

[FR] Host or Editor? Decision from the Court of Cassation at last

IRIS 2010-2:1/16

*Amélie Blocman
Légipresse*

The Court of Cassation has just delivered an eagerly awaited and noteworthy decision, pronouncing for the first time on the matter of the qualification - and hence the corresponding scheme of liability - of a service “hosting” personal websites on the Internet.

The dispute was one of infringement of copyright, initiated by two famous strip cartoon editors against the company Tiscali (Telecom Italia), when they discovered that the entire adventures of Lucky Luke and Blake & Mortimer were being reproduced on personal websites operated by the IAP in question. Since the case originated before Directive 2000/31/EC on Electronic Commerce was transposed into French law by the Act of 21 June 2004 in favour of confidence in the digital economy, the applicable legislation here was the provisions of Article 43-8 of the Act of 30 September 1986 as amended by the Act of 01 August 2000. Overturning the judgment delivered by the regional court, which had qualified Tiscali as a host, the court of appeal in Paris had held, in 2006, that the company’s intervention “could not be limited to a mere technical service since it offered Internet users the possibility of creating their own websites by using its site at www.chez.tiscali.fr”. As justification for holding that its liability was invoked because of the content on the site that infringed copyright, the court of appeal had held that “the company Tiscali should be regarded as also having the quality of editor since it is established that it operates the site at issue commercially, as it offers paying advertising space to advertisers directly on the personal websites, such as the disputed sites”. Tiscali could therefore not claim the less onerous liability of a host, defined in Article 43-8 of the amended 1986 Act as “natural or legal persons who, whether or not a charge is made, provide direct and permanent storage for making available to the general public [content] of any kind that may be accessed by these services”. According to this text, the latter’s criminal or civil liability can only be invoked “if, the matter having been brought to their notice by a legal authority, they did not take prompt action to render access to the content impossible”. Tiscali therefore applied to the Court of Cassation, claiming that it was exercising the technical function of a host supplier and not the editorial function of the author of the disputed personal websites, which it had not designed and over the content of which it had no control.

In a decision delivered on 14 January 2010, the Court of Cassation upheld the decision of the court of appeal, on the grounds that the mere acknowledgement that the company was offering Internet users “the possibility of creating their own websites on its site and offered advertisers paying advertising space directly on these sites, which it managed” showed that the services provided went beyond the mere technical and storage functions referred to in Article 43-8 of the amended Act of 30 September 1986. Tiscali could not therefore claim the benefit of this text and its quality as host supplier, which was denied by the Court of Cassation, in order to elude liability.

This solution is somewhat baffling, as very many of the decisions reached by judges in previous cases have been based on the consideration that “the selling of advertising space justifies the categorisation of a company [providing web services] as a content editor since there was nothing in the text of the Act to prevent a host taking advantage of its site by selling advertising space” (see IRIS 2009-6: 11). It is doubtful that the terms of the current 2004 Act in favour of confidence in the digital economy, which defines hosts as “natural or legal persons who provide, even free of charge, storage [for content] belonging to a service receiver so that it may be made available to the general public on-line using communication services”, will change the Court of Cassation’s interpretation. This decision represents a very restrictive position for hosts.

