

# in the news

## Intellectual Property / New Technologies / Media Department

### Topic of the month: The Court rules that Facebook is a provider of hosting services

In a summary judgement handed down on 13 April 2010 the Paris Court (*Tribunal de Grande Instance*) found against Facebook, the famous social networking site, on the grounds that it was hosting illegal content.

The Bishop of Soissons, a town located in the north of Paris, had objected to the presence of a photograph that was displayed on the site without his consent, on a page called "*Courir nu dans une église en poursuivant l'Evêque*" (running naked after the Bishop in a church) and to a number of unflattering comments about him.

In accordance with Article 6-1 of the French Law on Confidence in the Digital Economy of 21 June 2004 ("LCEN Law" - *Loi pour la Confiance dans l'Economie Numérique*), the claimant first sent Facebook written notice by recorded delivery (signed for), requesting the removal of the photograph and the disputed comments.

As the social platform's failed to respond, he then applied to the Paris Court in summary proceedings, on the basis of Article 9 of the French Civil Code which provides that a person has the right to privacy and to the protection of his image (*droit à l'image*), and also on the basis of Articles 29 and 24 of the Law of 29 July 1881 prohibiting public insults and incitement to hate and violence on the grounds of a person's religion. The Bishop asked the Court to order the social networking site to take down the disputed photograph and to disclose all information in its possession in order to enable the identification of the authors of the malicious comments posted on the page.

The Court found that Facebook is a provider of hosting services, on the basis of the LCEN Law, and ordered it to remove the disputed content and to disclose information enabling the authors to be identified, on penalty of a fine for non-compliance.

This decision is interesting in that it establishes that Facebook is a provider of hosting services. This appears coherent at first, given that Facebook's role is essentially a passive one: it does not choose the content of its pages, which would make it a publisher. Yet, according to the LCEN Law a provider of hosting services can only be held liable for illegal content if it has been notified thereof and has failed to act promptly to remove said content or block access to it.

However, it is rather more surprising given other recent decisions by the French courts.

In a judgement dated 12 March 2010 the Paris Court found that companies offering an intermediation platform for the sale and purchase of domain names (with a domain name parking service allowing owners to select key words that generate commercial links) should be defined as publishers.

The Court ruled that the companies did not just store information. The domain name parking activity was found to be a decisive activity, since the commercial exploitation of the pages allowed the companies to collect "a fee from advertisers for the advertising links displayed, which means that it has a direct commercial interest in the choices made when selecting key words, even if this commercial interest is very minor in the case in hand".

Similarly, on 14 January 2010 the Court of Cassation, France's highest Court of Appeal which rules on points of law only, approved a decision by the Appeal Court, which found that Tiscali Média could not claim limited liability as a provider of hosting services as it performed a publishing role, in that it enabled users to create personal pages via its site and offered to advertisers chargeable advertising spaces, which were also managed by Tiscali.

Conversely, in a decision dated 14 April 2010 in a case between Dailymotion and the actors Omar and Fred, the Court found that the site was not liable as a publisher, on the ground that the service only made the site's home page and standard display sections available to advertisers, and not the users' personal pages. It found that "*the service did not use a target advertising approach based on the user-generated content in order to capitalise on the content and to therefore select content on the basis of commercial considerations*".

The resulting new case law introduces the principle that untargeted advertising prevents a site from being qualified as a provider of hosting services.

In other words, when a provider simply sells advertising space that is unrelated to the hosted content or the profile of its members it cannot be found liable as a publisher. Conversely, if it knowingly selects the type of advertisements on the basis of the information it hosts, it may be found liable as a publisher.

The advantage of this principle is its clarity; it can be used to classify web 2.0 providers, whose activities are essentially financed through advertising.

Facebook offers targeted advertising with advertisers being charged per click or impression (display of the advertisement), and Facebook accordingly has a commercial interest.

Given that the courts have found that targeted advertising is a decisive condition when assessing whether a site is a publisher, Facebook's targeted advertising system could raise serious problems, along with the problem of how to protect privacy and personal data on the famous social networking site.

## News

### ■ The *sui generis* right of the producer of a database in light of competition law

Intellectual property law and competition law are based on two very different approaches that are often difficult to reconcile. The latest example of this is the decision handed down by the Court of Cassation, France's highest Court of Appeal that rules on points of law only, on 23 March 2010.

The ruling brought an end to lengthy proceedings between France Télécom and a telephone sales company. The sales company claimed that France's traditional telecom operator was abusing its dominant position, while it argued that it had a *sui generis* right to the database it had used to create its directories, refusing to allow any access or use for commercial purposes.

The Court upheld France Télécom's claims, emphasising the "investment efforts" required to build up the database, which were sufficient to establish *sui generis* protection of the database in accordance with Article L.341-1 of the Intellectual Property Code. Accordingly, the sales company could not claim that the directory was an essential tool, and it was ordered to pay damages for unauthorised data extraction.

However, the Court also said that charging an exorbitant fee to consult the database would amount to an abuse of a dominant position, in breach of competition law rules. Finding the right balance will prevent attempts to plunder databases (provided they can be protected) while allowing them to be accessed at a fair price.

### ■ Selective distribution of luxury goods

On 20 April 2010 the European Commission adopted a Regulation on vertical agreements covering the purchase or sale of goods and services, which confirms that manufacturers are free to select their distribution methods, including on-line methods. Pure players such as Ebay or Priceminister will not benefit from the Regulation but the luxury goods industry should welcome it, as it validates their strategy of increasing control over distribution channels. The right to require that distributors have a "bricks and mortar" sales outlet is maintained, provided the manufacturer does not have a market share in excess of 30%. Distribution and supply agreements must not include hardcore restrictions on competition, such as price-fixing or the re-creation of barriers to the single market.

The aim is to enable manufacturers to prevent their products from being distributed in a manner that is detrimental to their image. Accordingly, the courts have already been asked to rule on whether the distribution of products outside an approved distribution network can constitute unlawful use of a trademark.

In that particular case, a company purchased cosmetics and perfumes from an approved distributor that had been placed in court-ordered liquidation, and then offered them for sale despite notices on the items expressly prohibiting any such resale.

The Chambéry Appeal Court upheld the claim of unlawful use of a trademark. The respondent's arguments that protection under the trademark had lapsed in accordance with Article L.713-4 of the Intellectual Property Code were dismissed, as it failed to produce proof that the owner of the trademark had agreed to the sale of its products outside its selective distribution network.

This reasoning was criticised by the Court of Cassation in a ruling dated 23 March 2010, which stated that "*unlawful use of the trademark cannot be established on the sole basis of the marketing of authentic products usually sold in a selective distribution network, when it is shown that they were first put on the market in France with the consent of the trademark owner and that they were lawfully acquired by the vendor against whom the case has been brought*".

Accordingly, the marketing of authentic products by an unapproved distributor is not sufficient to constitute a trademark infringement. The owner must establish the existence of legitimate grounds for objecting to the resale of the products in question. This rule will apply even when the new vendor offers the products in circumstances that are detrimental to the brand's image and reputation.

### ■ HADOPI: the latest stumbling blocks

The legislative process surrounding the HADOPI or 'Creation on Internet' Law is proving to be slow and painful. After an initial vote against the bill before the National Assembly and two partial censorships by the Constitutional Council, the HADOPI (High Authority for the Diffusion of Arts and the Protection of Copyright on the Internet) had to face an appeal against decree 2010-236 of 5 March 2010 on the automated processing of personal data, authorised by Article L.331-29 of the Intellectual Property Code.

The appeal, which has been lodged by the association of internet access providers FDN (French Data Network), contests the legality of the decree on the basis of Article L. 36-5 of the Post and Electronic Communications Code, which requires the French post and telecommunications regulator, ARCEP, being consulted prior to any bill or decree concerning the telecommunications sector. However, the decree was enacted by the Government without consulting the ARCEP and is therefore procedurally flawed, according to the FDN.

Its repeal would delay the sending of warning e-mails to offenders, which the Government wanted to implement in July 2010.

Another cause for delay is that the identification and storage of IP addresses is still pending authorisation by the data protection authority, the CNIL. The Constitutional Council decided on 10 June 2009 that the CNIL has to ensure that the processing of personal data is not disproportionate in the light of the intended purpose.

There are also technical obstacles. A program that generates false IP addresses on P2P networks is now circulating. Known as Seedfuck, it generates a large volume of random IP addresses in order to populate the database, at the risk of including the addresses of innocent users who are not suspected of illegal sharing. As there is currently no known antidote, this seriously questions the reliability of the IP address as evidence.

Moreover, the need to identify the IP address to prove the offence of established negligence, as provided in Article L.335-7-1 of the Intellectual Property Code, restricts the scope of the HADOPI Law. Certain alternative techniques (such as direct downloading, newsgroups, streaming, etc.) do not require the "visible" circulation of the IP address, and all communication between the user and the server hosting the infringing content is completely anonymous. Without an IP address the entire system put in place by the HADOPI Law is paralysed.

The only way to get around this problem would be for holders of rights to apply to the courts on the grounds of Article L.336-2 of the Intellectual Property Code in order to get an injunction requiring internet access providers to block certain sites, thus removing potential sources of illegal downloading. This possibility has not yet been explored but will probably become topical in the near future. However, one positive development should be noted: the publication of the decree of 25 June 2010 defining established negligence and means of secure access.

It will be up to the courts to decide whether the criteria have been satisfied and the sanctions can be imposed, given that users will still have the possibility of establishing the existence of justifiable grounds, which, moreover, still have to be defined. Watch this space ...

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