

Kluwer Copyright Blog

Recent decisions of the Paris Court of Appeal: towards an extra duty of surveillance for hosting providers?

Catherine Jasserand (Institute for Information Law (IViR)) · Tuesday, March 29th, 2011

In four recent decisions (respectively relating to the movies “le génocide arménien”; “l’affaire Clearstream”; “les dissimulateurs” and “Mondovino”), the Paris Court of Appeal held Google liable for copyright infringement. The facts of the different cases are similar: an Internet user had placed an unauthorized copy of a movie on Google Video. Following the procedure set up by the law on confidence in the digital environment, which has implemented the e-commerce Directive (Directive 2000/31 EC) in France, the right holders had notified Google about the presence of the illegal copies. Once informed, Google had removed the material from its platform. However, after a while, the right holders established that Google Videos was still proposing links to the litigious videos and sued the company (Google Inc. and Google France) for copyright infringement.

At first instance, the District Court rejected the claims and exempted Google from copyright infringement. In appeal, the Court ruled that Google not only had the obligation to remove the notified videos but also to use all the possible technical means to prevent new access to the infringing materials. In two instances (“les dissimulateurs” and “affaire Clearstream”), it appeared that illegal copies of the videos (and not only links to) had been placed back on the platform by other users. Because Google failed to promptly act to prevent any new publication of already notified materials, the Court refused to apply the liability regime of hosting providers. The Court applied instead the general regime of civil liability. In addition, the Court considered that the search engine function of Google Video was going beyond the passive and neutral functions of a hosting provider. Through this function, Google was not proposing a direct access to videos posted by users but was instead reproducing, on its own pages, videos available on other platforms. These unauthorized reproductions constituted copyright infringements.

These four decisions are quite surprising. Until recently only [lower courts](#) had created an ‘extra duty of care’ obliging hosting providers to monitor a priori subsequent infringements (such as new publications) of already identified infringing materials. In these decisions, the Court of Appeal seems to recognize this new duty of surveillance. However neither the e-commerce Directive nor the law on confidence in the digital economy imposes such an obligation. This position is jeopardizing the neutrality of online intermediaries. At the same time, it is more and more obvious that the definition of hosting providers is not adapted to online platforms (such as Youtube, Dailymotion, Facebook) or search engines (Google) whose activities are not limited to the storage or transmission of materials. This leads to discrepancies between national jurisdictions when applying the liability regime to hosting providers but also to the creation of national obligations, which are not compliant with the e-commerce Directive. The future revision of the e-commerce

Directive should take into account the diversity of online intermediaries and their activities.

The decisions are not available on the official website of Legifrance but can be read on the platform Legalis (www.legalis.net). We invite our readers to check the following decisions: Google Inc. / Compagnie des phares et balises (movie “le genocide arménien”); Google Inc./ Bac Films, the Factory (movie “l’affaire Clearstream”); Google Inc./ Bac Films, the Factory, Canal + (movie “les dissimulateurs”) and Google Inc./Les Films de la Croisade, Goatworks Films (movie “Mondovino”), all issued on 14 January 2011.

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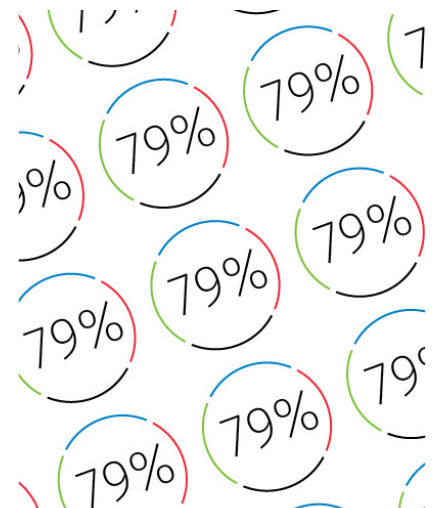
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