

UNSIGNED COPY

V.S. 2192/99

IN THE MATTER OF:

1. IFPI V.Z.W., established at Almaplein 3, b5, 1200 Sint-Lambrechts-Woluwe,
2. POLYGRAM RECORDS N.V.
established and trading at Woluwedal 34/1, 1200 Sint-Lambrechts-Woluwe, Brussels Commercial Register no. 316.152;
Claimants, of Counsel, Maître S. EVRARD, acting for Maître B. MICHAUX, attorney of Tervurenlaan 268A, 1150 Sint-Pieters-Woluwe;

v.

BELGACOM SKYNET N.V.
established and trading at Avenue E. Jacqmain 177, 1030 Brussels; Brussels Commercial Register no. 611.237;
Defendants, of Counsel, Maître PETERS, attorney of Chaussée de La Hulpe 177/6, 1170 Brussels, who also appears for Maître A. STROWEL, attorney established at the same address;

Having regard to the provisions of the act of 15 June 1935 concerning the use of languages in legal matters;

Having regard to the registered writ dated 26 February 1999;

Having regard to the judgement dated 30 June 1999, ordering reopening of the hearing:

Having regard to the pleadings by the parties;

Whereas the claim concerns:

- an order that the defendants, by knowingly storing information in their server which gives rise to unlawful electronic distribution of musical recordings from the catalogues of the second claimants and of the members of the first claimants, are acting in conflict with fair trading practice within the meaning of article 93 of the Trade Practices Act (WHPC), whereby damage may be caused to the professional interests of the claimants,
- the defendants to be ordered to cease immediately from these practices, on penalty of a fine of BEF 500,000 per day or part of a day during which the defendants act in conflict with the judgement;
- in accordance with article 99 of the Trade Practices Act (WHPC), publication to be ordered of a summary of the judgement on the "home page" of the defendants' site, and in five dailies and journals at the claimants' choice and request, the cost of publication and due translation being repaid by the defendants on presentation of a pro forma invoice;

Whereas the claimants, who say that the first claimants are a professional association within the meaning of art. 98 (3) of the act of 14 July 1991 concerning trade practices and consumer information and consumer protection and who combine the leading producers and distributors of phonograms (i.e. musical recordings), while the second claimants, a member of the first claimants, are the lawful distributors in Belgium of CDs containing recordings of leading artists (pop group

U2, George Michael, etc), argue in the writ that they have ascertained that the defendants are guilty of a breach of art. 93 of the Trade Practices Act (WHPC), this breach being described as follows:

- the defendants are an "Internet service provider" who both offers access to the Internet and "hosts" Internet sites (i.e.: places its server or computer infrastructure at the disposal of third parties with a view to messaging on the Internet);
- the defendants "host", amongst other things, an Internet site known as "Somnus" and another named "freemusic";
- sites such as Somnus offer hyperlinks (i.e. electronic references) to sites on which unlawful activities are conducted;
- the illegal activities consist of electronic distribution of musical recordings, including performances by the pop group U2 and George Michael, to the public without the consent of the legal beneficiaries, including the producer of the original musical recording; these recordings are digitalised and are referred to under the term "MP3" (referring to a compression technique); "MP3" files automatically imply unauthorised performances except in exceptional cases, e.g. if they refer to the own productions of the site operator (which is not the case at present);
- the claimants have in vain called on the defendants to remove these hyperlinks, by letters from their counsel of 5 January and 25 February 1999;
- the defendants were already previously given notice of similar events, so that (if necessary) they were aware of the illegal character of this electronic distribution under the term "MP3" files;
- "Internet service providers" such as the defendants today possess "MP3" file scanners that enable "MP3" sites and links to be identified;
- according to the claimants, this means that the defendants continue to store information on their "server" giving rise to illegal activities;

the claimants deplore this attitude all the more since the defendants were expressly notified of the above facts and called upon to terminate them; the sites in question hosted by the defendants further state: "please be aware of any copyright violations";

the claimants regard such conduct by the defendants as in breach of fair trading practices (art. 93 WHPC);

they stress that this deed is such as to cause possible damage (and has already done so) to their professional interests;

Whereas the defendants, on the merits, argue that this Court has no jurisdiction to decide on this claim in accordance with article 96 WHP;

in the alternative, they argue, on the one hand, on the basis of the same exception under article 96 WHP and, on the other, through the absence of interest and capacity, that the claim should be rejected as inadmissible;

they further argue that the claim is unfounded;

they ask the Court to take note of the fact that an intermediary such as themselves providing access and/or hosting has no obligation whatever to check the contents of the sites to which they provide access or which they host so that they cannot be held directly liable for the encroachment, as a result of such information made accessible or hosted, of any legal obligation whatever or of any subjective third party right whatever;

the defendants, further in the alternative, plead that the request to impose a fine and publication must be declared unfounded;

1. Competence

Whereas articles 95 and 96 of the Trade Practices Act read:

- 95. The presiding judge of the commercial court will ascertain the existence and order the cessation of an act, even if covered by criminal law, that infringes the provisions of this act;

- 96. Article 95 does not apply to cases of imitation that fall under the acts concerning patents of invention, trade or service marks, drawings or models and copyright (and neighbouring rights);

Whereas a claim to cessation in accordance with art. 95 of the Trade Practices Act (WHPC), based exclusively on acts which by their nature must by virtue of the provisions of the Copyright Act 1994 be regarded as imitation of copyright or neighbouring rights cannot be upheld (Cass. 19 March 1998, T.B.H., 1998, 339);

Whereas the exception contained in article 96 HWP to the rule under article 95 HWP must be restrictively interpreted;

breach of copyright and/or on neighbouring rights raised in proceedings concerning alleged unfair trade practices cannot result in the court considering the action declaring itself incompetent by virtue of the said article 96;

whereas, in the present case, the claim does not extend to terminating an act of imitation but to unlawful commercial acts, deliberately promoting acts of imitation committed by third parties within a commercial business; no infringement is directly claimed of copyright or neighbouring rights, except incidentally, especially when examining potential unfair practices;

Whereas we regard ourselves competent to consider the dispute;

2. Admissibility

Whereas article 98 (1) of the Trade Practices Act (WHPC) states:

"98. 1. A claim based on article 95 will be introduced at the request of:

1. The interested parties;"

Whereas the first claimants, who by virtue of their articles enforce the rights and interests of, in particular, leading producers and distributors of phonograms and of all those who participate in Belgium in the activities of the phonographic and audio-visual industry, are thereby entitled to resist actions that threaten the commercial interests of the said persons;

the interests in question are affected in Belgium;

the defendants, in fact, are a Belgian "SERVICE PROVIDER";

the interests of the musical industry - to some extent - in Belgium are also affected; the same argument applies to the admissibility of the claim made by the second claimants, the distributors in Belgium of CD discs, and members of IFPI;

Whereas the claim is admissible, as far as the claimants are concerned, and is also so insofar as it is made against the defendants, contrary to the arguments put by the latter;

after all, the claim is aimed at stopping an alleged unfair trading practice;

the defendants, as far as can be ascertained, are the only persons who can put up a defence in this connection;

the fact that others might also be held liable, especially in connection with the illegal distribution of music, does not affect the specific liability of Skynet;

the plaintiffs may take action against any person guilty of unfair acts which enable or help to enable infringements of copyright; any person must within his own area ensure that no infringements are committed on the Internet;

the claimants correctly comment with regard to this defence that this part of their arguments, which formally affects the admissibility of the claim, in fact concerns its merits;

3. With regard to the merits

Whereas the defendants, in connection with the basis of the case, argue that they cannot be accused of any infringement of fair trading practices, as described by the claimants in their writ and made clear in their pleadings, in brief, deliberate collaboration with the illegal activities of customers, while a careful trader would take steps in such a case;

the defendants dispute that they have any obligation to examine the contents of a server;

according to them, there can be no question of any "joint liability", the more so since the "hyperlinks" mentioned in pleadings are simple references that permit switching to the information referred to;

the content to which reference is made and with which, moreover, they have nothing to do, has not been demonstrated as unlawful;

Whereas the proceedings concern indirect infringements, namely the provision of a technique (website hosting) for providing information on the Internet;

the defendants may be held liable for these infringements as vendor, if as in the present case, after having had their attention drawn to the suspect activities, they do not remove the "links" in question;

in deciding in this case, we declare our preference for the decision of the District Court of The Hague given on 9 June 99, where it states that "Service providers by maintaining a "link" on their computer system without the claimants' consent which on being activated initiates the duplication of works to which the claimants have copyright on the screen of the user's computer, act unlawfully if and insofar as they are notified of the presence thereof, and further if the accuracy of such notification cannot reasonably be doubted and the Service providers do not then proceed as rapidly as possible to remove the link from their computer system";

Whereas this argument implies that the pure "keeping of a link" (and not actually creating the link) gives rise to the provider's liability if, as in this case, the linkage can result in a breach of copyright;

the notification is relevant, the accuracy of which cannot reasonably be doubted;

there is no room in the present case for doubts, as deliberate linkage has occurred to well known web pirates (illegal MP3 files); the joint liability of the defendants in making illegal reproductions of musical files available to the public in Belgium results in illegal exploitation in Belgium and unlawful trading;

Whereas the penalty appears justified in the present case, insofar as it guarantees that Skynet will effectively take the necessary steps in respect of specific links to which its attention is drawn and with regard to which it has received no proof of legality through its customers;

the publication measures must contribute towards stopping infringements and their detrimental consequences; they are similarly justified;

FOR THESE REASONS,

We, Jean-Marie LAHAYE, Deputy Presiding Judge at the Commercial Court of Brussels, in open session on cease and desist orders - summary proceedings court, Law Courts, deputising for the Presiding Judge who is unable to attend for good reason, assisted by Michel PLEVOETS, Clerk.

Giving judgement in the presence of the parties,
Reject all other pleadings in conflict herewith as unfounded;

- confirm that by knowingly storing information in their server which gives rise to unlawful electronic distribution of musical recordings from the catalogues of the second claimants and of the members of the first claimants, the defendants are committing an act in conflict with fair trading practices within the meaning of art. 93 of the Trade Practices Act (WHPC), whereby damage may be caused to the claimants' professional interests,

- order the defendants to cease and desist immediately from these practices, on penalty of a fine of BEF 500,000 per day or part of a day during which they act in conflict with the judgement to be given;

- empower the claimants in accordance with article 99 of the Trade Practices Act (WHPC) to publish a summary of this judgement on the "home page" of the defendants' site, and in five newspapers and journals of the claimants' choice and at their request, the costs of publication and due translation being repaid by the defendants on presentation of a pro forma invoice;

- costs against the defendants, assessed at Frs 12,756 on the part of the claimants and Frs 4,500 on the part of the defendants;

Given and decided in public session at the court concerned with cease and desist orders on 2.11.1999.

signature
PLEVOETS

signature
J.M. LAHAYE