

CLIENT ALERT

Contracts & E-Commerce

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A Paris Court judges that Google books infringes French copyright law

According to the Court of Paris, Google infringes copyright law by scanning books that are protected by copyright and making excerpts of these books available to the public in its Google Books search results, without authorization of the author.

Background

Google Books is a service offered by Google that searches the text of books that are relevant to the user's keyword search. These books have been scanned, converted to text using optical character recognition, and stored in the digital database of Google . When clicking a result from Google Books, an interface opens in which the user may view pages from the book as well as links to the publisher's website and booksellers.

However, this service has raised several copyright issues. In 2005 for example, the Authors Guild of America and Association of American Publishers sued Google for infringement of copyright. Eventually Google entered into a settlement agreement with the Authors Guild and the publishing industry. However, it had to be renegotiated after the US Justice Department concluded that the deal violated anti-trust law.

In Europe and more specifically in France, Google has not (yet) entered into an agreement with the authors and the publishing industry. In 2006, the French publisher La Martinière announced its intention to sue Google Inc and Google France in the Court of Paris.

Judgment of the court of Paris

On Friday, 18 December 2009, the Paris Court ruled against Google in the case filed by La Martinière, who was joined by the French Publishers Association and French authors group SGDL.

The Court stated that the digitalization of a work protected by copyright, in this case a technique consisting of scanning the entire work, constitutes an act of reproduction for which the authorization of the author is required.

According to the Court, the works are also communicated to the public without authorization of the author, since the user has access to the title, the cover and excerpts ('snippets') of the books.

Google relied on the exception for short quotations foreseen in article L 122-5 3° of the French Code of Intellectual Property in order to justify its practices. After all, article L 122-5 3° states that when a work has been disclosed, the author cannot prohibit short quotations that are justified by, *i.a.*, the critical, scientific or informative character of the work in which they are enclosed. However, the Court was of the opinion that the exception for short quotations did not apply in this case, since the covers are entirely communicated to the public, even in a reduced size, and because the excerpts are randomly chosen so that the informative purpose, as required by article L 122-5 3°, is not complied with.

The Court further stated that not only the patrimonial rights, but also the moral rights of the author were infringed by the service provided by Google. The Court judged that the fact that the excerpts of the work are curtailed in a random manner and in the form of a paper banner, is an infringement of the right to respect the work.

The Court stated that Google was infringing the copyright of the publishers' books by scanning the works and including excerpts in its Google Books Search results.

The Court ordered Google to pay damages to La Matinière in the amount of 300.000 EUR. As part of the ruling, Google must pay 10.000 EUR each day its infringing practices last.

Google has planned to appeal.

Belgian Parliament passes new Gaming Act despite EU Commission's warning

In our [newsletter of June 2009](#), we announced that the Belgian Government had introduced a draft Act aiming to reform and modernize the Belgian gaming and betting legislation, in particular the 1999 Act on games of chance. On 3 December 2009, this new Act, containing some far-reaching and controversial changes, was passed in its entirety by the House of Representatives despite a negative detailed opinion by the EU Commission.

Introduction

As previously explained, the new Act contains several innovations that are important from a TMT perspective.

First, licensed operators of a casino (license A), a gaming arcade (license B) or of a betting service (license F1) will be able to obtain a license to offer their services online (via a so-called '+-license', either A+, B+ or F1+) when satisfying a number of requirements, some of which are doubtful in light of EU law (see below).

Second, TV-, radio- and print media will need to obtain a license in order to offer games via their various channels (G1-license for television programs entirely focused on the game in question, G2-license for all other games (SMS-games, promotions in magazines etc.).

Third, intermediaries and players may increasingly appear on the Gaming Commission's radar since the new Act penalizes both consumers and intermediaries that knowingly participate in or contribute to the operation of unlicensed games of chance.

The EU Commission's detailed opinion

Pursuant to Belgium's notification under Directive 98/34/EC, the EU Commission sent a detailed opinion regarding the draft Act to both the Belgian government and the Gaming Commission. In this opinion, the Commission warned Belgium that the draft law would infringe Article 49 of the EC Treaty (prohibition of restrictions on the freedom to provide services within the EU, now Article 56 of the Treaty on the Functioning of the European Union (hereinafter the "Treaty")) were it to be adopted in its then-current form, i.e. without taking into account the Commission's remarks.

The Commission's remarks focused on the first and third innovations described above.

Indeed, the opinion first criticizes the Act's "online license"-requirements of 1) a land-based license for similar services and 2) the presence of a server in a permanent establishment on the Belgian territory. The Commission seems to be of the opinion that these requirements go beyond what is suitable and necessary in order to protect consumers and/or prevent fraud and hence unduly restrict the freedom to provide betting and gaming services within the EU. The requirements entail, notes the Commission, that a foreign operator, duly licensed and operating from another Member State, must first become the licensed operator of a casino (license A), a gaming arcade (license B) or a betting service (license F1) in Belgium in order to then be able to apply for a '+-license' to offer the same or similar services via information society means to the Belgian public (A+, B+ or F1+ license, as the case may be). In addition, in order to be granted the '+-license' applied for, such operator is then required to relocate its servers into a permanent establishment in Belgium. As though this would not yet suffice, the new Act also provides for a limitation by Royal Decree of the maximum number of land-based licenses for Casinos, gaming arcades and betting services and, in order to determine this maximum amount, account will mainly be taken of the number of operators already existing on the Belgian market. The Commission reminds Belgium that these requirements make it impossible for account to be taken of obligations to which an operator is already subjected in the Member State in which it is established. With regard to the *numerus clausus* of land-based licenses, it also notes that, according to the case law of the Court of Justice of the European Union (CJEU), the fact that a Member State considers a certain number of licenses to be sufficient for its territory is not an appropriate justification for the obstacles to the freedom to provide services that its licensing regime represents.

A second important change that gave rise to warning by the EU Commission is the fact that, under the new Act, the current list of persons liable to criminal sanctions is extended to include consumers who participate in games of chance not licensed in Belgium. The question that immediately comes to mind when reading this provision is indeed whether such criminal sanctions, ranging from 1 month up to 3 years of imprisonment and fines between 143 € and 137,500 €, are really necessary in order to achieve the Act's objectives of consumer protection and fraud prevention. Moreover, one is left to wonder whether heavy penal sanctions are even at all suitable to attain these objectives. It would indeed appear that, by criminalizing the players themselves, the playing of non-licensed games of chance will more probably than not be pushed further underground. At the same time, the prospect of criminal sanctions will also likely deter addicted gamblers from seeking help through official channels, leaving them only with less suitable options...

The Belgian Government seems to take the view that, pursuant the recent Santa Casa ruling of the CJEU on 8 September 2009¹, the aforementioned restrictions on the free movement of services contained in the new Act can be considered to be authorized national policy, justified by overriding reasons in the public interest.

Analysis and conclusion

The fact that the Belgian Act was passed regardless of the Commission's opinion (which was reminded of at the House of Representatives' hearing of 3 December by one of its members, just prior to the vote) and without the problematic provisions being modified, is all the more disappointing since the Act passed through both the Belgian Senate and its House of Representatives and because Belgium has already been condemned by the CJEU for similar violations. This was in 2000, where the Court ruled that Belgium did not comply with its obligations under Article 49 of the EC Treaty (now Article 56 of the Treaty) when it required surveillance companies established in other Member States to have a registered office in Belgium and did not take into account the justifications and guarantees already offered by the foreign operator in its Member State of establishment².

Although the Commission did not talk about it in its detailed opinion on the new Act, the establishment and server requirements are also discriminatory with regard to foreign EU operators, certainly since the number of (required) land-based licenses in Belgium is very limited. A similar objection could be made with regard to the fact that a G1-license can only be obtained by broadcasters legally recognized in Belgium.

The new Act provides for its entry into force on the first of January 2011, but Royal Decrees may provide for some provisions to enter into force earlier. It remains to be seen what the Commission's and the betting and gaming industry's reaction will be, but one thing is for certain : this Act will not pass unnoticed.

References : [new act regarding betting and gaming](#), [new act regarding the Gaming Commission](#) and [website of the Gaming Commission](#)

¹ CJEU, 8 September 2009, *Liga Portuguesa de Futebol Profissional and Bwin International / Departamento de Jogos da Santa Casa da Misericórdia de Lisboa* , C-42/07

² CJEU, 9 March 2000, C-355/98, Commission / the Kingdom of Belgium

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