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Copiepresse SCRL & *alii* v. Google Inc. – In its decision of 5 May 2011, the Brussels Court of Appeal confirms the prohibitory injunction order banning Google News and Google's "in cache" function

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ABSTRACT

In 2003, Google made available in Belgium its online free service "Google News", which consisted in offering Internet users a computer-generated press review. In his orders of 5 September 2006 (previously commented in [2007] 23 CLSR 82–85) and of 13 February 2007 (previously commented in [2007] 23 CLSR 290–293) the President of the High Court of Brussels found that, by offering this service, Google infringed the copyrights of Belgian press editors and authors. On 5 May 2011, the Brussels Court of Appeal upheld to a very large extent the first instance decision. The Court confirmed that Google's "cache" function and its "Google News" service were infringing the claimants' copyrights and that Google could not rely on any copyright limitation (such as the exceptions for quotation or for report on news events), legislation or fundamental right.

1. Facts and proceedings

The dispute opposing Belgian collecting societies to the American behemoth involved its "Google News" online press review as well as the "in cache" feature of its services.

The "Google cache" service consists in making available to the public the content of its search robots' cache. Search engines allow Internet users to find web pages by means of keywords, but contrary to what may seem, the whole web is not processed in real time. Results are indeed obtained by scanning a cache, namely copies of the HTML code of the available Internet web pages temporarily stored on local servers. When a research is carried out, Google allows users to access its cache copy of the pages referred to in the results by way of a "in cache" hyperlink that Google puts purposely under the references.

"Google News" is a computer-generated daily press review sorted between different main topics such as business, sport, entertainment, etc. Any press article is announced by its title, a thumbnail of its illustrating picture when applicable, a brief summary or the first lines of the article and an underlying hyperlink redirecting (deep linking) to the page where the article is posted. An "in cache" hyperlink is also provided in the Google News service.

The claimants were three Belgian collecting societies, namely Copiepresse, SAJ and Assucopie. Whereas Copiepresse is the collecting society for press editors (newspapers), SAJ represents journalists and Assucopie authors from the scientific, research and educational fields. The collecting societies deemed that the two services infringed their copyrights and therefore lodged a claim to get a prohibitory injunction from the President of the Court of First Instance of Brussels.

After analysing Google's cache system separately from the recent Google News site, the President of the Court found that both services infringed the claimants' copyrights. The Presi-

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dent ordered Google to withdraw *from all its sites* (Google News and "cache" Google under whatever denomination) all articles, photographs and graphic representations of the Belgian newspapers represented by Copiepresse as of the notification of the Order under a daily penalty of 25.000 EUR for every day of delay and to publish the entire Order on the home page of "google.be" and "news.google.be". This had to be done in a visible and clear manner and without comments, during an uninterrupted period of 20 days as from the day of the notification of the Order under a same penalty.

As regards the claims of the two other claimants, the President obliged Google to withdraw the infringing material from its sites (and more particularly from Google News and from the *visible*[1] cached web pages of Google web search engine). The President also set up a "notice and take down" procedure, in order to enable the involved collecting societies to notify to Google which works were covered by copyright belonging to their members. Google was granted 24 h as from notification of an infringement to delete the copies, under penalty of a fine of 1.000 EUR per day in the event of non-deletion.

Google appealed the decision, resubmitting the entire case to the Court of Appeal of Brussels.

2. A new defence based on applicable law

Google's defence consisted mainly in reiterating most of the arguments raised in first instance. However, Google also developed a new plea based on the law applicable to the situation. Citing a decision of the French Supreme Court[2], Google argued that on the basis of article 5(2) of the Berne Convention of 9 September 1886 for the Protection of Literary and Artistic Works, the applicable law is the law of the country where the infringing acts take place, and not where the damage occurs. Accordingly, Google claimed that American law was applicable given that the insertion of the copyrighted material happened on its servers in the United States.

After establishing that Google did not evidence that fact, the Court considered that the French case law was anyway irrelevant to the case and that article 5(3) of the Berne Convention was the correct provision to apply. The infringement act is committed when protected works are transmitted in Belgium via the "google.be" website, and copyright protection in Belgium is governed by Belgian law. The Court also based its decision on article 4(1) of the "Rome II" Regulation (EC) n 864/2007 on the law applicable to non-contractual obligations, which provides that "unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur".

The Court further explained that even if the preparatory acts of the infringement had to be taken into account to determine the applicable law, the delict should then be analysed as an ensemble of complex acts located in different countries (upload in the USA, diffusion in Belgium). In the light of article 4(3) of the Rome II Regulation, Belgium would in that case be the country in which the damaging act was more closely connected.

In addition, the Court further considered that whereas a ".be" can be accessed all over the world, it is supposed to only interest Belgians residing abroad or foreigners keen on keeping themselves informed on what is happening in Belgium: these categories of users are far less numerous than internet users residing in Belgium. The connection with the Belgian ground was therefore sufficiently established in the Court's opinion.

After having focused its reasoning on the ".be", the Court decided to limit the territorial scope of its injunction to the "google.be" and "google.com" websites (the reason to finally include the ".com" in the scope is however not clearly explained[3]).

3. Google's "cache" practices

As regards the "cache" function, Google pretended that the communications and copies at issue were carried out by the users and not by Google. It further argued that anyway, the function was technically necessary and was therefore covered by the "transient copy" exception of article 21 §3 of the Belgian Copyright Act, which provides an exception for temporary copies that are an essential part of a legitimate technical process (transposition of article 5(1) of Directive 2001/29/EC concerning copyright in the information society).

The Court deemed that Google's caching practise was equal to storing on its servers copies of regularly visited web pages and transmitting such copies when the user clicks on the "in cache" hyperlink. The Court concluded that Google therefore reproduced the articles and communicated them to the public.

In relation to Google's resort to the specific caching exception, the Court answered that the "in cache" service of Google could not be compared to the computer "caching" technique aimed at by the Directive and further defined by the EU Court of Justice's *Infopaq* decision.[4]

First of all, Google failed to prove that the public communication of the cached webpage was necessary from a technical point of view. Secondly, the Court also noted that the copies were not transitory as they were kept for a long time on Google's servers and remained freely accessible even when the article was no more openly available on the editor's websites. The Court finally (and unhappily) raised the point that the disabling of the "in cache" function was possible with a human intervention, which would be contrary to the fact that a cache should, according to the EU Court, be deleted "automatically, without human intervention".

[1] We underline this important nuance.

[2] *Lamore* decision of the French Cour de cassation of 30 January 2007. Google also cited the S.A.I.F. decision of the Paris High Court of 20 May 2008, which was however reversed by the Paris Court of Appeal on 26 January 2011.

[3] This can however be inferred from an article of J. Ginsburg quoted by the Court (J. Ginsburg, observations on TGI Paris, decision of May 20, 2008 (SAIF c Google), *RDTI* n 33 p. 501, 511–15).

[4] E.C.J., 16 July 2009, Infopaq International A/S v Danske Dagblades Forening, Case C–5/08, point 64.

Even though the Court was far from being wrong when deeming that Google's "in cache" practise went too far because public access to the cache was not *per se* necessary in a caching process in the strict and technical sense and because the cache was probably too loosely configured, the last argument raised by the Court is surprising. Caching is, like any computerised process, configurable to some extent, and such configuration is the result of human decisions and interventions. The *a priori* exclusion of some pages or websites from the process is a matter of configuration, but the *a posteriori* deleting of cached pages must indeed be automatic for the process to qualify for the exception. More fundamentally, one could wonder whether the Court actually asked itself what a compliant and legitimate cache configuration should be, particularly in terms of retention duration and parameters.

However, as the Court limited the scope of its stop order to Google's ".be" and ".com" websites, aiming more particularly at the "in cache" *visible* links and the Google News service, the decision should at the end of the day not affect, in too detrimental manner, the internal (and therefore "*invisible*") cache mechanisms implemented by Google in the framework of its search engine core business.

4. Google News

Google presented the Google News service as a specialised search engine, the working of which was based on an automatic indexation of press articles available throughout the Internet. Furthermore, Google pretended that the elements that were automatically extracted from the press websites were not protected by copyrights.

The Court rejected this argument, and confirmed that Google also reproduced and communicated copyright protected parts of the original works to provide the Google News service. Furthermore, the Court stressed that the selected elements which were reproduced were generally the ones that conveyed the essential information, and that there was therefore no need to read the entire articles (and consequently no need to visit the newspapers' websites) to understand such information. The Court concluded that Google needed an authorisation from the rights holders to proceed with its Google News activity.

The Court also confirmed the President's finding that the moral rights of the authors had been infringed as well. Paternity rights were infringed as the names of the authors were not mentioned on Google News. Additionally, reproducing parts of the articles was qualified as a modification that was brought to the works without respecting the integrity rights of the author.

In order to try to legitimise its activity, Google raised several arguments based on copyright limitations.

First of all, Google seems to have mentioned a general exception of « legitimate purpose », which was rejected by the Court. The latter indeed reminded that the list of copyright limitations provided in the Belgian Copyright Act was exhaustive, and that the law did not provide for such general limitation.

Google news asserted that its activity would be covered by the exception for quotation (article 21, §1 of the Belgian Copyright Act). According to this provision, a quotation must aim at certain specific purposes (criticism, controversy, education or review) or must be made in the framework of scientific works. Furthermore, the quotation must respect the fair practises of the profession and must be justified by the pursued goal.

The Court deemed that the exception was not applicable to Google News. Since there is no legal definition of what a press review is under the Belgian quotation exception, the Court referred to the notion developed in French case law, which requires that the review must be carried out by a press organ and be the result of compilation and sorting efforts, and that the moral and patrimonial rights of the authors must be respected.

The Court underlined that Google was not a press institution and that it made neither any compilation efforts, nor any analyses, comments nor links between the reproduced elements. As the most important information was reproduced, Google News could be used as a substitute to the editors' websites (which is not permitted either under French law). Even though it had not been reproduced as such as a transverse rule in the Belgian Copyright Act, and notwithstanding the fact that the three-step test had been included as a condition to the application of the quotation exception, the Court concluded that such substitute effect conflicted with the normal exploitation of the works and prejudiced the rights holders. The Court therefore judged that Google News could not benefit from the exception.

The Court then also analysed whether Google could benefit from the exception for report on news events (article 22, §1, 1 of the Belgian Copyright Act). This limitation normally covered the reproduction of short fragments of works (with an exception allowing the reproduction of entire visual art works) when made for reports on recent events.

The Court stressed that this exception was created in order to cover situations where the urgency to publish a copyrighted element rendered impossible the act of asking for prior permission from the rights owner in a timely manner. The Court deemed that Google did not meet the conditions of the exception, as it noticed that some articles remained listed during more than 30 days, and that Google had always had the opportunity to contact the collecting societies to sign a prior general agreement.

One will observe that, quite oddly, at the end of the analysis pertaining to the application of copyright limitations, the Court goes back to the three-step test in a new and specific section and addresses it in general terms and separately from any exception in particular. After quoting article 5(5) of the 2001/29/EC Directive, the Court explicitly confirms that it applied the test to the Google Cache and Google News activities and found that both the services in question prejudiced the normal exploitation of the works.

5. The Court rejected Google's alternative arguments

Google tried but failed to convince the Court of the legitimacy of the services at stake by relying on several other facts and legal provisions.

Google insisted that the press publishers always disposed of technical means to prevent the cache reproduction by search engines, namely the "no archive" meta-tag. Google alleged therefore that by not using this parameter, the publishers had, at least implicitly, consented to the indexation and caching of their web pages. In other words, the editors would not have used their "opt-out" option and would have agreed with Google's processing.

In answer to that argument, the Court reminded everyone that copyright is an exclusive right, and that standard regulations provide for the necessity to obtain a prior consent from the copyright holders: contrary to what Google pretends, "opt-in" is therefore the rule when copyrights are involved.

In response to Google's argument based on the exemptions provided for by the E-Commerce Act of 11 March 2003 (transposing the E-Commerce 2000/31/EC Directive), the Court repeated that Google's caching activity went way further than the cache mechanisms required to perform technical intermediaries' activities. The Court also refused to assimilate Google's position to simple hosting as Google remains at the origin of the reproductions and the communications. According to the Court, Google is therefore not to be considered as a passive intermediary that would benefit from the liability limitations provided in the E-Commerce laws.

The Court also rejected the defence developed by Google in reference to article 10 of the European Convention for Human Rights, which guarantees freedom of expression. The Court quoted article 10 §2 of the same convention, which provides for the possibility to limit the freedom of expression when necessary to protect other essential values such as the protection of third parties' rights. It explained that a balance between freedom of expression and copyright has already been struck by the lawmaker, which resulted in the creation of several copyright exceptions.

Google even tried to argue that the claimants had abused their rights or behaved in an anticompetitive way. In response the Court retorted that no evidence or any substantial reasoning had been provided as regards the definition of the market to be considered in assessing the claim, and that in any case, Google had systematically rejected any attempt to reach an amicable settlement.

6. Decision and conclusion

The Court of Appeal therefore globally confirmed the first instance decision, but rephrased more narrowly the dispositive part with the following amendments:

- The injunction is limited in scope to the "google.be" and "google.com" domains;
- Google is enjoined to withdraw the infringing material *from the visible "cached" links* of "Google Web" and from the "Google News" service under a daily penalty of 25.000 EUR for every day of delay; and
- The reproduction and communication on Google News of article abstracts from a particular newspaper are specifically excluded from the scope of injunction.

These important nuances brought by the Court to the dispositive part of the decision are welcome.

The plaintiffs' grievance pertained to allowing internet users to access all or parts of their copyrighted articles from another source than the official ones, namely from Google's cache or Google's "News" web pages. By restricting the stop order to the "visible cached links" and to the Google News service, the Court puts an end to illegal reuses and communications to the public without tampering with possible legitimate caching activities, which is a wise call.

The limiting of the order's scope to the ".be" and ".com", which translates the Court's will to restrict the effects of the order to Belgian territory, seems also a good decision, even if the arguments that led to it are not the clearest.

Notwithstanding these improvements, an appeal from Google before the Supreme Court would not be surprising, as the reasoning of the Court is not beyond criticism, particularly regarding the assessment and the application of the three-step test.

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