

Copiepresse news: a Pyrrhic victory?

The Brussels Appeals Court has ruled that Google infringed the copyrights in journals represented by Copiepresse by reproducing protected works in its Google News service and giving access to articles via its cache function. The interesting question raised by the case is not so much whether Google violated local copyright law, which the Brussels Appeals Court found it had, but rather whether, and if so how, Copiepresse is entitled to a compensation and copyright law should be amended to adapt it to the rapidly changing Internet world.

To understand the case, one must first understand what Google is and what it has been doing. We first summarize this below, then address whether Google had indeed violated copyright law, set out the analysis of the Brussels Appeals Court, and finish with some thoughts for the future.

Google and Google News

Google is a global technology leader that focuses on improving the way people access information over the Internet. Its innovations in web search and advertising have made its web site a top Internet property and its brand has become one of the most recognized in the world.

To achieve this, Google maintains a large index of web sites and other online content. Its original, and still its most important, service is the access to this index and its content. Access is made available, free of charge, via a search engine, to anyone with an Internet connection. The automated search technology allows people almost instant access to relevant information from Google's vast online index.

Google generates revenue primarily by delivering online advertising through the AdWords and the AdSense programs. Businesses use the AdWords program to promote their products and services with targeted advertising. Through AdSense, third-party web sites can use the Google Network to deliver relevant ads that generate revenue.¹

Using cached links, Google records snapshots of web pages taken at the time they were indexed. This allows users to access a copy of almost any web page – within Google's own web site – and to view web pages that are no longer available on the web site of the original creator. That could mean the copy of the page accessed is either minutes or months old, depending on when Google last crawled (*i.e.* automatically downloaded and indexed) it.

Google's services have been extended over the years and include Google News, Google Finance, Google Maps, Google Images, Google Videos, Google Books, Google Blog Search, Google Product Search, and Google Groups.

The service of particular interest for this commentary is Google News. Google News gathers information from news sources worldwide and presents news stories in a searchable format within minutes of their publication on the web. Users get much more than a link to information. The leading stories are presented as headlines on the user-customizable Google News home page. These headlines are selected for display entirely by a computer algorithm. Information, which may contain texts, pictures, tables and graphics, is kept for a long period of time.

¹ See our analysis in 'Google goochelt en ontgoochelt...', *IRDI*, 2004, 226-234.

Google has had to face a large number of court cases. It has had copyright claims filed against it by companies alleging that features of certain of the Google products and services, including Google Web Search, Google News, Google Video, Google Image Search, Google Book Search, and YouTube, infringe the rights of others. Several cases have been filed against Google alleging copyright infringement by Google News, and Google has settled a number of them.²

To better understand the case before the Brussels Appeals Court, a closer look at how Google News works is helpful. The system is a fully automated news aggregator which scans a vast number of news publications found on the Internet and sorts them, by relevance, into different categories. Google then shows these results on Google News' main page (which can be edited by users) and in news specific search results. The following information is displayed: the title of the article, the first couple of lines, the author of the article (sometimes), the source of the article, and (usually) a small picture taken from the article. Users wishing to read the complete articles can then click on the title or the picture displayed by Google News, which in principle activates a "deep link" to the original web page.

In order to speed up its search process, the Google search engine automatically copies all web pages onto its servers. This allows it to render search results without having to consult the actual internet sites (this would slow down traffic to these sites). Instead, the search engine first searches its own servers for results and only then links users to the actual internet sites. This, however, isn't the only use for these "cache" copies. The said copies can also be viewed by Google's users, allowing them to consult older versions of the website they are looking for. Though the main purpose of this function is to display websites that might temporarily be inaccessible, it also gives users the possibility to view pages that have been removed from the Internet, such as news articles that have been deleted from the site on which they were originally published or news articles that have become only accessible against payment.

The downside of this service for the news publishers like the members of Copiepresse is that Google News makes the newspapers less attractive for subscribers, which in turn causes the newspapers to lose advertisers' interest. Also, if they are not acknowledged in the Google News results, the authors consider that their rights are violated.

Our analysis

The cache function of Google must not be confused with the "caching" of article 13 Directive 2000/31 which is – like "mere conduit" (article 12) and "hosting" (article 14) – the basis for the exemption from liability of Internet service providers. A service provider can benefit from the exemptions for "caching" when he is in no way involved with the information transmitted; this requires, among other things, that he does not modify the information that he transmits (observation 43 Directive 2000/31).

Also, search engines have been expressly excluded from the list of parties benefiting from the exemption from liability (article 21 Directive 2000/31).

In contrast, Google's activities show that it is a content provider. With regard to the copyright issues, Google's activities as a publisher of its website must be distinguished from its other roles e.g. as the provider of AdWords and AdSense services, in which context the ECJ has held that

² Google Annual Reports as of 2006.

Google does not infringe trade mark law by allowing advertisers to purchase keywords corresponding to their competitors' trademarks³. Google itself is only responsible if it interferes with the content and the selection of keywords, and if it does not delete infringing Adwords-ads after it has been requested to do so. Advertisers cannot, by using such keywords, arrange for Google to display ads which do not allow Internet users easily to establish from which undertaking the relevant goods or services originate.

In the context of Google News, content reproduction and communication by Google itself is at stake.

Assuming questions regarding applicable law and jurisdiction are resolved, and that Belgian law is applicable, Google is expected to comply with certain copyright rules in relation to copyright protected content. In the Brussels Appeals Court case, none of the parties contested that the articles were original works protected by copyright.

As mentioned above, the content provided by Google News contains texts, pictures, tables and graphics. Belgian copyright law and case law have extended copyright protection to these formats, provided the 'originality test' laid down by the Belgian Supreme court many years ago is fulfilled⁴. As a consequence, unless they contain only untreated or unreviewed information, texts will be copyright protected and, as a result, may not be reproduced or communicated without the prior explicit consent of the author. Also, content within a picture may be independently copyright protected, in addition to the copyright in the picture itself. Such content cannot be reproduced or communicated to the public without the consent of the rights holder. This consent must be in writing, explicit and precede the reproduction and communication. A persons' image is also protected under copyright law. Any person may object to the reproduction and communication of his image. Consent may however be implicit. Equally, specific persons may have particular copyrights on content contained in Google News.

We will not enter into detail on the extent of rights protection or other potential nuances that would need to be looked at on a case by case basis. What counts here is that one should keep in mind that the content communicated in Google News is protectable by copyright. Some of it may also contain trademark protected signs.

Another principle to keep in mind is that citation of part of a text, picture, drawing, etc. is permitted, and does not require the consent of the rights holder, if certain conditions are fulfilled:

- The information must have been published by the author;
- The citation must be short – but the law does not define what is 'short' (several lines of text is regarded as acceptable as is an entire picture);
- The citation must be made for the purpose of criticism, polemic discussion, education, or in the framework of scientific research. Citation in websites focused on entertainment or having a commercial purpose is not generally regarded as covered;
- The citation must be in good faith in that it must be in conformity with professional rules and justified;
- The citation must include express mention of the source and the name of the author.⁵

³ Joined Cases C-236/08 to C-238/08.

⁴ Cass., 27 april 1989, *Pas.*, 1989, 908.

⁵ This exception should be compared with the 'fair use' exception of article 107 of the US Copyright Law :

So, what to think of Google News?

Google clearly reproduces content from news websites and communicates at least part of that content via Google News. Assuming that the material is protected by copyright – conceded by the parties before the Brussels Appeals Court – Google should have obtained prior consent from the relevant rights holders before proceeding with its reproduction and communication in Google News. But, as pointed out by the Court of Appeals in its decision, it had not obtained such consent from Copiepress members, with the possible exception of l'Echo. In addition, the conditions to benefit from the citation exception do not seem to have been fulfilled.

This analysis doesn't leave much room for any legal aerobics.

And so it was before the Court. Google attempted to raise counter arguments - but without success. Among others, it was unsuccessful in persuading the Court that users, rather than Google, were reproducing and communicating the relevant content. In fact, users see information that has already been saved by Google and in cases where a user visits a cached copy of material that has been removed from the original site, it is still Google's copy that is viewed. Google was also unsuccessful in persuading the Court that its cache function is caching for the purposes of Directive 2000/31. As set out above, that argument should fail. Finally, Google unsuccessfully argued that Copiepresse members could have chosen to opt-out of the Google system. The Court quite rightly concluded that such an argument is incompatible with the requirement of consent under Belgian copyright law. Belgian copyright law gives authors the exclusive right to authorise the reproduction of their protected works and their communication to the public (Article 1).

We conclude that the decision of the Court matches our own analysis. An appeal to the Supreme Court on issues of legal principle would seem to have little chance of success.

The wider debate

Mid July 2011, Google removed material belonging to members of Copiepresse from its index – not just from Google News – arguing that this was necessary in order to comply with the Court's judgment. A couple of days later, following protests from members of Copiepresse, the material was restored to the index.

(continued...)

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include :

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

The reaction of Copiepresse members shows the importance of Google's index and of Google News. Obviously, the Copiepresse members like users to be able to find them through Google's search engine. They did not of course attack the search engine, nor could they have done so. Google is not obliged (and could not be forced) to index everybody. However, its credibility may suffer if it makes exceptions.

Copiepresse members complained that Google's measure caused problems for users, who had the impression that they were being prevented from continuing to read content from Copiepresse members. One member even argued that Google was "boycotting" its newspaper.⁶

These reactions show a number of things: Google's indexing and Google News have changed the habits of the Internet user. With Google News, users can easily verify whether information is available on a particular subject. They can find it quicker than by visiting those news sources they can find or are aware of/familiar with to check whether any of them carries stories on a particular subject. Equally, Copiepresse members clearly see the added value of the indexing system. By mid July 2011, they could not but admit that they understood that they and their users are fundamentally dependent on the single point of contact to the internet, which is offered by Google. Users make less and less effort to remember domain names. Instead, they use the Google search engine. Copiepresse members started to realize this during the course of the litigation and ultimately had to concede the added value of Google.

The legal analysis applied to the Google News service might also apply, at least to some extent, to other services offered by Google. But other providers of services permitting users to search previous versions of web pages, like archive.org, may also be criticized under copyright law for the same reasons as Google.

In our opinion, the question is not whether copyright laws are infringed, but whether the law should be amended – and if so how – to make it compatible with the can't-live-with-it-can't-live-without-it position regarding the Googles of this world. Recently, Flipboard, a content-browsing application for the iPad, has been confronted with the same kinds of legal issues that Google has been facing. Others will follow.

Undoubtedly, Google News adds value. Flipboard does too. But must screen or web scraping be tolerated while disregarding copyright rules, just because the collected information becomes part of a web site that creates value? Unlike patents which are meant to stimulate innovation, copyrights all too often seem to have been assigned the task to discourage creativity. Either the parties concerned will be required to proceed with a self-regulation or the legislator will need to intervene – doubtful in our country in the imminent future and probably unachievable in Europe as a whole. The only alternative will be for the courts to be repeatedly called upon.

But will court intervention stop the Googles of this world from creating and offering new possibly infringing services? Much may depend on the compensation one may be ordered to pay for the infringement. However, as has been demonstrated in local case law over and over again, compensation for intellectual property infringement is hard to calculate and the compensation policy that our local courts may go along with is still unpredictable. The issues at stake before the Brussels Appeals Court have not yet been resolved with regard to the compensation claimed by Copiepresse. We would highlight a couple of principles in that regard: damages still

⁶ Various articles were published on the websites of Copiepresse members from July 15, till July 18, 2011 and are still accessible.

need to be demonstrated with corroborative evidence. In all probability, Copriepresse members benefited from referencing by Google News – users may never have noticed certain articles if they had not used the search engine – and this may, at least in part, neutralize alleged damages. As we have pointed out in many other commentaries, any determination in equity or on the basis of so-called fixed compensations allegedly generally accepted in case law – *quod non* – should be carefully examined, if not avoided. Arguing that compensation should be based on the licensor / licensee approach by reference to the tariffs that would ‘usually’ be applied by the licensor, would also be unworkable, particularly if the licensor would not have had a license scheme in place...

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