

Media & Entertainment - France

Is once enough? Notifying hosts of infringing works online

Contributed by **Nomos**

September 20 2012

[Lower court decisions](#)
[Court of Cassation decisions](#)
[Google Suggest](#)
[Comment](#)

The Court of Cassation has held that a 'stay-down' injunction is invalid in relation to content that has been notified as infringing; however, the court recognised the right to order a search engine to implement preventive measures.

Lower court decisions

The Paris Court of Appeal rendered a number of decisions in infringement proceedings, upholding claims brought by audiovisual producers and a photographer against Google France and Google Inc. In addition to confirming Google's role in hosting stored content, the court examined its compliance with its obligation to withdraw content promptly. It held that Google was responsible not only for withdrawing the infringing video in question, but also for using all technical means to block access to any new video containing the same audiovisual work (ie, a stay-down obligation).

The court held that if "the content of the video and the intellectual property rights attached thereto are identical", each act of reposting online does not require separate notification. This reasoning led to the conclusion that notification is not required when other users upload the same infringing work. Google appealed.

Court of Cassation decisions

The Court of Cassation issued three decisions in which it mainly upheld the Paris Court of Appeal's approach. However, the Court of Cassation set aside those parts of the decision which ordered Google to block further access to the disputed content.

The Court of Cassation held that under the lower court's reasoning, Google would be obliged to prevent the posting of video content online if such content had already been characterised as infringing when previously posted, even if Google had not received notification of the new infringement. It stated that the obligation to take down content arises when the host is notified of the existence and location of such content. If no notification is received, no such obligation arises. In deciding that this requirement may be triggered without further notification, but solely on the basis of the original notification, the Paris Court of Appeal had imposed a restriction that exceeded its power to order appropriate measures to prevent or stop damage relating to the existing content of the website.

Therefore, the Court of Cassation held that a stay-down order imposes a general duty to monitor and requires the implementation of a blocking mechanism for an unspecified time; such requirements, it found, were disproportionate to the objective being pursued.

Google Suggest

However, on the same day the court issued a further decision on the Google search engine and the obligation to prevent or stop copyright infringement, including the obligation to restrict or prevent the use of the keyword suggestion function to facilitate infringement of IP rights. Its decision is the first on the application of the provision introduced by the Creation and Internet Act whereby beneficiaries can act to stop or prevent the infringement of their rights, irrespective of the assessment of liability.

In this case the professional association *Syndicat national de l'édition phonographique* (SNEP) took action against Google. It claimed that the auto-complete function of the Google Suggest search tool directed users towards services that offered music files for

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illegal downloading. SNEP had found that when the name of an artist or album was typed into Google, the search engine associated the name with online piracy services.

SNEP maintained that under the Intellectual Property Code:

"in the event of an infringement of copyright or a related right caused by the content of an online communications service to the public,... the High Court may order all appropriate measures to prevent or cease an infringement of copyrights or related rights, against anyone who might to help remedy it."

The court of first instance and the Paris Court of Appeal had rejected requests that Google be ordered to remove 'Torrent', 'Megaupload' and 'Rapidshare' - terms associated with file-sharing websites - from suggestions offered through the Google Suggest service. Although the court of appeal acknowledged that the law is intended to apply to intermediaries, service providers and search engines, it considered that the illegal content was not directly available through the search engine's website and that the latter could not be held liable for illegal downloading by its users. Moreover, the court held that the removal of the terms from the suggested searches would be unlikely to stop illegal downloading.

The Court of Cassation agreed with the industry body's reasoning, finding that the lower court had not drawn the correct findings from its observations. Rather, the Court of Cassation found that:

"the online communications service to the public from Google systematically directs internet users, by the appearance of keyword suggestions based on the number of queries, towards sites containing recordings made available to the public without the authorisation of artists/performers or record labels, so that this service offered a means of copyright infringement."

The court also found that:

"The measures sought intend to prevent or cease this infringement by removing the automatic association of keywords with the query terms, by Google, which could thus contribute to remedying this [problem] by making it more difficult to find the disputed sites; although there is no reason to expect that the measure would be totally effective."

Therefore, the court set aside and quashed the order. It held that the search engine function in question facilitated the infringements of producers' rights, and that the measure sought by the recording industry body was appropriate to prevent or stop such infringements, even if only partially.

Comment

These decisions should be read in light of the European Court of Justice's July 12 2011 decision confirming that court injunctions can be ordered against a service provider if the latter decides not to take measures on its own initiative to prevent further infringement. Thus, it is possible to order an operator to take measures that contribute not only to the cessation of infringement by users, but also to the prevention of renewed infringement in future. These injunctions must be effective, proportionate and dissuasive, but may not create barriers to legitimate trade.

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