[FR] Acquittal of Advertisers on Peer-to-peer Sites Upheld

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It will be recalled that the producers of the hit film “The Chorus” (*“Les choristes”*) brought a case against half a dozen major advertisers (Voyages-sncf.com, AOL France, Neuf Cegetel, Telecom Italia, etc) who were advertising on peer-to-peer sites alongside links giving access to the unlawful downloading of the film (see IRIS 2006-8: 14). The film’s producers had brought them to court, rather than the actual peer-to-peer sites, the advertising agencies or the Internet access providers (IAPs), on the grounds that the advertisers were promoting the unlawful availability of a cinematographic work in disregard of the rights of its creators and producers. Following on from the regional court in 2008, the court of appeal in Paris has in its turn rejected the case brought by the producers who are the victims of infringement of copyright. The court of first instance had confirmed that an offence had been committed. Thus “every Internet user who exchanges unlawful files on a network of the peer-to-peer type is guilty of infringement of copyright since the work is made available to the public in violation of the copyright and neighbouring rights of its producers”. Similarly, “the criminal liability of the editors of peer-to-peer sites or dedicated sites is at issue inasmuch as they are organising and promoting the distribution of intellectual works without authorisation from the rightsholders”. The court nevertheless noted that neither the liability of the Internet users nor that of the editors of the sites at issue was being invoked in the case. It therefore analysed the question of the criminal liability of the advertisers whose banners were published on the illegal downloading sites. Recalling that Article 121-7 of the Criminal Code referred to in the proceedings sanctions intentional complicity, the court set out to determine whether the advertisers in this case had put their advertising on the sites in question deliberately or otherwise. The latter strongly contested the accusations made against them by the parties claiming damages regarding any intention on their part to promote peer-to-peer sites. Upholding their line of argument, the court noted that the defendant advertisers were not in any way professional advertisers on the Internet, and indeed that they had had to go through advertising agencies which had in turn made use of sub-contractors. It was recalled that “a media agency that calls on a multi-media agency purchases ‘a volume of space’ on dozens or hundreds of sites constituting a package, although the advertiser never receives a list of the sites on which the advertising appears”. Moreover, the court added, the hypothesis of “banner-jacking” could not be excluded in the present case, and it therefore discharged the defendants, since it

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was not established that they had knowingly had their banners published on the sites at issue. The producers are not giving up, however - they have appealed to the court of cassation.

Cour d'appel de Paris, 13e chambre, section A, 25 mars 2009, Api, Films Galatée et autres c. Neuf Cegetel et autres

Court of appeal of Paris, 13 th chamber, section A, 25 March 2009; Api, Films Galatée et al. v. Neuf Cegetel et al.

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