[FR] Effect of the Sale of Advertising Space on the Qualification of Video Sharing Sites

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In two decisions handed down on 9 and 14 April 2010, the Paris Court of Appeal has confirmed the qualification of Google Vidéo and Dailymotion as hosts for sites storing audiovisual content in cases brought by the rightsholders of a film ("Le Monde selon Bush") and of sketches (by the comedians Omar and Fred) who complained that their works had been put on line without their authorisation. These decisions have been awaited with interest, since they come after the Tiscali decision handed down by the Court of Cassation on 14 January 2010 (see IRIS 2010-2: 1/16), which attracted much comment. The Court had found that the company at issue could not claim the benefit of the "light" scheme of liability for providers of technical services provided for in the Act of 21 June 2004, and should therefore be prosecuted as a content editor under common law, on the grounds that it proposed setting up advertising space for advertisers directly on the personal pages it offered, in return for payment. In the judgment in the case of *Omar and Fred v. Dailymotion*, the comedians argued that the platform was wrong in claiming the status of a provider of technical services, because it made commercial use of the content by selling advertising space, the yield of which was directly correlated to the site's audience figures. However, the Court found a number of arguments to support its view that "the operation of the site by the commercialisation of advertising space, as long as it did not result in the service being able to take any action in respect of the content put on line, did not justify qualification as the editor of the service at issue". In its decision, the Court noted more specifically that the legislation on confidence in the digital economy made specific provision that the hosting service could be offered "even if no charge was made", in which case it was necessarily financed by income from advertising. It was not proven in the case at issue that there was any relationship between the method of remuneration by advertising and determination of the content put on line, particularly as Dailymotion is not able to target any advertising in connection with the content put on line in such a way as to gain advantage or to carry out a selection of content that would be guided by commercial imperatives. Similarly, the judgment concerning Google Vidéo did not note any correlation between the funding of the site by advertising and the putting on line of content operated by Internet users, over which neither the advertisers nor the company Google had any influence. Having confirmed that the sites were hosts, the Court of Appeal went on to examine whether, in that capacity, they had fulfilled their obligation to withdraw content notified by rightsholders with the speed required by law. This

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was not the case in regard to Google Vidéo, as it had taken more than two weeks to do so. The company's liability as a host was therefore invoked; and it was ordered to pay EUR 265 ,000 in monetary prejudice caused to the rightsholders and to the professional associations of producers involved in the case. As proof of failure to comply with the obligation of prompt withdrawal of illegal content once notified was also brought in the Dailymotion case, it was ordered to pay EUR 50 ,000 in damages in respect of the moral and pecuniary prejudice suffered by the rightsholders. Thus with these two decisions the Paris Court of Appeal confirms the position already adopted in previous cases (in respect of "Joyeux Noël" on 6 May 2009 and "Lafesse v. Dailymotion" on 16 September 2009).

Cour d'appel de Paris (pôle 5, chambre 2), 9 avril 2010, Flach Film et Editions Montparnasse c. Goggle

Paris Court of Appeal (section 5, chamber 2), 9 April 2010, Flach Film and Editions Montparnasse v. Google

Cour d'appel de Paris (pôle 5, chambre 1), 14 avril 2010, Omar Sy et Fred Testot c. Dailymotion

Paris Court of Appeal (section 5, chamber 1), 14 April 2010, Omar Sy and Fred Testot v. Dailymotion

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