[FR] Dailymotion’s Liability Invoked under Common Law despite its Status as a Host

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A new element has been added to the body of jurisprudence being amassed on the liability of video share sites - in the present case, Dailymotion. The producers and directors of three documentaries *(“Les enfants perdus de Tranquillity Bay”, “Une femme à abattre”,* and *“Les années de sang”*), realising that their works were again accessible on the site despite the formal notices that had been issued previously, and an initial withdrawal, brought proceedings against Dailymotion for infringement of copyright. As has now become common practice, Dailymotion claimed in its defence its status as host within the meaning of Article 6 of the Act of 21 June 2004 in favour of confidence in the digital economy (LCEN), which instituted a scheme of limited liability, waiving common law, in a limited number of cases (the liability of the technical service provider cannot be invoked unless it has actually had knowledge of the unlawful nature of the information being stored or if it has not taken prompt action to withdraw the information or prevent access to it as soon as it becomes aware of such information). The applicant rightsholders considered for their part that Dailymotion had not behaved as a host but as a “broadcaster of audiovisual content”, proposing the downloading of the documentaries at issue as part of a scheme that was nothing short of a video-on-demand service that bore its brand name. They felt therefore that the rules of common law on infringement of copyright should apply to the company. The court noted that in reality Dailymotion’s role was limited to the supply of technology for storing and viewing videos; these could only be put online on the initiative of the site’s users, who retained total control. It could not therefore be assimilated to a video-on-demand service. Moreover, and contrary to the arguments put forward by the applicants, the commercialisation of advertising space could not be deemed to exclude the benefit of the provisions of the LCEN, which did not contain any provision that prohibited the host from making a profit from its site. Furthermore, the court held that the distinction the applicants had drawn between an online communication service for the public and hosting was artificial, as it was not the intended result of the legislation, “the second (hosting) being in fact, by virtue of the text, the technical means of achieving the first (online communication to the public)”. As far as the court was concerned, and in accordance with the larger part of the jurisprudence, Dailymotion did indeed have the status of host. As such it could not then in the present case validly claim the benefit of the scheme of limited liability instituted by Article 6 of the LCEN. Having in fact been duly informed by notification of the unlawful nature of the content at

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issue, the platform had not demonstrated that it had “implemented all the necessary means of preventing further circulation”. Thus, whereas the company had been prompt in withdrawing the disputed content that had been reported to it by the applicant parties, complying with its obligations as a host, the documentaries at issue had nevertheless been made available again subsequently. “Having failed to carry out the diligences necessary for rendering it impossible to put online again the documentaries already notified as unlawful, the company Dailymotion could not claim the benefit of the scheme introduced by Article 6-I-2 of the LCEN and its civil liability is therefore invoked under common law on infringement of copyright, on the basis of Articles L. 335-3 and L. 335-4 of the Intellectual Property Code (CPI)”. On the basis of both the number of times each documentary had been viewed and the infringement of the moral rights of the applicants because of the mediocre quality of the broadcasting of their films and the omission of their names as joint originators, the regional court ordered Dailymotion to pay them 80 000 euro in damages.

TGI de Paris, 3 e ch. 2 e sect., 10 avril 2009, Zadig Production et autres c. Dailymotion

Regional court of Paris, 3 rd chamber, 2 nd section, 10 April 2009; Zadig Production et al. v. Dailymotion

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