

Kluwer Copyright Blog

A Greek premiere: Greek ISPs ordered to block access to infringing websites

Tatiana Synodinou (University of Cyprus) · Wednesday, November 21st, 2012



“This finding could have been considered predictable, if it wasn’t for a special provision in the Greek Constitution that safeguards participation in the information society.”

Is obliging ISPs to cut off internet access to specific copyright infringing websites compatible with the Greek Constitution? That is one of the main questions that were answered by the ruling of the District Court of Athens of May 16th, 2012.

Even if it is just a response in a demand for injunctions, this decision is important for two reasons. First, it places Greek jurisdiction among other jurisdictions that decided to impose specific technological measures on a website that hosts or offers copyright infringing content. Second, it is undoubtedly a sign of maturation of Greek case law with regard to copyright protection on the Internet.

Indeed, with a few exceptions, the great majority of Greek copyright case law has been mainly focused on classic legal questions, such as public performance in hotel rooms, equitable remuneration and the question of originality. As regards the application of copyright in the field of new technologies, the case law has mainly dealt with software and database protection issues. But even in the decisions regarding copyright infringements via the internet, Greek judges have consistently shown a perplexity in front of legal questions related to technology (see for example the decision 8084/2009 of the District Court of Athens and the decision 965/2010 of the three-member Misdemeanours Court of Kilkis (1), which both lack a meticulous analysis of the legal questions which have been raised).

The facts of the present case are rather common. Two internet sites, both hosted in foreign countries, offer their subscribers a great number of various works protected by copyright without authorization. Greek collecting societies, representing both the authors and the holders of related rights, asked for injunctions, demanding, among others provisional measures, the imposition of technological measures by the Greek ISPs in order to make these sites inaccessible to the Greek

public. The legal basis for this demand has been article 64A of Law 2121/1993 which implemented article 8 par. 3 of the Information Society Directive. According to article 64A, “Rightholders may apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right. It is the same for the sui generis right of data base maker”. This has been the first time a Greek court has been asked to apply this provision.

The importance of this provision for Greek copyright law is much higher than it is for other jurisdictions, as Greek law does not allow collecting and processing IP addresses for reasons that relate to copyright protection. Indeed, there is no legal ground for lifting the confidentiality of communications for copyright violations, including IP addresses, which are considered as external elements of the communication (see article 5 of Directive 2002/58 of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector). Therefore, the role of intermediaries in the fight against on-line copyright infringements is crucial.

The Court responded positively to the demand. A first prerequisite has been the inclusion of ISPs in the concept of “intermediaries” in article 64 A of Law 2121/1993. With regard to this specific point, the Court has closely followed the Court of Justice of European Union (CJUE)’s case law and more particularly the decision of 19th February 2009 in the case LSG-Gesellschaft v. Leistungsschutzrechten v. Tele2 Telecommunication GmbH, (C-557/07), that said that “access providers which merely provide users with Internet access, without offering other services such as email, FTP or file sharing services or exercising any control, whether de iure or de facto, over the services which users make use of, must be regarded as ‘intermediaries’ within the meaning of Article 8(3) of Directive 2001/29”. After confirming that ISPs are considered as intermediaries, the Court ordered the Greek ISPs to block Internet access to the infringing websites.

This finding could have been considered predictable, if it wasn’t for a special provision in the Greek Constitution (article 5 A) that safeguards participation in the information society. In that context, the question had to be asked while taking into consideration the balancing of copyright protection and this particular provision. Undeniably, this is one of the most interesting parts of the ruling.

According to the Court, the constitutional right of participation to information society comprises, among others, the right of citizens to claim access to the infrastructures of the information society. Therefore, technological interventions that result in the interruption of internet access or in the degradation of services shall, in principle, be considered as contrary to the Greek Constitution, regardless if they derive from private initiatives or are made pursuant to judicial decisions or laws. The right to participate in the information society is broad and covers also p2p networks which are considered as vital elements of the information society infrastructures, let alone that are also used for lawful purposes.

Consequently, in the opinion of the Court, the degradation or the interruption of access to p2p infrastructures shall be considered as contrary to the Greek Constitution. Similarly, based on an interpretation of the Greek Consumer Protection Act (Law 2251/1994) under the light of the constitutional protection of the right to participate in the information society, contractual terms between ISPs and their subscribers which entitle the ISPs to the interruption or the termination of access to services of the information society shall be considered as abusive. In the same vein, the Court also rejects the possibility of imposing a general obligation of monitoring to ISPs as contrary to article 15 of the E-commerce Directive. Equally, the Court, by making a direct reference to the established case law of the CJUE (CJUE, 24 November 2011, Scarlet v. SABAM, C-70/10 and CJUE, 16 February 2012, SABAM v. Netlog, C- 360/10) (2), denies the legitimacy of the

obligation for ISPs to apply general filtering schemes to monitor all content preventively and indefinitely at the expenses of the ISPs, as a an unfair measure which violates both fundamental rights and the *acquis communautaire* .

The question of blocking access to specific web pages or websites had to be evaluated in a different way. The key concept for this assessment is the principle of proportionality, which is also guaranteed expressly by the Greek Constitution (article 25). In order to decide whether the imposition to ISPs of the obligation to interrupt access to the infringing sites is an appropriate, necessary and proportionate technological measure, the Court examines the technological, financial and the legal consequences extensively. As the Court states, obliging ISPs to terminate the access to a specific IP address or/and a specific domain name is an appropriate technological measure, since it is effective and easily achievable (it simply requires from ISPs to add a few lines of source code) without having any negative impacts on the functioning of the Internet generally and to the equipment or the functioning of ISPs in particular (e.g. speed access, delay response, available bandwidth) or to other websites (the two infringing websites do not share the same Internet address with other websites). Moreover, with regard to the element of proportionality in a narrow sense, the proposed technological measures are necessary and reasonable in relation to their purpose, because they are capable of terminating the access of Greek users who are installed in Greece to specific IPs and/or websites. The proposed measures are also adequate and effective, since they restrict access to all content and services of the infringing website, while the technical process of circumventing them is generally unknown to the average Internet user.

Nonetheless, in order to oblige ISPs to terminate access to the specific websites, the Court must initially arrive to the conclusion that these websites infringe copyright. The Court accepts this finding altogether for both websites, without developing a detailed legal qualification of the infringing acts in each separate case. This is undoubtedly justified by the provisional nature of the measures asked by the claimants (procedure for injunctions). The Court could have been, nevertheless, more analytical also as regards this part of its 60 pages long decision.

While uploading and hosting copyright infringing content to a website by the website's owners is a clear act of primary copyright infringement, affirming copyright infringement when the website is providing links to other infringing websites (such as megaupload.com or rapidshare.com), that host copyright protected works that have been uploaded by the owners of the linking website or/and its subscribers, presupposes a more comprehensive legal scrutiny. In this case, the website functions mostly as a forum where the subscribers have access to links pointing directly to the works and, consequently, the unauthorized reproduction of the work takes place only when the user chooses to activate the link.

The Court could have analyzed more thoroughly the role of the creator of the links who cannot be considered as the primary infringer in case the work is offered to tend users via downloading, but possibly only when the work can be accessed via streaming. The legal situation is much more complicated if we have a look to the disperse case law in this area (See for example the decision of the German Federal Court of Justice in the "Paperboy" case (2003): linking does not violate the right of making available. See also the decision of the Court of appeals of Barcelona in the "SGAE/Indice Web" case (2011): providing a link to potentially copyright infringing content that could be downloaded with P2P software does not imply making available the protected work). However, the website that contains the links could be considered to be a secondary infringer, since it provides the necessary means for copyright infringement by its subscribers (on the condition that its owners have actual knowledge or they are aware of the manifestly infringing nature of the

referred website and content, a fact that cannot be doubted in the circumstances of the present case). In other words: it facilitates and authorizes copyright infringement by enabling its subscribers to find and access the digital files containing the works to the host location. This is not clarified in the decision and that is regrettable, since this case could have at least introduced the vivid and captivating discussion about the liability of creators of links for copyright infringement in Greek case law. The Court emphasized only the recognition of the significance of the role of the ISPs in the copyright infringement. This role is considered essential since their services are deemed necessary for the accomplishment of the infringement in the case of both websites. Another point of the case which shall require further qualification is the legal qualification of the role of the users/subscribers of this website, who upload the infringing content to the hosting sites that could be described as file-sharing social networks. Therefore, as it seems, we have to wait the next steps to this judicial procedure, since this case just opens the debate for the role of ISPs and further the liability of intermediaries in the Greek copyright legal landscape.

(1) See this [earlier blogpost](#): Tatiana Sinodinou, Greece : No criminal liability for copyright infringement by a Greek website providing links to copyrighted material.

(2) See [this earlier blogpost](#): Philippe Laurent : SABAM v. Netlog (CJEU C 360/10) ... as expected!

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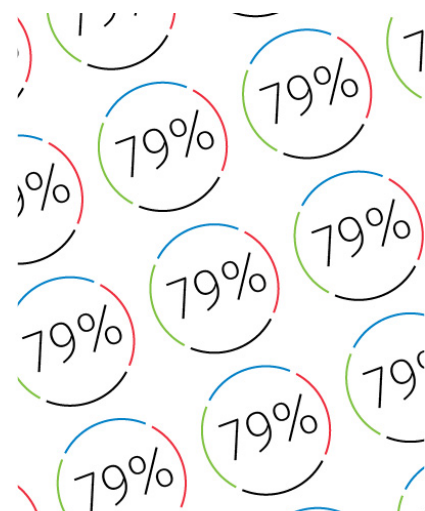
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