# Kluwer Copyright Blog

## France -Youtube guilty but not liable? some more precisions on the status of hosting providers

Catherine Jasserand (Institute for Information Law (IViR)) · Monday, June 18th, 2012

*"No obligation of monitoring subsequent publications is inscribed in the law; however French Courts have a tendency to impose such an obligation on hosting providers shifting from a notice and take down rule to a notice and stay down rule."*

On 29 May 2012, the Paris Court of First Instance (Tribunal de Grande Instance) issued a lengthy decision in a case opposing TF1, a French TV channel, to the platform YouTube for copyright and related rights infringements, trademarks infringements as well as unfair competition/parasitic behaviour. The procedure started in 2008 before the Tribunal of Commerce, which rejected the claims for lack of jurisdiction. The case was then referred to the Court of First Instance.

TFI and several of its affiliated entities made numerous IP claims as producers, broadcasters and also copyright holders of several TV shows and films that were available on Youtube. In its decision, the Court of First Instance rejected most of the claims since they were not sufficiently evidenced to establish the rights of TF1 and/or its affiliated companies. The Court reduced the action to 7 sport programmes for which TF1 claimed broadcaster's rights in application of Article L. 216-1 of the French Intellectual Property Code.

According to that article, a broadcasting company must give its consent for any reproduction of its programmes, sale, exchange, rental or communication to the public against the payment of a fee. TF1 also invoked a violation of its copyright for the same programmes; however the Court rejected that claim on the ground that the claim on copyright infringement could not be cumulated with a claim on a related right for the same subject matter. This statement is disputable as it is not based on any legal provision and as the subject matter of the related right at stake (broadcasting right) is different from the subject matter of the copyright. The brodcasting right relates to the programme as a message or signal; whereas the copyright relates to the programme as a protectable work. The programmes should have therefore benefitted from the two qualifications (or classifications) and received two separate (but cumulative)

protections.

After having established the ground on which TF1 was entitled to sue Youtube, the Court of First Instance ruled on the status of Youtube (hosting provider versus content provider), to determine the level of liability regarding the videos available on its platform. In its decision, the Court referred to the criteria set forth by the Court of Cassation (Nord-Ouest case) and by the CJEU (SABAM v. Netlog) to consider that Youtube had a passive role. First of all, the platform did not perform an a priori monitoring of the posted videos. Second, the selection of materials was automatically made via algorithms. Finally the fact that Youtube made profits (through the sale of advertisements) could not be considered a criterion to classify the platform as a content provider. The Court concluded that Youtube was a hosting provider subject to Article 6 of the Law on Confidence in the Digital Economy (know as LCEN) (implementing Articles 12 to 15 of the e-commerce). In application of this article, the liability of Youtube was limited to its knowledge or awareness of the presence of an illegal material on its website. And once informed, it had the duty to promptly remove it. Neither the Directive nor the French law provide precisions concerning what constitutes a prompt removal. However in the case at stake, the judges considered that removing the videos 5 days after their notification was not reasonable. Youtube was considered not having performed its duty of hosting provider.

But the Court did not fine Youtube for a late removal of the materials. Instead, the Court considered that the conditions of Article L. 216-1 of the French Intellectual Property Code (on which the claim was based) were not satisfied because the access to the platform was free! This argument does not sound very strong. The Court also added that Youtube provided the means (via its system called Content ID) to prevent a notified material to be reposted online and had fulfilled its obligations. This raises the issue of subsequent publications of a notified material and the liability of a hosting provider thereof. No obligation of monitoring subsequent publications is inscribed in the law; however French Courts have a tendency to impose such an obligation on hosting providers shifting from a notice and take down rule to a notice and stay down rule.

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