

CLIENT ALERT

ISP-Liability & Media Law

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Belgian and French courts take different stance towards sports event bets organized by online bookmakers

The Belgian and French courts have recently been confronted with claims from the organizer of the tennis tournament “Roland Garros”, trying to prevent the use of its name and trademarks and the placing of bets on its matches by online bookmakers. The court cases are relevant both to the European sports and betting sectors. Some aspects of the cases (especially jurisdiction) may even be of interest to any internet business operating on a cross-border basis.

Introduction

The French Tennis Federation (“Fédération française du tennis” or FFT) initiated two litigations early 2008 against various European online bookmakers in order to prevent those bookmakers from using FFT’s trademarks in the “Roland Garros” tournament and even from taking bets on the tournament. In Belgium, FFT sued Ladbrokes in summary proceedings before the Liège courts. In France, FFT sued Expekt and Unibet on the merits before the Paris courts.

The litigation is not the first in its kind: in the “Real Madrid” case, a number of football clubs and their players unsuccessfully attempted to prevent online bookmakers from using their respective names. In that case as in the present one, parallel litigation was initiated in France and in Belgium.

In Belgium, FFT’s action was unsurprisingly dismissed (President of the Liège Court of first Instance, decision of 28 April 2008), in line with earlier case law in the “Real Madrid” case.

In France however, FFT obtained a surprising win (President of the Paris Court of first instance, decision of 30 May 2008) on the basis of the argument that the organization of bets on the “Roland Garros” tournament constituted a tortuous act.

The Belgian and French decisions are briefly discussed below.

The Belgian “Roland Garros” decision: FFT vs. Ladbrokes

The claim. In the Belgian “Roland Garros” case, the FFT initiated summary proceedings against Ladbrokes in order to prohibit the latter from accepting bets from Belgian residents on the tennis matches played in the framework of the “Roland Garros” and “Masters de Paris” tournaments.

Legal basis. The legal basis for the claim was that the organization of bets would damage the tournaments’ reputation, and that such organization of bets therefore constituted a tort towards FFT.

Jurisdiction. The President of the Liège Court of first instance accepted that it had international jurisdiction over the case, even though defendant Ladbrokes was a UK-based company. The mere fact that the Ladbrokes website was accessible and permitted betting from the Belgian territory was sufficient to establish jurisdiction. According to the President, it was irrelevant to examine whether or not there was an effective and material use of the website from Belgium.

The merits. However, according to the President, organizing bets in no way constituted a tortuous act. The mere fact that a number of fraud bribery scandals have recently occurred in the sports betting arena did not alter this finding. In fact, according to the President, Ladbrokes had taken reasonable care in preventing fraud by engaging into various cooperation agreements and by setting up internal controls.

This decision is in line with an earlier decision by the Liège Court of Commerce in the “Roland Garros” case (24 November 2006) in which it was stated that football players and football teams could in no way oppose the organization of bets on their matches.

The French “Roland Garros” decisions: FFT vs. Unibet and Expekt

The claim. In the French “Roland Garros” case, the FFT initiated proceedings on the merits against bookmakers Unibet and Ladbrokes in order to prohibit them from accepting bets on the “Roland Garros” tournament – this time without specifying whether such prohibition would only apply on the French territory, or rather worldwide.

Legal basis. The legal basis for the claim was threefold: Unibet and Expekt would have (i) violated FFT’s trademark rights; (ii) violated FFT’s monopoly on the exploitation of the “Roland Garros” tournament; and (iii) free-rided on FFT’s commercial success.

Jurisdiction. The Paris Court of first instance did not investigate whether it enjoyed international jurisdiction over the case. That is rather surprising, since in the “Real Madrid” case, the Paris Court of appeal held that it had no international jurisdiction after having found that the betting websites of the defendants were only marginally used by French citizens to bet on French sports events.

The merits. The Paris Court of first instance held that Unibet and Expekt did not violate FFT’s trademark rights. However, the Court held that FFT’s monopoly on the exploitation of the “Roland Garros” tournament extended to downstream markets such as the organization of sports bets. Furthermore, the Court held that Unibet and Expekt “free-rided” on the success of the tournament, and that such “free-riding” constituted a tortuous act of parasitism.

Analysis and conclusion

The decisions discussed above raise a number of interesting questions that are of great interest to actors in the sports arena, in the online betting sector and beyond:

- first, it remains unclear as of when a national court has international jurisdiction over a website. The Paris Court of appeal held in “Real Madrid” that a “real connecting link” was required to the French territory and that websites with only marginal access to France did not fulfill this criterion. In the other cases, mere accessibility of the website was sufficient to establish international jurisdiction.
- second, online bookmakers and other economic actors offering services ancillary to sports events may increasingly face lawsuits from athletes, sports teams and/or event organizers invoking tort law provisions to prevent betting on their matches. The Belgian and French courts seem to adopt a very different approach to such claims. In any event, various defenses are open to online bookmakers, including defenses relating to competition law and the freedom to operate on “downstream markets”.

References: Tribunal de Commerce de Liège, 24 November 2006, RG 0899/05; Président du Tribunal de Première Instance de Liège, 28 April 2008; Président du Tribunal de Grande Instance de Paris, 31 May 2006; Cour d’appel de Paris, 14 February 2008; Tribunal de Grande Instance de Paris, 30 May 2008.

Recent French and German case-law tightens the liability regime for Web 2.0 platform operators

Two recent decisions of the French Tribunal de Grande Instance and one decision of the German Bundesgerichtshof impose far-reaching monitoring obligations on operators of online user-generated-content platforms (“Web 2.0” platforms). The new case-law can be criticized from a legal point of view by the online intermediaries sector, but will certainly be welcomed by intellectual property rights holders. Rights holders can now invoke new court precedents that require platform operators to take monitoring and filtering measures.

Introduction

The liability regime for internet service providers that store or transmit third-party content is harmonized on a European level in the E-Commerce Directive 2000/31. This Directive provides for a “safe haven” regime under which providers of hosting, caching and mere conduit services are exempt from liability under certain conditions. Furthermore, the E-Commerce Directive states that the providers of these services cannot be subject to any general monitoring obligation. Courts can only impose temporary monitoring obligations in specific cases.

National courts have however experienced difficulty in the past in correctly applying the provisions of the E-Commerce Directive. In earlier case-law, providers were sometimes wrongly denied the benefit of the “safe haven” regime, and courts sometimes imposed obligations that were akin to a general monitoring obligation. Two recent French decisions seem to indicate a shift in the national courts’ attitude. Both the earlier case-law and the recent French and German decisions are discussed below.

Earlier case-law

- **France.** In the *MySpace* case, a French citizen, Mr. Lafesse, sued platform operator MySpace for having stored and having provided public access on www.myspace.com to certain videos without Mr. Lafesse's authorization. The Paris Court of first instance ruled that although MySpace performed the technical function of hosting, it could not be considered as a host provider under the E-Commerce Directive and the French implementing legislation. Rather, the fact that MySpace was financed through online advertisements on its website and the fact that MySpace's website was equipped with a specific lay-out and presentation structure led the court to consider MySpace as a "*éditeur de contenus*" or "content publisher".

In the *Dailymotion* case, another French citizen, Christian C, sued platform operator Dailymotion for having stored a cinematographic work on its platform that was put online without authorization by the right holder. The Paris Court of first instance held that Dailymotion qualified as a provider of hosting services, but could not benefit from a liability exemption since the court deemed Dailymotion knowledgeable of the fact that its platform was used for illegal postings. The Court derived such knowledge from the fact that the platform's commercial success necessarily implied that it would be used also for illegal postings. Furthermore, the Paris court held that it could impose a general monitoring obligation to Dailymotion notwithstanding the provisions of the E-Commerce Directive, since Dailymotion would have enticed the illegal postings through the operation of its platform .

In the *Google* case, search engine Google was condemned because it had not undertaken sufficient effort to remove footage from its Google Video service after having received a notice requesting for takedown. Google *had* actually removed the litigious footage, but this footage was later posted again. According to the Paris Court of first instance, Google qualified as a provider of hosting services. However, it could not invoke a liability exemption since, according to the Court, once a provider has been informed of the illegal nature of a certain footage posting, all future "re-postings" of such footage must be prevented.

In the *Wikimedia* decision, the Paris Court of first instance qualified the Wikimedia Foundation as a provider of hosting services. According to the Court, Wikimedia could not be held liable for libelous content generated by Wikimedia users since Wikimedia could not be expected to be knowledgeable of such libelous activities.

The above decisions can be criticized for a number of reasons. First, it seems that the French concept of "*éditeur de contenus*" is contrary to the E-Commerce Directive. As a matter of fact, under the Directive, the circumstance that a platform operator generates revenue through its website and/or provides a certain lay-out or structure is not relevant to the qualification as a provider of hosting services. Second, and in the same line of reasoning, it seems incorrect to assume that commercial success of a platform implies that the operator would be knowledgeable of the fact that illegal activities take place on that platform. Third, the E-Commerce Directive generally precludes *any* general monitoring obligation, and the circumstance that an operator would allegedly entice illegal behavior therefore does not justify imposing such obligation.

- **Belgium.** The Antwerp Court of first instance condemned the platform provider Seniorennet on the grounds that "*any operator of a platform has the obligation to take reasonable action to prevent damage from occurring to third parties*". Therefore, and notwithstanding the fact that the Court did not hold Seniorennet liable for any copyright infringement, Seniorennet was obliged to prevent future exchange of copyright protected files through its platform.

This decision has been criticized by Belgian legal scholars since it imposes an *ex ante* monitoring obligation that seems contrary to the E-Commerce Directive and Belgian implementing legislation.

- **Germany.** The German Supreme Court (*Bundesgerichtshof*) already ruled back in 2004 that an online auction platform qualified as a provider of hosting services. According to the Supreme Court, trademark holders could not only require the removal of any counterfeit products *already* offered on the auction platform, but also the installation of a solution precluding the *future* posting of such products.

This decision can again be criticized since the solution advanced by the Supreme Court amounts to imposing an *ex ante* and general monitoring obligation, which runs counter to the E-Commerce Directive.

Recent decisions

Two Dailymotion decisions in France. In two recent decisions dated 15 April 2008, the Paris Court of first instance was again confronted with claims against the online platform Dailymotion. The Paris Court rightfully qualified Dailymotion as a provider of hosting services, and not as an “*éditeur de contenus*”. However, the Paris Court held that in order to benefit from a liability exemption, Dailymotion not only had to remove infringing content, but also to prevent such infringing content from being posted again.

One auction website decision in Germany. In a decision dated 30 April 2008, the German Supreme Court confirmed its position that the E-Commerce Directive and national implementing legislation does not prevent a court from imposing a monitoring obligation upon operators of auction websites. The German Supreme Court confirmed its position that it does not hold the auction website operator liable for the trademark infringements committed by the third parties offering counterfeit products through the auction website concerned. However, the auction website operator has a duty, according to the German Supreme Court, to prevent such infringements from happening in the future.

Analysis and conclusion

The recent decisions will undoubtedly be welcomed by intellectual property rights holders who now have additional arguments to force auction websites, community websites and other Web 2.0 platforms to take *ex ante* and proactive steps against infringements of their rights.

Internet service providers (ISP's) and online intermediaries may, however, view these decisions as a setback and as a violation of the E-Commerce Directive. In any event, the practical consequences of the recent decisions may be far-reaching.

References: *Tribunal de Grande Instance Paris, 22 June 2007, Lafesse c. Myspace* ; *Tribunal de Grande Instance Paris, 13 July 2007, Christian C, Nord Ouest Production c. Dailymotion* ; *Tribunal de Grande Instance Paris, 19 October 2007, sarl Zadig Productions c. Google Inc. and AFA* ; *Tribunal de Grande Instance Paris, 29 October 2007, M. X c. Wikimedia Foundation*; *Voorzitter van de Rechtbank van eerste aanleg te Antwerpen, 5 October 2006; Seniorennet, Tribunal de Grande Instance Paris, 15 April 2008, Dailymotion, and Bundesgerichtshof 30 April 2008 and 11 March 2004.*

Flemish media regulator further clarifies stance towards product placement

The Flemish Media Regulator (FMR) has recently issued a number of decisions that clarify its stance towards product placement in TV programs. In particular, it has clarified when such product placement is “unavoidable” and therefore allowed. The case law of the Flemish Media Regulator may be interesting both to broadcasters and to advertisers wishing to enter into product placement agreements with broadcasters.

In a decision dated 22 February 2008, broadcaster Vitaya was cleared for having repeatedly displayed and orally mentioned wines from the ‘Côtes du Rhône’ region in the cooking program “Menu à la carte”. The FMR held that mentioning wines in a cooking program was unavoidable and took into consideration that the display of the wine bottles was not emphasized. However, in another decision of the same date, broadcaster VTM was convicted for having repeatedly displayed and mentioned a particular line of products from a single brand in its cooking program “De perfecte keuken”. A similar conviction was pronounced on the same date against broadcaster VijfTV for displaying and mentioning a particular brand of knives in the cooking program “Peter kookt”.

In view of this recent case-law, both advertisers and broadcasters have a clear interest in agreeing on the conditions under which product placement during Flemish broadcasts will take place. In addition in the event of a conviction it is recommended to agree on a clear allocation of liability to the payment of a fine to the FMR.

Link: www.vlaamseregulatormedia.be

The European Commission adopts a Communication on the protection of consumers and minors in respect of the use of video games

The European Commission has issued a Communication fostering inter alia the increased use of PEGI labels, which are currently applied by 20 Member States. The European Commission also urges stakeholders to come up with a code of conduct within two years’ time relating to the retail sale of games to minors.

Background

With its Communication, the Commission is replying to the Council's call for a review of the various methods used for assessing the content of video and computer games and to report back to the Council. The Communication follows a questionnaire that was sent to all Member States, *inter alia* enquiring on the use of PEGI labels. Adopted in 2003, PEGI labels provide an age rating and warnings such as violence or bad language, empowering parents to decide which game is appropriate for their children, as well as adult gamers to better choose their games. PEGI is supported by the major console manufacturers in Europe. PEGI Online was launched in 2007, co-funded by the EU's Safer Internet Programme ([IP/08/310](#)), in response to the rapid growth of online video games.

Contents of the Communication

The Communication calls upon the Member States to integrate into their national systems the information and classification system put in place in the framework of the PEGI and PEGI On-line initiatives.

Furthermore, the video games and consoles industry is urged to further improve the PEGI and PEGI On-line systems and in particular to regularly update the criteria for age rating and labelling, to advertise PEGI more actively, and to increase the list of signatories.

Also of note is that stakeholders involved in the sale of video games in retail shops are called to agree within two years on a Pan-European Code of conduct on the sale of games to minors and on commitments to raise awareness of the PEGI system among parents and children, as well as to ensure adequate resources to implement the provisions of this Code.

Analysis

Although a Commission Communication is not binding, it is of note that the Commission has urged the video games sector to implement certain policies within a set period of time. The Communication may indicate the Commission's determination to develop a policy in the field of video games and may be the precursor of legislative initiatives on a Community level, should self-regulatory initiatives fail to take place.

Link: http://ec.europa.eu/avpolicy/reg/minors/video/index_en.htm

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