Intellectual Property - Switzerland

Free pass for cunning digital content offerings in Switzerland?

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May 13 2013

On October 11 2012 the Federal Supreme Court published three decisions, all rendered in the context of criminal proceedings and related to making available encrypted pay television broadcasts.(1) The decisions all concerned merchants selling television set-top boxes (digital television receivers with a highly customisable operating system and internet access, known as 'dreamboxes') which had been modified or reprogrammed prior to sale. Consequently, and due to the alterations made by the merchants, end users could receive premium pay television content (particularly from French pay television broadcaster Canal+) that would usually be available only for a fee.

In the first two cases the cantonal court considered the merchants' behaviour to be unfair competition according to Article 5(c) of the Unfair Competition Act, which provides that anyone that, by means of technical reproduction process and without a corresponding effort of its own, takes the marketable results of another person's work and exploits them is deemed to have committed an act of unfair competition. The cantonal court did not consider the merchants' behaviour to be copyright infringement. On appeal, the Federal Supreme Court acquitted the merchants entirely.

The Supreme Court first confirmed the cantonal court's understanding regarding copyright infringment and held that Articles 10(2)(d) and 37(b) of the Copyright Act would not apply, since the merchants had not made the broadcasts perceivable, which would be a prerequisite for the criminal provisions of the act to apply. For procedural reasons, the court could not assess whether such behaviour could also be considered a violation of the copyright owners' rights to transmit broadcasts to the public.

Contrary to the cantonal court, the Supreme Court held that Article 5(c) would not apply. The court reasoned that the broadcasts were not reproduced by the merchants, but rather directly transmitted from the broadcasters to the end users. Also, it was not the encoding system that was reproduced, but rather decoding signals that were transmitted. According to the court, therefore, no marketable results of work had been taken.

Regarding the third case, the cantonal court found the merchants guilty of manufacturing and marketing equipment used to decode encrypted services (an offence under Article 150bis of the Criminal Code, which punishes those who offer to the public equipment and components or data processing programs which are designed and suitable for the unauthorised decoding of encoded television programmes or telecommunications services). The cantonal court's sentence was based on a violation of the copyright owners' rights to transmit broadcasts to the public (Article 67(1)(h) of the Copyright Act).

The Federal Supreme Court overturned the verdict. It held that the merchants did not violate the Copyright Act regarding the transmission and retransmission of broadcasts. In particular, it held that the sale of the dreamboxes did not constitute an act of retransmission under Swiss law, since the streaming of the protected content took place directly between the broadcasters and end users, and the merchants' involvement consisted of merely making available the decryption codes. Regarding the applicability of Article 150bis, the court held that any claim under this provision had already expired under the statute of limitations before the first-instance verdict had been rendered and therefore could not be considered. However, the court also said that it appeared that the merchants' behaviour would not fall within the provision. The merchants were therefore acquitted.

Notwithstanding this, these decisions should not be understood to offer a free pass to this type of business in Switzerland. Given the particularities of the cases, the following important aspects were not considered:

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- The Federal Supreme Court could not assess whether the merchants had acted in breach of Article 69a of the Copyright Act, which sanctions the violation of the protection of technological measures or information relating to digital rights management. This provision - which entered into force on July 1 2008, after the business practices had been brought to court - offers a broader scope of protection in a comparable context.

- Further, the potential applicability of Article 150bis (the production and marketing of equipment for the unauthorised decoding of encoded services) was not fully considered due to the expiry of the limitation period.

- Finally, the Federal Court could not provide guidance on the fact that even though no transmission of the digital television streams had occurred between the merchants and end users, there was an exchange of decryption data, which might itself be copyright protected. This line of argument was introduced the proceedings at too late a stage to be considered.

Therefore, to fight unauthorised or parasitic forms of commercialisation of protected content by third parties successfully, it remains highly recommendable to the owners or licensees of valuable content rights to retain legal counsel at an early stage in order to develop fitting strategies to enforce and defend IP rights.

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Endnotes

(1) See 6B_156/2012, 6B_167/2012 and 6B_584/2011.

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