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Computer Law & Security Report

Case note article

# Brussels High Court confirms Google News' ban – *Copiepresse SCRL v. Google Inc.* – Prohibitory injunction/stop order of the President of the High Court of Brussels, 13 February 2007 [opposition procedure against the first default stop order by the same President]☆

*Philippe Laurent*

ABSTRACT

Since 2003, Google has made available in Belgium its online free service "Google News", which consists of offering Internet users a computer-generated press review. In his default order of 5 September 2006 (previously commented in [2007] 23 CLSR 82–85), the President of the High Court of Brussels found that, by offering this service, Google infringed the rights of Belgian newspapers. In its order of 13 February 2007 delivered upon opposition, the same jurisdiction confirms the copyrights infringement and partially withholds its decision.

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## 1. Facts and proceedings

Since 2003, besides its classical "Google" search engine, Google offers a service called Google News Belgium. The website (http://news.google.be) is a computer-generated daily press review sorted between different main topics such as business, sport, entertainment. 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 to the page where the article is posted, when the latter is still online.

The plaintiff, Copiepresse, represents some of Belgium's largest newspapers. On 3 August 2006, a writ of summons to appear in Court, issued by Copiepresse, was served upon Google. Copiepresse claimed that by including headlines and links to online stories from the Belgian press without its prior permission, Google News infringed the copyright and *sui generis* database rights of its newspaper members. Furthermore, Copiepresse reproached Google that, when an article was no longer freely available on the site of the Belgian paper, one could obtain its content through a "cached" hyperlink that directs the user to the content of the article, which Google registered in the cache memory of its servers.

Google Inc. failed to appear at the hearing of 29 August 2006: the order of 5 September 2006 was handed down by the President of the Court solely taking into account Copiepresse's point of view and documents produced. In this default order,[1] The President of the Court noticed that the information was extracted from the press web servers without permission, and held that Google could not exercise any exception provided in the laws relating to copyright and neighbouring rights (Act of 1994) [2] and in the law on database

☆ The last revision of this case note was made on 15 March 2007. The author wishes to thank Jan Ravelingien for his helpful contribution to and correction of this note.

[1] For more information on the default order, see Ph. Laurent, Brussels High Court Bans Google News, C.L.S.R., 2007, vol 23, n°1, p. 82–5.

[2] Act of 30 June 1994 on copyrights and neighbouring rights, M.B. 27 July 1994; errata: M.B. 5–22 November 1994.

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rights (Act of 1998).[3] He therefore found Google to be in breach of the newspapers' rights.

The Default Order obliged 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 1,000,000 EUR for every day of delay; and
- to publish in a visible and clear manner, without comments, on the home page of "google.be" and "news.google.be" the entire Order during an uninterrupted period of 20 days as of the day of the notification of the Order under a daily penalty of 500,000 EUR per day of delay.

Google opposed this order, which entailed the review of the case by the same jurisdiction. Several other collecting societies willingly intervened in the proceedings in order to join Copiepresse in its claims against Google.

## 2. Database rights and deep linking issues put aside of the debate

In the default order, the President of the Court withheld Copiepresse' argument that Google infringed the database rights of its members. In the opposition procedure, however, the President agreed to Google's plea that the plaintiffs were not entitled to act on behalf of their members as regards database rights, as the Database Rights Act of 1998 did not provide for such representation (contrary to the Copyright Act of 1994). The President concluded that the case was therefore not admissible as far as database rights are concerned.

The new decision focuses therefore solely on copyright issues.

The President of the Court also put aside the question whether deep linking would constitute an infringement to the copyrights pertaining to the linked pages. This issue seems not to have been put forward by the plaintiffs in the opposition procedure.

## 3. Copyright infringements

After analysing Google's cache system separately from the recent Google News service, the President of the Court found that both systems infringed the copyrights in the press articles.

### 3.1. *Google Cache is an unlawful reproduction and communication to the public*

The President noted that Google's caching practice was equal to reproducing the content of the press publisher's webpages on its servers and allowing the search engine's users to access such copies.

One can guess from the wording of the order that Google pleaded for the technical necessity of such reproduction in order to provide an effective and fully operational search engine service. The President argued therefore that even if the reproduction of the HTML code of the webpages was inseparably part of the indexation process, one must notice that such reproduction are also carried out for another purpose, namely to allow users to gain direct access via Google's website to documents that were not available anymore at the original source.

The President concluded that by uploading copies of copyrighted works on its cache memory *and* (the President emphasises this word)[4] by allowing the users to access these pages stored on such memory, Google actually reproduces and communicates these works to the public. By doing so without the consent of the copyright' owners, Google was found to be infringing these rights.

### 3.2. *Google News reproduces original parts of copyrighted works*

One remembers that one of the main points of disagreement between the parties related to the qualification of the Google News service. According to Google, this service worked as a specialized 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 copyright.

From Copiepresse's point of view, Google News was far more than a search engine but consisted of a real information portal that was fed by unauthorized copy-pastes from the journal's websites.

The President did not seem to care about the qualification of the service, but settled for the analysis of the content extracted from the press websites, namely the titles and the introductory lines of the press articles. The President indicated that the length did not matter in terms of copyright, and that a title might be protected as long as it was original. In the current case, he actually found that some of the reproduced titles deserved copyright protection.

The President also stressed the point that the reproduction of parts of a protected work might constitute copyright infringement as soon as the copy encompassed elements that made the work original. He emphasised that copyright protection of the first lines of some press articles might not be excluded, especially bearing in mind that the first sentences of press articles worked generally as teasers.

The President concluded that by reproducing titles and short abstracts of articles, Google reproduced and communicated copyrighted works to the public.

Finally, one should note the finding of the President that the moral rights of the authors were also infringed. The fact

[3] Act of 31 August 1998 implementing in Belgian law the Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, M.B. 14 November 1998.

[4] Further in its order, the President confirms, when dismissing the application of the E-Commerce Directive 2000/31/EC, that it is the public communication which is incriminated and not the mere temporary reproduction on cache memory.

of reproducing parts of the articles was analyzed as modifications that were brought to the works without respecting the integrity rights of the author. Furthermore, the President noticed that the names of the authors were not mentioned on Google News and concluded that their paternity rights were therefore also infringed.

## 4. Rebuttal of Google's defence

Google tried but failed to convince the President of the legitimacy of the Google News service by relying on several legal provisions. Google mainly invoked the freedom of expression and several copyright exceptions. Other more general arguments were also put forward without success.

### 4.1. *Freedom of expression*

The first defence developed by Google to oppose to the claims was not grounded on copyright exceptions as such but consisted of a reference to article 10 of the European Convention on Human Rights, which guarantees freedom of expression.

The President's response was a quotation from 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.

The President then was referring to the decision of the Belgian Supreme Court of 23 September 2003,[5] which specifically confirmed that the freedom of expression may not hinder the protection of the originality showed by an author in the way he expresses his ideas and concepts. He further made the point that copyright law is grounded on the balance between the acknowledgment of the author's legitimate interests, on one hand, and the interests of the public and the society, on the other. In that sense, the President was emphasizing the point that freedom of expression was taken into account by the law maker when the latter provided for exceptions to copyright, such as the quotation exception.

Accordingly, the President of the Court rejected that first argument.

### 4.2. *Exception for quotations*

First of all, the President of the Court confirmed that exceptions to copyright must be interpreted narrowly and by reference to the triple-test provided for in article 5.5 of the Directive 2001/29/EC.

He then assessed whether Google news activity could be covered by the exception for quotations (article 21 §1 of the Belgian Copyright Act).

According to this article, a quotation must aim at certain specific purposes (criticism, controversy, education or review[6]) or must be made in scientific works. Furthermore, the quotation must respect the fair practices of the profession and must be justified by the pursued goal. According to Google, this provision should apply to its service as it was a press review activity.

The President, however, followed the publisher's point of view that the insertion of the word "*review*" in article 21 §1 Copyright Act was not made in order to create a new and autonomous kind of exception. Rather, this exception should undergo the same legal regime as quotations: accordingly, articles could only be quoted in the frame of coherent comments and serve as illustrations of a review that should encompass other elements.

According to the President, the mere random juxtaposition of article fragments did not qualify as quotation, as the latter may solely be, per definition, an accessory that is used within the limits of the intended demonstration. The President stressed that quotations should be used to illustrate or defend an opinion.

Finally, the President added that Google News could not be considered as a press review service anyway, as a "*review*" would imply a "*methodical analysis of a group of elements*", and a press review was generally defined as "*a comparative overview of various press articles on the same topic*". The goal of a "*review*" was, therefore, not to collect elements to give a general overview on a topic but to comment upon some works.

The President noticed that Google News service automatically selected and classified the articles, but did not offer any analysis of the articles or draw any comparison between them. Neither did it express criticism or comment concerning these articles. He therefore concluded that Google News could not benefit from the exception.

### 4.3. *Exception for report on news events*

The President had also to assess whether Google might benefit from the exception for reports on news events (article 22 §1 of the Belgian Copyright Act). This exception for reproduction for informational purposes covers only 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.

That the activity of Google news related to spreading information was not sufficient to convince the President. Indeed, he insisted once again on the fact that Google News did not comment upon the news. The President therefore stated that, like for the quotation exception, the exception only applied when the copyrighted works were accessory to the news report and were not the very object of it.

The President also drew the attention of the parties to the justification for this exception, which was the necessity to enable media to react quickly to events and to comment upon such events by using some copyrighted material even when it is not possible to ask for prior permission from the copyright owners given the urgency to disseminate the information.

In the case of Google, given that Google extracts systematically and automatically articles from the press websites, the President states that it was possible to contact the press publishers and ask prior permission for such activity.

[5] Cass., 23 September 2003, C030026N, (available at http://www.cass.be).

[6] This "review" purpose was added by the Act of 22 May 2005 implementing in Belgian law the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, M.B. 27 May 2005.

### 4.4. *Other unsuccessful means of defence*

Google insisted that press publishers always disposed of technical means to prevent the indexation by search engines, and that this way of proceeding had become a standard throughout the Internet. Google deemed therefore that by not using these parameters, the publishers had, at least implicitly, consented to such indexation. The President did not share this point of view but reminded the court that standard copyright rules provided for the necessity to obtain a prior consent from copyright holders and that they did not have to take positive measures to prevent infringements.

Google also tried but failed to convince the President that the publishers had abused their rights and intended to distort the competition between them and Google. The President disregarded these arguments since the copyright infringements were being withheld.

Finally, in response to Google's argument based on the exemptions provided for by the E-Commerce directive, the President confirmed that cache systems were not illegal as far as the cached pages were not accessible to the public.

## 5. Conclusion

The President confirmed the default order but with two amendments: (1) the case was rejected as far as database rights were concerned, and (2) the fines imposed in case of non-compliance were reduced to EUR 25,000 per day. Quite astonishingly, it is understood from this wording that Google was still obliged to withdraw from its cache (without distinction whether they were accessible or not) all articles, photographs and graphic representations of the Belgian newspapers represented by Copiepresse.

For the claims of the intervening parties though, the President obliged Google to withdraw the infringing material from Google News websites and from the *visible* cached webpages. The President also set up a "notice and take down" procedure, in order to enable the involved collecting societies to notify to Google which press articles were covered by the copyright belonging to their members. Google was granted 24 hours as from notification of an infringement to delete the copies, under penalty of a fine of EUR 1000 per day in the event of non-deletion.

Whereas this ruling of the President seems less threatening as regards the Internet's fundamental research techniques, it remains a defeat for Google. But the battle remains ongoing: Google plans an appeal, although an agreement does not seem to be totally improbable from Copiepresse's point of view.

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