



Anne-Katel MARTINEAU

akmartineau@medias-tic.com

Has The Court Of Justice Of The Eu Opened A Breach In The Protection Of Copyright In France? *By Anne-Katel MARTINEAU, Attorney at Law, Paris Bar*



The publication of digital works (articles, images or videos) on the Internet is an essential part of corporate marketing strategies. However, the risks of infringement of copyright due to the publication of protected works are often disregarded. These risks can be difficult to grasp because once uploaded on a website, these works can easily be copied and shared on other websites and social networks. Once it has been communicated online, can a work be shared on the Internet without limitation? French courts offer a broad protection which covers all kinds of works and means of communication. However, recent decisions of the Court of Justice of the EU (CJEU) are challenging the boundaries of copyright protection on the Internet.

How are works protected on the Internet by copyright law in France?

Under French law, the reproduction or representation of a work without the consent of its author is consid-

ered an infringement of copyright, which can be punished by three years imprisonment and a €300,000 fine¹. To these sanctions can also be added damages for the infringement of the author's economic rights, as well as separate damages for the infringement of the author's moral rights. French courts apply these sanctions to the reproduction of works online whether they are directly uploaded online or copied from another website.

On July 12, 2012², the "*Cour de cassation*" (French Supreme Court) held that the company *aufeminin.com* that had uploaded online photographs without the photographer's consent and the company Google which was reproducing these pictures in its search

engine Google Images were both infringing the author's rights. In two other cases held on 12 July 2012³, the *Cour de cassation* also found that reproducing digital works with the "*embedding*" technique was infringing copyright. The "*embedding*" or

"*framing*" technique consists of reproducing an extract of a digital work which contains a hyperlink to visualize the content hosted on another website without having to go on that website. In these two cases, the Court found Google Inc. and Google France liable of copyright infringement for providing links enabling to watch a movie on the website www.video.google.fr via the embedding technique.

Under French law⁴, the website "*editor*" (person who has an editorial control on the contents published online) is liable for all the content published on his website; the website "*host*" (who only exercises a control on contents after they are published) is liable if he fails to remove infringing content within a reasonable timeframe after being notified of the infringement.

Therefore, if an employee publishes content on the firm's website directly by uploading it or indirectly by copying it from another website, the website editorial director may be held liable of copyright infringement. However, the recent CJEU decisions

provide a more restricted protection of copyright on the Internet.

What are the new boundaries of the protection of copyright according to the CJEU?

In the "*Svensson*" case, the CJEU established on February 13, 2014⁵, in a preliminary ruling procedure, new rules regarding hyperlinks and copyright. Swedish journalists, who had their articles published in a magazine and on the website of this magazine on a freely accessible basis, brought an action against another website which provided hyperlinks towards their articles without their consent. The CJEU held that providing hyperlinks which redirect internet users to digital works available on a freely accessible basis on another website does not constitute an "*act of communication to the public*" within the meaning of EU law⁶ because the works are not made available to a "*new public*". Therefore, pursuant to this EU law interpretation, anyone may, without the consent of the copyright holders, publish hyperlinks towards digital works as long as they are published on another website





without any specific restriction (payment or password requirement for example).

Pursuant to EU copyright law, if protected works have already been made freely accessible on another website by copyright holders, you may publish hyperlinks towards these works without having to ask for the right holders' consent. However, this right to provide hyperlinks applies to protected works made available online by the right holders. If you publish a link towards protected works uploaded unlawfully, you may be held liable of copyright infringement. Therefore, it is only if you willingly publish your works online without any restriction that everyone will be allowed to publish hyperlinks towards them without needing an authorization.

The "*Svensson*" case regarded only hyperlinks, but in its "*Bestwater*" order of October 21, 2014⁷, the CJEU extended its scope to cover hyperlinks using the "*framing*" technique. In a preliminary ruling procedure, the Court was asked by a German court if providing on a website a hyperlink

using the framing technique was an "*act of communication to the public*" under EU law which required the consent of the right holders. A video had been embedded on two websites without the copyright holders' consent. The CJEU found that providing a hyperlink towards protected works with the framing technique did not require the copyright holders' consent, if the protected works were not made available to a new public or by different technical means.

Therefore, many have considered that you could now avoid copyright protection by using the framing technique: if you don't copy directly a protected work on your website, but only show an image of the work containing a hyperlink towards it using the framing technique you wouldn't need the right holders' consent as long as the work is already freely available online...

However, the condition of the "*Svensson*" ruling that the protected work should have been initially made available online with the right holders' consent should still apply. So before

embedding protected works, you should make sure the works were initially communicated with the right holders' consent.

Moreover, it is not certain that the interpretation of the CJEU applies to all protected works. In the "*Bestwater*" case, one had to click on the embedded link to watch the video. When pictures are embedded, you see the entire work without having to click on a link, so applying the "*Bestwater*" interpretation to pictures purely circumvents the author's reproduction right. This interpretation of the EU Directive 2001/29 seems in contradiction with its initial purpose to ensure a high level of protection of author's rights in the EU.

The latest cases of the French Supreme Court consider that embedding protected works infringes copyright and it is still uncertain to what extent French courts will follow the CJEU interpretation.

The CJEU has recently held twice that EU Member courts may adjudicate on the infringement of a copyright

protected within their jurisdiction, but that their jurisdiction is limited to the damage caused in that member state. On October 3, 2013⁸, the CJEU found that a musician could bring a claim before French courts against the reproduction of his works without his consent on a CD pressed in Austria and marketed by United Kingdom companies on their websites because they were accessible in France. On January 22, 2015⁹, the CJEU found that Austrian courts could adjudicate on the reproduction of photographs by a German firm on its German website because the website was accessible from Austria. Following this CJEU case law, French courts may adjudicate on damages caused in France by any infringement of copyright on a website accessible in France, and the *Cour de cassation* already applied these jurisdiction rules in three cases held on January 22, 2014. Pursuant to Article 8-1 of the Rome II Regulation, French courts will logically apply French law to the copyright infringement in France.

Therefore, if you publish articles, images or videos online, you should



verify whether they are copyright-free, and if they are not, it is always safer to obtain the right holders' consent before publishing. This consent can be obtained by signing a written assignment of rights which includes specific provisions such as the extent of the assigned rights and assignment duration.

Pursuant to the latest CJEU case law, if you intend to share works that are already online via hyperlinks or the framing technique, you should verify if the works were uploaded with the right holders' approval and if they are accessible without any limitation. If you are uploading works which are not yet online, you will need the right holders' consent.

Regarding the uncertainty under French law, you should try to obtain the right holders' consent even to publish via framing technique. Moreover, you should bear in mind that no matter how you publish protected works, you should always respect the authors' moral rights.

If you are an author and some of your works are published without your consent on a website accessible from France, you can bring an action before French courts for the damages caused in France by the infringement or of course negotiate a settlement agreement.

Anne-Katel Martineau is a French lawyer at the Paris Bar. She holds a Masters degree in Information Technology law and Intellectual Property and has ten years of experience in the acquisition and protection of intellectual property rights and information technology law. She has a cross-cutting approach to digital media, entertainment and technology.

After working for major law firms in Paris renowned for their IP, IT and media law practice, she seized the opportunity to accompany two of her clients to the USA in 2007 where she worked in New York. When she came back to Paris, her entrepreneurial spirit encouraged her to establish her own law firm - MARTINEAU AVOCATS- MEDIASTIC, in Paris.

MARTINEAU AVOCATS - MEDIASTIC specialized in digital law has an important international practice and works with correspondents in several EU countries and the USA.

Anne-Katel Martineau is a member of the Copyright Society of the USA.

1. Articles L.335-2 and L.335-3, Intellectual Property Code
2. Cass. 12 July 2012 (n°11-15165 ; 11-15188)
3. Cass. 12 July 2012 (n°11-13666 ; 11-13669)
4. Law n°2004-575 21 June 2004 (LCEN)
5. C-466/12
6. Directive 2001/29/EC
7. C-348/13
8. C-170/12
9. C-441/13

