[FR] M6 Appeal against Online Guide to Catch-up TV Rejected

IRIS 2011-6:1/17

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On 27 April 2011 the court of appeal in Paris rejected the appeal brought by the M6 group against the company operating the TV-replay.fr site, an online guide to catch-up TV sites that offers summaries and links to the programmes of most of the major French channels that are available as catch-up TV. In doing so, the court upheld the judgment delivered in the initial proceedings (see IRIS 2010-8/29). The television group, which operates the channels M6 and W9 together with their catch-up TV services M6replay and W9replay, complained more particularly that TV-replay.fr was providing direct access to its programmes, without first directing viewers to the home pages of M6replay and W9replay. M6 claimed this was a violation of the general conditions for using its catch-up TV services, an infringement of its copyright protection as the creators and producer of a database, and considered that TV-replay's action constituted unfair competition and parasitic behaviour.

Deliberating firstly on the alleged infringement of the exploitation rights of MS and W9's production subsidiaries, the court of appeal warned that it was not up to that court to deliver a general judgment on the lawful or unlawful nature of systematically making audiovisual works available to the general public using deep hyperlinks. It recalled that it was required to deliberate on the merits of an application for a court order for the payment of a sum of money in compensation for prejudice suffered. However, since M6's production subsidiaries had failed to identify the works they claimed they held rights for, they had not furnished proof of either an infringement of specific rights or quantifiable prejudice. The judgment was therefore upheld in that it rejected the applications based on such an infringement. M6 was also claiming infringement of its rights as a producer of a database. Article L. 341-1 of the Intellectual Property Code (Code de Propriété Intellectuelle - CPI) provided that "the producer of a database, to be understood as the person taking the initiative and the risk of the corresponding investment, has the benefit of protection of the content of the database where its constitution, verification or presentation demonstrates a substantial financial, material or human investment". As the court confirmed, in order to put a daily selection of programmes on its catch-up TV services, M6 devised a search tool for its programmes classified by genre, date, time and title, links to bonus material, and an RSS feed updating the programmes available by date and title, including the associated deep hyperlinks. The court held that this information met the definition of a database in accordance with Article L. 112-3 of the CPI. However, the

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documentary evidence M6 produced for infringement of its rights as the producer of the database, referred to the expenditure incurred in listing the programmes and operating the proposed catch-up TV services, but contained no indication of the expense connected with organisation and updating, “which constituted the essence of a databank”, according to the court. M6’s application on this point was therefore rejected. The court also confirmed that M6 had not produced proof of the alleged prejudicial parasitic behaviour on the part of TV-replay, i.e. that it had deliberately concealed its intention to constitute and commercialise a parallel competitor on-demand video portal. On the other hand, and contrary to the court’s finding in the initial proceedings, the court of appeal awarded TV-replay 15 000 euros in damages, holding that M6 had, without giving sufficient notice, broken off their established commercial relationship. TV-replay has more than 2 million single visitors per month and an offer of free on-demand programmes that is constantly increasing; this judgment facilitates the continuation of its development.

Cour d'appel de Paris (pôle 5, ch. 1), 27 avril 2011 - Métropole Télévisions SA, M6 Web et a. c. Sbds Active

Court of appeal in Paris (section 5, chamber 1), 27 April 2011 - Métropole Télévisions SA, M6 Web et al. v. Sbds Active

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