

Host : Status and liability
under French law & Bird & Bird

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Case-law on the hosting : research of the application of the host liability → Why?

- Article 6.I.2 of the LCEN of June 21, 2004, provides **liability for contents**:
 - If, once duly notified of a litigious content, the host does not react promptly to take it down.
- Case law specifies :
 - Who is the host and who is not
 - How to notify to the host the presence of the illicit content
 - The “swift/prompt” reaction of the host
 - If the host has the obligation to ensure that the content that has been taken down, will stay down (and not reappear)

More than a hundred judgements relating to the question of the host provider status have been pronounced in France since 2007...

➔ What is this case-law about?

Who can benefit of the host status ? → Five main categories of the host

1. Web 2.0
 1. Networking services (Facebook, Wikipedia ...)
 2. Video platforms (Dailymotion, YouTube ...)
2. Commercial links (Google adWords, ...)
3. Aggregators (Fizz, ..)
4. Research tools (Google, Google Image, Yahoo ...)
5. E-commerce platforms (Amazon, eBay, ...)
 - The most unstable category
 - First question : host / editor
 - Current question : host / editor / broker OR host / editor of services (CA Reims, 20 July 2010, eBay c/Hermès International) / editor of content

What kind of litigious content ?

- Denigration /Defamation
- Video / Image published without the permission of the holder of exploitation rights
- Counterfeiting products / trade-marks
- Unfair competition
- Invasion of privacy
- Offer for sale in violation of an organised distribution network

A few examples...

French humorists

- French humorists whose video have been published by users on YouTube and Dailymotion tried to engage the liability of these website in order to get damages for the losses they suffered as it is easier to sue the host than the persons who posted the videos
- Judge has to verify whether the host status apply to the service provider
- ➔ YouTube and Dailymotion have been both considered as providing host services ➔ they are not liable for the content posted by their users until they react promptly in the case of the notification of the illicit content

Dailymotion : Cour de cassation decision of February, 17th 2011

- Nord-Ouest Production and UGC Images holding the exploitation rights on the motion picture Joyeux Noël filed in 2007 a claim against video sharing platform Dailymotion for infringement and unfair competition considering that the latter was giving access to the film by streaming.
- The claim has been dismissed by the Court of appeal which applied the Law of 21 June 2004 on intermediary service providers, whose liability can only be triggered if it has not promptly removed illegal content once duly notified by a claimant (Take down notice principle). → Decision approved by the Supreme Court
- the “re-encoding” and “formatting” operations managed by Dailymotion on the content were only “technical operations which are the essence of the host provider” as well as the use of marketing and advertising spaces that “does not induce a capacity of action of the service on the content put on line”

Research tools: Paris Court of Appeal of January, 26th 2011

- The French collecting society SAIF (*la société des auteurs des arts visuels et de l'image fixe*) started proceedings in 2005 against Google France and Google Inc, contending that Google Image was counterfeiting the rights of its members on their works.
- The court decided that Google Inc and Google France should not be held liable for counterfeiting since they **are not editors nor content providers but rather intermediary service providers** according to the Electronic Commerce Directive. → The services provided by Google do not exceed the scope of a search engine functions. → Google cannot be liable for the automatic, intermediate and temporary storage of the Google images, as the storage is performed for the sole purpose of providing efficient information's onward transmission to recipients of the service.

French case-law qualifies two relevant criteria

- Activity actually practised
 - A host : the activity practised is globally the storage of information
 - Other than a host : the storage of information is “indivisible” or “secondary” to the global economical activity
- Passivity
 - Neutrality of the storage activity to the content stored
 - No ability to act on the contents
- Criteria qualified as non relevant
 - Cost of the service
 - Advertisement
 - Architecture of the website
 - Secondary services/Offered services

Thank you & Bird & Bird

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