[FR] Audiovisual communication companies have exclusive right to authorise making their programmes available on demand, including via deep links

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On 2 February 2016 the Court of Appeal in Paris delivered an interesting decision in the case between Play Media, editor of the Play TV site, and France Télévisions. The site had been offering a free and subscription-free service broadcasting television channels live since 2010, for which the regional court in Paris (Tribunal de Grande Instance - TGI) had ordered it to pay France Télévisions more than a million euros (IRIS 2014-10/13). In refusing Play Media the right to claim it was acting on the must-carry principle instituted by the Audiovisual Act of 30 September 1986, in which the TGI found that broadcasting France Télévisions' programmes without its authorisation constituted an infringement of copyright and neighbouring rights, and found wrongful use of the community and French brand names owned by the public-sector television group.

Play Media appealed against the judgment, and although the initial judgment was upheld, a new point of law came to light. In reaction to the initial court's decision, Play Media had in fact introduced on 20 November 2014 a new model for broadcasting and using France Télévisions' channels, based this time not on capturing, modifying and rebroadcasting their terrestrial or satellite signal on the Internet, but on the use of deep links directing Internet users to France Télévisions' Pluzz site and allowing direct, automatic access to its programmes. The deep nature of the links is a feature of the technique of 'transclusion' - the links do not take Internet users to the Pluzz site on which the broadcasts may be viewed, but enables Internet users already on the playtv.fr site to gain direct access to specific works and to view them online after the display of advertising "play-rolled" in by Play Media. France Télévisions considered that this new system was as much an infringement as the previous system, despite recent jurisprudence at the Court of Justice of the European Union (CJEU) on the subject of hyperlinks. Play Media's response was that it was using technology that was in frequent use, and recognised on the Internet. It referred to the CJEU's Svensson judgment delivered on 13 February 2014 in considering that broadcasting on its Internet site did not constitute broadcasting to a new audience but rather to the same audience, which was moreover counted in favour of the same editor, and that, because it was not a new audience, communication to that audience did not require the authorisation of the copyright holders.

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The Court noted that from 20 November 2014 onwards the audiovisual communication company had only infringed France Télévisions' neighbouring rights, as covered by the second paragraph of Article 3 of Directive 2001/29/EC, and not its copyright protection, such that the Svensson judgment and the BestWater International order were not applicable in the case at hand. The Court added that it transpired from the CJEU's C-More Entertainment AB judgment of 26 March 2015 firstly that the notion of 'communication to a new audience' via the use of hyperlinks, as defined in the Svensson judgment and the BestWater International order, did not apply to the protection of the neighbouring rights of audiovisual communication companies; and secondly that the French legislator was entitled to afford holders of such neighbouring rights protection that was not specifically included in Directive 2001/29/EC. Thus, by virtue of the provisions of Article L 216-1 of the Intellectual Property Code, interpreted in the light of Article 3 (2) of Directive 2001/29/EC, France Télévisions, in its capacity as an audiovisual communication company, had the benefit of the exclusive right to authorise making its programmes available to the public online and on demand, including via the use of deep links using 'transclusion' technology.

By allowing access on its playtv.fr site since 20 November 2014 to the programmes broadcast by France Télévisions on its own Pluzz site using deep links and 'transclusion' technology without the company's authorisation, the appellant company had infringed the neighbouring rights of the audiovisual communication company owned by France Télévisions. The Court prohibited its insertion of these deep links, on pain of financial penalty. Thus the initial court's decision was upheld and the company was ordered by the Court of Appeal to pay France Télévisions 200 000 euros in respect of these practices (plus 150 000 euros on the grounds of unfair competition).

Cour d'appel de Paris (pôle 5, ch. 1), 2 février 2016 - Playmedia c/ France Télévisions

Court of appeal in Paris (section 5, chamber 1), 2 February 2016 - Play Media vs. France Télévisions

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