partnerships made between an approved and a non-approved operator, the letter enclosed with the decision states in particular that the approval of *"an online gaming or betting operation is non-transferable"* and *"thus, any contractual mechanism regardless of what it is may not involve the direct or indirect transfer by an operator of its approval"*.

ARJEL also thus states that consequently any agreement between an approved and a non-approved operator may not have the effect of offering visibility to the non-approved operator insofar as such visibility would be illegal and could give rise to criminal prosecution (Article 57 of the French Law of 12 May 2010).

Concerning partnerships with third parties not operating as online gaming operators, ARPEL states that, in accordance with the French decree of 12 May 2010, approved operators, if they wish to use their partners' websites to offer online betting, must have declared the domain names of these websites when making the application for approval and must mention their company name and their approval number on the homepage of partner websites.

With respect to partnerships between approved operators and their partner websites with the purpose of creating traffic towards the operator's website, ARJEL states that these affiliated websites must not be aimed mainly at minors.

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