

Media & Entertainment - France

Decisions signal developments in phonogram producer-musician relationship

Contributed by **Nomos**

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Introduction

[Court of Cassation decision](#)

[Paris Superior Court decision](#)

[Comment](#)

Introduction

Over the past 20 years, relations between producers of phonograms and musicians in France have been characterised by a conflict between producers and SPEDIDAM, the society for the collective management of musicians' rights, which claims the right to authorise any new exploitation of a phonogram.

Two judgments issued since the beginning of 2013 herald significant developments in this relationship.

Court of Cassation decision

First, the Court of Cassation considered an appeal by SPEDIDAM against a Paris Court of Appeal judgment which had dismissed its claim to be granted the right to authorise the exploitation of phonograms for use in films.

In two statements of principle, the Court of Cassation dismissed SPEDIDAM's claims.

First, the court noted that whatever its constitution, a society for the collection and distribution of performers' royalties can defend the individual rights of a performer in legal proceedings only if it has authorisation to do so. Therefore, SPEDIDAM could not claim to act in defence of individual musicians' rights where it did not provide proof that they were members of the society or that they had given the society a mandate.

Second, SPEDIDAM argued that in the absence of a written contract, phonogram producers could not assign sound rights for use in film. Conversely, the producers argued that where consent was given before the 1985 act, it did not have to be given in writing, as such consent resulted from industry practice and collective agreements.

The Court of Cassation held that the appeal court had correctly deduced from its findings that the producers held the right to proceed with the disputed exploitation of recordings in exchange for additional compensation due under collective agreements. The Court of Cassation reaffirmed that it was for the court to assess the extent of any authorisation, and that in this case the collective agreements made in 1959 between the professional associations and the musicians' unions "in the presence of SPEDIDAM as a third party entitled to collect" were relevant and "should be interpreted as recognizing the right conferred on producers, the owners of the recordings, to exploit them for film soundtracks".

The Court of Cassation confirmed the importance of collective agreements in the assessment of the authorisation given by performers and rejected the retroactive application of the law to contracts concluded before the entry into force of the 1985 act.

Paris Superior Court decision

SPEDIDAM also filed a claim in the Paris Superior Court to challenge the 2009 collective agreement between the producers' professional associations and major musicians' unions. This agreement stipulates the required form for a musician's authorisation for the exploitation of his or her performances, and the minimum payment permitted for different kinds of use. It also introduces a proportional remuneration system for all rights managed collectively by producers.

SPEDIDAM and some other unions attacked this collective agreement, claiming that it should be deemed invalid. The court dismissed their application as follows:

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- The court held that the applicant unions did not succeed in characterising as sufficiently one-sided the differentiations made in the collective agreements between featuring artists and musicians, holding instead that these provisions relied on objective criteria to define each concept without taking into account the discretion of the producer.
- It held that the collective agreement did not provide that all rights of a musician should necessarily be assigned on the conclusion of a contract of employment, but simply envisaged the possibility that a musician might allow for secondary uses when he or she signs an employment contract, in addition to the fixation and the first use of its performance, provided that the scope of such licence is specified.
- The parties had not provided for the automatic transfer of ownership of the performers' rights, but rather had agreed terms and conditions, including minimum payment terms, according to which such a transfer could take place at the conclusion of the employment contract.
- In addition, the collective agreement did not require that the authorisation be given for the duration of the rights, but stated instead that the authorisation should specify the period for which it was granted.

Therefore, the collective bargaining agreement did not undermine the principle of the individual exercise of rights because permission was given within the framework of an employment contract or special provisions thereof - that is, by the individual employee.

The court acknowledged that it may be possible for a producer to decline to engage a performer who refuses to assign the rights needed to exploit the performance in a way that would be required for the producer to make good on their investment. This contingency is possible in any contractual relationship under which bargaining power depends on the respective positions of the parties.

The court further held as follows:

- If each use had to be authorised by the performer in full knowledge, there was no reason why this should preclude a single authorisation being granted for several types of use, provided that these were sufficiently identified, or the payment of a single lump-sum by way of consideration for several licences, as long as it was specified that such remuneration applied to these different uses and the relevant authorisations.
- The various forms of exploitation defined by the collective agreement were sufficiently precise and detailed to enable the performer to understand the extent of the authorisation when he or she transferred the rights to each form of exploitation.
- The classification system defined in the collective agreement can serve to notify performers of the various rights that they can surrender and the minimum amounts of compensation payable in respect of the different forms of fixation that they can authorise.
- The exploitation of a musician's performance in the form of a commercial phonogram necessarily includes its communication to the public by way of download – the legal status of a commercial phonogram being independent of the existence or lack of any physical medium.
- On the question of proportional remuneration, the court noted that such remuneration represents an improvement of the situation for performers who had no right to receive anything of the kind before the entry into force of the collective agreement. The contested provision did nothing unlawful in that it provided the opportunity for a producer to entrust to its collection and distribution society the mandate to manage its rights to exploit different forms of use, as authorised by the relevant performer.

Accordingly, the court rejected all of SPEDIDAM's demands and considered that the national collective agreement of phonographic publishing contradicted neither the provisions of the Labour Code or the IP Code guaranteeing the rights of performers, nor the duties and rights assigned by the legislature to performers' collective management societies.

Comment

SPEDIDAM may appeal this ruling. However, the decisions mean that French producers must begin to come to terms with a situation comparable to that of other countries, where session musicians assign their rights in exchange for an initial lump sum and additional remuneration as set out by collective agreements.

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