

Kluwer Copyright Blog

France: Radioblog condemned to damages for over €1 million

Brad Spitz (REALEX) · Tuesday, November 13th, 2012



The French Supreme Court (“Cour de Cassation”) has upheld, in a ruling of [25 September 2012](#), a judgment of the Court of Appeal of Paris condemning Radioblog and its managing directors to the payment of damages amounting to over €1 million, in addition to a suspended prison sentence of nine months and a €10,000 fine.

The case is interesting for two reasons: the gigantic amount of damages and the application, for the first time, of new provisions of the French Intellectual Property Code condemning the provision of software applications intended to be used for infringing copyright.

The facts are the following: the website Radioblog provided a software called ‘RadioBlogClub’ to Internet users that enabled them to create a music player on an Internet page and to broadcast musical files in the form of playlists accessible to anyone (via streaming). This system did not however allow the Internet users to download the musical files. Moreover, the device enabled the Internet users to research music by title or by artist from a database available on the website [radioblog.fr](#).

Software manifestly intended to communicate unauthorised works to the public

The Court of Appeal of Paris, in its decision dated [22 March 2011](#), condemned Radioblog and its managing directors, not only (very classically) for communicating protected recordings to the public in violation of [Article L. 335-4](#) of the Intellectual Property Code, but also on the grounds of [Article L. 335-2-1](#) of the same code, which punishes anyone who “publishes, makes available or communicates to the public, knowingly and in any form whatsoever, software manifestly intended to communicate unauthorised works or protected objects to the public” with up to 3 years imprisonment and a fine of up to €300,000.

The Supreme Court upholds the ruling of the Court of Appeal Paris, which had considered that these provisions were applicable in this case, since the website offered to Internet users the possibility of listening to recordings, most of which were protected by intellectual property” and since “the accused, who are professionals in a very specialised field, could not ignore the obligation to ensure compliance with the rights of the right owners, before allowing the public to

broadcast the works”.

Punitive damages

The ruling of the French Supreme Court is also very interesting in that it upholds the judgement of the Court of Appeal, which awarded over €1 million in damages to the two unions representing French record producers, which took action against Radioblog (SCPP and SPPF). This amount of damages is based on the amount of profits that were made by the websites through publicity. The Court of Appeal based its decision on paragraph 1 of Article L. 331-1-3 of the Intellectual Property Code which provides that “To award damages, the court takes into account the negative economic consequences, including lost profits suffered by the injured party, the profits made by the infringer and the moral prejudice caused to the holder of these rights because of the infringement”.

The *Cour de Cassation* upheld the Court of Appeal’s judgment, ruling that the assessment of damages is left to the discretion of the lower courts. This is however questionable. Even though the Supreme Court is not the judge of the facts, the way in which the Court of Appeal of Paris assessed the prejudice of the plaintiffs should be considered as breaching the law, since the French judges are not supposed to indemnify beyond the actual prejudice. Indeed, the Court of Appeal did not define the prejudice actually suffered by the plaintiffs. The two French above-mentioned unions certainly do not represent the entire musical production, as well as the authors, publishers, performing artists, etc. In a way, the Court of Appeal of Paris applied serious punitive damages (see *Axel Saint Martin, Radioblog – Peine privée pour contrefaçon, RLDI 2009, 53*), and the Supreme Court approved the Court of Appeal in the negative, by simply ruling that it is not the judge of the facts.

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