

France- Dailymotion heavily fined for the late removal of infringing content

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On 13 September 2012, three months after the first ruling in a case opposing the French TV channel, TF1, to YouTube, the Paris Court of First Instance (Tribunal de Grande Instance) issued a second judgment in a case opposing the same TV channel to Dailymotion. The facts of the two cases are quite similar but the conclusions of the Court differ. In the first case, the Court dismissed the TF1's claims (copyright and related rights infringements) although the Court acknowledged the liability of YouTube for the late removal of duly notified infringing content. In the second case, not only did the Court find Dailymotion liable but the Court also sanctioned the platform by awarding a substantial amount of damages to the plaintiffs. In 2007, TF1 and some of its affiliated companies noticed that several of their programmes had been made available, without their consent, on the video-sharing platform Dailymotion. They started legal proceedings before the Tribunal de Commerce, which dismissed the action for lack of authority and referred the case to the Paris Court of First Instance. The TV channels claimed that Dailymotion had infringed their copyright, producers' and broadcasters' related rights.

The Court first assessed the admissibility of the action before checking the role played by Dailymotion to determine the level and type of liability (publisher versus hosting provider). Concerning the TF1's rights as a producer, the Court ruled that the TV channel had justified its standing in the absence of any adverse claim on the originality of the programmes. As for its rights as a broadcaster, the Court applied Article L.216-1 of the French Intellectual Property Code, which requires the broadcaster's consent to reproduce, sell, rent or communicate its programmes to the public. The Court also checked whether the other plaintiffs had standing and either rejected their admissibility or reduced their standing to a few programmes. This issue is not interesting enough to be fully discussed here.

The Court then analysed the status of Dailymotion. The plaintiffs argued that the platform was a publisher as it had control over the materials available on its website and had also set up a search engine function suggesting keywords to Internet users looking for materials available on the platform. The Court rejected this argument. Dailymotion was not in a position to perform a general and a priori monitoring of posted materials. Regarding the search engine function, the Court considered it was a technical service falling within the competence of a hosting provider that must ensure accessibility to stored materials. As for the choice of keywords, it resulted from a technical operation automatically suggesting keywords. The Court also rejected the argument of the profits drawn from advertisements as a criterion to qualify Dailymotion as a publisher.

As a second part of its reasoning, the Court of First Instance checked whether Dailymotion could be held liable as a hosting provider. The plaintiffs had asked the Court to examine the case as an alternative. The Court reminded the safe harbour provision applicable to hosting providers. According to Article 6-1-2 of the Law on Confidence in the Digital Economy, hosting providers are immune from civil liability in the absence of effective knowledge or awareness of the illegal nature of hosted content or upon obtaining such knowledge if they promptly act to remove the allegedly illegal material or block access to it. The plaintiffs argued that no prior notification is required when a hosting provider becomes aware through circumstances of the illegal nature of materials available on its website. They also considered that once a hosting provider has been duly notified of the presence of an illegal material, it has the duty to prevent any subsequent publication of that material. The Court disagreed. The hosting provider cannot be obliged to prevent access to the material if it has not received a proper notification. Any interpretation to the contrary would subject hosting providers to an obligation of general monitoring of stored materials, which is prohibited by law and would be the same as ordering the setup of a filtering system for an unlimited period of time. The Court also mentioned that since 2007 Dailymotion had already proposed efficient solutions to prevent subsequent publications of infringing materials (by introducing fingerprints). However, the Court found that Dailymotion lacked care in closing down the accounts of the most active "uploaders" and had breached its duty of care in the removal of the regularly notified infringing materials. In the present case, the Court considered that a period of four days between the notification and the removal was too long. As a consequence, Dailymotion was fined and obliged to remove specific terms from the list of suggested keywords in its search engine box.

In one case (TF1 v. YouTube), the Court of First Instance dismissed the claims, whereas in the second case (TF1 v. Dailymotion), the Court heavily sanctioned the video sharing platform. What can explain the differences of rulings between May and September? First of all, I believe that the recent decisions of the Court of Cassation have had an impact on the second decision. On 12 July 2012, the French Supreme Court issued 4 decisions through which the Court put an end to the notice and stay down rule created by the Courts of First Instance and backed up by the Paris Court of Paris. In the present case, the Court of First Instance clearly recognized that the knowledge of Dailymotion on the presence of the infringing materials could not be assumed. The platform had to be notified. Any conclusion to the contrary would result in imposing on the hosting provider an obligation of general monitoring, prohibited by the law. The position of the Court on this issue could not be clearer. In another landmark case issued on 12 July 2012 as well, the Court of Cassation ruled that online providers could be ordered filtering keywords linking to online piracy websites in application of Article L.336-2 of the French Intellectual Property Code (providing an injunctive relief to stop copyright infringements). In the present case, the Court of First Instance applied that article and restated that Dailymotion could not be subject to an obligation of general monitoring (thus general filtering), which is contrary to law (and Article 15 of the e-commerce Directive). Besides, the recent decisions of the Court of Cassation, I also believe that another reason justifies the different ruling. The decision of May 2012 was notably criticized for the way the Court of First Instance had interpreted Article L. 216-1 of the French Code of Intellectual Property. As a consequence, YouTube was found liable (for the late removal of infringing materials) but not guilty in the absence of any applicable legal ground.

Finally the ruling raises an interesting issue, the role of the notification procedure. The e-commerce Directive does not impose such a procedure. The French legislator added an optional notification procedure contained in Article 6-1-5 of the LCEN. The article describes the different elements that allow the identification of the disputed material. The notification is only a way to assume the knowledge of the hosting provider about the presence of the allegedly illegal material on its website. However, Courts have a tendency to impose the notification procedure and to consider that any duly notified material must be removed. This interpretation of Article 6-1-5 goes against the position expressed by the French Constitutional Council in the decision reviewing the constitutionality of the Law on Confidence in the Digital Economy. According to the Constitutional Council, a hosting provider cannot be held liable for not removing a notified material if the material is not manifestly unlawful or if the hosting provider has not received a Court order to do so. Infringing content does not fall into the category of manifestly unlawful content since the illegal nature of a content needs to be assessed by a judge. Some more precisions in the law itself would be useful to have a complete notice and take down procedure.