

SCRIPT-ed

Volume 3, Issue 4, June 2006

La France v. Apple: who's the dadvsi in DRMs?

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Abstract

On August 1, 2006 the French Parliament passed the law on copyright and related rights, known as DADVSI (loi relative au Droit d'Auteur et aux Droits Voisins dans la Société de l'Information), which implements the European Copyright Directive of 2001. The main feature of the law is the legalisation of technical protection measures for copyrighted works (also known as TPMs or DRMs) and the introduction of legal mechanisms to protect and enforce these technical measures. Such steps, aimed at combating digital piracy, should have been welcomed unreservedly by all involved in the media industry, from artists and producers to distributors, especially online content distributors such as Apple and Sony. However, the legalisation and protection of technical measures came with a few twists from French lawmakers. These twists have unnerved Apple, the market leader in music media players and online content distribution with its iPod player and iTunes distribution platform respectively.

The DADVSI law introduces the requirement of interoperability for technical measures meaning that all DRM-protected music file must be playable on any device,

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This article is a modified version of a paper presented at the [VI Computer Law World Conference](#) in Edinburgh (United Kingdom) on September 8, 2006 and at the [International Conference on Business, Law and Technology](#) (IBLT) in Copenhagen (Denmark) on December 6, 2006 where it was published in S. Kierkegaard (ed) *Business, Law and Technology: Present and Emerging Trends* (pp. 244-253). Copenhagen : IAITL (ISBN87-991385-0-6).

irrespective of its brand or of the software used to read it. Such requirement of compatibility between competing DRMs threatens Apple's exclusive DRM technology. In doing so, the law threatens the umbilical cord between the iPod player and the music sold on iTunes, and thus Apple's dominance in both markets. This paper will describe how French lawmakers have managed to put in place an original and, so far, unique legal framework based around a new independent body in charge of implementing DRM interoperability and of ensuring that technical measures do not upset the balance between the interests of the rightholders and those of the consumers.

DOI: 10.2966/scrip.030406.473

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1. Introduction

On August 1, 2006 the French Parliament passed a law on copyright and related rights: the *Loi relative au Droit d'Auteur et aux Droits Voisins dans la Société de l'Information* known as DADVSI.¹

The DADVSI law (the law) substantially modifies the French Intellectual Property Code, *Code de la Propriété Intellectuelle* (the CPI) in matters such as the copyright of civil servants,² collecting societies,³ the legal deposit (*dépôt légal*)⁴ or the resale right (*droit de suite*).⁵ However, the main objective of the DADVSI law is the implementation of the European Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society (the directive).⁶

The implementation of the directive had become a pressing matter for France, which faced the threat of financial sanctions after being condemned in 2005 by the European Court of Justice for failure to comply with the 2002 implementation deadline.⁷ Consequently, the bill was introduced by the government under a fast-track procedure, a move strongly criticised by the opposition parties which argued that such complex and technical legislation should not have been rushed through parliament.

The bill proved to be very controversial as it touched sensitive issues such as the exceptions to copyright, especially the scope of private copying and the statutory introduction of the three step test, the definition and sanctions against digital piracy and the status of technological protection measures for copyrighted content (TPMs also known as Digital-Rights Management or DRMs).

As a whole, the law is in line with the spirit and the letter of the directive, as it reinforces the means to combat piracy and to protect the interests of rightholders. For instance, the illegal file-sharing by individuals remains classified as a criminal offence;⁸ the law creates a new criminal offence for publishers of software used for illegal file-sharing which is punished by three years in jail and a €300,000 fine⁹ and it

¹ Loi n° 2006-961 du 1er août 2006 relative au droit d'auteur et aux droits voisins dans la société de l'information ; parue au JO n° 178 du 3 août 2006, page 11529, thereafter [Dadvsj](#).

² [Dadvsj](#), Articles 31-33.

³ [Dadvsj](#), Articles 34-38.

⁴ [Dadvsj](#), Articles 39-47.

⁵ [Dadvsj](#), Article 48.

⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, thereafter [EUCD](#).

⁷ ECJ Commission v France [C-59/04](#) (In French only), available @< <http://curia.europa.eu/>>.

⁸ The provision to “decriminalise” file-sharing by individuals which would have lowered the maximum sentence from a €300,000 fine and three years in jail to a mere maximum fine of €150, though proposed by the government and adopted by both houses of parliament, was eventually struck down by the Constitutional Court (Décision du Conseil constitutionnel n° 2006-540 DC du 27 juillet 2006: thereafter [Décision n° 2006-540 DC du 27 juillet 2006](#))

⁹ CPI, Article L. 335-2-1.

recognises and protects TPMs. Critics of the law have argued that such choices tip the balance too much in favour of the protection of big media and software corporations, to the detriment of the consumers.

More surprisingly, however, the law has also managed to provoke the ire of one of those big media companies. Apple, which is largely credited for having single-handedly created the mass market for legal online content distribution, thanks to the combined success of its iconic iPod player and iTunes music store, has dubbed the law “state-sponsored piracy”¹⁰ and threatened to leave the French market altogether.

Amazingly, the French law has managed to incense both the proponents and the opponents of TPMs. This article will explain how the law tries to find a balance regarding TPMs. Much to the displeasure of Apple, the law counterbalances the legal protection of TPMs (2) with the idiosyncratic requirement that TPMs should interoperate (3) and also creates the Regulatory Authority for Technical Measures, the “*Autorité de Régulation des Mesures Techniques*” (ARMT), a specific regulatory body to implement this interoperability requirement (4).

2. The legal protection of TPMs and RMIs

The law implements article 6 to 8 of the directive by introducing the principle of the protection of TPMs and Rights-Management Information (RMI) (2.1) and by providing criminal sanctions to deter the circumvention of such measures (2.2).

2.1. The legal recognition of TPMs

2.1.1 A legal recognition long overdue

The statutory recognition of TPMs had become an absolute necessity, not only because of the threat of EU sanctions but also because France had been one of the earliest adopters of such measures.

Given the propensity of TPMs to frustrate consumers, their deployment on various CDs had generated numerous cases all over France. Strictly speaking, since these measures were not yet recognised in statutes and with France being a Civilian country, they were illegal. The courts faced with disgruntled customers who could not, for instance, play a purchased CD on their car stereo, had to determine whether the incriminated TPMs were licit or not. The courts have rendered conflicting decisions. The lawmakers evoked¹¹ a week in 2005 when a decision by the Versailles Court of Appeal¹² ruled that the use of TPMs and the commercialisation of CDs was licit, and the next week a decision by the Paris Court of Appeal ruled otherwise.¹³ The situation needed to be clarified by the new law.

¹⁰ Elinor [Mills](#), Apple calls French law 'state-sponsored piracy'. CNET News.com, March 22, 2006; Michael [Geist](#), Compatibility worries fuel battle over iPod law. The Toronto Star, Retrieved April 17, 2006.

¹¹ Rapport n° 2349 (2004-2005) de M. Christian Vanneste, député, fait au nom de la commission des lois, déposé le 1er juin 2005 (thereafter [Rapport n° 2349](#)), p.44.

¹² Cour d'Appel de Versailles, 15 avril 2005.

¹³ Cour d'Appel de Paris, 22 avril 2005.

2.1.2 *The legal recognition of TPMs*

The law adds to the CPI Article L. 331-5 which protects “the effective technological measures intended to prevent or restrict acts which have not been authorised by the owner of a copyright or any right related rights in a work, other than software, an interpretation, a sound recording, a video recording or a program”¹⁴

It is interesting to note that the lawmakers wanted to make clear that these provisions would not apply to TPMs protecting a software because software has a specific legal protection.¹⁵

In terms very similar to the directive the law defines TPMs as “any technology, device or component in the normal course of its operation, intended [to restrict acts that have not been authorised by the rightholder].”¹⁶ The CPI deems these measures effective “where [the use of a protected work] is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.”¹⁷

2.1.3 *The legal recognition of RMI*

The new Article L. 331-22 also gives legal protection to the “information in electronic form regarding the rights-management of a work, other than software, an interpretation, a sound recording, a video recording or a program”¹⁸ or, to use the terminology of the directive, rights-management information (RMI). The law specifies that RMI should be protected when “one of these elements of information, numbers or code is attached to the reproduction or appears to be in relation with the communication to the public of the work, the interpretation, the sound recording, the video recording or the program they relate to.”¹⁹

RMI is defined as “any information provided by a rightholder which enables to identify a work, an interpretation, a sound recording, a video recording, a program or a rightholder” but also “any information on the conditions or modalities of use of a work, an interpretation, a sound recording, a video recording, a program or any number or code representing all or part of these information in whole or in part.”²⁰

2.2. **The protection of TPMs**

The law gives a wide array of remedies to the rightholders in the event of the circumvention of a TPM and RMI. Such circumventions are classified as criminal offences and are punished by heavy sentences. Besides, the rightholder has, in certain

¹⁴ CPI, Article L. 331-5, §1.

¹⁵ Rapport n° 308 (2005-2006) de M. Michel Thiollière, fait au nom de la commission des affaires culturelles, déposé le 12 avril 2006, (thereafter [Rapport n° 308](#)), p. 146.

¹⁶ CPI, Article L. 331-5, §2.

¹⁷ Ibid.

¹⁸ CPI, Article L. 331-22, §1.

¹⁹ Ibid.

²⁰ CPI, Article L. 331-22, §2.

circumstances, the faculty to be granted remedies such as the seizure of circumventing materials or of the proceeds of the sale of such materials.

2.2.1 The classification of TPM circumvention as a criminal offence

Any circumvention of TPM and RMI is a criminal offence. However, the lawmakers wished to differentiate the sentences between the mere user and the supplier of the circumvention technique.²¹ Consequently, the fact of supplying a means of circumvention entails a tougher sentence than just using the means of circumvention:

The fact to knowingly circumvent a TPM or to delete or alter a RMI (as well as the concealment or facilitation of such alteration whether they protect copyright,²² related rights²³ or database rights²⁴ is punished by a €3,750 fine.

But, the fact to knowingly provide or offer to the public, directly or indirectly a means to circumvent any TPM or to alter any RMI is punished by a six month jail sentence and a €30,000 fine.²⁵ It is important to note that these provisions do not apply when the acts of circumvention are made for the purpose of research or computer security.

2.2.2 The procedure of infringement seizure extended to TPM circumvention

The procedure of infringement seizure (*saisie contrefaçon*), which was traditionally open for copyright holders in the event of a copyright infringement, has been extended to cases of TPM and RMI circumvention.

The modified Article L. 332-1 now allows the rightholder to request for a police commissioner or a court to seize any copy, product, device, mechanism, component or means circumventing TPMs and RMI. In addition to the seizure of circumventing materials, the procedure allows the court to order the suspension of all manufacturing activity in progress, the seizure of the proceeds of activities related to circumvention and the blocking, by any means, of a website providing illegal material.

By recognising and protecting TPMs and RMI the law implements the directive and allows the media industry to secure the integrity of the products sold through digital distribution. As such, this increased protection emboldens businesses to invest in these new means of distribution. Most online platforms use TPMs like Sony's ATRAC or Windows Media DRM to distribute digital content and Apple, as the leader in such distribution, should have welcomed this law unreservedly. However, the law has taken an idiosyncratic turn by counterbalancing the protection given to TPMs with the requirement that such TPMs should be compatible.

²¹ [Rapport n° 308](#), p. 72.

²² CPI, Articles L. 335-3-1 and L. 335-3-2.

²³ CPI, Articles L. 335-4-1 and L. 335-4-2

²⁴ CPI, Articles L. 342-3-1 and L. 342-3-2.

²⁵ CPI, Articles L. 335-3-1 and L. 335-3-2, L. 335-4-1 and L. 335-4-2, L. 342-3-1 and L. 342-3-2.

3. The interoperability requirement

Before explaining what this interoperability requirement is (3.2), it is worth explaining why the French lawmakers felt the need to introduce such a requirement (3.1).

3.1. The justification for interoperability

The lawmakers felt that the way TPMs were deployed was detrimental to the consumers and that their use should be regulated. Such regulatory approach has been received with mixed reviews, with Apple being its strongest opponent.

3.1.1 The need to regulate TPMs

The legal requirement of interoperability stems from the lawmakers' realisation that the market for digital content was segmented along the lines of competing and incompatible TPM formats.

The lawmakers observed²⁶ that online music platforms did not provide enough compatibility: some platforms having taken the strategic commercial decision to sell protected files which can only be read by a specific brand of electronic devices. Other platforms which have chosen interoperability are not allowed to use this specific format and the technical measures used by the most widely-used player in the market. This situation is exemplified by Apple's products and services which are tied together by an exclusive TPM system called FairPlay and based around Apple's proprietary AAC file format. Because of this TPM, people who have an iPod can only buy legal content from Apple's iTunes music store. And people who buy songs from iTunes can only play them on an iPod, to the exclusion of any other portable player. The absence of an industry-wide standard, the lawmakers argued, is detrimental to the consumers and to the dissemination and the equal access to culture. The lawmakers then concluded that TPMs needed to be made compatible through regulation.²⁷

3.1.2 A mixed response to this regulatory approach

Understandably, Apple was outraged by this decision to include the requirement of interoperability as it could sever what Laurence Frost described as, "the umbilical cord between its iPod player and iTunes online music store - threatening its lucrative hold on both markets."²⁸

The introduction, in early 2006, of this requirement raised speculations and threats from Apple that it might leave the French market altogether. Commentators argued that Apple could also decide to comply with the new law in France but maintain exclusivity elsewhere or decide not to comply and count on the length of court proceedings, relatively light damages and the absence of class actions in France, calculating that its iPod and iTunes profits would dwarf the penalties it could face.²⁹

²⁶ [Rapport n° 2349](#), p.20.

²⁷ Ibid.

²⁸ Laurence [Frost](#) (AP), French daft law threatens iPod's future. Findlaw, March 17, 2006.

²⁹ Comments reported in: Laurence [Frost](#) (AP), French daft law threatens iPod's future. Findlaw, March 17, 2006.

Beyond Apple's case, a more general point was made that such a regulatory approach would have limited effect as it would only apply to France. It would also threaten the efficiency of TPMs and would thus hinder and potentially destroy online distribution.³⁰ It was also argued that Apple's dominance was the result of the quality of its products and services. Apple's customers were aware and not deterred by the lack of interoperability. Ultimately, the argument went, the market, not regulators, should be shaping the rules of digital content distribution.

However, supporters of interoperability like consumer groups, praised France for taking the lead in those matters. UFC-Que Choisir, one of France's main consumer organisation, said that interoperability would benefit the consumers and that this statutory approach was the only way to increase competition in digital music systems by opening up the iPod-iTunes restrictions.³¹ Some content producers, like music and movie majors also felt that this requirement could lessen the grip that technology companies, especially TPM producers like Microsoft and Apple are creating in the market of online distribution. The content producers are worried that they might become dependent on technology companies and that their customers would be locked in and their market segmented.

Setting aside the question as to whether such a regulatory approach is appropriate, it is undeniably a novel approach in the field of TPMs and requires further explanation.

3.2. Provisions on interoperability

It is interesting to note that it is Article L. 331-5 which, as it recognises TPMs, also provides that they "must not have the effect of preventing effective interoperability."³² The lawmakers thus making it clear they wished to prevent the segmentation of the offer of cultural goods according to the configuration of the playing device, or that a particular good which would be only available in a particular online store, would also be accessible only through a certain type of player.³³

Article L. 331-5 then provides that suppliers of TPMs can be required to give access to "the information essential for interoperability,"³⁴ this information being defined in Article L. 331-7 as the technical documentation and the interface of programming necessary to access a work protected by a TPM or RMI.³⁵

These provisions which set the principle of interoperability raise numerous practical questions: who is entitled to ask for such sensitive information? Who would be required to disclose the information? What are the terms and conditions of such disclosure? What is the consequence if such access is refused by the TPM supplier?

³⁰ Comments reported in: Thomas [Crampton](#), France weighs forcing iPods to play other than iTunes. The New York Times, March 17, 2006.

³¹ Comments reported in: Thomas [Crampton](#), France weighs forcing iPods to play other than iTunes. The New York Times, March 17, 2006.

³² CPI, Article L. 331-5, §4.

³³ [Rapport n° 308](#), p. 154.

³⁴ CPI, Article L. 331-5, §4.

³⁵ CPI, Article L. 331-7, §2.

Is it, for instance, possible for a consumer who has bought a song on MSN music which he cannot play on his iPod, to force Microsoft and/or Apple to disclose the information that would allow both proprietary TPMs to interoperate?

After introducing the requirement of interoperability the law had to provide for its implementation. Again, the French lawmakers came up with a new solution by creating a specific body to implement interoperability.

4. The creation of a specific body to implement interoperability

The question of how to implement interoperability is intricately linked to the question of who should implement interoperability. Choosing the institution in charge of the implementation is not a neutral choice.

After examining various options, the lawmakers came to the conclusion that a new body needed to be created (4.1). The Regulatory Authority for Technical Measures, *Autorité de Régulation des Mesures Techniques* (the ARMT) was thus created and we are going describe its missions (4.2) composition and independence (4.3) procedure and powers (4.4).

4.1. The need to create a specific body

Through the legislative process, various solutions were tried and discarded.

4.1.1 Discarding the civil courts

One option was to let the civil court implement interoperability. They have, after all, jurisdiction over intellectual property (IP) matters in general and copyright issues in particular. They are the people's court as anybody, anywhere in France, is entitled to launch an action with regards to a copyright issue. However, Parliament discarded this option on various grounds.³⁶ First, it was feared that most courts of first instance, especially in smaller communities, would not have the technical expertise to deal with such complex questions. Second, the fact that anybody could make a claim could generate a multiplicity of cases around France, and as many conflicting decisions. This would create a legal uncertainty that would only be lifted, years later, by a decision from the *Cour de Cassation*, the French Supreme Court in civil matters. Third, the fact that anybody could potentially access confidential information on TPMs could threaten their integrity and efficiency.

4.1.2 Discarding the Council on Competition

The other option was to let the Council on Competition deal with these matters. This would have been a more pro-business choice. As it deals with issues of anti-competitive behaviour and abuse of dominant position, the Council is well aware of the practices and standards of the business world, especially in dealing with confidential information. Furthermore, only a limited number of bodies, such as companies, the Ministry of the Economy or consumer groups can refer to the Council.

³⁶ [Rapport n° 308](#), p. 155.

This limits the number of cases and helps ensure faster decisions. Finally, as the sole body involved in implementing interoperability, its decisions, though susceptible of appeal, would provide a better level of legal certainty. Unfortunately for lawmakers, the Council ruled in 2004 that Apple's refusal to make its technology interoperate with that of its competitor was not an abuse of dominant position.³⁷ The parliament observed that the Council's decision was legally sound and that, since then, no new element emerged that would make the Council reverse its decision.³⁸ As a consequence, giving the Council the role to implement interoperability would almost certainly result in the Council legitimising once again Apple's strategy, thus making the whole exercise pointless. Hence, the Senate's decision to create a new body.³⁹

4.2. Creation and missions of the ARMT

The law creates the “*Autorité de Régulation des Mesures Techniques*” (the ARMT) and defines its status and missions in three articles of the CPI.⁴⁰ The ARMT is an independent administrative authority whose missions are to:

- Ensure that TPMs, “because of a lack of interoperability, do not create, in the use of a work, additional and independent limitations to those expressly chosen by the rightholder” (Article L. 331-6);
- Monitor the field of technological protection and identification measures for copyrighted works (Article L. 331-17);
- Ensure that the introduction of TPMs do not prevent users to benefit from copyright exceptions such as private copying (Article L. 331-8).

4.3. Composition and independence

Article L. 331-18 provides that the ARMT consists of six members appointed by decree after having been designated by their respective body. These bodies are amongst the most prestigious bodies of the Republic and should guarantee the independence of the members of the ARMT:

- the Chairman of the *Commission pour la Copie Privée*, the Committee on private copying,
- a member of the *Conseil d'État*, the Supreme Court in administrative matters,
- a member of the *Cour de Cassation*, the Supreme Court in civil and criminal matters,
- a member of the *Cour des Comptes*, the Auditor-general's Court,
- a member assigned by the president of the *Académie des Technologies*, the Academy of Technological Science,

³⁷ Conseil de la Concurrence, [Décision 04-D-54](#) du 9 novembre 2004.

³⁸ [Rapport n° 308](#), p.pp. 152-155.

³⁹ [Rapport n° 308](#), p. 151.

⁴⁰ [Dadysi](#), Articles 14, 17.

- a member of the *Conseil Supérieur de la Propriété Littéraire et Artistique*, the Higher Council on Copyright

The independence of the body is further ensured by provisions regarding its members and under which people who are or were involved, or have any interest in collecting societies or any company involved in the production and distribution of music or films cannot become a member (Article L. 331-19).

4.4. The procedure and powers of ARMT

Article L.331-7 addresses such questions as to know who can be asked access to information essential for interoperability, by whom, under which conditions by defining the procedure and powers of the ARMT.

4.4.1 The procedure

The possibility to refer a case to the ARMT is open when access to interoperability information has been refused by the supplier of a TPM.⁴¹

However, the law limits the number of entities who can claim such access to three categories of professionals, namely “software publishers, manufacturers of technical systems and service providers.”⁴² This restriction was made to prevent the general public access to sensitive information that would be largely useless to them and the potential dissemination of which could be lethal to the efficiency of TPMs.

The ARMT must give its decision within two months.⁴³ The ARMT will first encourage the parties involved to commit to end the practices contrary to interoperability.⁴⁴ In the absence of such a commitment, the ARMT may decide either to reject the demand or will issue an order detailing how the claimant should access the information.⁴⁵ Great care has been taken to ensure that in the event of such a disclosure the ARMT imposes a proper procedure to secure the confidentiality of the information.⁴⁶

4.4.2 The power to impose a huge financial penalty

The ARMT may impose a financial penalty in the event of non-compliance with the order or the parties’ commitment.⁴⁷

The maximum amount of the penalty for a company is 5% of the worldwide turnover after tax.⁴⁸ The financial penalty is proportionate to the scale of the damage caused to

⁴¹ CPI, Article L. 331-7, §1.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ CPI, Article L. 331-7, §4.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ CPI, Article L. 331-7, §5.

⁴⁸ Ibid.

the parties, to the financial situation of the body or company penalised and to the likelihood of any repetition of practices contrary to interoperability.⁴⁹

4.4.3 The publication of decisions and appeal

The decisions of the ARMT are made available to the public, but with regards to the respect of the secrets protected by law and they can be appealed in front of the Paris Court of Appeal.⁵⁰

4.4.4 The cooperation between the ARMT and the Council on Competition

Finally, the president of the ARMT can refer to the Council on Competition about abuse of dominant position and of anti-competitive behaviours that he may come across in the field of TPMs.⁵¹

The President of the ARMT can also refer to the Council on Competition, for advice, on any other question relating to its jurisdiction. Conversely, the Council on Competition informs the ARMT of any referral that falls within the field of TPMs.⁵²

5. Conclusion

The DADVSI law manages to be at the same time conventional and highly innovative. It implements the directive by offering strong legal protections for TPMs but goes far beyond by requiring that such TPMs should interoperate.

The law also puts in place an original and robust regulatory framework to implement this requirement. At its centre is the ARMT which has been given significant powers to force any TPM supplier to disclose information essential for interoperability.

This ambitious framework is bound to be tested sooner rather than later. The first case that will be referred to the ARMT is sure to attract worldwide scrutiny especially if it involves such heavyweights as Apple, Microsoft or Sony. The success or failure of the ARMT in France will give a strong indication on whether TPMs should and can be regulated.

⁴⁹ Ibid.

⁵⁰ CPI, Article L. 331-7, §6.

⁵¹ CPI, Article L. 331-7, §7.

⁵² Ibid.