[FR] On-line Digital Recording Service for Downloading Programmes from DTV Channels without their Authorisation Banned

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A company, currently in enforced liquidation, that made available to the public a free on-line digital recording service allowing the downloading of the programmes of the 18 national DTV channels to the service user's computer, was summoned to appear in court to answer claims of infringement of copyright by a number of these channels, who were holders of intellectual property rights in respect of the programmes. In the initial proceedings, the regional court had allowed their claims and pronounced measures banning the downloading of the programmes at issue. In support of its appeal, the company in the case claimed that the functioning of the disputed service was based on the successive generation of two copies, each covered by an exception to the monopoly of copyright and neighbouring rights: the temporary copy and the private copy, initiated respectively by separate persons - the temporary copy was initiated by the service and the private copy by the user. The court of appeal in Paris found, without contesting the modus operandi of the service, that the channels were right in claiming that the encrypting and decrypting operations required had no effect on the nature of the service, which consisted of making a single copy that was not temporary but was intended to be saved by the user on a computer hard drive or on any other durable digital medium, for the entire time necessary for the user's requirements (the user being the only person who might delete a file), i.e., for an unlimited period of time. The court found that the operation consisting of the user decrypting a copy encrypted previously by the service could not be regarded as generating a new copy separate from the initial copy. Thus the service generated one single copy, with its own economic value since each copy was attached to a user, and the amount of the advertising revenue generated by the site was directly linked to the number of users. Therefore the copy made by the company in this case did not meet the definition of a temporary copy as defined in Articles L. 122-5-6° and L. 211-3-5° of the Intellectual Property Code. The company was also wrong in claiming the exception for making a private copy, since the copy was not intended for the use of the person making the copy but for that of the final user.

The court also upheld that the reproduction of the semi-figurative mark of one of the channels on the home page of the site at issue, with the advertising message "Gratuit enregistrez toute la TNT" (record everything on DTV for free), constituted its appropriation by the appellant company for its own promotion to the public of

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the service it was offering, which constituted an infringement of copyright. The court however rejected the claims made on the grounds of unfair and parasitic competition, as the facts of the case in this respect were no different from those invoked for the infringement of copyright. The court upheld the measures banning the downloading of the respondents' programmes pronounced in the initial proceedings. In evaluating the prejudice suffered by the channels, the court referred to the average cost of a video on demand, which was EUR 2 per copy made of each programme, arriving at a figure of between 10, 000 and 1.2 million Euro, which is to be included in the liabilities of the liquidation of the appellant company.

Cour d'appel de Paris (pôle 5, ch. 1), 14 décembre 2011 - C. Rogeau, liquidateur judiciaire de Wizzgo c. Métropole Télévision, TF1 et a.

Court of appeal in Paris (unit 5, chamber 1), 14 December 2011 - C. Rogeau, official liquidator of Wizzgo v Métropole Télévision, TF1 et al.

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