Kluwer Copyright Blog

Spanish Supreme Court rules in favour of Google search engine

Kluwer Copyright Blogger · Friday, June 15th, 2012

By Raquel Xalabarder, Universitat Oberta de Catalunya

"This ruling is very good news for the recent doctrinal attempts to bring some flexibility in the way copyright laws are being interpreted and applied. It is difficult to predict the impact that this ruling may have in successive case law, but it is certainly an important milestone in adding flexibility in the application of copyright laws within technologically changing contexts. "

On 3 April 2012, the Spanish Supreme Court issued a major ruling in favor of the Google search engine (including its "cache copy" service): Sentencia n.172/2012, of 3 April 2012, Supreme Court, Civil Chamber.

After accepting that none of the statutory limitations listed in the Spanish Copyright statute (TRLPI) exempted the unauthorized reproduction and making available of protected works within the running of the search engine (let alone the "cache copy" service), the Supreme Court concludes that it does not amount to an infringement, based on the grounds that intellectual property –as any other kind of property- must abide to its "social goal" (as envisioned by art.33 Spanish Constitution), to the ius usus inocui, and to the general principles of the law, such as good faith and prohibition of an abusive exercise of rights (ex art.7 Spanish Civil Code). Furthermore, the Court states that the three-step-test must be read not only in a negative manner but also in a positive sense, so as to include all these principles.

Although the Supreme Court specifically states that the ruling only extends to the specific circumstances of this case and is clearly disgusted by the claimant's "maximalist" petitum (shut down the whole operation of the search engine), this ruling is a major success in favor of a flexible interpretation and application of the copyright statutes, especially in the scenarios raised by new technologies and new agents, and in favor of using the three-step-test as a key tool to allow for it.

The case

In 2006, the owner of a web page (www.megakini.com) sued Google Spain for the unauthorized reproduction and making available of its contents, by means of the Google search engine and the Google Cache service, seeking damages for an amount of 2.000 euros as well as an injunction to prevent Google Spain from further operating its search engine service.

The courts had to decide whether either one or both of these unauthorized uses qualified as an infringement:

• reproduction and display of some fragments of the web page contents under the links resulting from the operation of the search engine by the users,

• and permanent reproduction and making available of the whole web page contents under the "Google Cache service".

It is worth pointing out that both parties (and the courts) agreed that Google's reproduction of the web pages html codes (and contents) in order for the search engine to operate was exempted under the temporary copies limitation of art.31.1 TRLPI (ex art.5.1 EUCD).

Both the lower court, Juzgado Mercantil n.5 de Barcelona, ruling of 30 March 2007, and on appeal, the Provincial Audience of Barcelona, sec.15, ruling of 17 Sept. 2008, concluded (albeit on different grounds) against the claimant on both accounts. The claimant appealed to the Supreme Court, which denied the appeal -confirming and rephrasing the grounds used by the appeal court- and enjoined the claimant to cover Google's fees.

On appeal, the court had concluded that the reproduction and making available of fragments of the webpage contents displayed under links was temporary, incidental and minimal and, accordingly, lacked any infringing stature. The appeal court also refused to find infringement of the Google cache service, despite accepting that it could be exempted neither under the "proxy caching" safe harbor (art.15 LSSICE, ex art.13 e-comm Directive) or under the search engine / links safe harbor (art.17 LSSICE), nor as a temporary copy (art.31.1 TRLPI, ex art.5.1 EUCD). Several reasons supported this conclusion: the three-step-test (art.40bis TRLPI) must guide the interpretation of the statutory limitations to the exclusive rights both in positive and negative terms, as if some sort of "fair use" doctrine (drawing a parallelism with the four factors in sec.107 US Copyright Act), the property rights cannot be deemed absolute, the ius usus inoqui is a natural limit aimed at preventing an abusive exercise of rights, and the Google Cache service is a "socially tolerated" use which was not prejudicial to the interests of the claimant.

The Supreme Court ruling

The appeal ruling was further appealed to the Spanish Supreme Court, which had the opportunity to confirm and expand on some of these arguments.

According to the Supreme Court, the reference to the fair use doctrine made by the appeal court was not a decisive factor of that ruling (ruling 1). The court explains that the claimant intends to exercise his right in strict observance of the statutory language only, and concludes that general principles of the law must also apply, especially in cases of incoherence (between statutory language) and in circumstances which are not specifically regulated by statutes –as in this case (ruling 2). The Supreme Court went as far as expressly questioning whether "a statute should be so

detailed –even when dealing with a closed list of exceptions- as to envision what is obvious and elementary" (ruling 3).

The Supreme Court admits that while the temporary copying limitation (art.31.1 TRLPI, ex art.5.1 EUCD), interpreted according to the three-step-test (art.5.5 EUCD), would not allow for the "cache copy" service that Google offers, the same result may not be true regarding the reproduction of fragments of the linked websites because of its insignificance and informatory purposes (ruling 5). Had the claim been limited to enjoining the "cache copy" service, the ruling would have been different (ruling 6). The court also reminds us that the requirement that the temporary acts of reproduction do not have an economic significance (ex art.5.1 EUCD) must apply to the acts of reproduction per se (that is, reproduction of fragments and cache copying), not to any other activities that Google may entertain on its website (namely, advertising).

The Supreme Court explains that the three-step-test (art.40bis TRLPI) is not only to be used as a "negative" interpretation criterion but also in "positive" terms, incorporating the specificities of the general principles of the law into the copyright statute; namely, the doctrine of the ius usus inocui, the principle of good faith (art.7.1 Civil Code), the prohibition of abuse of right (art.7.2 Civil Code), as well as the Constitutional construction of property as a limited (non-absolute) right. Specifically, the court examines the terms "normal" exploitation and "legitimate" interests in the three-step-test within the specific circumstances of this case and concludes that the claim is ultimately aimed at causing harm to Google, and even acquiring some fame, rather than at the protection of any copyright interests (ruling 5-6). In short, although limitations and exceptions must be narrowly interpreted, neither the temporary copying exception nor the three-step-test excludes the application of the ius usus inocui doctrine or the general principles of abuse of right and good faith (ruling 6).

The Supreme Court makes it clear that this ruling neither intends to introduce a new limitation (not envisioned in the TRLPI) nor to validate Google's activities. Rather, the ruling is based on the grounds that the protection of copyright and its limitations do not allow for abusive claims (against any legitimate interests or the normal exploitation of works), that the closed regime of statutory limitations should not go as far as to include "absurd scenarios," that copyright law must be used to protect copyright interests and cannot foster "arbitrary claims" aimed only at harming the defendant (ruling 8).

The Supreme Court makes clear that the ruling only extends to the specific circumstances of this case and that "courts do not solve doctrinal polemics." Furthermore, it stresses the fact that the claimant does not attempt to neither delete the "cache copy" from the search engine results nor the fragments of work copied from the linked websites, but rather to stop the whole operation of the search engine on account that Google is making profit with advertising (Fund. 4). According to the Supreme Court, it is precisely this "maximalist" claim which explains both previous rulings on first instance and on appeal (Fund.4).

Comments

This Supreme Court ruling is interesting on two accounts: it concludes that copyright –as any other property right- is neither an absolute right nor immune to the general principles of the law, such as good faith, ius usus inocui, prohibition of abuse of right; and it favors the reading of the three-step-test as a flexible clause, rather than only as a 'restrictive' instrument, in the interpretation and application of copyright law.

This ruling is very good news for the recent doctrinal attempts to bring some flexibility in the way copyright laws are being interpreted and applied. It is difficult to predict the impact that this ruling may have in successive case law, but it is certainly an important milestone in adding flexibility in the application of copyright laws within technologically changing contexts.

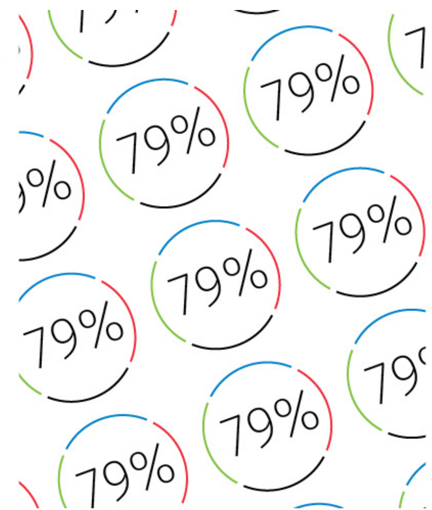
To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

Kluwer IP Law

The **2022 Future Ready Lawyer survey** showed that 79% of lawyers think that the importance of legal technology will increase for next year. With Kluwer IP Law you can navigate the increasingly global practice of IP law with specialized, local and cross-border information and tools from every preferred location. Are you, as an IP professional, ready for the future?

Learn how **Kluwer IP Law** can support you.

79% of the lawyers think that the importance of legal technology will increase for next year.



Drive change with Kluwer IP Law.
The master resource for Intellectual Property rights and registration.

2022 SURVEY REPORT
The Wolters Kluwer Future Ready Lawyer
Leading change

This entry was posted on Friday, June 15th, 2012 at 4:06 pm and is filed under Case Law, Enforcement, Fair Use, Infringement, Jurisdiction, Limitations, Spain
You can follow any responses to this entry through the Comments (RSS) feed. You can skip to the end and leave a response. Pinging is currently not allowed.