

Kluwer Copyright Blog

Embedding is no criminal offence, the Brussels Court of Appeal says

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 “No need to wait for the ECJ, the Court replied.”

In Belgium, besides being a tort from a civil law perspective, a copyright infringement can also be a criminal offence, on the condition that it is done “with malicious or fraudulent intent”. When copyright infringements are committed by unknown perpetrators (which is quite common on the internet), it is usual to file a complaint with an examining magistrate who is endowed with specific criminal investigation powers.

This is what the producer of “Fait d’hiver” (an Academy award nominee short film) did after noticing that the movie had been entirely uploaded on YouTube and embedded in the pages of two websites, namely koreus.com and garagetv.be. Google AdSense advertising banners were added on the latter, generating 2 Eurocents per click.

The original YouTube upload had been made via a Russian IP address. As Google Inc (owner of YouTube) refused to communicate data from outside Europe to a European claimant, this first inquiry was dropped. Likewise, the person responsible for the post on koreus.com was not found.

However, the person responsible for the embedment on gargetv.be had been identified and prosecuted in a criminal court. The court of first instance acquitted the defendant, but the claimant appealed the decision.

“Let’s await the ECJ’s decision in the [Svensson Case C-466/12](#)” answered both the plaintiff and the defendant at the hearing to the question whether linking or embedding are communications to the public within the meaning of Article 3(1) of Directive 2001/29/EC.

“No need” replied the Court!

Indeed, in its decision of 19 March 2013 (available in Dutch [here](#)), the Court reminds that two cumulative conditions must be met to uphold the alleged offence: the copyright infringement and the additional moral element, namely the malicious or fraudulent intent. According to the Court, there has been no such intent, as:

– the defendant was not exploiting the film, just the banners;

- this mere fact does not prove that the defendant was fraudulently acting when embedding the Youtube video;
- there is no proof that the defendant was aware of the illegitimacy of the initial uploading on Youtube;
- on the contrary, as the platform’s Terms of Service provide that users must represent and warrant that they have the right to upload their content, the defendant could assume that the video had been uploaded with the authorisation of the rights owners; and
- moreover, the fact that the video had been uploaded more than a year before the post without having been removed could support the defendant’s assumptions.

Consequently, the Court decided to confirm the first instance decision to acquit the defendant.

It must be emphasized however that the reasoning of the Court, which we deem reasonably convincing, pertains to the assessment of the moral element of the copyright –criminal– offence only, and not to the copyright infringement as such, which is subject to other criteria. As regards the latter: let’s indeed wait the ECJ’s decision in the Svensson case!

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