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**Computer Law
&
Security Review**

European national news[☆]



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ABSTRACT

Keywords:

Internet
ISP/Internet service provider
Software
Data protection
IT/Information technology
Communications
European law/Europe

The regular article tracking developments at the national level in key European countries in the area of IT and communications – co-ordinated by Herbert Smith LLP and contributed to by firms across Europe. This column provides a concise alerting service of important national developments in key European countries. Part of its purpose is to compliment the Journal's feature articles and briefing notes by keeping readers abreast of what is currently happening “on the ground” at a national level in implementing EU level legislation and international conventions and treaties. Where an item of European National News is of particular significance, CLSR may also cover it in more detail in the current or a subsequent edition.

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1. Belgium

1.1. *The Brussels Court of First Instance finds that search engines may benefit from the safe harbours under the e-commerce Directive*

This case involved actions by claimant-book authors against various websites for copyright infringement because those websites were copying and communicating excerpts of their books without permission, with the excerpts appearing in Google search results. Upon the claimants' request, Google removed the offending URLs. However, the claimants were not satisfied and took the case to court, seeking further relief through (i) an order that Google Inc. and Google Belgium remove from their websites any links to web pages that contain infringing content and prevent any further recurrence during 18 months following the date of the ruling, and (ii) an award of damages to the claimants.

In its ruling of 4 December 2013, the Court of First Instance of Brussels made reference to the European Court of Justice's decision of 23 March 2010 for the cases C-236/08, C-

237/08 and C-238/08, in which it was held that Google's search engine activity is purely technical, automatic, and passive, and that Google has neither knowledge nor control over the information transmitted or stored. The Brussels Court ruled that for the purposes of Article 18 of the Belgian legislation of 11 March 2003 on certain legal aspects of information society services (the “e-commerce Act”) (which implements into Belgian law the EU e-commerce Directive 2000/31/EC of 8 June 2000), such activity constitutes a mere conduit. Furthermore, in the current case, Google was found not to be liable because it (i) does not initiate the transmission; (ii) does not select the receiver of the transmission; and (iii) does not select or modify the information contained in the transmission. Also, each time Google was notified about the infringing content it disabled access to the information which was being displayed unlawfully within a reasonable time. Since the claimants were unable to show any negligence on the part of Google, the Court rejected their damages claim. The Court added that the general rule of tort liability set out in Article 1382 of the Belgian Civil Code does not apply because of the special liability regime under the e-commerce Act which was in application in this case.

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The claimant's other claim, for the imposition on Google of a temporary monitoring obligation of all URLs used in order to prevent any future copyright infringement was also rejected since it would constitute a violation of Article 21(1) of the e-commerce Act (which implements Article 15(1) of the e-commerce Directive) which states that: "service providers shall not have a general obligation to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity". Moreover, the Court found that a search engine is not able to assess the content of a web page and to make—on its own initiative—a notice about a copyright violation. Although Article 21 of the e-commerce Act further says that the prohibition of any general monitoring obligation "does not exclude the right of the competent judicial authorities to impose a temporary monitoring obligation in a specific case, if an act enables this possibility", the Court refused to accommodate the claimants' demand under the Belgian Copyright Act (BCA). According to the Court, the cease-and-desist proceedings set out in Article 86ter of the BCA may not justify any positive injunction of prior monitoring of web content. The Court stressed the fact that the plaintiffs did not invoke any other legal provision to support their demand.

Finally, it is noteworthy to mention that the Court found that it is the web browser—and not the search engine—that displays the web page on the screen of the user. The Court also dismissed the action against Google Belgium since this local subsidiary of Google Inc. does not operate the search engine's activity which was at issue in the case.

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2. Denmark

2.1. The Danish implementation of the consumer rights directive

A new Danish Consumer Contracts Act (the "Act") has been enacted and is effective as of 13 June 2014. The Act improves and expands the rights of the consumer, while increasing obligations for the trader and makes specific changes in relation to sales of digital content.

2.1.1. General changes

The Act implements the Consumer Rights Directive (2011/83/EU). The major changes made to the current Consumer Contracts Act are:

- The information requirement in consumer sales is expanded and now covers both distance and regular sales, where it used to only cover distance sales.
- If goods have been marketed in Danish, all information must be provided in Danish, unless the consumer has given express consent to receive it in another language.
- Rights of cancellation for consumers are expanded.

2.1.2. Special regulation of digital content

The Act introduces new special regulation concerning sale of digital content. Digital content is defined by the Consumer

Rights Directive as "data which are produced and supplied in digital form". Computer programs, apps, games and music are mentioned as examples of digital content.

This specific regulation relating hereto prescribes that the trader must:

- Provide specific information about the functionality of the digital content and whether there are any technical limitations imposed by area codes, piracy protection etc.
- Provide information about the digital content's interoperability with other software and hardware.
- When the digital content is delivered, provide a copy of the consumer's acceptance and acknowledgement of the lapse of the cancellation right.

2.1.3. Return of used goods

Under the current Danish Consumer Contracts Act, consumers can return goods after the packaging has been opened if this was done solely to determine the use, properties, or kind of product. The Act grants the consumer extended rights to return following slight use.

This return-right does not apply to computer software. However, this exception only applies if the trader, in accordance with his duty to disclose, has informed the consumer this limitation.

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3. France

No contribution for this issue.

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4. Germany

4.1. Parents not liable for copyright infringements by adult children

On 8 January 2014, the German Federal Court of Justice (*Bundesgerichtshof*) issued a landmark ruling on parental liability for illegal file sharing by the adult children of parents. The Court found that the owner of an internet connection is not liable for illegal file sharing by their adult sons and daughters if the owner has no indication that the connection is being used to commit infringements.

In the case before the Court, the holders of exclusive rights to certain copyright protected material filed a claim against the stepfather of a 20-year-old adult who had used his stepfather's internet connection to make over 3000 copyrighted audio files available on a file sharing platform. The claimants held the stepfather is responsible for the copyright infringements as he had made the internet connection available to his stepson, thereby creating a risk of copyright infringements. The lower courts had shared the claimants' view that the stepfather was

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