

Media & Entertainment - France

Consent for commercialisation of phonogram includes paid downloads

Contributed by **Nomos**

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Background

Appeal decision

Supreme Court decision

According to the Supreme Court, the consent given by musicians for the use of their performances as "phonograms published to be commercialised" includes communication to the public through paid downloads. The court so ruled on September 11 2013 when it issued six decisions to end a dispute between record labels and Spedidam, the collecting society representing the musicians.

Background

Since Spring 2006 Spedidam has separately sued the six main downloading hubs (Fnac Direct, Ecompil, iTunes, OD2 (now Nokia), Sony Connect and Virgin Mega), targeting more than 250 French songs from the 1960s to the 1990s and claiming that the musicians that participated in these recordings gave their authorisation to record, reproduce and communicate to the public their performances only for the creation of phonograms published to be commercialised – the notion of publication being the sole distribution of tangible mediums.

The lawsuit was brought during the discussion of the Hadopi Law in order to put pressure on the legislature in the context of the debate on illegal downloading, and to impose the principle of a mandatory licence, to which producers and most performers were opposed.

According to Spedidam, the authorisation given by the musicians could not include making works available by download, as this type of commercialisation implies, due to its dematerialisation, a change of destination characterising a secondary exploitation requiring a distinct authorisation.

This interpretation was based on the Rome Convention, which defines 'publication' as "the offering of copies of a phonogram to the public in a reasonable quantity", as well as the World Intellectual Property Organisation (WIPO) treaty on interpretation, execution and phonograms. It was also based on EU directives that distinguish:

- the right of distribution, which is the right to authorise the making available to the public of phonograms through sale or otherwise; and
- the right to make the work available to the public and communicate it on demand.

Appeal decision

Like the tribunal, the appellate court held that a phonogram is the fixation of a sequence of sound and that its nature is not modified by dematerialisation or its destination (ie, to be listened to by the party acquiring it).

The court deduced that making available to the public by downloading is within the definition of 'making available to the public for a commercial purpose' to the same extent as the distribution of a tangible copy, and the phonogram should not be confused with the tangible object that is available to the public in the record stores.

Supreme Court decision

The Supreme Court held that the appeal court had legally justified its decision and had rightly held that under Article 3B of the Rome Convention and Article 2 of the WIPO treaty, the legal qualification of a phonogram is independent from the existence of a tangible medium. Thus, the court had deduced that the authorisations given by the performers included communication to the public through paid downloads.

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The Supreme Court therefore held that the legal qualification of a phonogram is independent from the existence of a tangible medium. As a consequence, the appeal court was entitled to analyse the consent given by the musicians and rule that according to industry use and the existing collective agreements, the authorisation granted by the musicians for the use of their performances as phonograms published to be commercialised included communication to the public through paid downloads.

The Supreme Court also confirmed that Spedidam was not entitled to claim that it represented the musicians. It held that:

- the appeal court correctly decided that Spedidam lacked standing to sue on behalf of individual interests of performers who were not members of Spedidam and had not given it permission to sue on their behalf; and
- a claim for damages, part of the credit and the assets transferred to the legal successors of deceased performers can be invoked in court only by those successors, unless they have given a third party permission to do so.

Therefore, the court indirectly confirmed that Spedidam should act "on behalf" of the performers, thus denying that it could benefit from an assignment of their rights.

Spedidam is pushing for intervention by the legislature to ensure that any online exploitation of a record – whether webcasting, on-demand streaming or downloading – is subject to collective authorisation and rights management. These attempts are receiving some support from the Department of Culture, which wishes to facilitate the making available of music and ensure the equitable sharing of income. While producers', performers' and musicians' unions signed a collective bargaining agreement in 2008 (which Spedidam persists in trying to invalidate, so far unsuccessfully), the Lescure Report recommends extending the scope of collective rights management to the online exploitation of phonograms. However, it is likely that these rights will continue to be licensed by the record labels, as in the rest of the world the entire catalogue of existing records is available at a reasonable price in the competing streaming and download offers.

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