

CASE TRANSLATION: FRANCE

Case citation:

Arrêt du 27 février 2013

Name and level of the court:

Cour d'appel de Paris Pôle 5, chambre 1

Date of decision:

27 February 2013

Members of the court:

Mr Benjamin Rajbaut (Presiding Judge), Mrs Brigitte Chokron and Mrs Anne-Marie Gaber (judges)

Lawyer(s):

**Me Frédéric Ingold,
Me Etienne Deshoulières**

France; copyright; probative value of official report; Afnor NFZ67-147 standard; software; internet; validity; co-author

Discussion

Whereas one must refer to the deferred judgment and to the parties' briefs for a full statement of the facts of the case and the proceedings.

Whereas it suffices to note that on 3 June 2009, Messrs. David D., Thomas M. and Pascal F. incorporated Doweb, each holding a 33% stake in the company's share capital, and Mr David D. served as manager until the General Meeting of 30 September 2010 during which he was dismissed and Messrs. Thomas M. and Pascal F. were appointed as co-managers.

The company operated a software called 'FacebookDislike' or 'Dislike', allowing its users to indicate on the web site that they do not like a publication (photo, status, etc.).

By subpoenas of 04 and 7 February 2011, Mr David D. served summons on Messrs. Thomas M. and Pascal F. to appear on a set day in court for the recognition of his copyright in the software and to obtain compensation for his loss.

Whereas the judgment handed down, in essence:

- dismissed Messrs. Thomas M. and Pascal F. of their applications for the invalidation of the subpoenas served on 04 and 7 February 2011 and of the online reports dated 4 November 2010, 13 and 24 January 2011, and 14 March 2011 for lack of probative value,

- rejected the plea of inadmissibility alleging the failure to join the co-authors of the disputed software to the proceedings,

- declared Mr David D.'s applications to obtain a copyright on the software 'Facebook Dislike' inadmissible.

Regarding the invalidity of the subpoenas

Whereas Messrs. Thomas M. and Pascal F. reiterated their preliminary application to the court to quash the subpoenas that were served on them on 04 and 7 February 2011 in accordance with article 56 of the French Code of Civil Procedure by arguing the indeterminacy of the creations claimed by Mr David D. who does not produce the claimed software code, which does not enable them to know the nature of the rights asserted, as well as the indeterminacy of the alleged infringement due to the absence of identification of the acts that were allegedly infringing, causing them a grievance as they are unable to determine the scope of the protection claimed and to know precisely the acts complained of establishing the infringement imputed to them.

Whereas Mr David D. replied that in his subpoenas he named the software, object of the claim, 'FacebookDislike', as disclosed to the public and specifically identifies the software whose source code was the subject matter of a bailiff's report dated 14 March 2011 (Exhibit No.13, regularly submitted in the first instance) and that moreover Messrs. Thomas M. and Pascal F. do not prove their grievance.

Whereas in the alternative he argues the subsequent regularization, having submitted in the first instance the source codes of all the versions of the software.

In view of the foregoing, as rightly pointed out by the trial judges, the proceedings brought by Mr David D. are not intended to compare the software, object of the claim, with a counterfeit software that was allegedly created by the defendants, but to rule on the validity Mr David D.'s claim regarding his copyright in the software 'FacebookDislike' created with the defendants.

Whereas he was not required in his subpoenas to produce the source codes of the different versions of the software in issue, but was required to ascertain the claimed work and to provide proof of his co-authorship and of the alleged harms suffered.

Whereas even though there have been several successive versions of the software, each version does not constitute a different software, but specific improvements to the initial work, and not a new creative work, remedying programming errors found upon use or allowing the software to better function.

Whereas in his subpoenas, David D. states that he developed, with Messrs. Thomas M. and Pascal F., a software called 'Facebook Dislike' consisting of a free additional programme for the online social network Facebook®; he describes the software as an additional programme adding to the profile page of users having downloaded it the functionality 'I do not like' in light of information published by another user on its profile page.

Whereas he claims in his subpoenas to be the co-author of this software programme which he says is technically composed of two complementary parts together forming the same application: a plug consisting of a programming interface add-in software and a programming interface enabling interaction of the expansion module and other computer programmes, including servers.

Whereas he also explains in his writ that he actively participated in the design of the software by writing a substantial and essential part of the source code lines and by proceeding amongst other things with the integration of their translation into twenty languages.

Whereas he adds that his name appeared in the source code, from the first edited version of the software in November 2009 to version 1.2.1 edited in August 2010, referring to this end to his Exhibits No. 5 and No. 6 (bailiff's reports of 4 November 2010 and 14 January 2011).

Whereas, finally, he argues in his subpoenas that the defendants violated his moral and economic copyrights by removing him from the running of Doweb and by removing the mention of his authorship in the source code of the software and in the general terms and conditions of use.

Whereas these findings demonstrate that the subpoenas precisely identify the creation claimed by Mr David D. under his copyrights and the alleged violations of his rights, so that the defendants were able to have knowledge of the object of his demands and prepare their defence.

Whereas, in any event, during the proceedings, Mr David D. specified in his pleadings before the trial judges that he claimed to be a co-author of the software 'Facebook Dislike', understood to be a collaborative work, and that he submitted the source codes of all available versions of the claimed software.

Whereas, therefore, the judgment that was handed down will be upheld in that it dismissed Messrs. Thomas M. and Pascal F. of their application to quash the subpoenas of 04 and 7 February 2011.

Regarding the validity of the reports of 4 November 2010, 13 and 24 January 2011, and 14 March 2011.

Whereas Messrs. Thomas M. and Pascal F. also reiterated to the court their application to quash the bailiff's online reports prepared on 4 November 2010, 13 and 24 January 2011, given their non-compliance with the jurisprudential rules and the Afnor NFZ67-147 standard of 11 September 2010 on the 'operating mode of online reports prepared by bailiffs', their direct connection to complex URLs without having gone through the normal path of a user, their failure to specify whether the computer used was or was not connected through a proxy server, and their failure to

check the DNS servers as provided in the aforementioned Afnor standard.

Whereas they also argue that the appendices to the report dated 24 January 2011 do not contain copies of the screenshots that the bailiff claims to have attached thereto. The bailiff's findings are therefore inconsistent with his operations.

Whereas they believe that these official reports are void or lack any probative value.

Whereas they also conclude the nullity of the official report of 14 March 2011, the findings of which are biased, in particular as the title of the first part of the report attributes a priori authorship of the disputed software to Mr David D. and as he proceeded to make a modification of the downloaded files to extract the source codes. The official report is void or at least has no probative value, and most of the entries are also in a foreign language.

Whereas Mr David D. replies that the bailiffs who prepared the official reports complied with all the jurisprudential rules on the probative value of online reports, the defendants merely rely on the non-binding Afnor standard, and the assessment of the probative value of the official reports is subject to a substantive examination.

Whereas, indeed, the Afnor NFZ67-147 standard invoked by Messrs. Thomas M. and Pascal F. is not mandatory and is only a set of recommendations of good practice; thus, the objections based solely on non-compliance with this standard, including for the verification of the DNS servers, are not relevant.

Whereas, moreover, in the disputed official reports, it appears that the bailiffs duly performed due diligence that is necessary and sufficient to assert the validity and probative value of an online report (description of the equipment used for the findings, indication of the IP address of the computer used to prepare the official reports, emptying of the computer caches prior to the overall findings, disabling of the proxy connection, deleting all temporary files stored on the computer and all cookies and browsing history).

Whereas, in particular, in the official report of 4 November 2010, the bailiff did indicate that the navigation software used was configured not to use a proxy server, which is sufficient to establish that the computer used was not connected to a proxy server at the time of the official reports.

Whereas the fact that during the preparation of the first three official reports, the bailiff went directly on to the online pages from URLs provided by Mr David D. without going on to the original web site, does not affect the validity and probative value of these findings, which only establish the existence of the disputed pages from those addresses whose titles, incidentally, show that they are indeed pages that the user can access from the original web sites (, ,).

Whereas the appendices to the official report of 24 January 2011 are screenshots made by the bailiff during his operations as described in the official report, even though he awkwardly called 'screen copy' what was actually a screenshot, it being pointed out that a screen copy can only be retained in digital format on a hard drive or external medium.

Whereas the official report of 14 March 2011 reveals no bias in its words, indeed by naming the first part of his report 'The disclosure of the Dislike software under the name Mr D.' the bailiff simply announced his findings of fact in the light of various internet pages viewed without giving a subjective opinion on the factual or legal consequences that may result therefrom.

Whereas the content of the folder entitled 'Internet report 140311' was not modified by the expert when he replaced in the name of each file the '.xpi' extension by '.zip' solely in order to be able to retrieve and read these files on his computer.

Whereas, finally, the fact that several items identified in the online reports are written in a foreign language does not in itself affect the validity of such reports, whose probative value depends on the substantial assessment of the legitimacy of Mr David D's applications.

Whereas, therefore, the appealed judgment will be upheld in that it dismissed Messrs. Thomas M. and Pascal F of their application to quash the official reports of 4 November 2010, 13 and 24 January 2011 and 14 March 2011.

Regarding the joinder of the co- authors

Whereas Messrs. Thomas M. and Pascal F. reiterated their pleadings before the court to declare David D.'s applications inadmissible for failure to have joined all the alleged co-authors of the disputed software to these proceedings, i.e. Messrs. Thomas M. and Anthony L., cited in the source codes as respectively translator and contributor.

Whereas they add that Mr David D. is also claiming before the court rights in the database, which would be, according to them, an inadmissible new claim on appeal.

Whereas the co-authors of a joint work must have a common purpose and have made their creations under the influence of a common inspiration and through consultation and on a sufficiently equal footing.

Whereas this is not the case of Messrs. Thomas M. and Anthony L. who have only, respectively, intervened as translator and contributor and have never claimed to be co-authors of the disputed software.

Whereas insofar as Mr David D. claims to be a co-author of the software with Messrs. Thomas M. and Pascal F. only, and insofar as the latter neither state nor even allege that Messrs. Thomas M. and Anthony L. are co-authors with them of this software, Mr David D. did not have to involve them in the proceedings.

Whereas before the court Mr David D. presents no new claim since he concluded, as in the first instance, that he is the co-author of the 'Facebook Dislike' software and holds economic and moral rights in this program.

Whereas the judgment will thus be upheld in that it dismissed the plea of inadmissibility alleging the failure to join all the co-authors of the disputed software to the proceedings and, furthermore,

Messrs. Thomas M. and Pascal F's applications to have the court declare Mr David D's new claims before the court of Appeals inadmissible will be dismissed.

Regarding Mr David D's capacity as co-author.

Whereas, first of all, Mr David D. contests the probative value of the exhibits, produced by the respondents to challenge his capacity as co-author, found in the report prepared by the digital repositories agency, a private company that has neither the capacity of sworn officer within the meaning of article L. 331-2 of the French Code of Intellectual Property, nor the capacity of bailiff.

Whereas, in the alternative, he argues that nothing in said report provides any evidence of disclosure of the software on 4 November 2009 under the name of Mr Thomas M., rejecting the probative value of various certificates produced.

Whereas he seeks the reversal of the judgment in that it did not grant his requests and recognition of his capacity as co-author of the software 'Facebook Dislike' and the ownership of his moral and economic rights in such software.

Whereas Messrs. Thomas M. and Pascal F. counter that the parties are free to produce online reports prepared by an independent third party in accordance with the technical prerequisites for any findings on the internet and that the report of the digital repositories agency prepared on 10 March 2011 not only complies with the jurisprudential requirements but also with the Afnor NFZ67-147 standard.

Whereas they hold that the exhibits produced in the discussions establish that Mr Thomas M. is the only creator of the software 'Facebook Dislike' which was disclosed by him on 4 November 2009 in his capacity as sole developer of the software on his personal account of the Mozilla Corporation web site () as this stems from the official report of 10 March 2011.

Whereas they add that to date the software is made available to users on both of Mr Thomas M's official pages, opened with Mozilla Corporation and Google Inc., where he appears as the sole creator of this software, the license to use specifying unequivocally

that he 'owns any right, title and interest in FBD or parts thereof, including, without limitation, all intellectual property rights with effect worldwide.'

Whereas they also claim that all those who worked for or with Doweb attest that Mr Thomas M. is the only software developer and has always been considered as such.

Whereas, finally, they point out that Mr David D. has provided no evidence of his involvement in the development of the software. The mere fact that he was the manager of Doweb or that he integrated alleged translations does not constitute sufficient creative input for him to benefit from the capacity of co-author.

Whereas, therefore, the digital repositories agency is a French private company playing the role of a trusted third party of the internet and whose mission is to ensure the secure exchange and archiving of digital data; this company also prepares online reports that are time-stamped.

Whereas regarding intellectual property, any kind of evidence may be used and a report prepared on the internet by a corporation having the status of a trusted third party, in full compliance with the technical prerequisites for any rigorous finding online, may be retained for simple information purposes.

Whereas it is not seriously disputed that the report prepared on 10 March 2011 by the manager of the digital repositories agency complies with all appropriate due diligence necessary and sufficient to assert the validity and probative value of an official report prepared on the internet as recalled above; furthermore such report is also consistent with the requirements of the Afnor NFZ67- 147 standard.

Whereas, pursuant to the provisions of article L 113-1 of the French Code of Intellectual Property, authorship belongs, unless proved otherwise, to the person or persons under whose name the work is disclosed.

Whereas it stems from the aforementioned official report of 10 March 2011 that the software 'Facebook Dislike' was leaked as of 5 November 2009 on the site

dedicated to additional modules to be downloaded for the Firefox® browser, by Mr Thomas M., responding as of that date in his capacity as developer to comments posted by users with respect to this software, such as translated into French.

Whereas on the site, in the 'news' section of 4 November 2009, an article by Mr Josh L. entitled 'an unofficial way to say I do not like on Facebook' introduces Mr Thomas M. as the developer of the software 'Facebook Dislike.'

Whereas on the sites used to download this software, the terms and conditions of use thereof explicitly state that Mr Thomas M. is the sole owner of the intellectual property rights in the software 'Facebook Dislike'.

Whereas, therefore, Mr Thomas M. may presume to be the author of the disputed software due to its release in November 2009, under his sole name.

Whereas to date Mr Thomas M. is still cited as the sole author or publisher of this software on the site dedicated to extensions to be downloaded for the Google Chrome® navigation software and on the site.

Whereas Mr David D. has provided no evidence to the contrary likely to rebut this presumption, indeed the official reports on the internet that he produced before the court contain contradictory information about his actual contribution to the development of this software, some calling him a publisher or producer, the same as Messrs. Thomas M. and Pascal F., while others (particularly in the official reports prepared on 4 November 2010 and 13 January 2011) only qualify him, together with Mr Pascal F., as the developer of the software, while they qualify Mr Thomas M. as being the sole creator.

Whereas the certificates issued by Mr Anthony C. on 26 September 2010 and Mr Jean-François M. on 28 September 2010 only indicate that Mr David D. programmed the translation of 'plugin' into twenty languages and performed functional tests of the 'plugin', purely technical works that do not result from particularly creative work.

Whereas the expert assessment conducted privately by Mr Leonhard E. on 21 September 2011 at the request of Mr David D. cannot satisfy the court insofar as the expert acknowledged that he had had in his possession, to perform his due diligence, only very few documents, essentially eight e-mail exchanges between Mr David D. and Messrs. Thomas M. and Pascal F., and it appears that his conclusions were only reached by extrapolating from these messages without further consideration of a technical nature.

Whereas, finally, the conversation exchanges on the internet between Mr David D. and Mr Pascal F. or Mr Thomas M. in November and December 2009 in a particularly obscure computer jargon do not prove the reality of the creative work performed by Mr David D. on the disputed software.

Whereas, therefore, the judgment will be upheld in that it declared that M David D's claims regarding copyright in the software 'Facebook Dislike' inadmissible.

Regarding the other claims

Whereas it is fair to award Messrs. Thomas M. and Pascal F. an additional overall amount of €4,000 in respect of the costs incurred by them in this appeal and not included in the costs of the proceedings, the judgment also being upheld in that it ruled on fees irrecoverable at trial.

Whereas Mr David D.'s application for payment under section 700 of the French Code of Civil Procedure will be dismissed.

Whereas Mr David D., the party losing the appeal, will be ordered to pay the costs of the appeal, the judgment also being upheld in that it ruled on the burden of the costs of the first instance proceedings.

DECISION

The court, ruling publicly and in the presence of both parties

- Upholds all the provisions of the judgment.

Adding that it:

- Dismisses Messrs. Thomas M. and Pascal F's applications for Mr David D's claims before the court,

considered by the latter as new claims on appeal, to be declared inadmissible.

- Orders Mr David D. to pay to Messrs. Thomas M. and Pascal F. the additional sum of €4,000 in respect of expenses incurred in this appeal and not included in the costs of the proceedings.

- Dismisses Mr David D.'s application for payment under article 700 of the French Code of Civil Procedure.

- Sentences Mr David D. to pay the costs of the appeal, which will be recovered in accordance with article 699 of the French Code of Civil Procedure.

The court: Mr Benjamin Rajbaut (Presiding Judge), Mrs Brigitte Chokron and Mrs Anne-Marie Gaber (judges)

Lawyers: Me Frédéric Ingold, Me Etienne Deshoulières

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