

Google's confrontation with Belgian newspaper publishers.

The Brussels First Instance Court in summary proceedings ruled in its 5 September 2006 judgment on the issue of the relations between professional publishers and on-line research engine services.

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• **The facts.**

Copiepresse, the claimant, is a company which manages the rights of Belgian publishers of French-language and German-language daily newspapers and is authorised to carry on business on Belgian territory. Its corporate purpose is to defend its members' copyright and check the use by third parties of its members' protected works.

Its members are publishers which, under Belgian law, hold rights proper to them as publishers and also rights acquired from authors (journalists).

In 2003, Google Inc., editor of the famous search engine launched its service called "Google News".

Google News extracts articles automatically which it then reproduces or summarises, the articles being taken principally from the sites of the newspaper publishers whose interests are defended by Copiepresse. The articles are reproduced and then communicated to the public, as press reviews, without the prior authorisation of the copyright holders. Copiepresse therefore filed a petition for a descriptive seizure and an expert was appointed on 13 April 2006.

The expert's searches revealed that *"when an article is still online on the Belgian publisher's site, Google refers the visitor, using the deep hypertext link mechanism, directly to the page where the article is; however, when the article is no longer on the Belgian newspaper publisher's site, the content of the article can be obtained via the cache hypertext link, which refers the visitor to the content of the article recorded by Google in the cache memory of the gigantic database which Google keeps in its huge server park."*

• **The claim presented by Copiepresse.**

Copiepresse wanted all the articles, photographs and graphic representations of the Belgian publishers of French-language and German-language daily newspapers reproduced on Google News (Belgium) to be removed, subject to a penalty of 2,000,000 Euros per day of delay and the publication of the judgment on the homepage of "google.be" and "news.google.be" for an uninterrupted period of 20 days.

• **The 5 September 2006 decision.**

The Court was disagreeably surprised by Google's attitude: it did not take part in the appraisal operations and was in default. The Court therefore first acknowledged Google's lack of goodwill and subsequently that Google had started negotiations with newspaper publishers in other countries.

Based on the appraisal report, the Court concluded that the system caused the daily newspaper publishers to lose control of their Web site and their content and that it bypassed the advertisements on the publishers' sites, whereas they are the source of a considerable part of their revenues. The system was also a means of short-circuiting many other elements such as the notices about the publishers, copyright notices, etc. The report also concluded that by using Google's cache it was possible to by-pass the log-in demanded by the publisher and avoid paying for the article.

The Court therefore ordered Google to remove from its site the articles, photographs and graphic representations of the Belgian publishers of the French-language and German-language daily newspapers represented by Copiepresse, subject to a penalty of 1,000,000 euros per day of delay. Google was also ordered to publish the entire decision on the homepage of "google.be" and "news.google.be" for an interrupted period of 5 days, subject to a penalty of 500,000 euros per day of delay.

Google complied with the first sanction, but asked the court to authorise the suspension of the penalties attached to the publication of the decision. This request was refused on 22 September 2006. In the end Google put the decision on line.

As it was a default judgment, the next hearing to be held on 24 November 2006 will examine Google's opposition request.

• **Google's response.**

Following this judgment, the sites of the newspapers "La Libre Belgique", "Le Soir", "La Dernière Heure" and "Vers l'Avenir" were no longer referenced as the first sponsored result when the Internet user carried out a search on "google.be".

However, the sites of these newspapers were still accessible as the first sponsored result when an Internet user carried out a search on the international form of Google.

It should be noted that a Belgian Internet user connected via a Belgian server will be referred automatically to "google.be" and not "google.com". However, once on the "google.be" page, the Internet user can connect directly to "google.com".

Apparently, Google since accepted to collaborate with the Belgian publishers...

What provisions of Belgian law have been breached?

➤ The law of 30 June 1994 on copyright and performing rights: the author of a literary or artistic work holds an exclusive right of reproduction or communication to the public. Any reproduction of a work, as defined by the 1994 law, is therefore prohibited without the express authorisation of the rights holder.

➤ The law of 31 August 1988 on databases protected by a *sui generis* right.

• **The solutions?**

The World Association of Newspapers (composed of 72 national press associations and 13 news agencies) has announced a project called "Automated Content Access Protocol", which is apparently a licence management system that would indicate to search engines whether they can reference a page, for how long and at what terms. The purpose of this project is to prevent search engines breaching copyright.

However, now that search engines like Google have become an essential tool on the internet, other questions arise... At the moment, some search engines blacklist sites. The question is then: does a right to referencing exist?

• **NEWS FLASH:**

- **The French rapper MC SOLAAR fined 20,000 Euros in damages for infringement.**

On 27 April 2006, the Paris Court of First Instance (TGI) ruled that the song "La, la, la, la" sung by the rapper MC Solaar was quite simply an infringement of the work called "La marchande d'allumettes" written by Gérard Layani. Part of Gérard Layani's work had been integrated into MC Solaar's song without any prior authorisation.

The Paris Judge based its decision on a study conducted by the SACEM (the French society of composers, authors and publishers) which found that the melody, rhythm and lyrics of Gérard Layani's work and MC Solaar's song greatly resembled each other.

The Court held that as Gérard Layani had assigned his exploitation rights to the work, he was unable to seek compensation for any economic harm.

As a result, the Court sanctioned MC Solaar on the basis of Gérard Layani's "moral right", ordering the former to put an end to the infringement subject to a penalty and to pay 20,000 euros in damages.

The TGI judged first of all that Gérard Layani's right to the authorship of his work had been infringed, by the complete failure to mention the use of Gérard Layani's work on the sleeves of the album and the single and in the video clip of "La, la, la, la".

But the TGI most of all found that MC Solaar had infringed Gérard Layani's right to the respect of his work. It noted MC Solaar's "distortion" of Gérard Layani's work by integrating in a rap song a work that is qualified as "a classic of La Chanson Française".

MC Solaar would have been able to avoid this sanction for infringement if he had managed to show that the similarities between the two works were the result of chance or "ordinary inspiration".

This was the argument that the band called the "Gipsy Kings" used unsuccessfully in a case where the group "El principe gitano" considered that the song "Djobi Djoba" from the "Gipsy Kings" was an infringement of their song "Obi Oba" (Decision dated May 16, 2006).

■ **Peer to Peer: The first sanction since the DADVSI law.**

Olivier D. was fined 2,000 Euros by the French Criminal Court in its judgment of 1 September 2006 under Article L.335-4 of the Intellectual Property Code for making music files available to others through a peer to peer (P2P) network without authorisation.

The fine was accompanied by the obligation to publish the judgment in the press at the defendant's expense and the confiscation of his computer equipment.

The sanction relates to facts committed between 2003 and 2004, whereby Olivier D. made musical works available to the public on a P2P network (eMule) by means of recordings which reproduced performances by national and international artists without any prior authorisation.

The Court considered that the material element of the infringement was constituted because Olivier D. used the eMule software on his computer. When using eMule to download music, the files during downloading are automatically made available to the "eMule community" and therefore the public, even if the user chooses not to share his files.

The deliberate nature of the offence, according to the Court, is shown from Olivier D's statements that he "recognised he had been passionately interested in information technologies and the Internet for the past five years" and had consequently acquired a great deal of computer equipment. This was sufficient for the Court to declare that Olivier D. must have known that the copy he made of these musical works "was not intended exclusively for him".

It is to be noted that the Court sanctioned Oliver D. based on the finding that he had downloaded only 2 music files whereas the investigators had found more than 5,600. This judgment is therefore tantamount to a sanction of downloading itself, when it implies that the downloaded file is made available to the public, at a cost of 1,000 Euros per download.

In this case, the S.C.P.P. (a collective company of producers) brought a civil action against Olivier D. for the payment of 7,828 Euros as damages

for downloading more than 3,700 files of the 5,600 found by the investigators.

The Court declared Olivier D. responsible for the damage suffered by the S.C.P.P. but referred the civil decision to a hearing on 19 October 2006.

Olivier D. therefore risks being sentenced to damages in addition to the 2,000 Euro fine.

It is to be noted that the facts leading to this sanction date back to before the entry into force of the DADVSI law, which did not amend Article L.335-4 of the Intellectual Property Code.

The position of the Criminal Court is nevertheless in contrast to the statements made by the Minister of Culture before the DADVSI law was adopted, which implied that individuals downloading on a "minor scale" would not be pursued.

Yet sanctioning an Internet user because he made files available to the public without authorisation when downloading musical works comes down in practice to sanctioning the downloading itself.

Article 24 of the draft DADVSI bill, which was censured by the Conseil Constitutionnel, stipulating a 150 euro fine for each file downloaded, seems today to be somewhat of an anachronism!

■ **On-line betting may be governed by French law.**

In a Decision dated 8 July 2005, the judge in summary proceedings of the Paris Court ordered the Maltese company Zeturf Ltd to stop taking bets on horse racing in France on the www.zeturf.com site, as French law reserved this activity to a French company called PMU.

Subsequently, the same judge, in its decision of 2 November 2005, sought the liability of the companies hosting the www.zeturf.com site, the Maltese companies BML and CATL, for not prohibiting access to Zeturf Ltd's site when they realised that the service they were hosting was unlawful.

On these grounds, the two above companies had been sentenced to pay a provisional fine of 30,000 Euros on the basis of the LCEN law ("law for confidence in numeric economy").

The Court of Appeal when confirming the fine in its 14 June 2006 judgment emphasised first that the French courts had territorial jurisdiction to hear the case because it is in France that the PMU suffered damage, whose "connection with the fault of the companies (is) manifest since without their technical support the bets could not have been placed".

Secondly the Court of Appeal noted that the 8 June 2000 Directive, now part of French law, "recommends the liberty of electronic commerce and excludes in its whereas 16 gambling involving wagers having a monetary value, including lotteries and transactions concerning bets". French law was therefore applicable.

With regard to gambling, the simple fact that a company is domiciled abroad is not sufficient to escape from the clutches of the French judges and the application of French law.

As a result, the Paris Court of Appeal confirmed the 2 November 2005 Decision and increased the amount of the provision to 210,000 Euros.

However, the merits of the position adopted by the Court of Appeal can be tempered following the European Commission's recent decision to investigate the monopoly held by La Française des Jeux (for lottery) and the PMU, which supposedly impedes the free movement of services. To be continued...

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