

## France: a digital file in iTunes is a phonogram

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*The right to exploit a recording "in the form of a phonogram published for commercial purposes", includes the right to exploit it not only in the form of a tangible medium, such as a vinyl record or a CD, but also in the form of a downloadable digital file.*

The judgement of 11 September 2013 is yet another recent important ruling of the French Supreme Court, the Cour de Cassation, in the field of neighbouring rights. In less than a year, the Cour de Cassation has ruled that collecting societies may only take action for their own members (see [France: Supreme Court makes music synchronisation safer](#)), that participants in a reality TV show are employees and not performers (see [France: participants in Temptation Island are employees, not performers](#)) and that the presumption of ownership, which exists in copyright, must be extended to neighbouring rights (see [France: Presumption of ownership extended to neighbouring rights](#)). In all these rulings, the Supreme Court makes neighbouring rights safer for producers and their distributors.

In the present case, another important question was at stake. SPEDIDAM, a collecting society that mainly represents side musicians in the music industry, and which is very active defending performers' rights, brought an infringement case against iTunes for distributing sound recordings ('phonograms') without the prior authorisation of the side musicians represented by SPEDIDAM. The case did not concern the lead artists, such as the singers on said recordings, but the mere studio performers. The national Union of Phonographic publishing (SNEP), and the record companies EMI Music France, France Sony BMG Music Entertainment, Warner Music and Universal Music France, intervened voluntarily in the proceedings.

SPEDIDAM argued that online distribution of sound recordings by iTunes is submitted, under article L.212-3 of the French Intellectual Property Code, to the prior authorisation of the performers whose performance was fixed on these recordings. Article L.212-3, which was drafted in 1985, provides that "The performer's written authorisation shall be required for fixation of his performance, its reproduction and communication to the public...". The side musicians in question had signed attendance sheets during the recording sessions (and not genuine recording agreements), which provided for the assignment of their rights in the performances for the exploitation "in the form of a phonogram published for commercial purposes", which meant, at the time of the recordings (before the digital era), on vinyl records or CDs, but not for downloadable digital files.

However, the Court of Appeal of Paris (pole 5, chamber 1, 7 March 2012, no 10/01369) ruled that the authorisation given by the artists included digital downloads, since a "phonogram" designates, in the meaning of the law, a fixation of sounds, whether the fixation is on a tangible medium or not.

SPEDIDAM lodged an appeal before the Supreme Court, arguing that digital downloading is a new and different form of exploitation, which therefore requires a separate authorisation of the performers, who had only authorised the publication of CD's and vinyl records. In consequence, the Court of Appeal breached articles L.212-3 of the French Intellectual Property Code, 3-d) of the Rome Convention of 26 October 1961, which provides that "publication" means the offering of copies of a phonogram to the public in reasonable quantity" and 2.e) of WIPO Performances and Phonograms Treaty of 20 December 1996, which provides that "publication" of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public".

The French Supreme Court, in a judgement of 11 September 2013, upheld the judgement of the Court of Appeal of Paris, stating that in the meaning of articles 3-b) of the Rome Convention and of 2.e) of the WIPO Treaty, "the legal status of a phonogram is independent of the existence or not of a tangible medium". Therefore, the authorisations given by the performers, when they signed the attendance sheets granting to the producers the right to exploit the recordings "in the form of a phonogram published for commercial purposes", included not only the exploitation of the performances on a tangible medium such as a tape, a vinyl record or a CD, but also in the form of digital downloading.

The French Supreme Court therefore refuses to interpret restrictively statutory definitions and contracts that were drafted when digital downloading did not yet exist.

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