Me Reynaert

In the case of
Google Inc

Versus

Copiepresse

We, ALBERT II,
King of the Belgians,

Make it known to all those present and to come:

The court of appeal of Brussels, 9th chamber

PRESENTED ON
11-05-2011
NOT SUBJECT TO REGISTRATION
THE RECEIVER BEX J.P.
[Signed]

Cause List No.: 2007/AR/1730

R. no.: 2011/*2999*
No.: *817*

Final judgment
Partial reformation

Copyright – private international law – application of the law of the country of origin

Copyright – reproduction in the world of information – "cached" links – counterfeiting

Copyright – news roundup – exception of quotation and news reporting exception (not)

Copyright – search engine – Information Society Services Act – not applicable
+ art. 118/2° LPCC

-5 -05- 2011

Notification art. *118/2°LPCCP* **Given on** *Copyright* 9/5/2011

following deliberations, delivers the following judgment:

IN THE CASE OF:

GOOGLE Inc., company incorporated under American law, whose registered office is located in MOUNTAIN VIEUW, 1600 Amphitheatre Parkway, 94043 CALIFORNIA (USA),

Appellant,
Respondent in the cross-appeal,

Represented by Me Erik Valgaeren and Me Audry Stevenart, attorneys in 1000 Brussels, rue de Loxum, 25,

Pleading attorneys: Me Erik Valgaeren, Me Audry Stevenart and Me Nicolas Roland,

VERSUS:

1.- COPIEPRESSE, association trading as a limited liability cooperative society whose registered office is located in 1070 Brussels, boulevard Paepsem, 22, registered with the Crossroads Bank for Enterprises under number 0471.612.218,

Respondent,

Represented by Me Bernard Magrez, attorney in 1180 Brussels, avenue Winston Churchill, 149,

2.- SOCIETE DE DROIT D'AUTEUR DES JOURNALISTES (SAJ for short), association trading as a limited liability cooperative society whose registered office is located in 1150 Brussels, avenue Roger

Vandendriessche, 36, registered with the Crossroads Bank for Enterprises under number 0455.162.008,

3.- ASSUCOPIE, association trading as a limited liability cooperative society whose registered office is located in 1342 Ottignies-Louvain-la-Neuve, rue Charles Dubois, 4/003, registered with the Crossroads Bank for Enterprises under number 0466.710.748,

Respondents,
Appellants in the cross-appeal,

Represented by Me Carine Doutrelepont, attorney in 1030 Brussels, square Vergote, 20

Pleading attorneys: Me Carine Doutrelepont and Me Jean-Roland Hubin

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I.- DECISION HANDED DOWN

The appeal is directed against the judgment the president of the Court of First Instance, ruling as in summary proceedings within the framework of the Copyright and Related Rights Act of 30 June 1994 (hereinafter "the LDA [loi relative au droit d'auteur at aux droits voisins]") pronounced after full argument on 13 February 2007

The parties do not produce any deed of service of the judgment in question.

II.- PROCEEDINGS BEFORE THE COURT

The appeal is lodged by petition, filed by Google with the registry of the court, on 22 June 2007.

The case was prepared for Court based on a ruling delivered on foot of article 747 § 2 of the Judicial Code dd. 17 June 2007 and on an additional ruling dd. 23

October 2008, delivered on foot of article 748 § 2 of the Judicial Code.

By statement of defence filed on 14 December 2007, SAJ and Assucopie filed a cross-appeal.

By statement of defence filed on 28 April 2008, Copiepresse filed a new claim.

These are proceedings in contradictory matters.

Article 24 of the Act of 15 June 1935 on the use of languages in judicial matters was applied.

III.- FACTS AND ANTECEDENTS OF THE PROCEEDINGS

1. Google is a search engine which allows users to find websites on the *Web*, by means of keywords. All they need to do is to type in one or several words in the search field which they deem to be featuring in the site they are looking for and Google runs through the *Web*, by means of intelligent robots, to find the content that matches the search. On the screen a certain number of sites then appear which are identified by means of a title, a few words and a URL address (e.g. www.xyz.be) which merely needs to be clicked if one wants to be automatically redirected to that particular site.

2. The mention "cached" also appears in the result.

   On its website Google gives the following description of the "cache" function:

   > "When Google explores the Web, it creates a copy of each page it has examined and stores it in a cache memory, which means that this copy can be consulted at any moment in time, and more specifically when the original page (or the Internet) is inaccessible. When you click on the "cached" link of a Web page, Google will display it as it was featured the last time it was indexed. Moreover, it is on the cached contents that Google bases itself to determine whether a page is relevant to your search. When a cached page is

> displayed, it is preceded by a framed heading which warns users that this is a cached copy of the page and not the original page, and which specifies the search criteria on the basis of which the page was included in the search results. To facilitate the use of this page, the different search terms are also highlighted in different colors."

The "cached" link directs cybernauts to the archived copy of the registered page. The advertisement featuring in the top banner is worded as follows:

> This is Google's cache of http:// [...]. It is a snapshot of the page as it appeared on [...] GMT.
>
> The "Cached" version Google offers corresponds to the page as it appeared the last time it was checked by Google. The page may have changed since that date. Click here to check the current page (not highlighted).
> This cached page may redirect you to images which may no longer be available. Click here to obtain the cached text only.
> To create a link to this page or to include it in your favorites/bookmarks, please use the following address [...]
> These search terms are highlighted: [...]

When the "cached" page is displayed on the cybernaut's screen, the graphic elements which are not directly relevant, so to speak, to the text searched (such as links to other articles, the weather forecast, the stock exchange and any advertising banners) are no longer the same as the ones that were displayed when this page was originally referenced, but those which the server of the referenced site insert, in real time. In its "cache" memory, Google only stores text excerpted from the page, converted into HTML language (which stands for *Hypertext Markup Language* which is a data format that was devised to display web pages). When the Cybernaut clicks on the "cached" link, he is directed to an archived copy of the *Web* page, registered with Google rather than to the original website of the page. But, as specified above, the graphic elements other than the text are transmitted by the publisher's server. As a result it is not unusual that the text searched for is a few days older than the other information that appears on the same page because the former emanates from the Google "cache" memory, while the latter come from the publisher's server.

3. Google also offers a service called "*Google News*".

   This service consists of a compilation of a very extensive number of articles published by the various media (the written press and televised broadcasts).

   If cybernauts look for newspaper articles concerning Mr. Verhofstadt, for instance, the following page comes up:

   [cf. print screen in judgment]

   So every result contains the title of the article that was extracted from the medium site, the name of the latter, the date of publication, the first two or three lines of the article and sometimes a photograph. The user who clicks on the result is automatically directed to the website of the medium and to the page in question.

   It is also possible to open the "*Google News*" page without using the search bar. In that case, a summary of the articles of the day appears, in the following format:

   [cf. print screen in judgment]

4. Copiepresse is the management company of the intellectual property rights of the Belgian publishers of the French and German-speaking press.

   On 9 February 2006, it filed a descriptive distraint petition with the distraint judge of the Court of First Instance of Brussels. It deems that the "*Google News*" service reproduces a significant part of the articles its members have published on their respective sites without permission. It also challenges the fact that Google stores these articles in its "cache" memory, so that any articles that have been withdrawn from the sites of the publishers can still be consulted via the Google site. As Google never sought prior permission for these reproductions, Copiepresse claims that this amounts to counterfeiting.

Under the terms of a ruling dd. 27 March 2006 this claim was acceded to and Mr. Luc Golvers was appointed as expert with a view to levying a descriptive distraint against Google. The expert filed his report on 6 July 2006.

By letter dd. 13 July 2006, counsel for Copiepresse issued Google with formal notice to withdraw the press articles (of which a list has been appended) by its members from "*Google News*" and the Google cache.

5. By writ dd. 3 August 2006, Copiepresse had Google summonsed in injunction proceedings before the president of the Court of First Instance of Brussels.

   It sought to:

   - "find that [Google] cannot exercise any of the exceptions provided for under the Copyright and Related Rights Act (1991) and the Database Act (1998);

   - find that the activities of Google News and the use of the Google "cached" notably violate the Copyright and Related Rights Act (1991) and the Database Act (1998);

   - order [Google] to withdraw the articles, photographs and graphic representations of the Belgian publishers of the French and German-speaking daily press, [it] represents, from all their sites (Google News and "cached" Google or any other name) from the date at which the ruling is served, under penalty of a fine for non-performance of two million euro per day of delay

   - Also order [Google] to publish, in a visible and clear manner and without any commentary from its part the entire intervening judgment on the home pages of Google. be and of News.Google.be for a continuous period of 20 days from the date at which the ruling is served, under penalty of a fine for non-performance of two million euro per day of delay".

   Under the terms of a judgment dd. 5 September 2006, delivered by default, this claim was acceded to, with the provision that the daily fines for non-performance were reduced to € 1,000,000.00 as far as the injunction was concerned and to € 500,000.00 as far as the publication on the Google website was concerned, and that the period of publication was reduced to five days.

6. Google opposed this decision by writ dd. 19 October 2006.

SAJ and Assucopie entered the proceedings voluntarily. The object of SAJ is the collective management of the copyright of journalists and the object of Assucopie, that of the authors of school, scientific and university publications. They sought to:

- "find that GOOGLE INC. cannot invoke any exception provided for under the Copyright and Related Rights Act (1994) and the Database Act (1998);

- find that the activities by Google News and the use of the Google "cache" notably violate the Copyright and Related Rights Act (1994) and the Database Act (1998);

- order GOOGLE INC. to withdraw from all its sites (notably Google News and "cache" Google or any other name) all the articles, photographs and graphic representations [from its members] from the date at which the ruling is served, under penalty of a fine for non-performance of one million euro per day of delay;

- also, order the original defendant to publish, in a visible and clear manner and without any commentary from its part the entire intervening judgment on the home pages of all the French-speaking Google and News Google sites for a continuous period of 20 days as of the date at which the ruling is served, under penalty of a fine for non-performance of EUR 500,000 per day of delay".

In the judgment handed down, the president of the court:

- "As far as COPIEPRESSE was concerned

- confirmed the challenged ruling under the sole provisos that

  - the original claim to the extent that is based on the Database Act is inadmissible;

  - the amount of the fines for non-performance is set at € 25,000 per day of delay.

- As far as the voluntarily intervening parties are concerned

- finds that GOOGLE cannot invoke any of the exceptions provided for under the Copyright and Related Rights Act;

- finds that the activities of Google News (i.e. the copying and making titles of articles and short excerpts of articles available to the public) and the use of the Google "cache" (i.e. the registering of articles and documents in its so-called cache memory accessible to the public) violate the Copyright Act;

- Orders GOOGLE to withdraw from all its sites (and more specifically from Google News and as far as the Google web search engine is concerned the visible cached links) all the articles, photographs and graphic representations from the authors in respect of whom the intervening plaintiffs can prove that they retain the rights;

- Rules that in that respect it is up to the intervening plaintiffs to inform GOOGLE, by e-mail to the address to be communicated by GOOGLE, of the name of the work in question with the proof that it forms part of its repertoire and that it is up to GOOGLE to withdraw the work in question within 24 hours of notification under penalty of a fine for non-performance of € 1,000 per day of delay.

- Rules that GOOGLE shall furnish the intervening plaintiffs, within 8 days of the ruling having been served, with the e-mail address to which these notifications must be sent".

7. Google appealed this decision and asked the court to rescind it.

   By means of a cross-appeal, SAJ and Assucopie asked the court to "change the challenged decision and to bring it into line with the measures Copiepresse was granted". They failed to develop this claim in their statement of defence however.

   Copiepresse filed an incidental plea seeking on order for "the precautionary attachment of all the tangible and intangible goods owned by Google, and if necessary the freezing of the bank accounts and of the other assets owned by the latter to the value of € 48,079,425.00", which is the loss it claims to have suffered as a result of the counterfeiting.

IV.- DEBATE

1.- On the procedural issues

A.- ON THE CLAIM SEEKING THE DISMISSAL OF THE COPIEPRESSE FILE OF EXHIBITS

8. On the basis that the Copiepresse statement of defence does not contain any inventory of the exhibits filed, as required by article 743 of the Judicial Code, Google asks that the file of exhibits produced by Copiepresse would be excluded from the debates.

   Google does not contest however that it received the exhibits in question by the deadlines the court had set

   Article 743, paragraph 2, of the Judicial Code, which stipulates that the inventory of exhibits should be appended to the statement of defence, does not provide for any sanctions however (Cass., [Court of Cassation], 30 October 1997, C960060N).

   It ensues therefrom that the judge can only dismiss exhibits produced by one party which do not come with an inventory if he comes to the conclusion that the supporting exhibits have not been furnished or have not been furnished on time. The only consequence of the lack of an inventory is of a purely probationary nature. The party who failed to append an inventory of its exhibits to its file cannot prove that said exhibits were effectively forwarded to its opposing party, in which case it is up to the latter, if the case arises, to forthwith – and on pain of the incident being ineffective – raise the alarm that he never received a particular exhibit, even though it is listed in the inventory (V. Pire, La procedure de droit commun [Common-law proceedings]; L'instruction du dossier et l'audience de plaidoiries [Examination of the file and the oral-pleadings hearing] no. 20, in Droit Judiciaire, Commentaire pratique [Judicial law, Practical comments], IV.2-1 – IV.2-23; cf. also Liège 21 February 1995, J.L.M.B. 1995, 1328).

   The argument is unfounded.

B.- ON THE CLAIM SEEKING THE DISMISSAL OF THE LAST EXHIBITS FROM THE RESPONDENTS

9. In its statement of defence filed with the registry of the court on 14 March 2011, Google asked that the slides which the respondents hoped to use during their arguments and that the copy of the European and French decisions which arrived after the deadline to file the statement of defence had expired would be dismissed.

   During the hearing of 14 March 2011, the parties agreed to consider the incident closed if Google would be given the right to reply at length, at the end of the pleadings.

   There is therefore no longer any point in countering the Google argument.

C.- ON THE LATENESS OF THE ARGUMENT THAT AMERICAN LAW WOULD PREVAIL

10. SAJ and Assucopie claim that Google, by invoking that the applicable law should be American law, introduces "a new fact forcing [it] to file a new claim which is [in contravention] of articles 807 to 810 and 1042 of the Judicial Code. They ask that this "claim" would be dismissed because it violates the right of appeal.

    Google does not file a claim but raises an argument.

    Moreover, by petition filed with the registry of the court on 26 August 2008, Google sought permission to file a new statement of defence, notably on the resolution of the conflict of laws in favor of American law and on the relevancy of competition law, which it was granted by ruling the court delivered on 23 October 2008 on foot of article 748 § 2 of the Judicial Code. What's more, Copiepresse, SAJ and Assucopie were the last to file their statement of defence and therefore had the opportunity to reply to the new arguments Google developed.

    It ensues therefrom that the argument is unfounded.

2.- On the admissibility of the claims filed by SAJ and Assucopie

11. The first judge found that SAJ and Assucopie did not accurately and concretely demonstrate how the copyright of one of their members was violated, which did not prevent them from filing proceedings however. It is for that reason that the injunction was limited to the pages or documents by authors in respect of whom SAJ and Assucopie could prove that they held the rights.

    Google recognizes that at least three members of SAJ are affected by the articles it inventoried in "*Google News*", but maintains that there is not one Assucopie member who has been affected, which leads it to conclude that since there is no proof that it has committed an offence against any one of its members, the claim from Assucopie should be pronounced inadmissible.

12. Under exhibit 13 of its file Assucopie files the list of the articles its members wrote, which were published in the newspapers affiliated to Copiepresse. Under exhibit 18, it also files a copy of three articles by its members which are inventoried under exhibit 13 and which have been published on the Lalibre.be site and in respect of which it is not disputed that it was inventoried by Google.

    It has therefore been established that Assucopie members are also affected by the acts it denounces. It does therefore have the interest and the capacity to file for an injunction.

    The inadmissibility argument from Google is unfounded.

3.- On the applicable law

13. The dispute involves, on the one hand, the publishers of the Belgian press, their authors and Belgian journalists (represented by their Belgian rights-management companies) who have published newspaper articles on sites operated in Belgium, whose electronic address ends in ".*be*", destined for readers or users located in Belgium and, on the other hand, an American company which operates a search engine.

    The latter is accused of having copied and published on the *Google.be* website articles and excerpts from articles without having obtained the prior permission from the publishers and authors.

    Google maintains that American law should prevail on the grounds that it is in the United States that it inserted, on its servers, the pages published on the Belgian websites of the Belgian newspaper editors.

14. Assuming that the physical location where the pages published by the members of Copiepresse would have been inserted in the *Google* search engine would be relevant to determine which law is applicable, it should first of all be established that Google does not produce a single document which corroborates that this takes place in the United States.

    It is therefore likely that it intervenes in several countries in the world.

15. The Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886 was promulgated with a view to protecting as effectively and uniformly as possible the copyright of authors on their literary and artistic works. In its article 5 it stipulates that:

Article 5
Rights Guaranteed:
1. and 2. Outside the country of origin; 3. In the country of origin; 4. "Country of origin"

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of

origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) The enjoyment and the exercise of these rights shall not be subject to any formality; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

(3) Protection in the country of origin is governed by domestic law. However, when the author is not a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors.

(4) The country of origin shall be considered to be:

(a) in the case of works first published in a country of the Union, that country; in the case of works published simultaneously in several countries of the Union which grant different terms of protection, the country whose legislation grants the shortest term of protection;

(b) in the case of works published simultaneously in a country outside the Union and in a country of the Union, the latter country;

(c) in the case of unpublished works or of works first published in a country outside the Union, without simultaneous publication in a country of the Union, the country of the Union of which the author is a national, provided that:

(i) when these are cinematographic works the maker of which has his headquarters or his habitual residence in a country of the Union, the country of origin shall be that country, and

(ii) when these are works of architecture erected in a country of the Union or other artistic works incorporated in a building or other structure located in a country of the Union, the country of origin shall be that country.

Under the terms of article 5 (4) (a) of the Convention the country of origin of the works in question is Belgium since the newspaper articles were published for the first time in Belgium.

The Convention does retain the country of origin of the work in cases where the author is not a national of this country, so when there is an element of foreign origin, reason why the authors of the convention did not want to intervene in the country of origin (F. DE VISSCHER and B. MICHAUX, *Précis du droit d'auteur [Copyright handbook]*, Bruylant, 2000, p 609).

It can be deduced therefrom that, in accordance with article 5 (3) of the Convention, protection in Belgium is governed by Belgian law.

16. Basing itself on a judgment the French Court of Cassation pronounced on 30 January 2007 (in the case of *Lamore*, no.03-12354), Google claims that the conflict of laws should be settled on foot of article 5 (2) of the Convention and that the law of the country where protection is sought is not that of the country where the harm was sustained but that of the country on the territory of which the offences took place, in this case the United States.

This judgment is irrelevant and does not apply to the facts of the case.

As Professor Jane C. Ginsburg from the University of Columbia in the United States, who has commented on French case law in relation to the scanning of books by Google (Conflict of law in the *Google Book Search*, a view from abroad, 2 June 2010, http://www.mediainstitute.org/new_site/IPI/2010/060210_ConflictofLaws.php) points out, and this in relation to the publication on *Google Images* of photographs on which no copyrights were paid (Note of observations under TGI Paris 20 May 2008, R.D.T.I. no. 33/208, pp. 508 to 520) the relevant provision in this matter is article 5 (3) and not article 5 (2) of the Convention.

Just like in the *Google Book Search* and *Google Images* cases, where French authors sought protection in France for an offence committed in France, Copiepresse and SAJ and Assucopie seek to have their works which were initially published in Belgium protected from illegal distribution in Belgium. Now, in the *Lamore* case, it involved an American author who sought protection in France for a work that was written and published in the United States. As the factual situations are not similar in nature, there is nothing to be learned from the *Lamore* judgment.

To the contrary, the heading of article 5 of the Convention is very clear and specifies that article (2) deals with the rights guaranteed outside the country of

origin, while paragraph (3) deals with the rights guaranteed in the country of origin.

17. In any event, the unlawful act is committed when protected works are disseminated in Belgium on the *Google.be* website, and it is of little relevance whether these are automatically "injected" by robots, allegedly located abroad.

As Professor Ginsburg points out (Note of observations under TGI Paris, *loc. cit*):

> "irrespective of the method of dissemination, what does matter is that the local consumer receives a copy or a representation (...). The localization ensues from acts of exploitation: does the website operator intentionally target the French public [in this case the Belgian public]? Location must be traced on the existence (or otherwise) of a local market (...). If the website targets the French public, the offence is committed in France. The issue is therefore whether Google offers its search-engine services to French cybernauts. The reply must be an affirmative one, both in respect of *Google.com* and in respect of *Google.fr*. Moreover, Google seeks advertisements from French advertisers, which confirms that there is a French market for the Google activities. The dissemination of images [in this case newspaper articles] on this market is therefore very much an act that is committed in France. Once the behavior called into question is engaged in in France, there is no need to veer the analysis towards the jurisdiction of a foreign law on the grounds that a number of acts were committed in that third country which preceded the counterfeiting located in France.

On the other hand it must be noted that in its judgment dd. 26 January 2011 (in the case from *S.A.I.F.* no. 08/13423), the Paris Court of Appeal, ruling on how to determine the country where protection is sought, in application of article 5 (2) of the Convention, reformed the judgment from the Tribunal de Grande Instance of Paris dd. 20 May 2008 on which Google based itself and ruled in law that:

> "There is no denying that within the context of the Internet the place where the event which resulted in the damage occurred is not necessarily the same as the place where the damage was sustained; in this case French law corresponds to that of the court before which the case is filed, the law of the country where protection is sought and for which it is sought, which may be the law of the place where the dealings called into question had its repercussions.

> It cannot be accepted that the connection to French territory would be insufficient for the simple reason that the facts called into question essentially originate outside of France, as it has been noted that it has not actually been contested that the law of the place where the loss may be sustained clearly has a closer proximity with the dispute.
> In that respect if the services called into question can be consulted by a French-speaking public it goes without saying that the dispute about the functioning of *Google Images* relates to services in French which is accessible to the French public and which mainly targets this public in that it is specifically accessible via the URL addresses in ".fr" (google.fr and images.google. fr); French territory is therefore unquestionably and deliberately targeted as the country where the images can be displayed and chosen with full knowledge of the facts.
> The place of connection and reception chosen by the owner of the search engine constitutes an important proximity criterion as the services put into place tend to have their effects in France and as their object as claimed by [Google] is to "facilitate cybernauts' access to information and knowledge".
> It has therefore been adequately established that the country of reception constitutes a link of proximity which is clearly more relevant than that of the country where the facts that resulted in the damage occurred in terms of assessing the present dispute.

The same reasoning can be followed in the present case because the factual situations are similar.

18. Finally, presuming that the Berne Convention would not contain the necessary clear references to resolve the conflict of law within the framework of a complex situation where the place of the infringement and that of the damage are located in two different countries, it is then up to the court to apply its national law.

In that case, one should refer to the general rule contained in article 4.1 of Regulation (EC) no. 864/2007 of the European Parliament and the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II") which stipulates:

> "Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur."

It is not appropriate in fact not to consider article 8 which deals with infringements on intellectual property right or

article 93 of the Private International Law Code because these articles use the same terms as the Berne Convention does, i.e. "the legislation of the country where [interpreted as "in respect of which"] protection is sought".

Supposing that the counterfeiting preparatory work, i.e., the injection of data into the Google servers, should be taken into consideration to determine the place of the harmful event, it would then be appropriate to find that the delict consists of a set of complex facts located in different countries (the United States in terms of the injection and Belgium in terms of the dissemination) and that one should refer to the law of the country with which the harmful is clearly most closely connected (cf. article 4 (3) of Regulation 864/2007). As already stated above, this would be Belgium, the place where the protected works are disseminated on the *Google.be* site.

Favoring the law of the place of injection may result in conferring the counterfeiter with a license of impunity because all he would have to do is to locate his servers in countries where copyright does not enjoy the same level of protection, which clearly does not tally with the objective of the Berne Convention.

Admittedly, a page that is disseminated on a site with a domain name that ends in "*.be*" can be read anywhere in the world. It is only likely to be of interest to Belgians living abroad or to foreigners who want to know what is going on in Belgium however. Their numbers are derisory in comparison to all the cybernauts living in Belgium. This mere fact does not suffice to claim, as Google does, that the "points of contact with Belgium are manifestly insufficient".

On the other hand, Google's reference to the rule in article 1.2.b of Council Directive 93/83/EEC of 27 September 1997 "communication to the public by satellite" is irrelevant to the extent that the situations are completely different, notably in terms of the risk of delocalization.

19. From all of the above it ensues that Belgian law should be applied.

The argument is unfounded.

20. So as to respect the territorial nature of the injection and to limit it to the country of origin, since Belgian law cannot govern infringements committed in every country of the world, it would be appropriate, if necessary, to define the scope of the injunction on the *Google.be* and *Google.com* sites.

4.- On the "cache" function

A. ON THE REPRODUCTION AND COMMUNICATION TO THE PUBLIC

21. It has been established that Google registers on its servers a copy of the pages which its intelligent robots come across on a regular basis when they are being inventoried within the framework of the "*Google Web*" service. It has also been established that when cybernauts click the "*cached*" link, Google transmits this copy to them.

    To decide whether Google has copied and communicated it to the public, it is of little importance whether the enclosed graphic elements (advertising, weather forecast, stock exchange and links to other articles) are transmitted by the publisher's server, as the copyright in question relates to the article journalists and scientific authors have written, and not to the other elements of the page excerpted from the website.

    Neither is it relevant whether the article is transmitted by Google in HTML language, before being transformed by the cybernaut's computer into a legible page, since the Google servers copy the pages in HTLM language, as they were published in this language by the publisher's server. It is therefore most certainly a copy of the same article, written in the same format, which Google transmits to cybernauts.

Google maintains however that it is not it that copies and communicates the work in the sense of the LDA, but the cybernaut when he clicks on the "cached" link and downloads it onto his computer. Google only provides cybernauts with the "installation" which allows them to make a copy.

22. It has not been disputed that articles from the daily newspapers enjoy the protection that the LDA has put in place for literary or artistic works.

Under the terms of article 1 of the LDA, only the author is entitled to copy his work or to authorize its reproduction, in whatever manner or form he chooses, and irrespective of whether this is done directly or indirectly, temporarily or permanently, in full or in part. Likewise, only the author is entitled to communicate it to the public by means of whatever process he chooses, including by making it available to the public in such a way that anyone can have access to it whenever and wherever he may choose.

From this provision it can be deduced that Google's registration on its own servers of a page published by a publisher constitutes a physical act of reproduction. On the other hand, the fact that Google allows cybernauts to take cognizance of this copy – which is not to be confused with the original – by clicking on the "cached" link amounts to public communication. In the digital field, the issue of reproduction arises from the moment there is a question of fixation, which makes that downloading comes under reproduction right (F. De Visscher & B. Michaux, *op. cit.*, p 71, no. 88).

Without the required intervention by Google, cybernauts would not have access to this page because, since it is a copy of the page as it was displayed at the time the robots visited the page, it does temporally no longer exist when the cybernaut is performing his search; in certain cases, there would no longer be a physical copy even once the publisher has withdrawn it from the website.

Google therefore wrongfully claims that it is the Cybernaut who copies the "cached" articles of journalists

and other authors of scientific works the publishers have published.

23. Contrary to what Google maintains, article 8 of the WIPO Copyright Treaty of 20 December 1996 does not specify that the "cached" service it provides does not constitute communication to the public. In fact it remains completely silent on the matter.

    Likewise, a service which consists of taking cognizance of an archived page cannot be assimilated to "the mere provision of installations aimed at or facilitating communication" as it has been referred to under preamble 27 of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. In fact, it would not be appropriate to confuse an instantaneous search for a page which is always available on the Internet by means of the normal "*Google Web*" service where Google does not act as a search engine with that of an old page, as it existed at the time it was visited by the intelligent robots owned by Google who thus offers and additional service.

    Finally, it is not appropriate to assimilate the Google search engine to a simply *copy-center* which puts photocopiers at the disposal of students so as to allow them to photocopy pages from books or scientific journals. In fact, in the case on hand, it is not the cybernauts who are making the copies, as students would, but it is Google who subsequently puts the copy it has made at their disposal.

B. ON THE TEMPORARY ACTS OF REPRODUCTION EXCEPTION

24. Google claims that it is entitled to benefit from the exception of the temporary act of reproduction as provided for under article 21 § of the LDA which stipulates that:

    "The author shall not be entitled to ban temporary acts of reproduction which are transitory or accessory and do not

constitute an intrinsic and essential part of the technical process and which has as sole purpose to facilitate:

- transmission in a network between third parties by an intermediary; or
- a legitimate use, of a protected work, and which does not have any independent economic meaning".

Google also invokes preamble 33 of Directive 2001/29 which provides that:

"The exclusive right of reproduction should be subject to an exception to allow certain acts of temporary reproduction, which are transient or incidental reproductions, forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made. The acts of reproduction concerned should have no separate economic value on their own. To the extent that they meet these conditions, this exception should include acts which enable browsing as well as acts of caching to take place, including those which enable transmission systems to function efficiently, provided that the intermediary does not modify the information and does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information. A use should be considered lawful where it is authorized by the rightholder or not restricted by law."

25. In computer engineering, *caching* or cache memory or cache memory is a component that temporarily stores copies of data from another data source, so that future requests (reading or writing) for these data (usually, a processor) can be served faster. The cache memory is faster and closer than the processor looking for the information. Data that may be cached may be programs or a block of images that need to be processed. (http://fr.wikipedia.org/wiki/M%C3%A9moire_cache).

The Google "cached" service cannot be assimilated to the mere caching of data as discussed under Directive 2001/19. Google itself recognizes that the cache it offers facilitates the "consulting of [a] copy at any moment in time, and more specifically in cases where the original page (or Internet) would be inaccessible".

Furthermore, Google does not demonstrate that the "caching" of the articles in question and above all the

communication to the public of these archived documents is necessary from a technical point of view to ensure the efficient transmission of the work, notably by influencing the performance and the speed at which the searches are processed.

It has therefore not been established that the service in question constitutes "an intrinsic and essential part of a technological process enabling efficient transmission in a network between third parties [the publisher, owner of the site and the cybernaut] by an intermediary [Google]".

26. What's more, one of the conditions to benefit from the exception of an act of temporary reproduction is that it must be "transient or incidental".

An act of reproduction can be qualified as "transient" in the sense of the second condition laid down in Article 5(1) of Directive 2001/29 only if its duration is limited to what is necessary for the proper completion of the technological process in question, on the understanding that that process must be automated so that it deletes that act automatically, without human intervention, once its function of enabling the completion of such a process has come to an end. (ECJ, 16 July 2009, C-5/08, *Infopaq*, point 64).

Now, it has not been contested that a "cached" copy remains available as long as the publisher keeps his article on his site, which may be for a number of days, weeks, months or years. On the other hand, it remains available free of charge, even if the publisher charges a fee for its downloading and no longer publishes it on his site. Moreover, the provisional enforcement of the judgment handed down, has shown that it is possible to delete the "cached" function of certain articles with human intervention.

It ensues therefrom that Google cannot invoke the benefit of the exception of a temporary act of reproduction as the "cached" copy cannot be qualified as transient.

5. On the "*Google News*" service.

A.- ON THE REPRODUCTION FOR LEGITIMATE PURPOSES

27. Google maintains that the acts of reproduction it is being accused of are performed for a legitimate purpose, i.e. for the purpose of access to information and this, even aside from the application of the exceptions provided for under the LDA which are not exhaustive in nature.

    It confirms that the selection of articles whose titles and short excerpts are reproduced by its "*Google News*" service features within the framework of a documentary inventory, exclusive of a substantial summary of the contents of the work and that this selection does not allow cybernauts to dispense with referring to the work itself.

    Moreover, according to the latter, the reproduction of titles is nothing other than a "footnote", a simple reference to a work which is not the same as a new act of publication.

28. If the search field which facilitates its singling out on the basis of a few keywords has not been activated, the "*Google News*" page features a summary of three or four suggestions which are all grouped according to different themes, such as "Starred", "World", "Belgium", "Business", "Sci/Tech", "Sports", "Entertainment", "Health", in other words some thirty short excerpts from articles. As the copy of the page dd. 23 November 2006, reproduced under point 3 of the present judgment, shows, each section features:

    - in bold print, the title of an article taken from one of the media;
    - the full reproduction of the first three lines of this article;
    - two other titles on the same subject, in ordinary print, which only feature the title and a reference to the publisher;
    - and finally an indication of the number of articles on the same topic.

If cybernauts click on the last option, they gain access to another "*Google News*" page on which, one after the other, all the articles in question are reproduced, in the same layout as the first excerpt, i.e. with their title in bold print and the first three lines.

Sometimes the title may have been slightly altered or one of the lines of the article may be missing, but this does not alter its meaning.

Contrary to what Google maintains, "*Google News*" is not a "signpost" which allows cybernauts to find press articles on a specific subject more efficiently, but is a slavish reproduction of the most important sections of the inventoried articles. As a matter of fact, one of the excerpts on the aforementioned page reads as follows:

> "**Kremlin accused by friends of poisoned ex-spy**:
> Le Figaro 20 Nov 2006
> Alexander Litvinenko still remains in hospital following a mysterious meeting during which he would have received information about the murder of Journalist Anna Politkovskaïa. Alexander Litvinenko was a ..."

This excerpt allows readers to find out the essential information the publisher and the journalist wanted to convey, i.e., in this case, the accusation against the Kremlin, the fact that Litvinenko is still in hospital and a reminder of the reasons why he would have been poisoned. To understand the information offered, readers do not need to read the entire article, by clicking on the excerpt, unless they wanted to get further details. Everything has in fact been summarized in the title and the first three lines which form the slogan for the entire newspaper article, and immediately grab the attention of the readers on that account.

It is even possible to change the "*Google News*" home page and to personalize it so that only excerpts from sections that have previously been selected come up, so that cybernauts can dispense with anything they are not interested in and can focus on their areas of interest instead.

29. As regards the sections of a work, it should be borne in mind that there is nothing in Directive 2001/29 or in any other relevant directive to indicate that these sections should be treated any differently from the work as a whole. It follows that they are protected by copyright since, as such, they share the originality of the whole work and they contain elements which are the expression of the intellectual creation of the author of the work (ECJ, 16 July 2009, *loc. cit.* no. 38 and 39), which is the case here.

Whatever its intentions, it is a fact that Google has *in extenso* reproduced sections of works that are protected under the LDA. In view of the broad scope that must be given to the term reproduction right, as was defined in article 2 of Directive 2001/29, it is appropriate to conclude that Google could not reproduce the titles and excerpts published by the publishers, without having obtained their prior consent first.

The right to authorize or prohibit the reproduction and communication to the public is exclusive, the exceptions and limitations to this right should be interpreted with reservation and should have been explicitly provided for. Preamble 32 of Directive 2001/29 moreover provides that the latter "contains an exhaustive enumeration of exceptions and limitations ". Now, neither the LDA nor the directive contains any general exceptions as regards the right of communication "for a legitimate purpose" on which Google bases itself. Only the exceptions featuring in articles 21 and ff. of the LDA can be taken into account and will be examined here.

B.- ON THE COMMUNICATION TO THE PUBLIC

30. Google maintains that, within the framework of the "*Google News*" service, it does not communicate the protected work to the public, but it limits itself to publishing references which allow cybernauts to gain access to the websites of the publishers.

Once again, Google confuses the "*Google Web*" and the "*Google News*" services.

As it has been demonstrated above, "*Google News*" does not confine itself to placing hyperlinks but reproduces significant sections of the publishers' articles.

So there certainly is communication to the public.

C.- ON THE EXCEPTION OF QUOTATION

31. Google maintains that, within the framework of a news roundup, it should be able to benefit from the exception of quotation provided for under article 21, § 1 of the LDA which stipulates:

> "quotes, taken from a legitimately published work, made for the purpose of a critical review, dialogue, a review, educational purposes, or in scientific works, in accordance with honest professional practices and for the lawful purpose of the goal pursued, do not adversely affect copyright. The quotes referred to in the previous paragraph shall mention the source and the name of the author, unless this proves to be impossible".

Since the LDA was amended by the Act of 22 May 2005, a quote may be inserted into a press review (A. Berenboom, Le nouveau droit d'auteur et les droits voisins, [The New Copyright and Related Rights Act], Larcier, 2008, page 172, no. 93). It is therefore appropriate to examine, on the one hand, whether "*Google News*" is a press review and, on the other hand, if the other terms provided for under the law, which are cumulative, are being adhered to.

32. The term press review has not been defined in the LDA. However, by analogy with French law (Cass. Fr., 30 January 1978), it can be accepted that a press review consists of "a conjunct and comparative presentation of various comments from different journalists on one particular theme or one particular event". In that light, it may benefit from the exception of quotation, if the following conditions have been satisfied:

    - the development by a press medium, which could not oppose the reciprocal use of its own articles by

other press bodies quoted for their own press reviews;
- the classification by theme or event: press reviews must show that a compilation effort was made which attests to classification work;
- respect for the moral and property rights of the authors: short quotes may not dispense with the readers' need to read the original article, full reference to the name of the author and the source so that readers can easily refer to it.

Now, it has been demonstrated above that cybernauts who consult "*Google News*" are perfectly informed of the essentials published in the press, and that they no longer need to check the articles themselves. So, the aim of "*Google News*" is to, to a certain extent, replace the sites of the publishers.

"*Google News*" – which is not published by a press body – could therefore be qualified as a press "roundup", which should be distinguished from a press review (as regards the difference between these two terms, cf. http://fr.wikipedia.org/wiki/Revue_de_presse).

"*Google News*" is only a reproduction of sections of press articles, classified into sections, and does not contain any comments or links between them. It has even been confirmed that this is automated, and that there is no human intervention involved. It ensues therefrom that these excerpts are not reproduced to illustrate a suggestion, to defend an opinion or to make a summary of a specific topic.

Now, the exception of quotation is only justified if the measure to pursue the goal can be justified. Quotes must be incidental, notably to illustrate a comment (A. Berenboom, *op. cit.* p 172, no. 93). This is clearly not the case here.

It can therefore not be maintained that "*Google News*" can be assimilated to a press review. In any event, this service does not correspond to the fair and standard practices the press bodies observe, when they make a press review.

33. Preamble 44 of directive 2001/29 stipulates that:

> When applying the exceptions and limitations provided for in this Directive, they should be exercised in accordance with international obligations. Such exceptions and limitations may not be applied in a way which prejudices the legitimate interests of the rightholder or which conflicts with the normal exploitation of his work or other subject-matter. The provision of such exceptions or limitations by Member States should, in particular, duly reflect the increased economic impact that such exceptions or limitations may have in the context of the new electronic environment. Therefore, the scope of certain exceptions or limitations may have to be even more limited when it comes to certain new uses of copyright works and other subject-matter.

Since cybernauts who check "*Google News*" are perfectly informed of the essentials published in the press, without having to check the articles themselves, it cannot be contested that the publishers, journalists and authors of scientific works are prejudiced within the framework of the normal exploitation of their work, to the extent that cybernauts are not necessarily directed to the original page where the article was published.

In this way publishers stand to suffer a financial loss because their advertising income is directly linked to the number of people visiting their site and the authors could complain that the integrity of their work has been violated. The terms provided for under the law (with due regard for honest practices and the absence of any violation of copyright) have therefore not been satisfied.

34. Finally, the name of the author of the article is not mentioned in "*Google News*". The fact that this press roundup was created automatically does not exonerate Google from the obligation contained in article 21, §1 of the LDA. In any event, it does not prove that this would be impossible: if it is possible, from a computer-engineering point of view, to copy a title of an article and the first lines of it – and sometimes changing them slightly – why then would the robots not be able to record the signature which either features at the start or at the end of an article?

35. From all the above it transpires that Google cannot invoke the exception of quotation provided for under the LDA.

D.- ON THE NEWS BULLETIN EXCEPTION

36. Google also invokes the benefit of the exception based on the news bulletin provided for under article 22, § of the LDA which stipulates:

> "When a work has been legitimately published, the author cannot prohibit:
> 1° the reproduction and the communication to the public, for informative purposes, of short excerpts from works or visual works in their entirety in news bulletins.

37. It was not the legislator's aim to extend the right of quotation, but to introduce an exception in favor of the news media which do not physically have the time to seek the authors' permission. This provision should therefore be interpreted with reservation, and should only apply to quotes, which in view of the need to disseminate information rapidly, could not possibly have formed the object of the author's consent (A. Berenboom, op. cit., p 173, no. 94).

    Now, Google acknowledges that the articles remain inventoried for 30 days.

    It ensues therefrom that the exception cannot apply.

    In any event, as the management companies have the authority to conclude general contracts on the exploitation of copyright with certain users – which releases the latter from seeking the prior permission from the rightholders – Google cannot maintain that it would be physically unable to obtain the permission from the publishers, journalists and authors of scientific publications: in fact all it would have to do is to conclude general contracts with the respondents which would allow them to publish article excerpts on "*Google News*".

E.- ON THE INFRINGEMENT ON MORAL RIGHTS

38. SAJ and Assucopie claimed before the first judge that the "*Google News*" service prejudiced the moral rights of authors whom they represent, in that their rights of disclosure, of authorship and integrity had been violated.

39. The admissibility of the claims filed by the management companies is no longer contested on appeal. In any event, the respondents produce special proxies from their members with a view to entrusting them with the management of their moral rights.

40. The first judge rightfully found that, in the case on hand, there was no question of the right of disclosure being violated, as the press articles had already been published on the websites of the publishers. Google is therefore entitled to invoke the rule of exhaustion as the right of disclosure can only be exercised once.

41. It has already been ruled in law above that "*Google News*" violated the right of authorship because the author's name is not mentioned.

42. As regards the right of respect for the integrity of the work, the first judge also rightfully found that, since only one excerpt is reproduced, the work had been changed.

    The mere fact that cybernauts know or should know that they only see an excerpt of an article on the screen and that they have the opportunity to take cognizance of that article in its entirety by clicking on the hyperlink, does not imply that the author has given his consent to his work being published in the form of excerpts only.

6.- As regards the extension of the claim to the "*Google News Archive*" service

43. SAJ and Assucopie ask, in the purview of their statement of defence, to have the injunction extended to the "*Google News Archive Search*" service.

Google confirms however, without being contradicted, that this service is not available in Belgium.

It is therefore appropriate to pronounce this claim unfounded or, in any case, premature, as not one single copyright violation has as yet been established in Belgium.

7.- On the three-step test

44. Article 5.5 of Directive 2001/29 containing the "three-step test" stipulates that:

> "The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

Even though when the directive was transposed into Belgian legislation, the legislator preferred not to *expressis verbis* include the "three-step test" in the law, as he deemed this to be a tool for the legislator rather than a mechanism which would allow the judge to restrict the exercising of an exception (S. Dussolier "Le géant aux pied d'argile: Google News et le droit d'auteur [The clay-footed giant: Google News and copyright] R.L.D.I. 2007, no. 26 p 74), it ensues from the above considerations that he did indeed perform the "three-step test".

In fact, it was stated above that in this case, the "cached" reproduction prejudices the normal exploitation of the work to the extent that cybernauts can have access to a page that had either been deleted from the publishers' site or which can only be accessed subject to the payment of a fee and is of a nature to cause them unjustified harm.

The same applies to the "*Google News*" service, to the extent that when authors are entitled to seek a reasonable fee for a new publication of their work in the form of a substantial excerpt, which is moreover of a nature to cause harm to the integrity of the work.

It has also been established that Google could not invoke an exception of the reproduction right and that, accordingly, its rights have not been violated. In that respect, it is appropriate to find that the dispute arose because Google refuses to enter into a reasonable agreement with the collective management companies, even though it has ample financial means to do so.

45. As regards the new copyright limitations and exceptions, not provided for under the law, which Google asks the court to deal with, it suffices to bear in mind that, when the reproduction right is an exclusive one, exceptions can only be interpreted with reservation and that it is does not come within the remit of the judiciary to take the place of the legislator in this manner.

However Google will receive a more elaborate response about the respect of the legitimate interests of third parties when the court deals with the arguments about the abuse of law, the violation of Human Rights and the principle of free competition.

8.- On the existence of the permission to reproduce

46. Google claims that it obtained the explicit permission from the newspaper L'Echo to reproduce its articles and that, in general terms, it can invoke the explicit or at least the implicit authorization from all the publishers to reproduce all or part of the articles published on their site or to "cache" them, as they did not activate the robot "meta tags" on their site or the */robot.txt* files which would ban the Google robots from inventorying them.

47. It does indeed transpire from an e-mail sent to Google, on 7 May 2004, that the daily newspaper L'Echo, a

member of Copiepresse, asked for the www.lecho.be site to be added" to '*Google news*". Likewise, in an e-mail dd. 26 January 2006, a representative from the L'Echo wrote: "I believe that our news, especially our Belgian news, would genuinely enrich your Belgian news site".

It ensues therefrom that L'Echo did give its permission to have its articles reproduced on "*Google News*".

Not having more rights than its members, Copiepresse could therefore not seek an injunction on the reproduction of the L'Echo articles on "*Google News*".

However, the permission does not extend to the "cached" service, all the more because L'Echo publishes on its site articles which can only be consulted against a fee and which could be consulted free of charge via the "cached" link.

It is therefore appropriate to reform the judgment handed down on this point, with the specification that this permission can always be revoked by means of reasonable and explicit notice, as it relates to an open-ended agreement. The filing of the Copiepresse proceedings can therefore only be construed as a statement from the L'Echo that it wishes to cancel this permission.

48. Meta tags are special tags which can be found at the top of an HTML document which notably provide information allowing search engines to index a web page.

In other words, when the "*no archive*" tag is activated, the search engine's robot is, in principle, unable to store the page in its "cache". The "robot.txt" file for its part, gives instructions to the robots authorizing or banning them from inventorying all or part of the pages of a website.

In 2006, when the action was filed, the publishers had not activated these tags, which allowed Google to inventory all their pages, notably "cached". Since the judgment was pronounced and to ensure the provisional enforcement of same, they have done that, which only allows Google to inventory pages on its ordinary "*Google Web*" service and no longer "cached". However the parties do not

explain how it would be technically possible to, via these tags, prevent Google from reproducing the titles and the first three lines of articles in the "*Google News*" service.

49. Google claims the benefit of modern marketing technologies which have developed the concept of implicit permission to collect data, called "*Opt-in*" (to subscribe) and "*Opt-out*" (to unsubscribe).

This is the manner in which personal data (and more specifically e-mail addresses) of cybernauts are collected. Cybernauts have four ways of subscribing to a distribution list. In the list hereafter, cybernauts' freedom of choice is increasingly restricted:

1/The active opt-in: cybernauts must voluntarily check a box or scroll through a drop-down list before his address (or other personal data) can be used for marketing purposes afterwards.
2/ The passive opt-in: one box has already been pre-checked or a drop-down menu is already positioned on yes (next to the question do you want to receive further information). With op-in, the cybernaut's consent is an explicit one.
3/ Active opt-out: One has to check a box or scroll through a drop-down list to be removed from the mailing list. The cybernaut's consent is deemed to be given by default, to be implicit.
4/ Passive opt-out: by registering for a service, cybernauts are automatically included in a distribution list and are not given the opportunity to change this at the time of registration. They can unsubscribe after they have registered.
The consent of Cybernauts is only sought a posteriori (http://www.journaldunet.com/encyclopedie/definition/286/33/21/opt-in_opt-out.shtml).

Since it had the technical means to browse all the publishers' sites, Google deduced that they had given it permission to reproduce their content. To summarize, its theory consists of maintaining that anything that is not forbidden is permitted, which implies that its relationship with the owners of the sites lies within the framework of the opt-out regime.

50. This theory is incompatible with the requirement of explicit permission which is inherent to copyright.

The reproduction right is exclusive and absolute. The emergence of an information society does not prevent that authors can benefit from a high level of protection (preamble 9 of Directive 2001/29), effective and rigorous (preamble 11) and a broad scope (*Infopaq* judgment, point 43).

Intellectual property has therefore been recognized as forming an integral part of property (preamble 9), and it cannot be permitted that a holder is deprived of his rights simply because he has neglected to implement a technological process or, as SAJ so colorfully puts it, that it would be "legal to rob a house of its contents because a door was left open!".

The court shares the opinion held by Professor Carine Bernault of the University of Nantes who wrote that: "subjecting copyright to technology would come down to creating a situation of dependency in respect of systems which – one knows – will never be infallible. Finally, and possibly especially, the impact of this evolution on the very nature of copyright should be examined. If it is lawful to benefit from technology and to organize its use, as it has been devised as a tool to ensure that rights are respected, it conversely seems excessive to see the condition of effectiveness in it. One should therefore refrain from trying to impose recourse to these technological measures, otherwise one could go on to consider that the rightholder who did not use the technological solution available to him to prevent his work from being exploited is deprived of all recourse against the counterfeiter. These technological measures should therefore remain at the service of the social (judicial, if you wish) rules, of the rules society has chosen. It would not be acceptable that software programs would become some sort of normalization tool of the so called information society, a technical 'law' that would be imposed surreptitiously!" (C. BERNAULT, "La tentation d'une regulation technique du droit d'auteur [The temptation to technically regulate copyright]", *Revue Lamy Droit de l'immaterial* [*Law on Intangible Rights Lamy Journal*], April 2006, p 61; cf. in that respect the

corresponding opinion held by Professor Séverine Dusollier from the University of Namur, "Le géant aux pieds argile: Google News et le droit d'auteur", same journal, April 2007, pp. 70 and ff.).

51. On these same grounds, Google fruitlessly invokes an implicit license. Moreover, article 3, §1, paragraph 3 of the LDA stipulates that contractual provisions on copy right and the way they are operated are strictly subject to interpretation.

    It ensues therefrom that the authors' explicit, unequivocal and prior permission is required before Google can exploit the articles, which is non-existent, save in the case of L'Echo within the framework of "*Google News*".

9.- On the application of the Information Services Act of 11 March 2003

52. Google claims the benefit of the exception clause regarding Internet service providers, as referred to under section 4 of European Directive no. 2000/31 of 8 June 2000 on electronic commerce, and under the Act of 11 March 2003 on certain legal aspects of information society services transposing this directive into Belgian law.

    Articles 12, 13 and 14 of the directive invoked by Google stipulate that:

    "Article 12

    "Mere conduit"

    1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network, Member States shall ensure that the service provider is not liable for the information transmitted, on condition that the provider:

    (a) does not initiate the transmission;

    (b) does not select the receiver of the transmission;

    and

    (c) does not select or modify the information contained in the transmission.

2. The acts of transmission and of provision of access referred to in paragraph 1 include the automatic, intermediate and transient storage of the information transmitted, in so far as this takes place for the sole purpose of carrying out the transmission in the communication network and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

3. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 13

"Caching"

1. Where an information society service is provided that consists of the transmission in a communication network of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission to other recipients of the service upon their request, on condition that:

(a) the provider does not modify the information;

(b) the provider complies with conditions on access to the information;

(c) the provider complies with rules regarding the updating of the information, specified in a manner widely recognized and used by industry;

(d) the provider does not interfere with the lawful use of technology, widely recognized and used by industry, to obtain data on the use of the information;

and

(e) the provider acts expeditiously to remove or to disable access to the information it has stored upon obtaining actual knowledge of the fact that the information at the initial source of the transmission has been removed from the network, or access to it has been disabled, or that a court or an administrative authority has ordered such removal or disablement.

2. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement.

Article 14

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent;

or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

53. As the first judge rightfully pointed out, in this case, it is Google's behavior which is called into question and not the content of the sites to which Google provides access.

Google is not being blamed "for not having checked the legality of the content targeted by means of inventoried hyperlinks on its services", but for the fact that it copies the articles published by the publishers on its servers itself and communicates these copies to cybernauts ("cached" service) and for reproducing, by virtue of their insertion into "*Google News*", significant excerpts from these articles, without permission and outside of the exceptions provided for under the law.

Furthermore, it must be borne in mind that the European legislator chose not to include search engines in the list of intermediary service providers who benefit from the exception clause. Article 21, 2 of the directive explicitly confirms this choice of the European legislator to the extent that it provides that the Commission will have to examine the need to adapt the directive and to analyze the need for proposals concerning the liability of providers of hyperlinks and location tool services.

As search engines do not benefit from the legal regime which is specific to technical intermediaries who enjoy immunity in principle, common law, which expects copyright to be respected by everyone, including search engines, shall prevail. (A. Berenboom, *op. cit.* p 313, no. 201).

54. In any event, as far as the "cached" service is concerned, it has not at all been established that this storing is done for the sole purpose of carrying out the transmission in the communication network and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

Google recognizes that this service has other functions, notably of allowing cybernauts to consult an (old) page when that page is no longer accessible. As stated above, this service is not similar to "caching", as it is understood in the world of computer engineering.

Moreover, the issue here is not the fact that an article is stored in an internal memory – even if it does involve reproduction through fixation – but above all that this copy is made available to the public without any hyperlink which would have provided access to the site of the publisher.

In conclusion, it has been established that the pages can remained "cached" for a very long time, which is not in conformity with the legal requirement of short-lived transiency.

It therefore ensues that the "cached" "storage" Google systematically resorts to is not really an activity which is linked to the transmission of contents across networks, i.e. to "*proxy caching*" which the directive on e-commerce refers to, but more so with an archive copy or mirror copy of the sites the search engine perused. It cannot be defended that this type of copies should be governed by the exception regime" (S. DUSSOLIER, op. cit., p 71).

55. As regards "Google News", it has been stated above that this service cannot be assimilated to a simple inventory such as "*Google Web*" and that it does not limit itself to transmitting a hyperlink to cybernauts.

In that respect, Google cannot be assimilated to a mere "host". It does not merely store information. It selects the information, classifies it in an order and according to its own method, notably by selecting one article in favor of

another by publishing it in bold print, reproduces a section and, sometimes, even changes its content.

Google is therefore not a "passive intermediary".

10.- On the application of article 10 of the ECHR

56. Google claims that the LDA, as it is interpreted by the respondents, violates article 10 of the ECHR and demands the right "to freely disseminate information";

57. Article 10, § 2 of the ECHR stipulates that:

> "The exercise of these freedoms [freedom of opinion and the freedom to receive or impart information], since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary".

In this case, there is no question of denying the public access to increasingly more information, but of checking whether an economic operator may take it upon himself to without prior consent reproduce information which has already been made available to the public by a press body. Moreover, as has been stated on several occasions, within the framework of the "cached" and "*Google News*" services, Google does not simply confine itself to inventorying hyperlinks to articles, as it does in the case of "*Google Web*"; the balance of the interests at stake which it asks the court to deal with has therefore nothing to do with the freedom to communicate this hyper link to gain access to the underlying information.

58. Supposing that the Google services called into question should be qualified as "communication of information" – which the respondents contest – it should be borne in mind that article 10, § 2 of the ECHR stipulates that the protection of the rights of others [in this case intellectual property rights which can be classified as property rights] can

justify the stipulation of a formality, condition, restriction or sanction on the freedom of the right to pass on information.

The European legislator did indeed take the fundamental freedoms into consideration, because he provides in the 3rd preamble of Directive 2001/29 that:

> "The proposed harmonization will help to implement the four freedoms of the internal market and relates to compliance with the fundamental principles of law and especially of property, including intellectual property, and freedom of expression and the public interest."

On the other hand, it cannot be disputed that respect for property right is a necessary measure in a democratic society. It is moreover guaranteed by the 1st additional ECHR protocol.

The French and Belgian Courts of Cassation admit that the right to information can be limited by the rights that authors have been guaranteed. So, the freedom to defend one's opinion and the freedom to listen to or transmit information or an idea, without fear of interference by the State and without restrictions, does not hamper the protection of the originality in a way where the author of a literary or artistic work expresses his ideas and concepts (Cass., 25 September 2003, C.03.0026.N); "[there is no] conflict with the public's right to information and culture [as a result] of the author's legal monopoly over his work [which] is an intangible asset, guaranteed by virtue of the fact that any natural person or legal entity has the legal right to have his/its assets respected, and in relation to which the legislator sets proportional limits, both in respect of the exceptions listed under article L. 122-5 of the Intellectual Property Code and in relation to the well-known abuse provided for under article L. 122-9 of that same Code" (Cass. Fr., 13 November 2003, no. 01-14.385, Bull., 2003, I, no. 229, p 181); the public's right to information hallowed by article 10 of the Convention on Human Rights and Fundamental Freedoms finds its limits in the respect for other rights which are also protected; this also applies to intellectual property rights, assets in the sense of article 1 of the additional Protocol (Cass. Fr., 2 October 2007, no. 05-14.928, www. legifrance.gouv.fr).

Finally, and contrary to what Google claims, its service is not being paralyzed by copyright, to the extent that it is free to conclude general contracts with collective management companies, which would release it from having to seek the prior permission from individual publishers, which would ensure that the latter and the authors would receive the reasonable remuneration they are entitled to. Admittedly, the "*Google News*" service is free of charge and, in Belgium, it does not contain any advertising; this fact does however not imply that the economic balance of the interests at stake would tilt in favor of Google, because it must be taken into account that this free service can only be provided thanks to the significant revenue Google generates as a result of the attractiveness of all its services and the horizontal sliding of revenue which this interactivity facilitates.

It ensues therefrom that the LDA, which transposed the directive, does not contravene article 10 of the ECHR.

11.- On the abuse of law

59. Google claims it is the victim of an abuse of law, to the extent that the publishers, journalists and authors of scientific publications are exercising their copyright purely for economic reasons, i.e. in a manner which is circuitous to its finality. It maintains that there is hardly any difference between the "*Google Web*" and the "*Google News*" services and that, accordingly, the publishers should adopt the same attitude to these two services. Finally, it confirms that the exercising of copyright ensues in a disproportionate disadvantage for Google and stems from the authors' intent to cause harm.

60. All these arguments have already been answered above.

The court points out that the "*Google Web*" and "*Google News*" services are not identical, that the reproduction of excerpts from articles in "*Google News*" is likely to prejudice the editors and the journalists and violates their copyright, notably, by depriving them of a fair remuneration.

The fact that they are seeking financial compensation in return for the permission to reproduce cannot be qualified as an abuse of copyright because the law itself provided for the existence of transferable, assignable ownership rights in accordance with the Civil Code.

It has also been pointed out that there is no disproportionate disadvantage to the detriment of Google which is always free to conclude general contracts and which should, technically, be capable of mentioning the name of authors, if they feature, on the original page.

Finally, the authors were entitled to consider that their relationship with the search engines did not feature within the framework of an *opt-out* regime. Accordingly, the fact of implementing protection procedures provided for under the LDA does not count as proof that they had the "intent to cause harm", for the simple reason that they had not activated, at the time, the appropriate tags. In this respect, it is symptomatic to find that Google blames the publishers for not having taken the technical precautions to avoid that certain pages of their sites would be inventoried, though never once bothered to seek their consent to reproduce their excerpts on "*Google News*".

The abuse of law has not been established.

12.- On the anti-competitive behavior by Copiepresse

61. Google maintains that the collective lawsuit by Copiepresse contravenes article 2 of the Competition Act [coordinated on 15 September 2006] (LPCE (loi sur la protection économique) for short) and article 81, §1 of the European Union Treaty [read 101, §1 of the Treaty on the Functioning of the European Union, TFEU, for short] and that it abuses its dominant position, which is in contravention of article 3 of the LPCE and 82 of the EU Treaty [read 102 of the TFEU] in that it pursues an anti-competitive objective.

The Google grievances read as follows:

- In relation to agreements between businesses:

  - the claim based on copyright is only a pretext to put the brakes on the activities of Google, which is seen as a competitor (point 234 of its statement of defence);
  - the members of Copiepresse would, on the one hand, collectively have taken the prior decision not to parameter their respective sites correctly to avoid that they would be inventoried in the "cached" links of "*Google Web*" and in "*Google News*", and, on the other hand, orchestrated a collective action so as to restrict competition (point 234);
  - the members of Copiepresse have, by virtue of their collective and contrived behavior, placed Google in an allegedly unlawful position, by not giving it the opportunity to know the parties of the site who did not want to be inventoried, forcing it, once the judgment handed down was pronounced, to completely un-inventory all the sites, thereby reducing the quality of the "*Google Web*" service (point 239 of its statement of defence);
  - the *leitmotiv* of the Copiepresse action is first of all financial and protectionist, to the extent that it tries to put the brakes on a new market service and to obtain additional revenue which the members would not have been able to generate on an individual basis (point 240);

- as regards the abuse of the dominant position:

  - Copiepresse artificially puts Google in an unlawful position to then resort to copyright to restrict access to the market by a new actor, perceived to be a competitor and to extract unreasonable business terms from the latter (point 248);
  - The members of Copiepresse got together to allow the inventorying of their sites so that they could subsequently eliminate the competition emanating from "*Google News*" by filing collective injunction proceedings (point 251).

62. Without dwelling on the twists and turns on competition law, notably the prior market definition Google fails to proffer and the questioning of the very existence of collective management companies which have in fact been recognized by the ECJ (cf. the *Sperziebonen* judgment dd. 27 March 1974 and the *Greenwich* judgment dd. 25 October 1979), it must first of all be noted that all these grievances stem from one and the same erroneous premise: they all presume that the publishers deliberately led Google to believe that they were adhering to the inventory *opt-out* regime by not activating the appropriate tags, so as to encourage it to commit an unlawful act before portraying itself as the victim, which would allow them to seek significant damages.

This process of intent, based on malicious dialogue, is not corroborated by any exhibit and is completely irrelevant.

To the contrary, the formal notice from counsel for Copiepresse dd. 13 July 2006 did not contain any request for damages; it simply asked for the copyright to be respected and for the articles by its members to be deleted from "*Google News*" and in the Google cache. This letter was not written or did not have the effect of chasing Google out of any market, in respect of which, for want of a definition of the markets in question, it is impossible to say whether the parties are competitors.

As to Google, it never worried about the fact that its practices might clash with the protection of intellectual property rights, even though is was already sued on this issue, in France to be precise. If it would have made contact with the publishers to seek their permission, it would have been able to conclude a general contract with the collective management companies and would thus have been able to avoid the consequences of any legal counterfeit proceedings.

What's more, it is up to the courts and not up to Copiepresse to decide whether damages are due to the authors for the counterfeiting committed by Google. For the future, it will be up to the parties to possibly negotiate a general contract which is not mandatory, because there is nothing to stop them, in the absence of permission –

which is the essence of copyright – from not inventorying the Belgian French-speaking daily newspapers if they do not wish them to be. This fact does not prejudice a global company like Google and will not stop it from developing its search engines on the market. In any event, it will always be up to the courts to decide if, on this occasion, Copiepresse was not abusing its dominant position by seeking an unfair fee, which is not the object of the present debate.

63. It ensues therefrom that not one single shred of factual evidence has been submitted about the fact that the members of Copiepresse would have entered into an agreement or would have engaged in concerted practices to prevent, restrict or falsify the game of competition or would have abused their possible dominant position by trying to charge unfair fees or by trying to limit the markets or technological development to the detriment of consumers.

    The argument is unfounded.

13.- On the precautionary attachment claim

64. In fear of Google's insolvency, Copiepresse filed a new claim seeking the authorization to levy a precautionary attachment on its tangible and intangible assets.

    This claim is unfounded.

    Copiepresse does not demonstrate that the recovery of the damages it seeks to claim from Google might be compromised by its financial situation.

    The fact that its share price plummeted as a result of the 2008 financial crisis – which was the case for every company – does not meet the celerity requirement defined by article 584, 5° of the Judicial Code. To the contrary, the share-price graph on page 54 of the Copiepresse statement of defence shows that this share clearly started to rise again from the month of March 2008.

14.- On the costs

65. In view of the complexity of the case, in which the parties exchanged 290 pages by virtue of statements of defence, it is appropriate to fix the amount of the litigation expenses sought by SAJ and Assucopie at the maximum amount sought, i.e. at €10,000.00, meanwhile index-linked to € 11,000.00. As they were represented by the same attorney, they are entitled to one set of litigation expenses only.

    As to Copiepresse, for lack of a specific claim, it is appropriate to award it the basic amount of € 1,320.00.

V.- ENACTING TERMS

For these reasons, the court,

1. **Admits the appeals and the Copiepresse cross-appeal.**

2. **Rules the appeal from Google to be marginally founded to the following extent.**

3. **Reforms the challenged judgment to the extent that it ordered "Google to withdraw from all its sites (...) all the articles, photographs and graphic representations (...)";**

   Ruling again on this point only, reforms the injunction as follows:

   Orders Google to remove from the *Google.be* and *Google.com* sites, more specifically from the "cached" links on "*Google Web*" and from the "*Google News*" service, all the articles, photographs and graphic representations from the Belgian publishers of the French and German-speaking daily newspapers, represented by Copiepresse, and from the authors in respect of

whom SAJ and Assucopie can prove to have been legally authorized, under penalty of a fine for non-performance of € 25,000.00 per day of delay, save in respect of the daily newspaper L'Echo in terms of the "*Google News*" service only.

Confirms the remainder of the judgment handed down.

4. **Pronounces the cross-appeal from SAJ and Assucopie unfounded and dismisses them.**

5. **Pronounces the new claim from Copiepresse to be unfounded and dismisses it.**

6. **Relinquishes the Google appeal costs and orders it to pay SAJ and Assucopie € 11,000.00 in litigation expenses and Copiepresse € 1,320.00.**

So judged and pronounced at the civil public hearing of the ninth chamber of the court of appeal of Brussels, on **- 5 -05-2011**

Where were present:

Henry MACKELBERT, Judge of appeal acting as president,
Marie-Françoise CARLIER, judge of appeal,
Marc VAN DER HAEGEN, substitute judge of appeal
Patricia DELGUSTE, court clerk

[Signed]
P. DELGUSTE

[Signed]
M. VAN DER HAEGEN

[Signed]
M.-F. CARLIER

[Signed]
H. MACKELBERT

Instruct and order all so requested judicial officers to enforce the present judgment, that our Attorney-Generals and District Attorneys with the courts of first instance shall uphold this and that all commanders and officers of the police shall lend their strong hand thereto if compelled to do so by law.

In witness whereof this judgment has been signed and sealed with the seal of the Court;

Certified true copy, issued to *Copiepresse*

(Approved the crossing out of *0* lines and *0* words)

Brussels, **26-05-2011**

[Stamp: COURT OF APPEAL – BRUSSELS]

The court clerk – acting head on duty
[Signed]

V. DE VIS

COURT OF APPEAL – BRUSSELS
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V. DE VIS

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L. VANPARIJS, Sworn Translator at the Court of First Instance – Leuven (Belgium).
Leuven, 09 June 2011.

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Door Ons,
- ~~de heer Roger MAES, hoofdgriffier~~
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- ~~de heer Pelgrim SCHRANCKX, griffier-hoofd van dienst~~
- ~~mevrouw Kristin GRISEZ, griffier-hoofd van dienst~~

van de rechtbank van eerste aanleg te Leuven, daartoe gemachtigd door de Voorzitter dezer rechtbank,
gezien voor echtverklaring van de handtekening van:

Leuven, de

0 9 JUNI 2011

RECHTBANK VAN 1e AANLEG LEUVEN

G. BOLLEN