

France: new legislation on damages for copyright infringement

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Two Acts of 2007 and 2014 to fight against counterfeiting have modified the French Intellectual Property Code, in order to enable improved compensation for the rightholders as well as better protection of intellectual property rights.

In French intellectual property infringement cases, damages were traditionally supposed to cover the prejudice suffered, no more, no less. Punitive damages were not theoretically possible. However, Acts No. 2007-1544 of 29 October 2007 and No. 2014-315 of 11 March 2014 to strengthen the fight against counterfeiting have modified many aspects of the French Intellectual Property ('IPC') with regard to damages and remedies.

Calculation of the damages

Article L.331-1-3 paragraph 1 IPC now states that the courts must, in order to assess the damages in copyright and neighbouring rights infringement cases, take into account separately:

- the negative economic consequences of the infringement, including loss of profits and loss suffered by the injured party;
- the moral prejudice caused to the rightholder;
- the profits made by the infringer, including savings in intellectual investment, equipment and promotion, which the infringer made through the infringement acts.

In its judgment, the court must therefore explain its assessment for each type of prejudice, which means that the plaintiffs will also have to justify their claims for each type of prejudice.

The 'negative economic consequences' cover two elements: the profits lost and the loss suffered. The lost profits may be calculated by assessing the impact of the infringing goods on the rightholder's sales volume, and then by determining the profits of which the rightholder was deprived (Court of Appeal of Paris, 25 September 2009, 08/11638, Lamylane). With regard to the loss incurred, it will be possible to take into account the depreciation of the work or protected subject-matter resulting from the commercialisation of sometimes mediocre products, or the fact that the infringement act has prevented the rightholder from granting licences or commercialising its product under normal conditions.

'Moral prejudice' is new to the IPC, but case law used to take this type of damage into account, even in the case of corporations (a recent example: Supreme Court, 15 May 2012, No. 11-10278).

The evaluation of the damages by taking into account the 'profits made by the infringer' is also new in French copyright law and should enable improved compensation for the rightholders as well as better protection of intellectual property rights.

In certain situations the assessment of the prejudice will however be difficult. Article L.331-1-3 paragraph 2 IPC offers an alternative to the assessment of the damages as described above:

"However, the court may, as an alternative and at the request of the victim, award damages in a lump sum. This amount shall exceed the amount of royalties which would have been due if the infringer had requested the authorisation to use the right which was infringed. This amount is not exclusive of compensation for the moral prejudice caused to the injured party."

The rightholders will be able to demonstrate the amount of royalties that would/should have been earned by disclosing the licence agreements they usually enter into for the same type of exploitations, or, in the case of authors, by providing a copy of the tariffs applied by certain organisations or collecting societies.

Additional damages and remedies

Article L.331-1-4 paragraph 4 IPC provides that the court may also order the confiscation of all or part of the proceeds that were made from the infringement of a copyright or a neighbouring right. This will be awarded to the victim or his assigns.

Moreover, Article L.331-1-4 paragraphs 1 to 3 IPC provides that the court may, in its judgement, order additional remedies, at the expense of the party that is condemned for copyright or neighbouring rights infringement. First, the court may order, at the request of the victim, the recall from the trade circuits, the destruction or the confiscation for the benefit of the victim, of the following elements: the objects made or manufactured in breach of the rights of the victim, the media used to unlawfully extract data from a database, and the equipment predominantly used for the manufacture. Second, the court may also order any appropriate measure to make the judgment public, including its display or its publication in full or in excerpts in newspapers or on the Internet.

Finally, the plaintiff may, during the pre-trial phase, ask the court to order the precautionary seizure of the capital assets and real estate of the alleged infringer (Article L.331-1-1 IPC). The claimant must demonstrate circumstances likely to jeopardize the recovery of damages. The court may, in particular, order the blocking of bank accounts and other assets. In order to determine the property likely to be the subject of seizure, the court may order the communication of bank, financial, accounting and commercial documents, or access to the relevant information.

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