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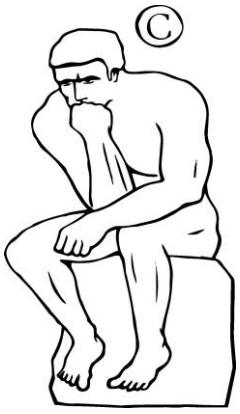
SUMMARY



THE USE OF PERSONAL BANKING CARD DATA AS PART OF REMOTE PAYMENTS

The new deal

With the entry into force of the European Data Protection Regulation this 25 May, the online payment systems must also be reviewed.

It is Resolution no. 2017-222 of 20 July 2017 by the *Commission Nationale de l'Informatique et des Libertés*, or *"CNIL"* (the French Data Protection Authority), which repeals Resolution no. 2013-358 of 14 November 2013, which defines in France the procedures for processing payment card data related to the sale of goods or provision of remote services.

Like any other processing of personal data, only the appropriate, relevant not excessive data in relation to the purpose of processing of data, may be collected and its use must be limited to those purposes for which it was expressly communicated.

1. In which cases can bank card data be collected?

For the specific, explicit and legitimate purposes that are:

- paying for a good or service,
- reserving a good or service,
- settling in several regular instalments of a subscription sold online,
- subscribing to an offer of payment solutions dedicated to remote sales by payment service providers
- facilitating any future purchases on the merchant website;
- fighting against payment card fraud.

2. What are the strictly necessary data that may be collected?

By default (restricted list):

- the bank card number
- its expiration date
- the visual security code

In other words, the identity of the bank card holder which is often requested should not be collected if it is not strictly required for completion of the online transaction or if it is not justified by the pursuit of a specific and legitimate purpose such as the fight against fraud.

The CNIL specifies that the payment card number cannot be used as a commercial identifier and that the photocopy or digital copy of the front and/or back of the payment card cannot be requested, even if the visual security code and part of the numbers are faded.

3. How long can the necessary data be stored?

Necessary data should in principle not be stored beyond the transaction.

The merchant's shopping website must include a simple and free means of withdrawing the consent initially given.

If it is nevertheless possible to propose that the card holders store their data in order to facilitate future purchases, storage of the security code is, in all cases, prohibited after completion of the first transaction. For other required data, prior consent of the client is thus required and must take the form of an explicitly voluntary act. It is not presumed and cannot result from a pre-checked box by default. In the same sense, acceptance of the general terms and conditions of use or general terms and conditions of sale cannot be equated to an explicitly voluntary act.

Concerning the fight against fraud, storage of data related to the payment card beyond completion of a transaction exceeds the contract framework. Storage beyond this may only be done if it participates in the completion of a legitimate interest of the data processor and is simultaneously not disregarding the rights or interest of persons pursuant to amended Article 7 (5) of Law no 78-17 of 6 January 1978.

In summary, the duration of bank card data storage depends on the purposes pursued:

Purpose	**Duration of payment card data storage**
One-off payment	• Until payment • Until receipt of the goods or execution of the service provision knowing that the period is systematically increased by the withdrawal period proved for sales and supplies of goods and remote service provision
Subscription without or with tacit renewal	• Until the final payment deadline, if the subscription does not provide for tacit renewal • Until cancellation of the subscription in case of tacit renewal, (subject to appropriate provisions and in particular the information of related persons prior to renewal)
Complaint management	• 13 months following the debit date • 15 months in case of deferred debit card • The data thus stored for proof of purchases must be stored in an intermediary archive and only used in the event of dispute of the corresponding transaction
Facilitating future purchases	• Until withdrawal of the consent • and/or when payment card validity expires because the storage duration cannot exceed the required period for fulfilment of this purpose.
Fighting against fraud	• Until the end of the period necessary for the accomplishment of that purpose
Fighting against money-laundering	• In the event that payment data is collected by a body subject to anti-money laundering obligations, in order to offer a remote payment solution, it may only be stored until the account is closed and then, the case being, archived in accordance with the relevant legal requirements

Extended version of the CNIL table https://www.cnil.fr/fr/le-paiement-distance-par-carte-bancaire

4. What are the information obligations?

Any use of the payment card number, whatever its purpose, must be the subject of complete and clear information to people.

In general, the data subject is informed of the identity of the data processor, purposes of the processing, the mandatory or optional nature of the information to be provided, the possible consequences of failure to provide it, recipients of the data, the storage duration of categories of data processed, the existence and manner of exercise of their access rights, of rectification and opposition to the processing of his data, including that of defining directives related to the fate of their personal data after death and, where appropriate, on transfers of data outside the European Union.

In the event that data related to the person was sent to a third party by the merchant, he must inform this third party without delay of the exercise of the right of opposition or rectification by the person concerned.

THE DECISION "DIALOGUE OF THE CARMELITES" – A FRENCH TRIBUTE…TO THE CREATIVE FREEDOM OF THE DIRECTOR

(continued, see article from 28.09.2017)

The final scene of Francis Poulenc's opera on a libretto by Georges Bernanos, a final scene which concentrates all the issue and sense of the work, shows the Carmelites having made a vow of martyrdom under the French Revolution, climbing one by one onto the scaffold and disappearing while singing *Salve Regina* then *Veni Creator;* joined by Blanche de la Force, even though she had refused that vow.

But in his staging of the subject of dispute, Dimitri Tcherniakov, accustomed to polemical productions, presents a wooden booth surrounded by the crowd held back by a security tape, in which the nuns are enclosed. At the sound of the recorded religious songs, Blanche de la Force saves them one by one from asphyxiation and locks herself in the cabin, which explodes a few moments later. The sound of the guillotine blade which punctuates each demise in Poulenc's opera, marks here each rescue.

In a decision on 13 October 2015[1], the Paris Court of Appeals had ruled, contrary to the lower court, that the spirit of the work was misrepresented by Dimitri Tcherniakov's staging presented at the Munich Opera in 2010, even though the libretto and the music were perfectly respected.

Very controversial, this decision much removed from previous case law and accompanied by several penalties, was quashed on 22 June 2017.

Grounds : the findings of the Appeals Court are inconsistent with the misrepresentation held (1).The penalties imposed ignore the application of proportionality control and the search for a fair balance between the fundamental rights at stake (2).

1. The findings of the Appeals Court are inconsistent with the misrepresentation held

In its decision of 13 October 2015, Paris Appeal Court had deemed that Dimitri Tcherniakov's staging had misrepresented "the spirit of the work".

[1]CA Paris, division 5, ch. 1, 13 Oct.2015, no. 14/08900, Bernanos et al w/ Munich Opera et al

Ironic, because it had previously pointed out that *"the disputed staging changed neither the dialogues, absent in this part of pre-existing works, nor the music, even going so far as to reproduce the sound of the guillotine's chop which punctuates each demise in Francis Poulenc's opera"*. In other words, the elements of the work were not changed and the integrity of the work was respected.

In the same sense, the Appeals Court admitted that the director *"respected the themes of hope, martyrdom, grace, and the transfer of grace and the communion of saints, dear to the authors of the original work"*.

And yet, it had ruled that the work had nonetheless been misrepresented.

This reasoning finds its justification in copyright law in the distinction between purely material elements and *"contextual"* elements.

In effect, according to the appeal judges, the staging had led to changes in the sense of the work. By punctuating the release of the nuns instead of punctuating the death as originally planned in the work of Bernanos and Poulenc, the sound of the guillotine as used by Dimitri Tcherniakov constituted a misrepresentation of the original work.

The Court of Cassation correctly penalises not the substance but the inconsistency held by the Court of Appeal. This does not mean however that the Versailles Court of Appeal, before which this case was sent, will not be able to retain the misrepresentation, but the exercise will be very difficult and the motivation will have to be very solid.

However, it would be a mistake for the judge to become a "censor"! French doctrine, supported in this matter by a part of the music critique[2], has a tendency to consider that Dimitri Tcherniakov *"took very important liberties with the opera*[3]".And Christophe Caron adds that the Versailles Court of Appeal "*should not forget that the authors of operas also enjoy a moral right which must not be systematically sacrificed at the altar of the director's right. In effect, the opera is not an underpinning that is possible to change with impunity. Its authors do not enjoy a diminished moral right (…)*[4] ».

Should the director be at the service of the work, or does he have to be regarded as a new author of a composite work ("oeuvre composite " in French, derivative work made from the existing first work), or also as a performing artist, free to make his own performance.

2. The penalties announced by the Court of Appeals have no legal basis for lack of prior control of proportionality

In its decision of 13 October 2015, the Court of Appeal announced an extremely severe penalty - which amounts to censorship - by "*ordering the Bel Air media company and Land de Bavière, under penalty, to take any measure to cease immediately and in every country the publication in commerce or more generally publishing, including online public communications networks, the disputed video and prohibiting the Mezzo company, under penalty, to broadcast or authorise the broadcasting of the latter in television programs and in all countries"*.

The Court of Cassation overruled this decision on the grounds that the Appeals Court did not examine *"as it had been invited to, how does the search for the right balance between the director's creative freedom and protection of the composer's and author's moral rights justify the prohibition"*.

It is interesting to note that the Court of Cassation in this case invokes Article 10 paragraph 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms and revives the expectation of the *Klasen* decision, without, however, giving any indication as to its application.

It could also have considered that the international jurisdiction of the French court cannot be unlimited. As for the pure and simple prohibition announced by the Court of Appeal; a serious and grave measure, it is true in any case that a simple public warning could have been preferred. The public is perhaps able to decide for itself?...

Since this cassation judgment, the initially prohibited marketing of audiovisual recordings of Dimitri Tcherniakov's staging in the form of videos has resumed and the case and parties have been referred to the Versailles Court of Appeals. Case to be continued ...

[2] C. Merlin, "Tcherniakov, a radical in court", Le Figaro 4 July.2017

[3] In this sense, see in particular C. Caron ""The Dialogue of the Carmelites" again before the Court of Cassation", Communication Commerce Électronique, September 2017, no. 9, pp 1 - 3 at E. Treppoz, "Comment on the decision of the decision of 22 June 2017", Légipresse, September 2017, no. 352, pp. 439 - 441

[4] C. Caron, " " *The Dialogues of the Carmelites*" again before the Court of Cassation », Communication Commerce Électronique, September 2017, no. 9, pp. 1 - 3

AUTHOR'S NOTE AND THE PRECAUTIONS TO BE TAKEN AS A PRODUCER

If the contract with the authors is sufficient to cause the assignment of rights, accounting law requires a company for each payment to be caused by an invoice, royalties invoice, receipt, etc. This is one of the reasons why producers must settle with authors given copyrights, whose content may vary knowing that the calculation basis and payment of contributions depends on the income category in which the copyrights are fiscally declared.

According to the definition of the *Agence pour la Gestion de la Sécurité Sociale des Auteurs*, or *AGESSA*" (which is the Social Security Fund for Artists and Authors together with La MAISON DES ARTISTES), "*any individual or legal entity is considered a producer whose registered office is located in France and who in exchange for the right of commercial exploitation of an original work pays remuneration or copyright to the author*".

Any producer having to remunerate an author is required to identify themselves through AGESSA or La MAISON DES ARTISTES by completing a tax identity registration form. At the end of this identification procedure, the producer is normally assigned an identification number to be reflected on the royalties invoices.

Producers must first settle the so called "*producer-contribution*", which is independent of the withholding tax and is due by the producer in all cases. In an amount equivalent to 1.1% of the gross author remuneration, it is composed as follows: social contribution of 1% + vocational training contribution of 0.10%.

Furthermore, all producers are required for each royalty payment to pay to AGESSA a withholding tax (payment of social security contributions for the author).This withholding tax requirement applies unless the author has a withholding tax exemption, through form S2026.This exemption is by no means systematic since only the authors declaring their income in Non-Commercial Earnings (*Bénéfices Non Commerciaux*, BNC) who have made the request and whose file has been accepted can benefit from it at the end of their first year of activity. The author must then present this exemption to the producer who will keep a copy of it as proof of the non-payment of the withholding tax in case of an audit by the *Union de Recouvrement des cotisations de Sécurité Sociale et d'Allocations Familiales*, or "URSSAF" (Union for the Recovery of Social Security Contributions and Family Allowances).

For their part, the authors must also register with the social agencies, and this, even though they have joined the *Société des Auteurs et Compositeurs Dramatiques*, or *"SACD*" (one of the French oldest copyright collecting agency for dramatic authors and composers) and declared their work. However, if the author's social fund is AGESSA, in practice no legal provision compels an author to join. Likewise, no criminal sanction is provided for in case of non-affiliation despite reaching the ceiling of 8,703 euros in annual revenue, beyond which the author must be affiliated with AGESSA.

Yet, when the producer establishes a royalty, the SIRET number of the author (assigned number of the Computerised Registry for Businesses in the Territory) appears obligatorily on said note.

In this way, AGESSA and URSSAF are able to notice through cross-checking that the author whose SIRET number appears on different royalties has for example reached the amount of 12,000 euros in one year (for example 4,000 euros paid by a first producer, 2,000 euros by a second producer and 6,000 euros by a third and final producer). If this amount is greater than 8,703 euros set to be subject to an affiliation with AGESSA as it is in this case, but the author is not affiliated, AGESSA and URSSAF will then verify the payments made for social contributions and quickly realise that there have not been any.

This is only if the producer is able to provide a copy of the withholding tax exemption provided by the author when establishing the copyright, that in case of an URSSAF audit, he will a priori suffer no correction. As a reminder, form S2026 is proof that given the particular status of the author, the producer was not required to deduct social contributions from the remuneration of the latter and pay them to AGESSA in the form of a withholding tax.

Failing to present this exemption to URSSAF, the producer may be subject to prosecution.

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