[FR] First Application of the HADOPI Act by the Courts

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In two judgments delivered with strong reasoning, the press section of the regional court of Paris has implemented the new Article 27-II of the 'HADOPI' Act of 12 June 2009 (see IRIS 2009-7: 13) in masterly fashion. The text instituted reduced liability on the part of the director of a publication in respect of messages posted in areas dedicated to free expression for Internet users (mainly discussion forums), since Article 93-3 of the Act of 29 July 1982, which lays down the scheme for liability in the case of press infringements committed by communicating to the public using electronic means (the so-called "cascade" scheme - the party sued is the director of the publication if the message or statement in question has been recorded in advance, otherwise the originator of the message, otherwise the producer) proved to be unsuitable for application in respect of messages of this type. Article 27 II of the Act of 12 June 2009 has therefore made up for this shortcoming by laying down that the director or co-director of the publication cannot be held liable at law as the principal originator if it is established that he did not have actual knowledge of the message before it was put online or if, as soon as he had knowledge of it, he took prompt action to withdraw it.

In the case at issue, the designer, creator and presenter of a site presented as being exclusively participant in a number of discussion threads accepting messages from Internet users without a moderator on the lives of celebrities, was being sued for defamation in a complaint brought by a famous female newsreader in respect of a certain number of the messages posted. The judgments were at pains to state firstly that the new provision was intended to apply equally to all services of communication to the public by electronic means and not exclusively to online press services as defined by Article 27-I of the new Act, and secondly that the new provision necessarily diverged from the legal scheme of the liability of the director of a publication as defined by Article 93-3 of the Act of 29 July 1982, and that a distinction was no longer drawn between public areas for personal contributions that were or were not moderated first.

Thus, whether these areas were moderated beforehand, afterwards, or not at all, the legal scheme was henceforth the same and the liability of the director of a publication could only be invoked in two cases: effective knowledge of the message before it went on-line, or failing to take prompt action to remove a message as soon as he had knowledge of it. Consequently, the director may not be sued for assisting in or supplying the means for committing a press offence if

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he is able to claim the exemption offered by the new provision. In the case at issue, for a certain number of messages, the court held that since it was impossible to identify the IP address of the sender, the defendant could not be held liable as their originator. The court also found that there was no proof at the level of certainty required in penal matters that he, as director of the publication, had actually had knowledge of the messages before they were put on-line or that, having received a request for their deletion, he did not take prompt action. On the other hand, three of the messages at issue had first been the subject of due diligence processes on the part of the plaintiff with the site's host, which had enjoined the defendant to delete the discussion thread dedicated to the journalist. Since the defendant had indeed deleted these messages and then deliberately put them back on line a few weeks later, the court held that he could not deny that he had had actual knowledge of the messages in advance before they were put online again. His liability as defined by the last paragraph of Article 93-3 of the 1982 Act introduced by Article 27-II of the Act of 12 June 2009 was therefore invoked.

The defamatory and offensive nature of the messages having been established, the defendant was fined EUR 1 000 and ordered to pay EUR 1 in damages to the plaintiff.

Tgi de Paris (17e ch.), 9 octobre 2009, C. Chazal c. Zephir (2 jugements)

Regional court of Paris (17 th chamber), 9 October 2009 - C. Chazal vs. C. Zephir (two judgments)

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