

ONLINE COPYRIGHT LIABILITY 版权网络侵权责任

Leading European Cases
欧盟典型案例调研

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ONLINE COPYRIGHT LIABILITY

Leading European Cases

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欧盟典型案例调研

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This publication takes the form of a survey of the leading cases for online liability for copyright infringement in Europe. It is undertaken in the framework of the EU-China IPR2 Project, as part of its work on supporting the development and enforcement of copyrights in the digital environment in China; and is a follow-up to the ‘Symposium on the Judicial Protection of Copyrights on the Internet’ held in co-operation with the Supreme People’s Court (SPC) of China in Shanghai, China from 28-29 April 2009. The Symposium addressed the existing mechanisms and practices for judicial protection of copyrights on the internet in China and internationally, in particular the European experience of adjudicating online piracy cases including handling evidence, procedures and remedies for actions to enforce online copyright.

IPR2 is a partnership project between the European Union and the People’s Republic of China on the protection of intellectual property rights in China. This is done by providing technical support to, and building the capacity of the Chinese legislative, judicial and administrative authorities in administering and enforcing intellectual property rights; improving access to information for users and officials; as well as reinforcing support to right holders. IPR2 targets the reliability, efficiency and accessibility of the IP protection system, aiming at establishing a sustainable environment for effective IPR enforcement in China.

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Part I. Online Copyright Liability: Legal Framework and Principles under European Law

Different forms of copyright infringement and liabilities exist and can apply online.

This publication offers a brief summary of the legal framework and principles that are in force in Europe.

A. Direct and Indirect Copyright Liability

A direct copyright infringement takes place when an infringing act, such as the reproduction or communication to the public of a copyrighted work¹, is committed. In Europe, Articles 2 and 3 of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society² (the “Copyright in the Information Society Directive”) respectively define what a “reproduction” and “communication to the public” cover: a reproduction can be “direct or indirect, temporary or permanent”, it can be made “by any means and in any form”; a communication to the public includes broadcasting and making protected works available to the public “in such a way that members of the public may access them from a place and at a time individually chosen by them”. Many acts performed by Internet users, for example posting, streaming, or uploading protected content, thus constitute direct copyright infringements.

Other actors which do not engage in those acts, but assist, promote, facilitate or benefit from those acts can also be held liable. ‘Secondary’ (or derived) liability presupposes a primary infringer. Secondary Liability applies to the ‘brick-and-mortar’ jukebox and music hall operators, copy shops and other purchasing agents on the market. On the Internet, intermediaries also exist: access providers, hosting providers, including of “user-generated content” (UGC) web pages, search engines and other providers of information location tools, such as hyperlinks or directories, are only some among the many intermediaries that help the information sought to be identified by and conveyed to the users. Their liability is usually indirect, although the technology they use can involve some reproduction or communication to the public of protected works.

B. Principles and Doctrines for Secondary Liability

Secondary Liability rules are not provided by the existing Community instruments (in particular by the seven copyright-related Directives adopted between 1991 and 2001). The national laws of the EU Member States, however, include various legal doctrines from which a Secondary Liability regime for copyright infringement can be derived.³ While US law uses the rubrics ‘contributory liability’ and ‘vicarious liability’, along with the more recently developed principle of ‘inducement liability’, other principles and approaches to Secondary Liability exist in Europe. For instance, the joint tortfeasor liability is known in the UK. Under this doctrine, a third party is liable if (s)he is engaged in a common design with someone who commits or authorises an infringement in pursuance of that design. In the UK (and other common law countries), the notion of ‘authorisation’ enshrined in the Copyright Acts can also be used against intermediaries which can be considered as “authorising” the infringing acts done by others. For civil law countries, the general tort rule (responsabilité civile in France and Belgium) from which a duty of care (zorvuldigheidsnorm in the Netherlands) can be derived, or the liability that allows some injunctive relief, but no damages (such as the German doctrine of Störerhaftung) are commonly used to define the contours of the liability of online intermediaries. The decisions summarised below show how some of those doctrines and principles are actually applied by the courts in different situations and to different intermediaries.

C. The Legal Framework for the Liability of Online Intermediaries

In addition to the various doctrines applied by the national courts, the Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market⁴ (the “e-Commerce Directive”) has defined some “safe harbors” for online intermediaries. Under those rules, some activities of online intermediaries are exempted from liability under strict conditions. For instance, Article 14 defines the liability exemption for hosting providers:

第一部分 网络版权责任：欧盟法律的法律框架及原则

版权侵权及其责任在网络上存在并可以适用的不同形式。

本引言对当前在欧盟有效的法律框架和原则进行简要概述。

A.直接版权侵权和间接版权侵权的责任

当实施侵权行为时，比如对享有版权的作品进行复制或向公众传播¹，就发生直接版权侵权。在欧盟，《关于协调信息社会中版权及邻接权若干方面的第2001/29/EC号指令》²（《信息社会版权指令》）第2条和第3条分别界定了“复制”和“向公众传播”的范围，复制可以是“直接的或者间接的，临时的或者永久的”，可以“通过任何手段以任何形式”实施；“向公众传播包括以公众成员在其个人选定的地点和时间可以获取的方式广播及向公众提供受保护的作品”。因此，互联网用户实施的许多行为比如发帖、流媒体播放或者上传受保护的内容等，均构成直接版权侵权。

其他一些行为人，虽然没有从事这些行为，但是如果协助、推动、促进这些行为或者从这些行为中获利，也可能被判定承担责任。“次级的”（或者派生的）责任以存在原始侵权人为条件。次级责任适用于“砖瓦水泥”媒体柜（即实体的、基础的、传统的自动点唱机，译者注）的经营者、音乐厅经营者、复制品商店以及市场上其他一些购买代理机构。在互联网上也存在中间商：接口供应商、主机供应商、包括“用户生成内容”（UGC）的网页、搜索引擎以及其他一些信息定位工具的供应商，比如超链接或者目录路径的供应商，这些只是诸多中间商中的一部分，他们协助用户搜索要识别的信息或者将信息传送给用户。他们的责任通常是间接的，尽管他们所使用的技术可能涉及一些复制或向公众传播受保护作品的行为。

B.关于次级责任的原则和理论

现有的共同体法律文书（尤其是1991年至2001年间通过的七个与版权相关的指令）中没有提供次级责任的规则。但是，在欧盟成员国的国内法律中存在各种各样的法律原则，由此可以派生出版权侵权的次级责任制度。³ 美国在其法律中使用了红字的“辅助责任”（contributory liability）⁴和“替代责任”（vicarious liability），在最近还发展出了“引诱责任”（inducement liability）原则。在欧盟，对次

级责任也有其他一些原则和措施，例如，在英国广为人知的共同侵权责任。在这一理论下，第三人如果与其他人共同从事了一项设计，该其他人对该设计实施了侵权行为或者授权别人实施了侵权行为，他/她⁵是要承担责任的。在英国（以及其他普通法国家），写入《版权法》中的“授权”（authorisation）的概念可以用来针对中间商，可以视为是中间商“授权”他人实施了侵权行为。在大陆法国家，一般侵权（在法国和比利时称为responsabilité civile）规则可以派生出一个注意义务（在荷兰称为zorvuldigheidsnorm），或者有一种责任，在出现这种责任时只给予受害方一个禁令救济，但通常不用损害赔偿救济（例如德国的Störerhaftung原则）来界定网络中间商的责任边界。下面将要归纳的案例阐述了法院在不同的情况下对于不同的中间商是如何实际应用这些理论和原则的。

C. 网络中间商责任的法律框架

除了国内法院所适用的各种原则，《关于内部市场中信息社会服务特别是电子商务若干方面的第2000/31/EC号指令》⁶（《电子商务指令》）也为网络中间商界定了一些“安全港”（safe harbors）。根据这些规则，网络中间商的一些活动可以在严格的条件下免于承担责任。例如，第14条界定了主机供应商可以豁免的责任：

- 1.当服务商所提供的信息社会服务是对用户提供的信息进行存储时，成员国应当保证，服务商对于按照服务接受者要求所存储的信息不承担责任，其条件是：
- (a)服务商实际上并不知晓存在违法活动或者违法信息，并且在受害人提出损害赔偿请求时，也不知晓可以证明违法活动或者违法信息的事实或者情节；或者，
- (b)服务商在知晓后迅速地删除该信息或者阻止他人接触到该信息。
- 2.第1款不适用于服务接受者的行为是在服务商的授权或者控制下实施的情形。
- 3.本条规定不应当影响法院或者行政机关有权依照成员国的司法制度要求服务商终止或者预防侵权，也不影响

1 In Europe, the rules for copyrighted works similarly apply to the subject-matter that is protected by related rights, such as the fixation of an artist’s performance or the first fixation of a film.

2 .OJ, 22.6.2001, L. 167/10.

3 For a recent analysis of the doctrines and case law on secondary copyright liability, see: A. Strowel (ed.), Peer-to-Peer File Sharing and Secondary Liability in Copyright Law, Edward Elgar, 2009, 321 p.

4 OJ, 17.7.2000, L. 178/1.

1 在欧盟，版权作品的规则类比适用于邻接权所保护的客体，比如对艺术家表演的固定或者电影的首次固定。

2 .OJ, 22.6.2001, L. 167/10.

3 关于次级版权责任最新理论分析和案例法，参见：艾·斯特鲁威尔（A·Strowel）（编辑），“点对点文档共享和版权法律中的次级责任”，爱德华·埃格拉，2009年，第321页

4 国内有学者将“contributory liability”译为“间接责任”，但在美国有专门的indirect liability与“间接责任”对应，二者有法律含义也有差别，故而译者在此未采用“间接责任”的翻译。译者注。

5 指该第三人。译者注。

6 OJ, 17.7.2000, L. 178/1.

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

For a hosting provider to benefit from the liability exemption, three cumulative conditions must therefore be met: (i) absence of actual or constructive knowledge; (ii) prompt reaction of the hosting provider to remove or disable access to the illicit content; and (iii) absence of control or authority of the hosting provider over the recipient or user of the service.

Furthermore, the liability exemptions of the e-Commerce Directive (including Art. 14) only apply to claims for damages, but “do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.” (recital 45 of the e-Commerce Directive).

The provisions of the e-Commerce Directive cannot be relied upon to oppose the implementation of technical measures: according to its recital 40, “the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and

identification and of technical surveillance instruments made possible by digital technology”.

In addition, Article 14 (1) of the e-Commerce Directive prohibits EU Member States to impose a general obligation to monitor in the following terms:

1. Member States shall not impose a general obligation on providers, [...], to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

This does not mean that some collaboration of the online intermediaries with the public authorities cannot be required: according to Article 14 (2) of the e-Commerce Directive,

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

The recitals 47 and 48 of the e-Commerce Directive further explain what obligations, including regarding monitoring, can be required from the online intermediaries:

(47) Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

(48) This Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to apply duties of care, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.

Those provisions of the e-Commerce Directive thus allow the national laws to impose “duties of care” for the online intermediaries. The case law summarised below helps to understand the extend of this “duty of care” and of the other liability principles based on common law that can apply to online intermediaries.

成员国有权设定程序来规制对信息的删除或者阻止接触行为。

因此，主机供应商要从责任豁免中受益，必须满足下述三个累加条件：(i) 没有实际的或者积极的主观明知；(ii) 主机供应商迅速反应，删除或者阻止接触非法信息；并且，(iii) 主机供应商没有对服务接受者或者用户进行控制或者授权。

另外，《电子商务指令》（包括第14条）中的责任豁免只能适用于损害赔偿的请求，但是，不影响颁发各种禁令的可能，这类禁令具体上可以是由法院或者行政机关颁发的命令，要求服务商终止或者防止侵权，包括删除违法信息或者阻止接触违法信息。（《电子商务指令》的鉴于条款第45条）。

不能依据《电子商务指令》的规定来反对技术措施的实施：根据鉴于条款第40条，“本指令与责任相关的规定不应当排除各利害关系人开发并有效运行保护和识别的技术系统以及由于数码技术而可以采用的技术监控工具。

另外，《电子商务指令》第14条第（1）款禁止欧盟成员国施加一个一般性的监视义务，其规定如下：

1. 成员国不得给服务商强加一般性的义务，[...]，以监视其传输或者存储的信息，也不得强加积极搜集证明违法活动的事实和情节的一般性义务。

这一规定并不意味着不能要求网络中间商与公共机关进行某种合作：根据《电子商务指令》第14条第（2）款，

2. 成员国可以给信息社会服务商设定义务，要求服务商迅速通知主管公共机关由其服务接受者所从事的违法行或者所提供的信息，或者，要求服务商在主管机关要求时，向主管机关传送可以识别与其有存储协议的服务接受者身份的信息。

《电子商务指令》鉴于条款第47条和第48条进一步解释了可以要求网络中间商承担什么义务，包括与监控相关的义务：

(47) 成员国不得向服务商施加的监控义务仅指具有一般性质的义务；这不涉及在具体案件中的监控义务，尤其是，不影响国家当局根据其国内立法所做出的命令。

(48) 本指令不影响成员国有权要求那些为服务接受者所提供的信息提供主机服务的服务商适用注意义务，注意义务是为了威慑和预防某种类型的违法活动可以合理期待其承担的义务并且在国内法中有具体规定。

因而，《电子商务指令》的这些规定允许成员国国内法律给网络中间商施以“注意义务”。接下来将要归纳的判例法有助于理解这一“注意义务”的范围，以及基于共同体法律可以对网络中间商适用的其他一些责任原则的适用范围。

Part II. Online Copyright Liability: Survey of Leading European Cases

The survey of the leading cases on online copyright liability is divided into seven main headings:

A. Liability of website operators and other users;

B. Liability of hosting providers;

C. Liability for (hosting) user-generated content;

D. Liability of access providers;

E. Liability for hyperlinking and providing location tools (including for hosting hyperlinks and BitTorrent technology);

F. Liability of search engines;

G. Disclosure of personal data.

However, as some of the decisions analysed under those headings also involve other issues, the following table offers an additional tool to identify the relevant decisions presented below:

Heading	Case	Protected subject matter	Contested conduct	Type of liability	Other important issues	Country
A	Perathoner v S Joseph Societe Free	musical works	unauthorised making available	direct liability; liability under tort law	proper notification; good faith defense	France
A	Polydor v Brown	musical recordings	file sharing	direct liability	protection of personal data; Norwich Pharmacal order; good faith defense	UK
A	Koda v Lauritzen	musical works	hyperlinking	direct and indirect liability	knowledge; good faith defense; copyright exceptions	Denmark
B	Hit Bit Software v AOL	musical recordings (MIDI files)	unauthorised making available	indirect liability	duty to monitor; standard of knowledge	Germany
B	Rapidshare IV	software	sharehosting	indirect liability	filtering technologies; duty to monitor; protection of personal data; relevance of warning	Germany
C	Cases on user generated content (UGC)	audiovisual works	making available on UGC platform	indirect liability	knowledge; duty to monitor; proper notification; freedom of speech	France
D	SABAM v SA Scarlet	musical works	file sharing	indirect liability	impossibility to comply with a court order; filtering technologies	Belgium
E	BMG Records v Heise Zeitschriften	software	hyperlinking; online article about illegal software	direct and indirect liability	circumvention of technical protection measures; freedom of speech; copyright exceptions	Germany
E	Belgacom Skynet v IFPI	musical recordings	hyperlinking	liability under tort law	duty of care; proper notification	Belgium
E	LeaseWeb BV v BREIN	musical, audiovisual and literary works	file sharing (BitTorrent technology)	indirect liability	protection of personal data; duty of care	Netherlands
E	Pirate Bay	musical, audiovisual works and software	file sharing (BitTorrent technology)	indirect liability	criminal complicity; knowledge; private copy exception	Sweden
F	Google v Copiepresse SCRL	literary works (press articles)	“caching”; hyperlinking	direct and indirect liability	copyright exceptions; freedom of speech; moral rights; abuse of rights	Belgium
F	Thumbnails	visual works (photographs)	thumbnails	direct liability	exceptions to copyright; misuse of right; implied license; freedom of speech	Germany
F	BREIN v Techno Design Internet Programming	musical works	searching of illegal content and hyperlinking	liability under tort law	relevance of warning; knowledge; private use exemption	Netherlands
G	Promusicae v Telefónica de España	audiovisual and musical works	file sharing	duty to disclosure identities of users	protection of personal data	EU
G	EMI Records v Eirecom	musical recordings	unauthorised downloading of files	duty of to disclose identities of users	protection of personal data; Norwich Pharmacal Orders	Ireland

第二部分. 欧盟关于网络版权责任的典型案例调研

关于网络版权侵权责任的典型案例调研分为七个主标题：

A. 网站运营商和其他用户的责任;

B. 主机服务商的责任;

C. 用户生成内容（主机）的责任;

D. 接口服务商的责任;

E. 超链接和提供定位工具（包括主机超链接和BT（BitTorrent，也有译为比特流）技术）的责任;

F. 搜索引擎的责任;

G. 个人数据披露的责任.

但是，正如那些判决书所分析的，这些标题下也涉及其他问题，下表提供了一个附加工具以区别下述相关判决：

标题	案例	受保护客体	争议的行为	责任类型	其他重要问题	国家
A	派拉通纳等诉S·约瑟夫·索赛特·弗雷（Perathoner v S Joseph Societe Free）	音乐作品	未授权提供	直接责任；侵权法责任	适当通知；善意辩护	法国
A	宝丽多诉布朗（Polydor v Brown）	音乐录音制品	文档共享	直接责任；	个人数据保护；《诺里奇药物令》；善意辩护	英国
A	科达诉劳里岑（Koda v Lauritzen）	音乐作品	超链接	直接和间接责任	明知；善意辩护；版权例外	丹麦
B	Hit Bit软件诉美国在线（Hit Bit Software v AOL）	音乐录音制品（MIDI文档）	未授权提供	间接责任	监控义务；明知的标准	德国
B	快速共享IV（Rapidshare IV）	软件	共享主机	间接责任	过滤技术；监控义务；个人数据保护；警告的相关性	德国
C	关于用户生成内容（UGC）的案例	视听作品	在UGC（用户生成内容）平台上提供	间接责任	明知；监控义务；适当通知；言论自由	法国
D	萨班诉SA·斯卡利特（SABAM v SA Scarlet）	音乐作品	文档共享	间接责任	遵守法院命令的不可能性；过滤技术	比利时
E	贝塔斯曼唱片公司等诉海泽杂志出版社（BMG Records and others v Heise Zeitschriften Verlag）	软件	超链接关于非法软件的网络文章	直接和间接责任	技术保护措施的规避；言论自由；版权例外	德国
E	比利时电信天空网诉国际唱片业协会（Belgacom Skynet v IFPI）	音乐录音制品	超链接	侵权法责任	注意义务；适当通知	比利时
E	出租网BV诉布雷恩（LeaseWeb BV v BREIN）	音乐、视听和文学作品	文档共享（BT技术）	间接责任	个人数据保护；注意义务	荷兰
E	海盗湾（Pirate Bay）	音乐、视听作品和软件	文档共享（BT技术）	间接责任	犯罪共谋；明知；私人复制例外	瑞典
F	谷歌有限公司诉科佩普莱斯SCRL公（Google v Copie-presse SCRL）	文学作品（新闻文章）	“缓存”；超链接	直接和间接责任	版权例外；议论自由；精神权利；权利滥用	比利时
F	缩略图（Thumbnails）	图像作品（摄影）	缩略图	直接责任；	版权例外；权利滥用；默示许可；言论自由	德国
F	布雷恩诉技术设计网络编程BV公司（BREIN v Techno Design Internet Programming）	音乐作品	非法内容搜索及超链接	侵权法责任	警告的相关性；明知；私人使用例外	荷兰
G	西班牙音乐制作协会诉西班牙电信（Promusicae v Telefónica de España）	视听和音乐作品	文档共享	用户身份披露义务	个人数据保护	欧盟
G	EMI唱片公司诉Eirecom公司（EMI Records v Eir-ecom）	音乐录音制品	未授权文档下载	用户身份披露义务	个人数据保护；《诺里奇药物令》	爱尔兰

A. LIABILITY OF WEBSITE OPERATORS AND OTHER USERS

Perathoner and others v S Joseph Societe Free (formerly Proxad) and others
Tribunal de Grande Instance, Paris, France (first instance)
23 May 2001

Reported: [2003] E.C.D.R. 8

Keywords: musical works; unauthorised making available of work; direct liability of website operator; liability of hosting provider under tort law; proper notification; good faith defense; France

Facts and procedure: Joseph Paumier, a website operator, was making a musical work *Ushuaïa* available over his internet website without authorisation. This website was hosted by Free. Right holders commenced proceedings against Paumier, Free and various other parties, seeking injunctive relief and damages for copyright infringement. They alleged that Paumier reproduced and distributed a musical work with “dishonest disregard” to the claimants’ copyrights. They condended that Free was in breach of its duties as a hosting provider, both by allowing the site to operate when it was offering infringing content and by failing to deactivate the site after receiving a complaint concerning the illegal content.

Both Paumier and Free denied liability. Paumier inter alia maintained he acted in good faith, and put forward the non-lucrative character of his activity and that it was difficult for him to know whether or not the works were protected, given that SACEM (a collecting society administrating the rights) does not provide a catalogue of protected works. He also based his defense on the rules of the French Consumer Code⁵ relating to distance sales and on the doctrine of exhaustion of rights. Free argued that it respected the set of obligations concerning identification, information, verification and diligence. Free submitted that the liability of the hosting provider only comes into play under certain conditions which were not met in the case at stake.

Held: Paumier is liable for copyright infringement as he reproduced and performed the work on his website without the authorisation of the right holders. Free did not

commit any legal wrong when executing its functions as a hosting provider.

Grounds for the decision: Concerning Paumier’s liability, the court found that by performing and reproducing *Ushuaïa* on a website without the necessary authorisations, Paumier infringed the public performance and mechanical reproduction rights in that work. Secondly, he cannot claim good faith as the work involved was well known; also, according to the facts of the case, under the request of one of the plaintiffs, he had indicated before the initiation of the proceedings that he was going to verify the existing files posted on his site – thus, he should have known about the illegal nature of the works. In any case, good faith is of no consequence to the case. Thirdly, the issue as to whether Paumier had been informed about the illegal nature of the work is irrelevant, given that authorisation had to be solicited prior to the public performance or reproduction of the work. Also, Paumier has not established that the plaintiffs had violated the Consumer Code nor that the doctrine of exhaustion could be applied to the case.

As far as the liability of Free, a hosting provider, is concerned, the court applied general rules of liability under tort law and rejected the claim that Free acted negligently. Free cannot be criticised for not having immediately closed access to the website since the indications provided by the plaintiffs were very vague and Free could not identify the work which was the subject of these proceedings. However, as soon as the necessary information was provided to Free, specifically upon delivery of the writ, it suspended access to Joseph Paumier’s site. This being the case, there can neither be liability for negligence nor for recklessness.

The e-Commerce Directive⁶ did not impose any liability upon Free in this case, both because it had not yet been implemented under French law on the date of the infringement and because the conditions for considering web hosting providers as liable had not been met.

5 Law No. 93-949 of 26 July 1993 on the Consumer Code.

6 See supra note 4.

A.网站运营商和其他用户的责任

派拉通纳等诉S·约瑟夫·索赛特·弗雷（Proxad的前身）等
法国巴黎高等法院（一审）
2001年5月23日

引自: [2003] E.C.D.R. 8

关键词: 音乐作品；作品的未授权提供；网站运营商的直接责任；主机服务商的侵权法责任；适当通知；善意防御；法国

事实及诉讼程序: 约瑟夫·鲍米尔（Joseph Paumier）是一个网站运营商，未经授权通过其互联网网站提供音乐作品乌斯怀亚（Ushuaïa）。该网站由弗雷（Free）公司提供主机服务。权利人对Paumier、Free公司以及其他各方提起诉讼，要求针对版权侵权行为给予禁令和损害赔偿救济。他们诉称，Paumier在“无德的漠视”下复制和散布起诉人享有版权的音乐作品。他们主张Free公司违反了其作为主机服务商的义务，在网站提供侵权内容时仍然允许其运营，并且在收到关于非法内容的投诉后未能停止网站的运营。

Paumier和Free公司均否认自己有责任。除了其他抗辩，Paumier还主张，其是在善意下行事的，并提出其行为的非盈利性质，在SACEM（一个集体管理权利的协会）没有提供保护作品名录的情况下，其难以知晓作品是不是受保护的。其辩护的基础还有《法国消费者法》⁷中关于远距离销售的规则以及权利利用尽原则。Free公司辩称，其遵守了关于识别、信息、核实和勤勉的一整套义务，主张主机服务商只有在符合一定条件时才承担义务，而这些条件在本案中并不满足。

判决: Paumier由于未经权利人授权在其网站上复制和表演作品而需承担版权侵权责任。Free公司在行使其作为主机服务商的职能时没有实施任何不法行为。

7 1993年关于消费者法案的第93-949号法律

判决理由: 关于Parmier的责任，法院认定，由于没有获得必要的授权而在网站上表演和复制Ushuaïa，Paumier侵犯了该作品上的公开表演权和机械复制权。其次，因为该作品是众所周知的作品，Paumier不能主张善意作为理由；而且，根据本案的事实，在一名原告的要求下，Paumier在诉讼启动之前就已经表明他打算核实在其网站上公布的文档——由此可知，他应当已经知道作品的非法性质。无论如何，善意对本案都没有影响。第三，是否将作品的非法性质通知了Paumier这一焦点是无关紧要的，因为在对作品公开表演和复制之前就必须获得授权。另外，Parmier没有证明原告违反了《消费者法》，也没有证明权利利用尽原则可以在本案中适用。

关于主机服务商Free公司的责任，法院适用了侵权法项下关于责任的一般规则，驳回了主张Free公司存在行为过失的诉求。不能因为Free公司没有立即关闭对网站的进入而受到责备，因为原告提供的证据非常模糊，Free公司不可能识别也该作品，而该作品正是这些诉讼的标的。但是，一旦向Free公司提供了必要的信息，具体说就是送达了令状，Free公司即中止了对Joseph Paumier网站的接入。从这个角度讲，不存在过失责任或者草率责任。

在本案中并没有给Free公司施加《电子商务指令》⁸中的义务有两个原因：一是因为在侵权发生之时指令还没有在法国法律中实施，二是因为网站主机服务商承担责任所要考量的条件也没有满足。

8 参见前注6

Polydor Ltd and others v Brown and others

High Court of Justice Chancery Division, UK (first instance)

28 November 2005

Reported: [2005] EWHC 3191 (Ch); (2006) 29(3) I.P.D. 29021; 2005 WL 3726034

Keywords: musical recordings; file sharing; direct liability of private user; protection of personal data; Norwich Pharmacal order; good faith defense; UK

Facts and procedure: Bowles (second defendant), with the help of the Lineware software installed on his computer, was making available more than 400 audio files stored in his computer to all other users of the Gnutella P2P file sharing network. After Mr Bowles' identity was obtained following a Norwich Pharmacal order⁷, the claimants (the record companies) requested for summary judgment for copyright infringement. Bowles admitted that he had used a P2P software, but was unaware that by doing so he was distributing music. He had had the software on his computer for about a year, and his children had used it for downloading music.

Held: Bowles, by using P2P software installed on his computer, made the works available to the public and thereby infringed the plaintiffs' copyrights.

Grounds for the decision: The court found that connecting a computer to the Internet, where the computer is running a P2P software, and in which music files containing copies of the claimant's copyright works are placed in a shared directory, falls within the scope of the making available right. This is a primary act of copyright infringement, and it does not matter whether the person knows, or has reason to believe, that what (s)he is doing is an infringement, because innocence or ignorance is no defence. The mere fact that the files were present and were made available is sufficient for the infringement to have been committed.

⁷ For more regarding the Norwich Pharmacal order see infra case EMI Records v Eirecom.

宝丽多有限公司等诉布朗等

英国高等法院法官法庭（一审）

2005年11月28日

引自: [2005] EWHC 3191 (Ch); (2006) 29(3) I.P.D. 29021; 2005 WL 3726034

关键词: 音乐录音制品；文档共享；私人用户的直接责任；个人数据保护；《诺里奇药物令》；善意辩护；英国

事实和程序: 鲍里斯（Bowles）（第二被告）利用其电脑中安装的Lineware软件，将其电脑中存储的400多个音频文档向Gnutella 点对点（P2P）文档共享网络中的其他所有用户提供。在根据《诺里奇药物令》⁹获得Bowles先生的身份后，起诉人（唱片公司）要求简易判决版权侵权。

判决: Bowles利用其电脑中所安装的点对点（P2P）软件向公众提供作品，因而侵犯了原告的版权。

判决理由: 法院认为，将一台电脑连接到互联网上时，如果该电脑运行一个P2P软件，并且将含有起诉人版权作品副本的音乐文档放入到共享目录中，这种联接即落入发行权的保护范围，是一个主要的版权侵权行为。这个人是否知道或者是否有理由认为她/他正在实施一个侵权行为，这一点无关紧要，因为无知和疏忽不能成为辩护理由。单单展示和公开文档就足以构成侵权行为。

⁹ 关于《诺里奇药物令》的更多内容，参见后面的案例EMI 唱片公司诉Eirecom公司。

Koda v Lauritzen
Vestre Landsret, Denmark (first instance)
20 April 2001

Reported: [2002] E.C.D.R. 25

Keywords: musical works; hyperlinking; direct and indirect liability of private users; knowledge; good faith defense; copyright exceptions; Denmark

Facts and procedure: The defendants, aged 15 and 17, operated websites which contained hypertext links from which visitors could download unlawful copies of popular musical works. The claimants commenced proceedings for copyright infringement, claiming that (i) placing hyperlinks to the works was an infringement as it was a form of making copies of those works available to the public, (ii) accessing the hyperlinks was an infringement as it was a form of reproduction, in that a copy of the work was cached on the internet user's hard disk even if he did not intend to download a copy, (iii) by making the hyperlinks available to the visitors, the defendants were contributing to the resulting acts of infringement. The defendants denied liability and maintained that, even if they had performed infringing acts, they did not know that their acts were infringing and did not intend to commit any infringing acts.

Held: The defendants are liable for copyright infringement both as principals and as accessories. The actions of which the claimants complained were infringing acts under copyright law and it was clear from the evidence that the defendants knew, or must be taken to have known, that their actions were unlawful.

Grounds for the decision: The court found that the defendants are liable as principles for copyright infringe-

ment as they made reproduction of the tunes for private purposes and copied the tunes from the CDs to the website. Copying of tunes for private purposes is not included in the exemptions of copyright. By copying the musical tunes from the CDs to the homepage, the defendant has infringed the prohibition contained in the Copyright Act against making samples.

By establishing direct links to musical tunes that others had illegally uploaded, defendants have independently made the musical tunes available to the public to such an extent that this act of making available should be placed on equal footing with public performance. There is thus a direct liability. Furthermore, by establishing direct links, the defendants have been accessories to the copying of the musical tunes by the visitors on their homepages. Both defendants knew that many of the visitors wanted to use the possibility to copy the musical tunes, to which they had access via the defendants' homepages. It is also clear from the text of the defendants' homepages that they understood that hyperlinks were the reason for the Internet users to visit their homepages.

The court did not order the payment of any fine as the defendants were young, had removed the offending hyperlinks from their websites when contacted by the claimants and had neither sought nor made any financial gain from operating their websites,. The court, however, ordered them to pay damages, which were calculated according to the method proposed by the claimants.

科达诉劳里岑
丹麦西博肯高等法院（一审）
2001年4月20日

引自: [2002] E.C.D.R. 25

关键词: 音乐作品；超链接；私人用户的直接和间接责任；明知；善意辩护；版权例外；丹麦

事实和程序: 被告的年龄分别为15和17岁，他们运营了一些网站，网站上包含有超链接，访问者可以从这里下载流行音乐作品的非法复制品。起诉人启动了版权侵权诉讼，诉称：(i) 对这些作品设置超链接是一种侵权，这是将作品的复制品向公众发行的一种形式；(ii) 接入超链接是一种侵权，是复制的一种形式，因为即使用户不打算下载副本，作品的副本也被缓存到互联网用户的硬盘里；(iii) 通过向访问者提供超链接，被告促进了最终的侵权行为。被告否认应当承担责任，并辩称，即使他们实施了侵权行为，他们也不知道他们的行为是在侵权，也没有意图实施任何侵权行为。

判决: 被告不管是作为主犯还是作为从犯均需为版权侵权负责。起诉人投诉的行为是版权法下的侵权行为，证据明确显示，被告知道或者必须被视为已经知道其行为是违法的。

判决理由: 法院认为，被告作为版权侵权的主犯是有责任的，因为他们为私人目的而复制乐曲并且从CD盘中复制乐曲传到网站。为私人目的复制乐曲没有包含在版权例外中。由于将音乐旋律从CD盘中复制到主页上，被告侵犯了《版权法》所包含的样品制作禁止权。

由于与他人违法上载的音乐旋律建立直接链接，被告独立地将乐曲提供给公众，其程度足够使我们将这一发行行为置于与公开表演同等的地位，因此构成直接侵权。不仅如此，由于建立直接链接，被告对于其主页访问者复制乐曲的行为来说也构成从犯。两名被告都知道许多访问者想要利用这个机会复制音乐旋律，通过被告的主页，他们可以获得这些乐曲。从被告主页的背景来看也很明确，他们很清楚超链接是互联网用户访问他们主页的原因。

法院没有裁定支付任何罚款，因为被告年龄尚小，在起诉人联系下他们也从网站上撤除了违法的超链接，而且既没有从网站运营中谋求也没有实际获取济利益。但是法院命令他们支付损害赔偿金，按照起诉人提出的方法计算。

B. LIABILITY OF HOSTING PROVIDERS

Hit Bit Software GmbH v AOL Bertelsmann Online GmbH & Co KG
Landgericht, Munich, Germany (first instance)
30 March 2000

Reported: [2001] E.C.D.R. 18; ZUM 2000, 418
Keywords: musical recordings (MIDI files); unauthorised making available; indirect liability of hosting provider; duty to monitor; standard of knowledge; Germany

Facts and procedure: AOL, an internet service provider, hosted a website on which various files, including MIDI files, were stored. AOL displayed a notice requiring users to respect third party rights and to indemnify AOL for breach of copyright that occurred when files were downloaded. Similarly, users uploading files were requested not to add material whose redistribution was not permitted. AOL had a voluntary file checking system, whereby files were scanned for viruses and for identifying whether the content is protected or not. Hit Bit Software, a right holder to MIDI files, claimed that three titles held on MIDI files on AOL’s site were infringing its copyright and it sought an injunction, damages and royalties.

Held: AOL had breached copyright when the MIDI files were uploaded and offered on its server without the consent of the right holder.

Grounds for the decision: By providing a service which enabled the MIDI files to be uploaded without the consent of the right owner, AOL has infringed the reproduction right. Also, by offering the records on its server, AOL has infringed the general (undefined) exploitation right.

Further on, the court found that the defendant is only partially right in claiming the limited liability of internet service provider under the German Tele-Service Law (TDG)⁸. Under the TDG, the internet service providers (ISPs) are liable for content provided and used by third persons only “when they have the knowledge of the content and it is technically possible and reasonable to prevent the use”. The court noted that an ISP must know that the content is present but the knowledge of its illegal nature is not required. The court found that AOL knew (or should have known) that the content had been offered on its server. AOL could acquire this knowledge through the voluntary file check system it used for its service. Also, according to the court, getting the required knowledge did not involve any great efforts or expenditure – a simple text editor allowing to open the files would have resulted in a (certain) knowledge of the copyrighted nature of the content. Therefore, the defendant could be expected to do this check.

8 German Teledienstegesetz of 22 July 1997.

B.主机服务商的责任

Hit Bit软件股份有限公司诉美国在线Bertelsmann网络有限两合公司
德国慕尼黑地区法院
2000年3月30日

引自: [2001] E.C.D.R. 18; ZUM 2000, 418
关键词: 音乐录音制品（MIDM文档）； 未授权提供； 主机服务商的直接责任； 监控义务； 明知的标准； 德国

事实和程序: 美国在线（AOL）是一个互联网服务商，为一个网站提供主机服务，网站上存储有各种文档包括MIDM文档。AOL公布了一个公告， 要求用户尊重第三方的权利，在下载文档时如果发生版权违约要对AOL进行赔偿。同样的，也要求上传文档的用户不得附加不允许再分发的材料。AOL有一个自愿文档审查系统， 通过这个审查系统对文档进行扫描，以发现病毒并识别是不是受保护的内容。Hit Bit 软件是一个MIDI文档的权利人， 诉称在AOL网站上MIDI文档中的三项标题侵犯了其版权， 要求禁令、损害赔偿和许可费。

判决: AOL在未得到权利人同意的情况下下载MIDI文档并在其服务中提供， 侵犯了版权。

判决理由: 由于提供服务使得MIDI文档在未经权利人同意的情况下得以上传， AOL侵犯了复制权。而且， 由于在其服务器中提供录音， AOL侵犯了一般性的（未定义）利用权。

法院进一步认为， 被告主张按照《德国电信服务法》¹⁰（TDG）的规定， 互联网服务商只承担有限的责任， 这一主张只是部分正确。根据《德国电信服务法》， 互联网服务商(ISPs)对于其提供的内容和第三方使用的内容， 只有在知道该内容并且防止使用在技术上是可行的也是合理的情况下才需承担责任。法院注意到互联网服务商必须明知该内容已经存在但不要求其知道该内容的非法性质。法院认为AOL知道（或者应当知道）该内容已经在其服务中提供。AOL可以通过其服务中使用的自愿文档审查系统获得主观的明知。而且， 按照法院的观点， 要获得这种明知不需要任何太大的精力和费用——一个简单的可以打开文档的文本编辑就能够对内容受版权保护的性质获得（某种程度的）知晓。因此， 可以期待被告进行这种审查。

10 1997年7月22日《德国电信法》（German Teledienstegesetz）

Rapidshare IV

Oberlandesgericht Hamburg, Germany (appeal instance)

2 July 2008

Reported: GRUR-RR 2009, 95

Keywords: software; sharehosting; indirect liability (*Störerhaftung*) of hosting provider; filtering technologies; duty to monitor; protection of personal data; relevance of warning; Germany

Facts and procedure: The defendant offered, under the name „Rapidshare“, a so called sharehosting-service. It provided the server space where the users could anonymously upload any material and download the material uploaded by other users. Two filters were used to prevent or remove unlawful uploads. The first, called “MD5”, prevented files which are identical to files previously removed from Rapidshare (because of an infringement) from being uploaded again. The second filter was used to search filenames (but not the files themselves) for keywords such as the names of computer programs.

Rapidshare was sued by the owner of the copyright in certain computer programs which had been unlawfully uploaded to Rapidshare several times. The plaintiff sought to have Rapidshare identified as a disquietor, so that it would have to stop copying or making computer programs available on the platform and to stop third parties from doing so.

Held: Rapidshare is liable as “disquietor” for copyright infringement as, after acquiring knowledge about the illegal content, it did not devote sufficient efforts to prevent future infringements.

Grounds for the decision: Rapidshare, as a hosting provider, is liable under the German Tele-service law⁹ as a “disquietor” only upon the reception of information about the illegal content. After acquiring the knowledge, the hosting provider is obliged to undertake all relevant attempts in order to prevent future infringements of the same rights.

In determining the extent of this “duty to monitor”, the court considered that it would always be important to consider the facts of the individual case, and to balance

9 Id.

different individual interests. The court identified certain relevant criteria for the balancing test: the importance and weight of the rights in question; the role of the online intermediary (e.g. does he receive a commission?); whether it is just and reasonable to expect the rightowner to actively engage in the protection of his/her rights; whether the rightowner is dependent on the online intermediary to protect his/her rights (e.g. because (s)he cannot take action against the users as (s)he has no access to information about their identity); and whether the legal and business model of the online intermediary would be hampered by the measures demanded.

The court found that the measures applied by Rapidshare were not sufficient. For example, the court considered that the filters deployed were insufficient, since (a) the smallest changes to files could circumvent the MD5-filter, as it only removed identical files, and (b) the names of files checked by the second type of filter would not necessarily reflect the content of the files. Other measures, such as the warnings to the users not to upload illegal content or the creation of an abuse department, which arguably would search for infringing content on the server, were not sufficient either.

The court considered that Rapidshare had deliberately and illegitimately exploited the anonymity of the internet in operating its business. Although it is not necessary to require Rapidshare to provide its services only to registered users, the court’s view was that it should have at least stored the Internet Protocol (IP) numbers of its users. This would have meant that it could have blocked the users’ access where they were using an IP address that had previously been used to upload unlawful content. Also, IP addresses could have been made accessible for the right holders in order to prosecute the infringers who had been repeatedly uploading the illegal copies of works. According to the court, data protection law would not prevent this solution.

快速共享IV

德国汉堡高等法院（上诉审）

2008年7月2日

引自: GRUR-RR 2009, 95

关键词: 软件；共享主机；主机服务商的直接责任(*Störerhaftung*)；过滤技术；监控义务；个人数据保护；警告的相关性；德国

事实和程序: 被告以“快速共享”（Rapidshare）的名字提供所谓的共享主机服务，其提供服务空间，用户可以在这里匿名上载任何资料并下载其他用户上传的资料，有两个过滤器被用来防止和删除非法的上载。第一个过滤器叫“MD5”，用来防止那些与以前从Rapidshare（因为侵权）删除过的文档相同的文档被再次上传。第二个过滤器用来在文档名（而不是文档本身）中检索关键词，比如主机程序的名字。

某些计算机程序的版权所有人起诉Rapidshare，其程序被多次非法上传到Rapidshare，原告要求将Rapidshare认定为一个“令人担忧的人”，以便它能够停止复制或者在其平台上提供原告的计算机程序并且阻止第三人这样做。

判决: Rapidshare作为“令人担忧的人”对版权侵权是有责任的，因为在知道非法内容后，它没有尽到足够的努力去预防未来的侵权。

判决理由: 法院认为，Rapidshare 作为一个主机服务商，只有在收到关于非法内容的信息后，才能按照《德国电信服务法》¹¹作为“令人担忧的人”而承担责任。在获得相关信息后，主机服务商有义务尽到全部必要的努力以防止未来对同样的权利发生侵权。

在确定“监控义务”的范围时，法院认为，考察个案事实并平衡不同个体的利益一直是很重要的。法院为平衡准则确定了一些标准：系争权利的意义和重要性；网络中间商的角色（例如，是否收取了佣金？）；期待权利所有人积极致力于保护他/她的权利是不是正当合理的；权利所有人是否依赖于网络中间商才能保护他/她的权利（例如，因为她/他没有获得用户的信息而不能对用户采取行动）；以及，网络中间商的法律及商业模式是否会受到所要求的措施的损害。

法院判定Rapidshare所应用的措施是不充分的。比如，法院认为所设置的过滤器是不充分的，因为，(a) 对文档稍微改变就可能规避掉MD5过滤器，因为它只删除相同的文档，并且，(b) 由第二种类型的过滤器审查的文档名并不必然反映文档的内容。其他一些措施，比如给用户发警告信要求用户不得上传非法内容或者滥用权利机构制作的内容，这些措施可能会检索服务中的侵权内容，但却是不充分的。

法院认为Rapidshare在其业务运行时有意地非法利用了互联网的匿名性。虽然不要求Rapidshare只向注册用户提供服务，但法院的观点是，Rapidshare至少应当存储用户的互联网协议(IP)号码。这可能意味着，当用户使用一个以前用来上传非法内容的IP地址时，Rapidshare可以阻止其接入这个地址。此外，IP地址可以提供给权利人以便于追诉那些重复上传作品非法复制品的侵权人。按照法院的观点，数据保护法律不当阻止这种措施。

11 同上注

C. LIABILITY FOR (HOSTING) USER GENERATED CONTENT

Christian C., Nord Ouest Production v Dailymotion, UGC Images
Court of appeal Paris, France
6 May 2009
(appeal of Tribunal de grande instance de Paris, France (first instance)
13 July 2007)

Jean Yves Lafesse v MySpace
Tribunal de grande instance de Paris, France (first instance)
22 June 2007

Flach Film et autres v Google France, Google Inc
Tribunal de commerce de Paris, France (first instance)
20 February 2008

Jean Yves Lafesse et autres v Dailymotion et autres
Tribunal de grande instance de Paris, France (first instance)
15 April 2008

Jean Yves Lafesse et autres v Google Inc. et autres
Tribunal de grande instance de Paris, France (first instance)
24 June 2009

Zadig Productions et autres v Google Inc, Afa
Tribunal de grande instance de Paris (first instance)
19 October 2007

C.用户生成内容(主机)的责任

克里斯蒂安·C., 诺德·奎斯特制片公司诉每日动感, UGC (用户生成内容) 图片公司(Christian C., Nord Ouest Production v Dailymotion, UGC Images)

法国巴黎上诉法院

2009年5月6日

(对法国巴黎高等法院2007年7月13日(一审)判决的上诉)

简·依福斯·莱福茜诉我的空间(Jean Yves Lafesse v MySpace)

法国巴黎高等法院(一审)

2007年6月22日

弗莱彻电影公司等诉谷歌法国, 谷歌有限公司(Flach Film et autres v Google France, Google Inc)

法国巴黎商事法院(一审)

2008年2月20日

简·依福斯·莱福茜等诉每日动感等(Jean Yves Lafesse et autres v Dailymotion et autres)

法国巴黎高等法院(一审)

2008年4月15日

简·依福斯·莱福茜等诉谷歌有限公司等(Jean Yves Lafesse et autres v Google Inc. et autres)

法国巴黎高等法院(一审)

2009年6月24日

赛帝格制片公司等诉谷歌有限公司, 埃法(Zadig Productions et autres v Google Inc, Afa)

法国巴黎高等法院(一审)

2007年10月19日

Reported: www.legalis.net and www.foruminternet.org

Keywords: audiovisual works; making available on UGC platform; indirect liability of hosting provider; knowledge; duty to monitor; proper notification; freedom of speech; France

Facts and procedure: All those cases share a similar pattern of facts, and can thus be presented together. The defendants were hosting the websites, providing so-called social networking services, which enable the users to share some information that might be coined “user generated content” (personal photos, videos created by the users, etc.). The services were arranged in different ways – some allowed the creation of personal profiles where the content could be uploaded and shared (e.g. MySpace, Dailymotion), in others the content was uploaded and shared on a common website (e.g. Google Videos).

Some right holders claimed that their works had been made available on these websites without authorisation. Although in most cases the hosting providers acted promptly to remove the illegal content, in some cases, the works had been repeatedly made available on the same platform by different users (e.g. Flash Film v Google; Zadig Productions v Google). The defendants sued for infringement of copyright (and other rights such as personality right).

Held: In most decisions in first instance (except the Jean Yves Lafesse et autres v Google Inc. decision of 24 June 2009), the French courts found the defendants liable for copyright infringement. However, the appeal decision of 6 May 2009 (Christian C., Nord Ouest Production v Dailymotion) has rejected the liability of the hosting provider because it could not be aware that illegal content had been posted in the absence of proper notices sent by the right owners.

Grounds for the decisions: The arguments made in the different proceedings were quite similar. Most courts reiterated the principle of freedom of speech, implying that the communication to the public by electronic means shall be free but that the exercise of this freedom may be restricted to protect the rights of others.

The courts then considered whether the defendants are liable as co-publishers or as hosting providers. In most cases co-publisher status was denied mainly because the content was initiated and uploaded by the users themselves (e.g. Flash Film v Google; Lafesse v Dailymotion; Zadig v Google). In one of the cases, the co-publisher status was granted on the basis that MySpace had determined the structure of the sites, the way the information had to be saved and organised on the webpage and had clearly derived some profits from the activity (Lafesse v MySpace). In the sole appeal decision known so far (Christian C., Nord Ouest Production v Dailymotion), the Paris court of appeal considered that the architecture of the Dailymotion site was not sufficient to conclude that it operated as a publisher. On the contrary, the recording of the video so that it fits with the interface of the website and the formatting needed to reduce the size of the file and to best integrate the file on the server are technical operations that are part of the activity of a hosting provider. In addition, offering some frames and classification tools for the content does not result in a selection of the content that a publisher typically makes, but is justified by the organisation of the service and the need to ensure an adequate access. By benefiting from advertising revenues, the hosting provider does not qualify as publisher either as the exploitation through advertising revenues does not result in the capacity to influence, and decide about, the content put online. Only if the advertising revenues were directly linked to the content posted by the users (targeted advertising) would Dailymotion become a publisher (in this case, the ads were not posted on the personal pages of the users who had uploaded the protected works, only on the homepage and on some standard frames of the Dailymotion site). The same reasoning regarding the role of the intermediary was followed in the June 24, 2009 decision of the first instance tribunal involving Google Inc. This last ruling also considered that Google liability should be assessed on the basis of the general principle of tort insofar it was offering an additional service allowing to index and view videos, including on third party's sites. At the light of the facts of this case, Google was not considered liable either as hosting provider or on the basis of the general principle of tort.

引自: www.legalis.net and www.foruminternet.org

关键词: 音像作品; 在UGC(用户生成内容)平台上提供; 主机服务商的间接责任; 明知; 监控义务; 适当通知; 言论自由; 法国

事实和程序: 所有这些案例共有一个类似的事实模式, 因而可以共同提出。被告都是为网站提供主机服务, 也就是提供所谓的 社会网络服务, 可以使用户分享一些信息, 这些信息可能标识为“用户生成内容”(个人照片, 用户制作的视频等)。这些服务以不同的方式安排——有一些服务可以允许创设个人资料, 在这里可以上传和共享一些内容(例如MySpace和Dailymotion), 在其他一些服务中, 在一个共同的网站上上传和共享内容(如谷歌视频)。

一些权利人诉称, 他们的作品未经授权而在这些网站上提供。虽然大多数案件中主机服务商都迅速行动, 删除了非法内容, 但在有些案件中, 这些作品在同一个平台上被不同用户重复提供(例如弗莱希电影公司诉谷歌(Flash Film v Google); 和赛帝格制片公司诉谷歌(Zadig Productions v Google))。这些被告被诉侵犯了版权(以及其他权利如人格权)。

判决: 在大多数一审判决中(除了2009年6月24日简·依福斯·莱福茜等诉谷歌有限公司(Jean Yves Lafesse et autres v Google Inc.)案的判决), 法国的法院认定被告要承担版权侵权责任。但是, 2009年5月6日的判决(克里斯蒂安·C., 诺德·奎斯特制片公司诉每日动感(Christian C., Nord Ouest Production v Dailymotion))驳回了要求主机服务商承担责任的请求, 因为没有发出适当的通知, 服务商不可能知道非法内容已经被公布。

判决理由: 不同诉讼中的观点却是非常相似的。大多数法院重申了言论自由原则, 意味着通过电子工具向公众传播应当是自由的, 但是这种自由的行使可以被限制以保护其他人的权利。

然后法院考察了被告是否作为共同出版商或者主机服务商而要承担责任。在大多数案件中否定了共同出版商的身份, 主要因为这些内容是由用户自己创始并上传的(例如弗莱希电影公司诉谷歌(Flash Film v Google); 莱福茜诉每日动感(Lafesse v Dailymotion); 和赛帝格诉谷歌(Zadig v Google))。其中有一个案件赋予了共同出版商的身份, 其依据是MySpace 确定了网站的结构以及在网页上保存和组织信息的方法, 并且很明显从这些活动中获得了一些收益(莱福茜诉聚友网(Lafesse v MySpace))。在迄今为止

所知道的唯一一个上诉案件中(克里斯蒂安·C., 诺德·奎斯特制片公司诉每日动感(Christian C., Nord Ouest Production v Dailymotion)), 巴黎上诉法院认为, Dailymotion网站的架构不足以得出结论认为其作为出版商在运营。相反, 为了适应其网站界面而对视频的记录, 以及在服务中为了减小文档的大小并优化文档所需要的格式化, 都是技术措施, 是主机服务商活动的一部分。另外, 为内容提供一些架构和分类工具并不构成出版商通常所做的内容选择, 对于服务组织和保证适当接入的需求来说, 也是正当的。从广告收入中获利并不能使主机服务商符合出版商的身份, 利用广告收入也不会产生影响和决定上网内容的能力。只有当广告收入与用户发布的内容直接关联(靶标广告)时, Dailymotion才可能成为出版商(在这种情况下, 广告不会在上传受保护作品的用户的个人页面上公布, 只会在Dailymotion网站的主页和一些标准框架处公布)。关于中间商的角色, 在2009年6月24日一审法院关于谷歌有限公司的判决中使用了同样的推理。最终的裁决还认为, 不能仅仅因为Google提供的附加服务允许索引和观看视频, 包括第三方的网站, 就基于侵权的一般原则而判决Google承担责任, 不论是作为主机服务商还是基于侵权的一般原则, 都不能认为Google应当承担责任。

因此, 在大多数法国案例中, 被告都具备主机服务商的身份。如果主机服务商实际知道非法内容, 或者情况显示内容违法是清楚的, 或者其已经知道了违法内容但是没有迅速删除, 在这些情况下, 主机服务商需要承担责任。在大多数案件中都确定了主机服务商明知的主观状态, 尽管基于的论证稍有区别。在一些案件中, 只是在被告已经收到了存在违法内容的首次通知以后, 才承认其主观明知。在一些案件中, 被删除的内容被有些用户重复提供(例如通过其他帐户), 被告不可能辩称其不知道, 因此, 其责任豁免的请求被驳回(比如弗莱希电影公司诉谷歌(Films v Google); 和赛帝格诉谷歌(Zadig v Google))。在克里斯蒂安·C., 诺德·奎斯特制片公司诉每日动感(Christian C., Nord Ouest Production v Dailymotion)案中, 一审法院提出了网站成功的基础是因为能够散发众所周知的保护作品(而不是用户自己的创作), 法院并由此推定Dailymotion知道这些违法内容。巴黎上诉法院驳回了这一推理, 裁决支持网站主机商, 因为权利所有人没有使用Dailymotion建议的提示系统, 也没有发送适当的通知(其通知过于含糊, 没有提到发布非法内容的网页, 权利所有人还遗漏了向Dailymotion发送其已经申请到的执行官报告。假定主机服务商肯定已经知道了其服务的用户可能正在发布侵权内容, 相当于给主机商施加了一个一般性的监控义务, 而这是与《电子商务指令》背道而驰的。

In most of the French cases, the defendants were thus qualified as hosting providers. Hosting providers are liable if they have actual knowledge of the unlawful content or if, from the circumstances, it is clear that the content is illegal, or, once they know about the illegal content, they did not act promptly to remove it. In most cases, the knowledge of the hosting providers was established, although on the basis of slightly different arguments. In some cases, the knowledge was recognised only after the defendants had received a first notification of the presence of the illegal content. In the cases where the removed content was repeatedly made available by some users (for instance through other accounts), the defendants could not argue they had no knowledge and therefore, the liability exemption was rejected (e.g. *Flash Films v Google*; *Zadig v Google*). In *Christian C.*, *Nord Ouest Production v Dailymotion*, the first instance

tribunal had referred to the success of the site, which was based on the possibility to disseminate protected works known to the public (rather than created by the users themselves), and from that, the court presumed that Dailymotion was aware of the illegal content. The Paris court of appeal rejected this reasoning and ruled in favor of the webhoster as the right owner had not used the notification system proposed by Dailymotion and had not sent proper notices (the notices were too vague, with no reference to the page where the illegal content was posted, and the right owners omitted to send to Dailymotion the bailiff reports they had asked for). To presume that the hosting provider must have known that users of its service would be posting infringing content would be tantamount to placing a general obligation to monitor on the hoster, which runs against the e-Commerce Directive.

D. LIABILITY OF ACCESS PROVIDERS

SCRL Société Belge des Auteurs Compositeurs et Editeurs (SABAM) v SA Scarlet Extended

Tribunal de Première Instance, Belgium (first instance)

26 November 2004, 29 June 2007 and 22 October 2008

Reported: decision of 29 June 2007 in [2007] E.C.D.R. 19; decision of 22 October 2008 in 3 Cardozo Arts and Entertainment 25, 1279 (2009)

Keywords: musical works; indirect liability of an Internet access provider; file sharing; impossibility to comply with a cease and desist order; filtering technologies; Belgium

Facts and procedure: The customers of SA Scarlet Extended (formerly SA Tiscali), an online access provider, were exchanging, by means of a P2P file sharing system, electronic music files without the authorisation of the right owners. SABAM, a collective management society, requested the court to grant a cease and desist order against the SA Tiscali. On 26 November 2004, the court ordered the cessation and, simultaneously, an expert opinion on the availability of technical measures capable of filtering the illicit exchanges of electronic files without unduly restricting the sharing of licit files. After the expert report was submitted, the court, on 29 June 2007, condemned the SA Scarlet Extended “to stop the violations of copyright found in the judgment of 26 November 2004 by making impossible any form, by means of a “peer-to-peer” software, of sending or receiving by its customers of electronic files containing a musical work from the repertoire of SABAM”.

SA Scarlet filed a petition where it requested to recognise that it is materially and legally impossible to comply with the cease and desist order of 29 June 2007 and asked to abrogate the daily fine. As an alternative, SA Scarlet requested the court to recognise the temporary impossibility to apply the order and to suspend the fine until the decision on the merits by the Court of Appeal of Brussels, which is now supposed to take place in early 2010.

Held: The court rejected the legal and material impossibility to comply with it previous judgment but confirmed the temporary impossibility and suspended the fine until 31 October 2008.

Grounds for the decision: Generally, the impossibility to comply with a court order must be admitted when it “is unreasonable to demand more effort and diligence than the condemned party has demonstrated”. The court rejected the legal impossibility argument. Legal impossibility exists, when it “was not known to the judge when he pronounced the daily fine, either because it only arose after the pronouncement of the decision, or because the debtor did not argue on this impossibility before the judge ruled on the request for the fine”. The court found that the legal objections raised by the SA Scarlet were not “new or unknown” causes of impossibility, and that they could perfectly well have been brought to the court’s attention during the previous hearings.

The court also found that SA Scarlet did not demonstrate the material impossibility to execute the cease and desist order (i.e. technical possibility to stop the transmission of illegal contents). The Court acknowledged that the Audible Magic system, which was proposed by the expert opinion as the most effective measure, does not function. Also, the use of encryption had spread since the judgment of 29 June 2007. However, according to the court, SA Scarlet did not show sufficient efforts to find the adequate technical solution allowing to comply with the decision, e.g. it did not experiment with other existing solutions.

However, the court accepted there was a temporary impossibility to comply with the order and the fine was suspended for nine months.

D.接口服务商的责任

比利时作家、作曲家和出版商协会（萨班）诉SA·斯卡利特扩展 (SCRL Société Belge des Auteurs Compositeurs et Editeurs (SABAM) v SA Scarlet Extended)

比利时初审法院（一审）

2004年11月26日，2007年6月29日和2008年10月22日

引自: decision of 29 June 2007 in [2007] E.C.D.R. 19; decision of 22 October 2008 in 3 Cardozo Arts and Entertainment 25, 1279 (2009)

关键词: 音乐作品；互联网接入商的间接责任；文档共享；遵守停止令的不可能性；过滤技术；比利时

事实和程序: 网络接口服务商斯卡利特（SA Scarlet Extended，其前身是SA·蒂斯卡利（SA Tiscali））的客户未经权利所有人的授权而通过一个点对点（P2P）文档共享系统交换电子音乐文档。萨班（SABAM）是一个集体管理协会，其请求法院对SA Tiscali发出停止令。在2004年11月26日，法院颁发了停止令，同时还有一份专家意见，专家意见探讨了是否可以采取技术措施，在不过分限制合法文档共享的情况下还能够过滤非法的电子文档交换。在专家报告提交以后，2007年6月29日，法院责令SA Scarlet Extended停止对2004年11月26日判决书中所认定的版权作品的侵犯，使得其用户没有可能利用“点对点”（peer-to-peer）软件发送或者接收包含有SABAM名录中音乐作品的电子文档。

SA Scarlet提交了一个请求，要求确认，履行2007年6月29日的停止令存在事实不能和法律不能，并要求撤销日罚款。作为替代方案，SA Scarlet请求法院确认暂时不能履行命令，并中止该罚款，直到布鲁塞尔上诉法院做出实体判决，目前预计实体判决会在2010年上半年做出。

判决: 法院驳回了其关于发行先前判决存在法律不能和事实不能的主张，但是确认了暂时不能并中止罚款到2008年10月31日。

判决理由: 一般来说，如果一项法院令不合理地强求被控的当事人付出比其已经证明的努力和勤勉更高层次的努力和勤勉，那么就必须承认遵守法院令就具有不能性。法院驳回了法律不能性的主张。不管是因为在宣判之后才出现不能，还是因为在法官对罚款请求裁决之前债务人没有主张这种不能性，如果法官在宣布日罚金时不知道这种不能，那么就存在法律不能。法院认定，SA Scarlet所提出的法律异议不是“新的或者未知的”不能原因，在之前的审理中完全可以提请法院注意。

法院还认为SA Scarlet没有证明执行停止令的事实不能性（即阻止非法内容的传输在技术上是是不可能的）。法院承认专家意见作为最有效措施建议的音响魔法系统不能起作用，而且加密技术也是从2007年6月29日才开始传播。但是，按照法院的观点，SA Scarlet并没有表现出充分的努力寻找适当的履行判决的技术方法，例如，它没有试验现有的其他方法。

然而，法院接受了履行命令存在暂时不能性的主张，中止罚款9个月。

E. LIABILITY FOR HYPERLINKING

BMG Records and others v Heise Zeitschriften Verlag
Oberlandesgericht, Munich, Germany (appeal instance)
28 July 2005

Reported: GRUR-RR 2005 Heft 7, 372

Keywords: software; direct and indirect liability (*Störerhaftung*) of website operator; hyperlinking; online article about illegal software; circumvention of technical protection measures; freedom of speech; copyright exceptions; Germany

Facts and procedure: The defendant Heise Zeitschriften, an online news service (defendant), published an online article concerning the software „anyDVD” marketed by SlySoft (established in Antigua). “AnyDVD” allows to circumvent the anti-copy measures applied in DVD technology. In the same article Heise Zeitschriften also provided a hyperlink to the website of SlySoft where the software could be found and downloaded. The plaintiffs, a group of right holders, sued Heise Zeitschriften requesting to grant an injunction both in respect of the hyperlink and the published article. The court of first instance granted an injunction against the hyperlink, however, denied the injunction in respect of the online article.

Both parties appealed. The right holders argued that the article describing the “anyDVD” software constitutes an advertising of software for circumventing technical protection measures (TPM), which is prohibited under German copyright law. Heise Zeitschriften argued that the article merely reports about the issue and is thus covered by the freedom of speech. Freedom of speech on Internet covers the provision of links to other websites.

Held: The decision of first instance was upheld. The injunction in respect of the online article was denied on the basis that its main function was news reporting rather than the advertising of the “anyDVD” software. The injunction against a hyperlink to SlySoft website was upheld on the basis that it facilitated the import and distribution of illegal software.

Grounds for the decision: The court mainly analysed whether the provisions of the German Copyright Act relating to the protection of technical protection measures were infringed (those provisions implement Article 6

of the Copyright in the Information Society Directive). It first of all recognised that the DVD technology includes a technical protection measure and that the „anyDVD” software is a measure primarily intended to circumvent the technical protection. As a next step, the court denied that the online article published by a plaintiff constitutes an advertisement of the illicit “anyDVD” software because its primarily goal was not to foster the distribution of product marketed by SlySoft but rather to report about an issue of public importance, i.e. the copy prevention through technical protection measures and their circumvention. This intention could be seen from the content of the article: it not only describes the functions of “anyDVD” software but demonstrates a critical attitude towards it, it stresses that it is prohibited and it provides comment of third parties on the issue. Also, the court rejected the argument that the publication of the article created some liability through participation or contribution to the marketing of circumventing measures.

The defendant, however, was held liable as a “disquietor” (*Störer*) for marketing of illegal software by providing a direct hyperlink to the website where the illegal software could be acquired. In copyright cases, the injunctive relief could be granted to the contributors who in any way – even without fault – intentionally and with a causal link contribute to the copyright infringement. In this case, the defendant provided a direct link to the website and thereby facilitated the connection to the illegal content. It was not relevant for the liability issue that this content was easily accessible through a simple search of the World Wide Web.

Also, according to the court, the injunction against hyperlinking does not violate freedom of speech. Although the placement of hyperlinks normally fall within the scope of freedom of speech, the restriction of freedom of speech was justified because the main function of the hyperlink in this case was not to provide the information but to make it possible for the user to access the linked website (additional function). As the hyperlinks facilitated the infringement of exclusive rights, the prohibition of hyperlinking was found justified.

E.超链接的责任

贝塔斯曼唱片公司等诉海泽杂志出版社
(BMG Records and others v Heise Zeitschriften Verlag)
德国慕尼黑高等法院（上诉审）

2005年7月28日

引自: GRUR-RR 2005 Heft 7, 372

关键词: 软件；网站运营商的直接和间接责任（*Störerhaftung*）；超链接；关于非法软件的网络文章；技术保护措施的规避；言论自由；版权例外；德国

事实和程序: 被告海泽杂志（Heise Zeitschriften）是一个网络新闻服务商（下称被告），其发表了一篇网络文章，是关于SlySoft（设在安提瓜岛）所销售的软件“anyDVD”的文章。“AnyDVD”允许对DVD技术中应用的反复制措施进行规避。在同一篇文章中，Heise Zeitschriften还提供了一个超链接，可以链接到SlySoft的网站，在这里可以找到并下载该软件。原告是一个权利人的组织，起诉Heise Zeitschriften，请求对超链接以及发表的文章都处以禁令。一审法院对超链接处以禁令，但是驳回了在网络文章的禁令请求。

双方均提起了上诉。权利人主张，描述“anyDVD”软件的文章构成了对技术保护措施（TPM）规避软件广告，而这是德国版权法律所禁止的。Heise Zeitschriften则主张，该文章仅仅是对问题的叙述，因而受到言论自由的保护。在互联网上的言论自由也保护向其他网站提供链接。

判决: 维持一审判决。驳回关于网络文章的禁令请求，理由其主要作用是新闻报道而不是对“anyDVD”软件广告。禁止与SlySoft网站建立超链接的禁令被维持，理由是它有助于非法软件的输入和散布。

判决理由: 法院主要分析了《德国版权法》中与技术保护措施的保护相关的规定是不是被触犯（这些规定是对《信息社

会版权指令》第6条的实施）。法院首先承认DVD技术包含一个技术保护措施，“anyDVD”软件是一个主要用于规避该技术保护的措施。接下来，法院否认由原告发表的网络文章构成了非法“anyDVD”软件广告，因为其基本目标不是为了促进SlySoft所销售的产品的配售，而是为了报道一个具有公共意义的问题，即，通过技术保护措施防止复制以及他们的规避。从文章的内容可以看出这一意图：它不仅描述了“anyDVD”软件的功能，而且对其表现出一种批评态度，强调这是被禁止的，并且提供了第三人对这一问题的评论。另外，法院还反驳下述观点，即，该文章的发表由于参与或者促进了规避措施的销售而产生出某种责任。

尽管如此，被告还是因为销售非法软件而被认定为一个“令人不安的人”（*Störer*）而要承担责任，其方式是为这个可以获得非法软件的网站提供超链接。在版权案件中，禁令救济可能被施加给促进者，不管他是以何种方式——即使没有欺诈——只要他有意地促进了版权侵权，并且与版权侵权有因果关系。在本案中，被告为这个网站提供了直接的链接，从而方便了与违法内容的联系。尽管在万维网上进行简单的检索就可以轻易地获得非法内容，但对于责任问题来说是无关紧要的。

另外，按照法院的观点，对超链接发出禁令并不违反言论自由。虽然设置超链接通常属于言论自由的范围，但是对言论自由的限制也是正当的，因为本案中超链接的主要功能不是为了提供这种信息，而是为了便于用户进入被链接的网站（附加功能）。既然超链接帮助了对专有权的侵权行为，可以判定禁止超链接是正当的。

Belgacom Skynet v IFPI Belgium and N.V. Universal

Cour d’Appel, Belgium (appeal instance)

13 February 2001

Reported: [2002] E.C.D.R. 5

Keywords: musical recordings; hyperlinking; hosting provider’s liability under tort law; duty of care; proper notification; Belgium

Facts and procedure: The websites of some customers of Belgacom Skynet, a hosting provider (appellant), included hyperlinks that were referring to illegal reproductions of musical recordings posted on other sites which were hosted by other internet service providers (ISPs). The right holders (respondents) claimed that Belgacom Skynet has failed to respond, or to do so in good time, to complaints that right holders had made. The right holders submitted that by knowingly storing information on its server giving rise to the unlawful electronic distribution of musical recordings, Belgacom Skynet acted in conflict with fair commercial practices. The court of first instance granted the relief.

Belgacom Skynet appealed the decision. It argued that right holders have neglected to accurately identify the contested hyperlinks and that it has always responded quickly whenever it received a complaint by immediately passing the complaint on to its customer and ensuring that the latter removed the hyperlink. For Belgacom Skynet, insofar as it can be expected to intervene, such an intervention can consist only in notifying its customer of the right holders’ request and not in removing the link immediately.

Held: It has not been shown that Belgacom Skynet did not act as a normally prudent and reasonable ISP would have acted when placed in a similar situation and, consequently, that it committed an act conflicting with fair trade practices.

Grounds for the decision: The Court considered that the rules of prudence (or the duty of care) require that when the right holders inform a hosting provider about the existence of hyperlinks on the sites it hosts, in case those hyperlinks refer to illegal musical recordings on other sites, the ISP should remove these links or prevent access to them, provided certain conditions are met and a certain procedure is followed: (1) the right holders must identify the links and expressly require that these links should be removed or made inaccessible; (2) they must indicate the facts that would, prima facie, lead a reasonable ISP to assume that the linked-to files are illegal; (3) the ISP must remove these links or make them inaccessible within three working days, unless it can show proof within the same period that the indicated musical recordings are legal; (4) the right holders must indemnify an ISP against potential claims that may be made by a customer, should it subsequently appear that the removal was done unlawfully.

After analysing the notices sent by the respondents, the Court held that they did not respect the procedure and fulfill its conditions as described above. In particular, the notices did not expressly include the facts that would prima facie make it apparent to a reasonable ISP that the musical recordings to which the links referred or which appeared on these sites themselves were illegal.

The court found no need to consider whether the presence of the links per se renders the hosting provider liable or whether or to what extent the hosting provider might be jointly liable for illegal activities conducted by others.

比利时电信天空网诉国际唱片业协会比利时和N·V·通用公司

比利时上诉法院（上诉审）

2001年2月13日

引自: [2002] E.C.D.R. 5

关键词: 音乐录音制品；超链接；主机服务商的侵权责任；注意义务；适当通知；比利时

事实和程序: 比利时电信天空网（Belgacom Skynet）是一个主机服务商（上诉人），它的一些客户的网站包含有一些超链接，可以索引其他网站上发布的音乐录音制品的非法复制品，其他这些网站是由另外一些互联网服务供应商（ISPs）提供主机服务的。权利人（被上诉人）诉称，对于权利人已经提出的投诉，Belgacom Skynet未能做出反应，或者未能及时做出反应。权利人认为，由于明知其服务上存储的信息会造成音乐录音制品以电子方式非法传播，Belgacom Skynet的行为与正当的商业惯例相抵触。一审法院授予了其请求的救济。

Belgacom Skynet对此判决提出上诉，诉称，权利人未能准确确定争议的超链接，Belgacom Skynet无论什么时候只要收到投诉，总是快速回应，立即将投诉转送给它的客户并确保后者（指客户）删除该超链接。对Belgacom Skynet来说，可以期待其介入的程度，仅仅是将权利人的请求通知到客户，而不是立即删除该链接。

判决: 没有证据证明，Belgacom Skynet未能象一个正常的、谨慎的、理性的网络服务商在类似处境下那样行事，因此没有证明其实施了与正当交易惯例相抵触的行为。

判决理由: 法院认为，谨慎规则（或者注意义务）要求，当权利人通知主机服务商其管理的网站上存在有超链接，只要这些超链接索引其他网站上的非法音乐录音制品，该网络服务商（ISP）就应当删除并且防止进入这些超链接，但是需要满足一定的条件并遵循一定的程序：（1）权利人必须辨别清楚这些超链接，并且明确要求删除或者不得接入这些超链接；（2）他们必须证明一些事实，这些事实会引导一个理性的网络服务商从表面上认为链接文档是违法的；（3）网络服务商必须在3个工作日内删除这些链接或者使此链接不能接入，除非它可以在同样的期间内举证证明所指明的音乐录音制品是合法的；（4）如果后来表明删除是非法的，网络服务商可能受到其客户的追诉，权利人必须为这些潜在的追诉给予网络服务商补偿。

在分析了被上诉人发出的通知后，法院认定他们没有尊重前述程序，没有满足前述条件。特别是，其通知没有明确包含那些从表面上可以使得一个理性的网络服务商能够看清楚的事实，即，这些链接所索引的音乐录音制品是非法的，或者在这些网站上出现的音乐录音制品本身是违法的。

法院认为不必考虑主机服务商是否要为链接的存在本身承担责任，也不必考虑主机服务商是否可以与实施违法活动的其他人共同承担责任以及承担共同责任的范围。

LeaseWeb BV v BREIN
Gerechtshof Amsterdam, Netherlands (appeal instance)
3 July 2008

Reported: www.rechtspraak.nl (LJN: BD6223)

Keywords: musical, audiovisual and literary works; indirect liability of hosting provider; file sharing (BitTorrent technology); liability under tort law (duty of care; *zorgvuldigheid*) protection of personal data; Netherlands

Facts and procedure: Hosting provider Leaseweb hosted, among other websites, the illegal BitTorrent¹⁰ website Everlasting. This website enabled users to download a large number of movies, games, musical recordings and e-books. BREIN, an anti-piracy organisation, claimed in interlocutory proceedings that Leaseweb be ordered to close down the site and to provide the name and address details of the website holder, since Leaseweb had refused to do so following BREIN's request. The court of first instance in interlocutory proceedings allowed BREIN's claim. Leaseweb appealed.

Held: BitTorrent website Everlasting knowingly played a facilitating role in the breaching of copyrights on a large scale and therefore manifestly acted wrongfully. Leaseweb acted wrongfully because it did not close down the website after BREIN's notice. Leaseweb should have also provided the name and address details of the website holder to BREIN.

Grounds for the decision: The Court of Appeal details the BitTorrent technology employed by Everlasting and concludes that Everlasting played an essential role in the uploading and downloading of files made by the users. A file is divided into packets. To trace the packets and reconstitute the file, other users need access to torrentfiles and to a "tracker". Everlasting's website made available the torrentfiles with the information about the packets and the address of the "tracker". Leaseweb put forward a large number of defences, which were all rejected. For instance, Leaseweb argued that the packets are not protected works and that the torrentfiles do not contain protected works. But the court found nevertheless that Leaseweb was providing the "necessary means leading to the breach" of copyright. The names of the torrentfiles not always correspond to the content referred to, but in most cases, the name will indeed correspond to the content, since the file sharing system only works if files are named in a reliable and obvious manner. The exchange of files could be realised without involving Everlasting, but this is not a ground for exempting Everlasting of any liability. The fact that the website was operated as a hobby and not on a professional basis was also irrelevant.

出租网BV诉布雷恩 (LeaseWeb BV v BREIN)
荷兰阿姆斯特丹法院 (上诉审)
2008年7月3日

引自: www.rechtspraak.nl (LJN: BD6223)

关键词: 音乐、视听和文学作品；主机服务商的间接责任；文档共享（比特流（BitTorrent）技术）；侵权法律责任（注意义务；*zorgvuldigheid*）；个人数据保护；荷兰

事实和程序：除了其他网站外，主机服务商出租网（Leaseweb）还给非法比特流¹²网站常青网（Everlasting）提供主机服务。这个网站可以使用户下载大量的电影、游戏、音乐录音制品和电子书。布雷恩（BREIN）是一个反盗版组织，在临时诉讼程序中要求责令Leaseweb关闭该网站并提供网站经营者的姓名和地址的详细信息，因为在BREIN请求后Leaseweb拒绝这样做。一审法院在中间程序中同意了BREIN的诉求。Leaseweb提起上诉。

判决：比特流网站常青网（Everlasting）在大规模的版权侵权中有意地扮演了一个促进角色，因而其行为明显违法。Leaseweb行为违法是因为它在BREIN通知后没有关闭该网站。Leaseweb还应当向BREIN提供网站经营者的姓名和地址的详细信息。

判决理由：上诉法院详细分析了Everlasting所使用的BT技术并得出结论，Everlasting在用户实施的文档上传和下载中起到了重要作用。一个文件分为一些包，要跟踪这些包并重构该文件，其他用户需要进入流文件和一个“跟踪器”。Everlasting的网站提供这些流文件以及关于包的信息和该“跟踪器”的地址。Leaseweb提出了大量的抗辩理由，全部被驳回。例如，Leaseweb辩称，包不是受保护的作品，流文件也不包含受保护的作品。但是法院认定Leaseweb在提供“导致版权侵权的必要工具”。流文件的名称与其所索引的内容并不总是对应的，但大多数情况下，其名称实际上需要与内容对应，因为只有在文件以可靠明显的方式命名时文档共享系统才能起作用。诚然，在不涉及Everlasting时也可能实现文件的交换，但是这不能成为免除Everlasting承担任何责任的理由。网站作为业余爱好而运行并且没有专业基础这一事实也无关紧要。

¹⁰ For more on BitTorrent technology see Pirate Bay decision.

¹² 关于比特流（BitTorrent）技术的更多内容参见海盜灣判决书

Sony Music Entertainment and others v. Fredrik Neij and others (Pirate Bay)

Stockholm District Court, Sweden (first instance)

17 April 2009

Reported: <http://www.ifpi.org/content/library/Pirate-Bay-verdict-English-translation.pdf> (unofficial translation)

Keywords: musical, audiovisual works and software; file sharing (BitTorrent technology); indirect liability of website operators; criminal complicity; knowledge; private copy exception; Sweden

Facts and procedure: The Pirate Bay website provided a file sharing service which used the BitTorrent protocol. The service had no central computer on the network, the files containing copyright works were saved in the computers of end users. BitTorrent software, generally, is used to divide a digital file into different segments and give them a mathematical number (known as a hash total), and to create a torrent file. A torrent file is a file which, in principle, contains only data which identifies the components the digital file has been divided into. To facilitate distribution of the digital file, an address for one or more trackers is, as a rule, specified in a torrent file.

The defendants where indicted for complicity in breach of the Copyright Act, since they operated the file sharing service The Pirate Bay and, through this, allegedly aided and abetted other individuals to infringe copyright law by reproducing and making protected works available to the general public. The plaintiffs requested an injunction and damages.

The defendants *inter alia* argued that the file sharing service The Pirate Bay was not illegal so no criminal complicity can be established. The production of copies has taken place on the users’ computers without the recordings and computer programs covered by the indictment having passed through The Pirate Bay’s computers. Defendants also argued that they had not been aware of the existence of the files specified in the indictment and that it is not an offence per se to provide a file sharing service which can be used for both legal and illegal purposes.

Held: The defendants are liable for criminal complicity to the breach of the Swedish copyright law.

Grounds for the decision: In order to establish the criminal liability for complicity in breach of copyright, the court analysed whether a “principle offence” was committed by others and whether the defendants have encouraged that principal offence. Firstly, the court found that the users of the Pirate Bay website were illegally making available (or broadcasting) the works to the public. According to the court, “By connecting to the Internet and activating their BitTorrent software (...) [users] are making it possible for other Internet users to acquaint themselves of the content of and, therefore, produce copies of the relevant files themselves. As far as accessibility for other Internet users is concerned, the procedure is, in principle, the same as when a work is made available by downloading it on an open Internet website.” Private use exemption could not apply as the works were made available to public.

Secondly, the court also rules on the complicity to the breach of the Swedish copyright law. Under Swedish Penal Code¹¹, not only the person who has committed the act (principal offence), but also other persons who have aided and abetted this person in word and deed, will be held liable for a specific act. The court found that the defendants have aided and abetted by enabling users to upload and store torrent files for the file sharing service of the Pirate Bay, by providing a database linked to a catalogue of torrent files, by enabling users to search for and download torrent files and by providing the functionality with which users who wished to share files could contact each other through the file sharing service’s tracker function.

According to the court, whether the copyright-protected works may possibly have been made available to the general public on other websites is irrelevant as liability

11 Swedish Penal Code of 1962 (entered into force on 1 January 1965) as subsequently amended.

索尼音乐娱乐公司等诉弗雷德里克·奈吉等（海盗湾）
(Sony Music Entertainment and others v. Fredrik Neij and others (Pirate Bay))

瑞典斯德哥尔摩地区法院（一审）

2009年4月17日

引自: <http://www.ifpi.org/content/library/Pirate-Bay-verdict-English-translation.pdf> (非官方译本)

关键词: 音乐、视听作品和软件；文档共享（比特流技术）；网站运营商的间接责任；犯罪共谋；明知；私人复制例外；瑞典

事实和程序: 海盗湾（Pirate Bay）网站提供一个文档共享服务，此服务使用比特流协议。该服务在网络上没有中央计算机，包含版权作品的文档被存储在终端用户的计算机上。比特流软件一般用来将一个数据文件分割成不同的部分，给他们一个数学数字（称为哈希总和或者数位总和），然后创建一个流文件。流文件是这样一种文件，原则上它只包含识别数据，即那些用来识别由数字文件分割而成的组分的数据。为了便于数字文件的传输，作为一项规则，在一个流文件里要为一个或者多个跟踪器设定一个地址。

被告被起诉共谋违反《版权法》，因为他们经营文档共享服务“海盗湾”，而且据说由此还帮助和教唆其他人通过复制和向普通公众提供版权作品而触犯版权法。原告请求禁令和损害赔偿。

除了其他辩解，被告还辩称，文档共享服务“海盗湾”不是非法的，因而犯罪共谋的指控不能成立。复制品的制作是在用户的计算机中发生，起诉书所述的记录和计算机程序没有通过“海盗湾”的计算机进行。被告还辩称，他们不知道存在起诉书所指明的文件，而且提供文档共享服务本身并不是一个犯罪行为，因为文档共享服务既可以用于合法目的也可以用于非法目的。

判决: 被告承担违反瑞典版权法的犯罪共谋责任。

判决理由: 为了确定共谋触犯版权法的刑事责任，法院分析了其他人是否实施了“主犯”的行为，以及被告是否鼓励

了该主犯行为。首先，法院认定“海盗湾”网站的用户向公众非法提供（或者广播）作品。按照法院的观点，“通过连接到互联网并激活其比特流软件…… [这些用户] 使其他互联网用户可能熟悉相关文件，从而可以自己制作相关文件的复制品。至于其他互联网用户是否是从犯，其判断程序原则上应当与在开放的互联网网站上通过下载而提供作品时的判断程序一样。”因为这些作品是向公众提供的，所以私人使用豁免在此不能适用。

其次，法院还对违反瑞典版权法的共谋进行了裁决。根据《瑞典刑法典》¹³的规定，不仅实施行为的人（主犯），而且那些用语言或者行为帮助和教唆此人的其他人，都需要为特定的行为承担责任。法院认为被告进行了帮助和教唆，其方式是：由于“海盗湾”的文档共享服务而使用户可以上传并存储流文件；提供了一个数据库被链接到流文件的目录上；使用户可以检索和下载流文件；以及提供了一种功能，利用这种功能，那些希望共享文档的用户通过文档共享服务跟踪器的作用可以互相联系。

按照法院的观点，这些受版权保护的作品是不是可能已经在其他网站上提供给了公众是不重要的，因为共谋责任并不要求“海盗湾”的运行对于向公众提供作品来说是必须的。提供作品的一个部分也足以完成犯罪。关于侵权的主观意图，从该案事实来看，法院认为很清楚，被告已经知道受版权保护的作品未经授权通过该网站被提供和共享。最后还确认了商业目的，因为“海盗湾”的运营至少部分通过广告收入来融资。

法院还分析了《电子商务指令》（在《瑞典电子商务法》¹⁴中实施）的适用性。《电子商务指令》为互联网服务商在他/她获知非法内容之前规定了一个有限责任。法院认为“海盗湾”落入互联网服务商的定义之中，但是，不能根据该法而享受有限责任，因为已经证明了被告对非法信息是明知的。

13 《瑞典1962年刑法典》（1965年1月1日生效），后经修改。

14 2002年6月6日《瑞典电子商务及其他信息社会服务法》

for complicity does not require the Pirate Bay's operation to be essential to the making available to the public of works. Also, the making available of a segment of a work is sufficient for the offence to be completed. What regards the intention to infringe, from the facts of the case, the court found it clear that the defendants had been aware that copyright-protected works were available and shared via the website without necessary authorisation. Finally, commercial purpose was established as the operation of the Pirate Bay was at least partially financed by advertising revenue.

The court analysed the application of the e-Commerce directive (as implemented in the Swedish Electronic Commerce Act¹²), which provides for a limited liability for internet service provider prior to his/her knowledge of the illegal contents. The court found that the Pirate Bay falls under the definition of an internet service provider, however, can not enjoy the limited liability under the statute as the defendants' knowledge of illegal information has been proven.

12 Swedish Act on Electronic Commerce and Other Information, Society Services of 06 June 2002.

F. LIABILITY OF SEARCH ENGINES

Google Inc v Copiepresse SCRL

Tribunal de Première Instance, Brussels, Belgium (first instance)

13 February 2007

Reported: [2007] E.C.D.R. 5

Keywords: literary works (press articles); “caching”; hyperlinking; direct and indirect liability of search engine; copyright exceptions; freedom of speech; moral rights; abuse of rights; Belgium

Facts and procedure: Google, a popular search engine, provided a news service called “Google.News” (in Belgium - Google.Actualités) which aimed to give internet users an overview of all press based on an automatic selection of news items from web servers of the written press. In order to do this, Google.News searches the web for press articles, then select and arrange a list of links to the selected articles, and incorporates on the Google. News pages the headlines of those articles and a snippet comprising the first lines of the selected articles. Copiepresse SCRL, a copyright management company representing the press publishers, brought proceedings against Google, alleging infringement of the copyrights and database rights of its members. Specifically, it considered that the Google.News service was infringing the rights of reproduction and/or communication to the public. Copiepresse argued that this service goes beyond a “mere” search engine service and that Google.News operates rather as a “portal to the press”. In addition, Copiepresse considered that the caching functionality offered by Google’s standard search service was infringing the reproduction right of the publishers as some articles which were no more available on the webpages of the publishers were still accessible through the cache copy made by Google. Google defaulted and the court granted an order in favor of Copiepresse. Google appealed.

Held: Google.News and the use of the Google “cache” function infringe the law on copyright, therefore, Google must withdraw all the copyright material belonging to the Belgian press from Google.News. It cannot rely on any exceptions provided for by the copyright law.

Grounds for the decision: The court found that, via the “cache” memory and the Google.News service, Google reproduced and/or communicated to the public works (or parts of works) protected by copyright. Firstly, for

the “cache” memory, when Google “robots” are indexing webpages they make a copy of each page retrieved, which is then stored in Google’s memory and can be accessed by internet user by clicking on the “cached” link. Thus there is a reproduction of the work and a communication to the public. In contrast to the hyperlinks referring the internet user to the site of origin, by consulting the “cached” link, the internet user is consulting the document reproduced on in Google’s servers.

Secondly, the court found that “Google.News” service is not a “mere search engine service”. Generally, hyperlinks to other websites (as normally provided in the list of search engine) do not constitute a reproduction (or, if there is a reproduction, it is made by the internet user). However, Google.News not only provides simple hyperlinks but reproduces and communicates to the public the headlines of the selected press articles and extracts from those articles. Although not all press articles’ headlines fall under the protection of copyright, one cannot assume that they would never be sufficiently original to benefit from the protection of copyright. Also, the first lines of the articles may be protected by copyright as far as a “distinctive stamp of the author” could be identified.

The court held that the moral rights of authors had been infringed as well. The works were modified without authorisation as only extracts of the works were reproduced. Also different extracts of articles, which can originate from any source, were grouped by theme, so that the editorial or philosophical approach espoused by the author may have been altered. Finally, the name of the author of the work is not mentioned on the Google. News website.

The court rejected the application of various limitations for quotation and reporting of articles. The quotations are used to illustrate a proposition, or defend an opinion whereas Google.News is exclusively based on a referencing process which is automatic. No “press review” could be identified as Google.News provided no commentary on the news. News reporting exception is supposed to enable the media to react rapidly to news events – however, this is not the position in which Google finds itself. The court

F.搜索引擎的责任

谷歌有限公司诉科佩普莱斯SCRL公司
(Google Inc v Copiepresse SCRL)

比利时布鲁塞尔初审法院（一审）

2007年2月13日

引自: [2007] E.C.D.R. 5

关键词: 文学作品（新闻文章）；“缓存”；超链接；搜索引擎的直接和间接责任；版权例外；言论自由；精神权利；权利滥用；比利时

事实和程序: 谷歌（Google）是一个常用的搜索引擎，其提供一个新闻服务，称为“谷歌新闻”（“Google. News”）（在比利时称为“谷歌时事”（Google. Actualités）），“谷歌新闻”有助于给互联网用户一个所有新闻的概览，其基础是从文字新闻的网页服务器中对新闻事项进行自动选择。为实现这一目的，“谷歌新闻”在网页中搜索新闻文章，然后进行选择并设置一个对所选出的文章进行链接的表格，将这些文章的标题和所选文章的首行摘录放入“谷歌新闻”的页面中。科佩普莱斯（Copie- presse）SCRL公司是一个代表新闻出版商的版权管理公司，其对谷歌提起诉讼，指控谷歌对其成员的版权和数据库权利构成了侵权。特别是，它认为“谷歌新闻”的服务正在侵犯复制权和向公众传播权。Copiepresse诉称该服务超出了“纯粹的”搜索引擎服务的范围，“谷歌新闻”相当于一个“新闻门户”在运营。另外，Copiepresse 还认为谷歌的标准搜索引擎服务所提供的缓存功能也在侵犯出版商的复制权，因为有些文章已经不在出版商的网页上提供，但通过谷歌制作的缓存副本却仍然可以获得。谷歌未出庭，法院颁发了有利于Copiepresse的命令。谷歌提起上诉。

判决: “谷歌新闻”和谷歌“缓存”功能的使用违法了版权法，因此，谷歌必须从其网站中撤除所有属于比利时人出版社（Belgian press）的版权材料。谷歌不能依据版权法规定的任何例外以免责。

判决理由: 法院认为，通过“缓存”存储器和“谷歌新闻”服务，谷歌复制和/或向公众传播了受版权保护的作品（或者作品的有关部分）。首先，对于“缓存”存储器来说，当谷歌的自动装置“robots”索引网页的时候，他们对检索的每个页面制作了一个副本，当时存储在谷歌的存储器中，互联网用户可以通过点击“已缓存”（cached）链接键而获得

这个副本，所以存在对作品的复制和公开传播。相对于指引用户与原始网站建立超链接来说，通过查阅“缓存”链接，互联网用户就是在查阅谷歌服务器上复制的文档。

其次，法院认为“谷歌新闻”服务不是一个“纯粹的搜索引擎服务”。一般来说，与其他网站的超链接（就像通常在搜索引擎列表上提供的那样）不构成复制（或者说，如果有复制的话，也是由互联网用户实施的）。但是，“谷歌新闻”不仅仅是提供简单的超链接，还将所选新闻文章的标题和摘录进行复制和公开传播。尽管不是所有的文章标题属于版权保护的范畴，但是人们不能假定这些标题的原创性永远都不足以保证权利人从版权保护中获益。而且，有可能从文章的首行辨别出“作者的清晰印记”，在这种程度上，文章首行也可以受到版权保护。

法院判定作者的精神权利也受到了侵犯。作品未经授权而被修改了，因为只是复制了作品摘录。另外，作品摘录可能来自于任何材料，按照主题对作品摘录进行分组，这样使作者所秉承的编辑方式和哲学思路也可能被更改。最后，“谷歌新闻”网站也没有提及作品作者的姓名

法院拒绝适用作品引用报道的各种限制。引用通常是阐述一个命题或者为一种意见辩护，然而“谷歌新闻”却仅仅依靠一个自动的索引处理。因为“谷歌新闻”没有对新闻作出评论，也无法区分出一个“新闻观点”。新闻报道例外应当是保证媒体对新闻事件作出快速反应，但是，本案中谷歌并不处于这种地位（虽然谷歌自认为处于例外的地位）。法院还驳斥了根据《欧洲人权公约》第10条提出的表达自由的观点。表达自由不是绝对的，应当受到限制以保护其他人的权利，包括版权。另外，表达自由被认为属于版权例外的范畴，特别是当允许引用出处的时候，才能适用。

法院还驳回了谷歌的其他主张，具体如下：Copiepresse和（有独立请求权的）第三人提起当前的诉讼是错误的，是一种权利滥用；根据《欧洲共同体条约》第81条第（1）款，存在违反竞争法的行为；根据《电子商务指令》的规定谷歌的活动是受到豁免的。

also dismissed the argument on freedom of expression based on Art.10 of the European Convention on Human Rights. The freedom of expression is not absolute and can be limited in order to protect the rights of others, including copyright. Moreover, freedom of expression is taken into account within the copyright exceptions, in particular, when allowing the quotation of sources.

Thumbnails

Oberlandesgericht Jena, Germany (appeal instance)

27 February 2008

Reported: GRUR-RR 2008 Heft 7, 223

Keywords: visual works (photographs); thumbnails; direct liability of search engine; copyright exceptions; mis-use of right; implied license; freedom of speech; Germany

Facts and procedure: The respondent, a popular search engine, provided a service which, under the request of users, searched for pictures and showed them in a reduced and compressed form – so called “thumbnails”. A right holder to visual pictures, which where reproduced as thumbnails, requested the court for an injunction against such unauthorised use of works. She claimed the infringement of copyright law. The defendant argued that there is no infringement of copyright, *inter alia* because the plaintiff has impliedly licensed such online use. The court of first instance rejected the request for injunction arguing that the right holder, by making the pictures available online, granted an implied license for reproduction of works in form of thumbnails in the list provided by a search engine. The right holder appealed.

Held: An unauthorised reproduction of pictures through thumbnails constitutes a copyright infringement. However, the request for injunction was rejected as the appellant misused her right.

Grounds for the decision: The court recognised that the reduced copies of pictures in the form of thumbnails shown in a result list of a search engine constitute a transformation and reproduction of work. The reduction or compression of pictures does not add an independent function to a work. Also, the respondent operating a search engine not only provides the technical means allowing such a reproduction but is itself responsible for this use as *inter alia* it serves the respondent’s commercial interests.

The court dismissed other claims by Google, namely, that Copiepresse and the interveners are guilty of an abuse of rights in pursuing the current proceedings; that there had been an infringement of competition law under Art. 81(1) EC Treaty; and that Google’s activities are exempted under the e-Commerce Directive.

This unauthorised use cannot be justified on the basis of the “catalogue exception” (allowing for organisers (of e.g. exhibition) to use the copy of work for advertising purposes) or on the basis of the quotation exception. Also, the court rejected the argument that the disputable conduct of a search engine corresponds to the need of Internet users and could be justified by the constitutional freedom of speech.

More over, the court denied the implied license argument which was adopted by the court of first instance. The upload of works online by a right holder can not automatically lead to the (implied) permission to transform the work. If the author wants to enable the enjoyment of work, this does not mean that he/she allows the uses extending outside this purpose. Taking into account the unforeseeable technical potential of Internet and the future uses, the decision about how the works can be used online should remain with the author. In addition, although there are technical possibilities to prevent the crawler from searching the websites and identifying the particular items, non-use of these technical measures by a right holder does not allow to establish the implied license.

However, the court rejected the injunction on the basis a misuse of right on behalf of the appellant. During the proceedings, the appellant had argued that she lacked the knowledge in the indexation and functioning of search engines (and therefore did not apply available measures preventing search engine to make a search in her website). However, she had used the function “search engine optimisation”, which facilitates the access to her website for a search engine. The court found these two facts contradictory and, as a result, established that the plaintiff had misused her right.

缩略图

德国耶拿高等法院（上诉审）

2008年2月27日

引自: GRUR-RR 2008 Heft 7, 223

关键词: 视频作品（照片）； 缩略图； 搜索引擎的直接责任； 版权例外； 权利滥用； 默示许可； 言论自由； 德国

事实和程序: 被上诉人是一个流行的搜索引擎，提供一种服务，在用户的请求下，可以搜索图片并以减小或者压缩的形式显示给用户——即所谓的“缩略图”。一个权利人的视频图片在这里被作为缩略图复制，要求法院对这种未授权使用作品的行为发出禁令。她诉称这属于版权法上的侵权行为。被告辩称不存在版权侵权，尤其是因为原告已经默示许可了这种网络利用。一审法院驳回了禁令请求，理由是：因为在网络上提供图片，权利人给予了一个默示许可，许可对搜索引擎所提供的列表中的作品以缩略图的形式进行复制。权利人提起上诉。

判决: 未经授权通过缩略图对图片进行复制构成版权侵权。但是，由于上诉人滥用权利，其禁令请求被驳回。

判决理由: 法院承认，搜索引擎结果列表中以缩略图形式显示的图片缩小副本构成作品的转换和复制。图片的缩小和压缩没有给一个作品增加附属功能。另外，运营搜索引擎的被上诉人不仅提供技术手段容许这样的复制，而且自身也对这种使用负责，尤其是因为这种使用服务于被上诉人的商业利益。

这种未授权使用不能基于“目录编排例外”（允许组织者（比如展览会组织者）为广告目的而使用作品副本）或者基于引用例外而正当化。此外，法院还驳回了另一种辩解，即搜索引擎存在争议的行为可以适应互联网用户的需求并且可能被宪法上的言论自由而正当化。

不仅如此，法院还否定了一审法院所采信 的默示许可的观点。权利人将作品上传到网络上并不能自动产生作品转化的（默示）许可。作者希望作品被欣赏，并不意味着他/她允许别人超越这一目的而使用。考虑到互联网难以预料的技术潜力和未来的利用，在网络上使用作品的方式应当留给作者来决定。另外，虽然有技术能力来防止网络爬虫搜索网站并识别特定事项，权利人不使用这些技术措施并不能构成默示许可。

但是，法院还是基于上诉人滥用权利而驳回了禁令诉求。在诉讼中，上诉人曾经声称她缺乏索引编制和搜索引擎运行的知识（因此不能应用可行的措施阻止搜索引擎在其网站上进行搜索）。但是，她曾经使用“搜索引擎优化”功能，这有助于搜索引擎进入其网站。法院认定这两项事实互相矛盾，因此，原告滥用权利的结论成立。

BREIN v Techno Design Internet Programming BV
Gerechtshof, Amsterdam, Netherlands (appeal instance)
15 June 2006

Reported: [2006] E.C.D.R. 21

Keywords: musical works; searching of illegal content and hyperlinking; search engine’s liability under tort law; relevance of warning; knowledge; private use exemption; Netherlands

Facts and procedure: Techno Design (respondent) operated a website that enabled its visitors to search for MP3 music files on the internet and to download them directly from the source website. BREIN, an organisation representing copyright and neighbouring rights owners, complained that Techno Design was creating opportunities for music files to be downloaded from unauthorised sources that infringed its members’ copyrights. Techno Design brought an action for a declaration that it was acting lawfully. The district court upheld its claim, finding that Techno Design was not making a primary communication to the public of the disputed music files, nor even a secondary communication since it was merely directing its visitors to other websites from which the files could be accessed. BREIN appealed.

Held: Techno Design is liable for acting tortuously against right holders of copyright and neighboring rights.

Grounds for the decision: The court found that making MP3 music files available via the internet constitutes a communication to the public. The fact that the person downloading an unauthorised MP3 music file only uses it for himself does not mean that, in that case, the communication must not (or no longer) be deemed to be an infringement of the right-holder’s copyright or neighbouring right. The subsequent private use is irrelevant for deciding about the wrongful nature of the communication to the public that takes place in the first instance.

Techno Design cannot be deemed to be an internet service provider (ISP) that merely transmits the information provided by the recipient of the information, as its actions

go considerably further than those of such an ISP. Techno Design not only made it possible for its visitors to communicate with each other, but it also manipulated the data it had compiled in such a way that it greatly simplified its visitors’ search for MP3 music files. That means that it does not qualify for the same protection as an ISP that offers a “mere conduit” for information.

The court noted that, in principle, Techno Design is free to operate its own search engine and to make a profit in doing so, even if this is a search engine which is designed to track down MP3 music files. In themselves, its actions are not tortuous, even if Techno Design is aware of the fact that the persons who communicate the files are committing an infringement of the copyrights or neighboring rights. However, the court found certain special circumstances establishing Techno Design’s liability. Techno Design was well aware that its search engine systematically and consistently linked visitors to unauthorised MP3 music files. Furthermore, Techno Design obtained some income from its search engine service through advertising: the turnover made therewith by this company was largely based on the availability of unauthorised MP3 music files. Therefore, the court found Techno Design liable for acting tortuously.

This conclusion, according to the court, is not impeded by the fact that Techno Design warned its visitors against downloading unauthorised files as it was clear that the users tended to completely ignore such a warning. Finally, the fact that it is not easy, technically, to ensure that a search engine distinguishes between authorised and unauthorised MP3 music files under the conditions in which Techno Design operated did not give Techno Design any relevant excuse for its actions.

Having found that Techno Design is liable under the general rules of tort, the court found no need to analyse whether Techno Design is directly liable for a copyright or neighboring right infringement.

布雷恩诉技术设计网络编程BV公司
(BREIN v Techno Design Internet Programming BV)
荷兰阿姆斯特丹法院
2006年6月15日

引自: [2006] E.C.D.R. 21

关键词: 音乐作品; 违法内容的检索和超链接; 搜索引擎的侵权法责任; 警告的相关性; 明知; 私人使用豁免; 荷兰

事实和程序: 技术设计 (Techno Design) 公司 (被告) 运营一个网站, 使其访问者可以在互联网上搜索MP3音乐文档并直接从源网站下载。布雷恩 (BREIN) 是一个代表版权和邻接权权利所有人的组织, 诉称Techno Design提供机会, 从那些侵犯其成员版权的未授权来源下载音乐文档。Techno Design提起宣告之诉, 要求宣告其行为合法。地区法院支持了其诉求, 认定Techno Design不是在向公众进行初级传播系争的音乐文档, 甚至不是一个二级传播, 因为它仅仅是将访问者指引到可以取得这些文档的其他网站。BREIN提起上诉。

判决: Techno Design需要为其实施的、对版权及邻接权的权利人构成侵权的行为承担责任。

判决理由: 法院认为, 通过互联网提供MP3音乐文档构成向公众传播。下载未授权MP3音乐文档的人只是自己使用该文档这一事实, 并不意味着在这种情况下一定不能 (或者不再能) 将这种传播视为是对版权和邻接权权利人的侵权行为。对于首先发生的公开传播, 后来的私人使用对于判定其违法性质没有影响。

Techno Design不能被认为是一个仅仅将信息接受者所提供的信息进行传送的网络服务商 (ISP), 因为其行为明显超

出了网络服务商的行为范围。Techno Design不仅使其访问者可能互相传输, 而且还对其编辑的数据进行操作, 其操作方式大大简化了访问者对MP3音乐文档的检索。这意味着它没有资格与那些为信息提供“纯粹通道”的网络服务商享受同样的保护。

法院提示, 原则上Techno Design可以自由运营其所拥有的搜索引擎并从中获利, 即使这是一个用来跟踪MP3音乐文档的搜索引擎。其行为本身是不侵权的, 即使Techno Design知道传送文档的人正在对版权或者邻接权实施侵权。尽管如此, 法院认为某些特殊的情节使Techno Design的责任成立。Techno Design非常清楚其搜索引擎系统地、持续地将访问者链接到未授权的MP3音乐文档上。再者, Techno Design通过广告从其搜索引擎服务上获得了收入: 该公司由此服务取得的营业额很大程度上是因为能够获得未授权MP3音乐文档。因此法院判定Techno Design应为其侵权行为承担责任。

根据法院的观点, Techno Design警告其访问者不要下载未授权文档这一事实对上述结论没有影响, 因为, 很明显, 用户通常根本不理睬这样的警告。最后, 还有一个事实, 即在Techno Design的运行条件下要保证搜索引擎将授权的和未授权的MP3音乐文档区别开来在技术上不容易实现, 但这一事实并不能给Techno Design的行为提供任何有意义的借口。

在判定Techno Design按照侵权法的一般规定承担责任后, 法院认为没有必要再分析Techno Design为版权或者邻接权侵权的行为是不是应当承担直接责任。

G. DISCLOSURE OF PERSONAL DATA

Productores de Música de España (Promusicae) v Telefónica de España SAU
European Court of Justice C-275/06
29 January 2008

Reported: ECR I-00271 (2008)

Key words: audiovisual and musical works; file sharing; hosting provider’s duty to disclosure the identities of end users; protection of personal data; EU

Facts and procedure: Promusicae, a Spanish collective management organisation, asked for an order to oblige Telefónica, a telecommunication company, to disclose the identities of its customers who were sharing protected audiovisual and musical files through the KaZaA P2P system and thereby were infringing copyright. It sought disclosure of identities in order to be able to bring civil proceedings against the persons concerned.

After the court ordered the preliminary measures requested by Promusicae, Telefónica appealed, contending that under the Spanish Act on Information Society Services and Electronic Commerce (LSSI)¹³ the communication of the data sought by Promusicae is authorised only in a criminal investigation or for the purpose of safeguarding public security and national defence, not in civil proceedings. Promusicae submitted that Article 12 of the LSSI must be interpreted in accordance with the provisions of various EU Directives and the EU Charter on Fundamental Rights¹⁴, which do not allow Member States to limit the obligation to communicate the data in question solely to the purposes expressly mentioned in the national law at stake.

The national court stayed the proceedings and referred to the European Court of Justice (ECJ) for a preliminary ruling asking whether Community law, in particular the

Directive 2000/31 on e-Commerce, the Directive 2001/29 on Copyright in the Information Society Directive¹⁵ and the Directive 2004/48/EC on the Enforcement of Intellectual Property Rights¹⁶, read also in the light of Articles 17 and 47 of the EU Charter on Fundamental Rights, must be interpreted as requiring Member States to lay down, in order to ensure effective protection of copyright, an obligation to communicate personal data in the context of civil proceedings.

Held: The Directives do not require the Member States to lay down an obligation to communicate personal data in order to ensure effective protection of copyright in the context of civil proceedings. When transposing those Directives, the Member States must allow a fair balance to be struck between the various fundamental rights protected by the Community legal order.

Grounds for the decision: Firstly, the ECJ, on its own initiative, analysed the Directive 2002/58/EC on privacy and electronic communications¹⁷ and found that it does not preclude the Member States from laying down, with a view to ensuring effective protection of copyright, an obligation to communicate personal data which will enable the copyright holder to bring civil proceedings. Member States are obliged to prohibit the storage of personal data by third persons, without the consent of the users concerned. However, the Directive authorises the Member States to adopt legislative measures to restrict the obligation of confidentiality where that restriction is necessary *inter alia* for the protection of the rights and freedoms of others including the protection of the right to property.

13 Spanish Act on Information Society Services and Electronic Commerce of 11 July 2002.
14 Charter of Fundamental Rights of the European Union proclaimed in Nice on 7 December 2000 (OJ, 14.12.2007, C 303/2).

15 See *supra* notes 4 and 2 respectively.
16 Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights (OJ, 30.4.2004, L 157/45).
17 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ, 31.07.2002, L 201/37).

G.个人数据披露

西班牙音乐制作协会(Promusicae)诉西班牙电信SAU
(Productores de Música de España (Promusicae) v Telefónica de España SAU)
欧洲法院C-275/06号裁决
2008年1月29日

引自: ECR I-00271 (2008)

关键词: 音像和音乐作品；文档共享；主机服务商披露终端用户身份的义务；个人数据保护；欧盟

事实和程序: 音乐制作协会（Promusicae）是西班牙一个集体管理组织，西班牙电信（Telefónica）是西班牙的一家电信公司。Promusicae要求发布一个命令，强制Telefónica披露该公司一些客户的身份，这些客户通过KaZaA P2P 系统共享受保护的音像和音乐文档，因而侵犯版权。Promusicae要求披露相关人员的身份以便向他们提起民事诉讼。

在法院裁决同意Promusicae请求的临时措施后，Telefónica提起上诉，诉称，根据《西班牙信息社会服务及电子商务法》(LSSI)¹⁵的规定，Promusicae所要求的数据传送，只能在刑事调查或者为了保护公共安全或者国防安全时才能授权，而不能在民事诉讼中授权。Promusicae则认为，《西班牙信息社会服务及电子商务法》第12条的解释必须符合各种欧盟指令和《欧盟基本权利宪章》¹⁶的规定，这些规定不允许成员国将争议数据传输的义务仅仅限制在有关国内法律明确提到的目的。

国内法院中止了诉讼，提交欧洲法院(ECJ)临时裁决，要求回答的问题是：共同体法律，特别是《关于电子商务的第2000/31号指令》，《关于信息社会中版权的第2001/29号指令》¹⁷和《关于知识产权执法的第2004/48/EC号指令》¹⁸，在《欧盟基本权利宪章》第17条和第47条也有述及，是不是必须被解释为要求成员国为了保证版权的有效保护而在民事诉讼中设定传送个人数据的义务。

15 西班牙2002年7月11日《信息社会服务及电子商务法》
16 《欧盟基本权利宪章》于2000年12月7日在尼斯正式宣布(OJ, 14.12.2007, C 303/2).
17 分别参见前注6和前注2
18 2004年4月29日《关于知识产权执法的2004/48/EC号指令》(OJ, 30.4.2004, L 157/45).

判决: 这些指令没有要求成员国为了保障版权的有效保护而在民事诉讼中设定传送个人数据的义务。在转化这些指令的时候，成员国必须在共同体法令保护的各種基本权利之间维持一个恰当的平衡。

判决理由: 首先，欧洲法院主动分析了《关于隐私和电子通信的第2002/58/EC号指令》¹⁹，认为它并不排斥成员国从保障版权有效保护的角度设定个人数据传送的义务，只要这些数据能使版权权利人提起民事诉讼。成员国义务禁止第三人未经相关用户同意而保存个人数据。然而，这些指令还授权成员国采取立法措施限制保密义务，只要这种限制是必要的，尤其是为了保护其他人的权利和自由包括保护财产权利的时候。

第二步，法院确定三个指令（2000/31号，2001/29号和2004/48号）不要求成员国在民事诉讼中设定个人数据传送的义务。成员国必须保证有关司法机关有权命令提供关于知识产权侵权货物的来源及配送网络的信息。但是，成员国没有义务为了民事诉讼而命令披露个人数据。

最后，这种义务在要求有效保护知识产权的《与贸易有关的知识产权协议》(TRIPs)中也不存在，基本的财产权利（包括知识产权）和有效司法保护也不能派生出这种义务。

19 欧盟委员会及理事会2002年7月12日《关于电信部门中的个人数据处理和隐私保护的2002/58/EC号指令》（《隐私和电信指令》）(OJ, 31.07.2002, L 201/37).

As a next step, the Court established that the three directives (2000/31, 2001/29 and 2004/48) do not require Member States to set an obligation to communicate personal data in the context of civil proceedings. The Member States have to ensure that the competent judicial authorities may order that information on the origin and the distribution networks of the goods which infringe an intellectual property right be provided. However, Member

States are not obliged to order to disclose personal data for the purpose of civil proceedings.

Finally, no such obligation exists under TRIPs, which requires the effective protection of intellectual property rights, or can be derived from the fundamental rights to property (including intellectual property rights) and to effective judicial protection.

EMI Records (Ireland) Ltd and others v Eirecom Ltd and others

High Court, Ireland (first instance)

8 July 2005

Reported: [2005] IEHC 233; [2006] E.C.D.R. 5

Keywords: musical recordings; unauthorised downloading of files; duty of hosting providers to disclose identities of users; protection of personal data; Norwich Pharmacal Orders; Ireland

Facts and procedure: The plaintiffs, assignees of the Irish copyrights in a large number of sound recordings, claimed that a number of subscribers to the internet services provided by the defendants had been downloading files containing copyright-protected works belonging to the plaintiffs. The plaintiffs sought disclosure by the defendants of the identities and addresses of 17 alleged copyright infringers who were known to the plaintiffs only by the unique numbers that constituted their respective Internet Protocol addresses. The defendants withheld the information arguing that they were bound by law to respect the confidentiality (or personal data) of their subscribers’ identities.

Held: The defendants were ordered to disclose to the plaintiffs, to the extent known or otherwise available to them, the identities of the registered owners of the internet accounts (name, postal address and telephone number). The information disclosed could be used solely for the purpose of seeking redress in respect of copyright infringement.

Grounds for the decision: The court applied a doctrine called Norwich Pharmacal Orders: “If through no fault of his own a person gets mixed up in the tortuous acts of others so as to facilitate their wrongdoing, he may incur no personal liability, but he comes under a duty to

assist the person who has been wronged by giving him full information and disclosing the identity of the wrong-doers.” In particular, when applied to the case at stake, Norwich Pharmacal Orders would require disclosure of identity and other information held by a third party (hosting provider) concerning an alleged infringer (subscriber of Internet services).

On the evidence of the case, the court found prima facie demonstration of a wrongful activity by the subscribers of Internet service, namely, the infringement of the plaintiff’s copyright. Also, the court recognised that there is neither a suggestion nor an evidence of any wrongdoing on the part of the individual defendants. However, the identity of the subscribers was known to the defendants and the defendants accepted that there was no other way by which the plaintiffs can acquire information concerning the identities sought. Therefore, the defendants were requested to disclose the identities of the infringers to the plaintiffs.

The defendants’ argument on confidentiality was rejected. The court recognised that there is a need of balancing the rights of the plaintiffs with the obligations of the defendants towards their subscribers and the rights of those subscribers, namely, the right of confidentiality or privacy. However, under national law, the right to confidentiality can be legitimately breached by an order of the court. The court found that the right to confidentiality cannot be relied upon by a wrongdoer to protect his or her identity. Thus, the right to confidentiality regarding personal data must give way where there is prima facie an evidence of wrongdoing.

EMI唱片有限公司（爱尔兰）等诉Eirecom有限公司等

爱尔兰高等法院（一审）

2005年7月8日

引自: [2005] IEHC 233; [2006] E.C.D.R. 5

关键词: 音乐录音制品；文档的未授权下载；主机服务商披露用户身份的义务；个人数据保护；《诺里奇药物令》；爱尔兰

事实和程序: 原告是一大批声音录音制品在爱尔兰的版权受让人，他们诉称，被告所提供的互联网服务的许多订购者一直在下载包含有原告的版权保护作品的文档。原告要求被告披露17名被控侵权人的身份和地址，原告只是通过构成他们各自互联网协议（IP）地址的独享编码知道这些人。被告拒绝提供该信息，辩称他们在法律上有义务尊重其用户身份的保密性（或者个人数据）。

判决: 裁决被告就其所知或者以其他方式获得的程度向原告披露这些互联网帐户注册所有人的身份（姓名、邮政编码和电话号码）。披露的信息只能用于在版权侵权方面寻求救济。

判决理由: 法院适用了一个称为“诺里奇药物令”的原则：“如果一个人不是由于自己的过错而卷入了他人的侵权行为

为从而帮助了他人的违法行为，但他有义务协助受损害的人，向受害人提供违法者的充分信息并披露违法者的身份”。具体适用到本案中，“诺里奇药物令”会要求第三人（主机服务商）披露其持有的、关于被控侵权人（互联网服务的订购人）的身份和其他信息。

根据本案的证据，法院认为，互联网服务订购者的违法活动，即对原告版权的侵权行为被初步证明。并且，法院承认，没有迹象或者证据表明各个被告自己实施了任何违法行为。但是被告知道订购者的身份，而且被告也承认没有其他办法可以使原告获得想要的有关身份信息。因此，要求被告向原告披露侵权者的身份。

被告关于保密性的主张被驳回。法院承认有必要平衡原告的权利和被告对其订购者的义务以及那些订购者的权利，即保密权或者隐私权。但是，根据国内法律，保密的权利可以通过法院命令而合法地打破。法院认为违法者不能依据保密权而保护他/她的身份。这样，当存在违法的表面证据时，关于个人数据的保密权必须做出让步。