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Discussions around a new online intermediary liability regime

Catherine Jasserand (Institute for Information Law (IViR)) · Thursday, April 14th, 2011

As a follow up to my previous post on the Google decisions, I am presenting a recent report issued by two senators (Mr. Laurent Béteille and Mr. Richard Yung) on the application of the anti-counterfeiting law (loi n. 2007-1544 of 29 October 2007 de lutte contre la contrefaçon). The report contains 18 recommendations aimed at improving the law and enhancing the protection of intellectual property (copyright, trademarks, patents) in France.

Recommendation 12 of the report is of particular interest. In order to fight cybercounterfeiting, the report proposes to adapt the e-commerce Directive (Directive 2000/31/EC) to introduce a new category of online service provider, service publishers ("éditeurs de services" in French), besides the already existing categories of hosting providers and (content) publishers. A specific liability regime would apply to this new category: stricter than the one applicable to hosting providers and softer than the one applicable to publishers. According to Article 14 of the e-commerce Directive, implemented in Article 6 of the French Law on Confidence in the Digital Economy, a hosting provider is not liable for data stored unless it was aware or informed of the illegal nature of the material and has not promptly acted to remove it or block access to it. Publishers are the ones that have control over the posted material and are therefore subject to (full) civil liability.

The senators explain that the context and reality have changed since the adoption of the e-commerce Directive. In 2000, hosting providers were only storing content and performed technical functions. Publishers on their side were creating content. Since the implementation of the Directive into French law, a new category of Internet actors has emerged: web 2.0 platforms (as well as auctions' websites). They allow users to do more than just retrieving information. They publish information, sell advertising spaces and propose services to users. They do not have merely technical activities and have a more active role than true hosting providers. The report shows the difficulty that French Courts had (and still have) to apply the liability regime of hosting providers to this new category of actors. The jurisprudence is not always consistent and the same Courts have decided that Tiscali or Google was to be considered as publishers whereas Dailymotion was only subject to the liability regime of hosting providers. The criterion of the economic benefits drawn from the sale of advertising spaces has been ruled decisive or irrelevant to qualify an online service provider as a publisher.

As a conclusion, the senators propose to create a new category of online service providers, whose definition would not be based on technical criteria but on the economic advantage they would draw from the direct consultation of hosted materials. Service publishers would have to set up an easy warning or signaling system that could be used by right holders and Internet users to notify the

presence of any content, which would seem illegal. In addition, they would have an obligation of surveillance by setting up all the necessary technical means to monitor hosted content.

Several observations can be made. First of all, this obligation of surveillance echoes the latest decisions of the Court of Appeal concerning Google. Although the Court ruled that Google was a hosting provider, it had the obligation to monitor subsequent publications of an infringing video, which had been notified (and removed) once. Following the trend developed by lower courts, the Court of Appeal has created an extra duty of surveillance for online providers, which are not merely hosting providers.

Secondly, the new obligation that would be imposed on service publishers seems to be rather close to the one imposed on content publishers. Currently content publishers have the obligation to monitor content of the pages they edit. They perform an "a priori" monitoring and filtering of posted content. Service publishers would also have to monitor content but would only be subject to a best effort obligation ("obligation de moyens") instead of the obligation to achieve a result ("obligation de résultat") imposed on content publishers. The obligation as described in the report seems to be rather vague and does not bring any solution concerning the technical means they could use to show they would have fulfilled their obligation.

More importantly, such a revision is not possible at national level without an evolution of the framework at European level. In other words, the e-commerce Directive would first need to be reviewed to introduce a new category of online service providers. It seems that the two senators have acknowledged this issue since they have stated that they plan to propose a draft law on the basis of this report but will exclude any provisions on a new category ofservice publishers.

Finally, it should be reminded that the question of the adjustment of the hosting providers' liability to web 2.0 platforms was already discussed in 2008 in an Information Report on the application of the law on Confidence in the Digital Economy (Assemblée Nationale) and in the Report on online intermediaries issued by the French Conseil Supérieur de la Propriété Littéraire et Artistique. Without a true debate at European level on this issue, neither the French Parliament nor the French Courts will be able to find an appropriate solution.

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This entry was posted on Thursday, April 14th, 2011 at 1:00 pm and is filed under France, Infringement, Liability
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