

Kluwer Copyright Blog

France: The Court of Cassation puts an end to the Notice and Stay Down Rule

Catherine Jasserand (Institute for Information Law (IViR)) · Tuesday, August 14th, 2012



Lower courts have shifted from a notice and take down rule (provided by the e-commerce Directive and the LCEN) to a notice and stay down rule (created by the judges). This interpretation was confirmed in 2011 by the Paris Court of Appeal. However, on 12 July 2012, the Court of Cassation put an end to this judge-made law by issuing its eagerly awaited position on that issue.

July has been a busy month for the French Supreme Court. On 12 July 2012, the Court of Cassation issued four interesting decisions. The three first ones relate to the obligations of online intermediaries concerning subsequent publications of infringing materials and will be the topic of this blogpost; whereas the fourth decision deals with the service of Google Suggest and the liability of Google for suggesting words such as “Torrent”, “Megaupload”, “Rapidshare” and will be the topic of another blogpost.

The [first decision](#) (Google & Aufeminin.com v. Mr. X) opposed a singer to Google and an online magazine for making available an unauthorized reproduction of a photo representing him. The Paris Court of Appeal found both Google and the online magazine liable for not taking all the necessary measures to prevent new publications of the picture that had been previously notified as infringing. The two other decisions ([“les dissimulateurs”](#) and [“affaire Clearstream”](#)) relate to the re-indexation of copies of movies that had also been previously notified as illegal. In these two cases, the [Paris Court of Appeal](#) also found that Google had failed to promptly act to prevent new uploads of the infringing materials.

Since 2007, French [lower Courts](#) have imposed to online intermediaries (hosting providers and by extension search engines) the obligation to monitor subsequent publications, uploads or re-indexation of materials previously notified as infringing. According to their rulings, this obligation to monitor derived from their obligation to expeditiously remove allegedly infringing content or to prevent access to it ([Article 14](#) of the e-commerce Directive transposed in [Article 6-I.2](#) of the Law on Confidence in the Digital Economy (LCEN)). Lower courts have shifted from a notice and take down rule (provided by the e-commerce Directive and the LCEN) to a notice and stay down rule (created by the judges). This interpretation was confirmed in 2011 by the Paris Court of Appeal. However, on 12 July 2012, the Court of Cassation put an end to this judge-made law by issuing its eagerly awaited position on that issue. According to the Court of Cassation, ordering online

intermediaries to monitor future online publications of infringing materials without further notice results in imposing a general obligation to monitor stored content and to search for illegal copies. It also generates an obligation for online providers to put in place a filtering system without any limit of time. As a consequence, online providers are under no obligation to prevent and monitor future infringements. Copyright holders must therefore notify each new infringement linked to the same material.

The question that arises is whether copyright holders would be able to rely on another provision to request online intermediaries via a Court order to set up filtering systems. The HADOPI law has indeed introduced in [Article L. 336-2](#) of the French Intellectual Property Code (IPC) the possibility for copyright holders to ask the Tribunal of Grande Instance to order any measures necessary to prevent or put an end to copyright infringements. The order can be issued against any person or entity likely to help (thus against online intermediaries). [Criticisms](#) against this article at the time of the adoption of the HADOPI law were numerous; however in the absence of unconstitutional ground, the [Constitutional Council](#) validated this provision. Even if the term “filtering” is not mentioned in the article, it seems that the expression “any measures necessary” is vague enough to cover a general filtering system put in place to fight copyright infringements. One can hope that the Courts will see the contradiction between this provision and Article 6-I.2 of the LCEN (and thus Article 15 of the e-commerce Directive) and refuse to grant a general filtering order on the basis of Article L.336-2 of the IPC.

Finally, it should be noted that the European Commission has launched a [consultation](#) on “procedures for notifying and acting on illegal content hosted by online intermediaries”. But surprisingly, the questionnaire does not touch upon the fundamental issue of the notice and stay down rule developed however by several national courts in Europe (see also [a recent decision in Germany](#)).

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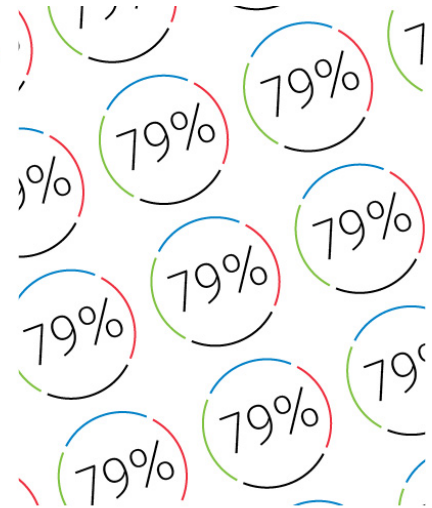
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