

The liability battle over online video-sharing platforms

Casalonga Avocats' **Caroline Casalonga** and **Ani Gevorkian** discuss the *TF1 v YouTube* French ruling and how it compares to other decisions

On 29 May 2012, the Intellectual Property Chamber of the Paris Court (Tribunal de Grande Instance, 3rd chamber) held that YouTube was under no general obligation to check the content uploaded onto its portal for copyright infringements, or to take measures other than those already established to prevent infringement.

The court held that YouTube was obliged to act only after being notified of infringing content.

The court dismissed a copyright and related rights infringement action filed by TF1, one of France's largest TV broadcasting companies, against Google's video-sharing platform, YouTube. TF1 had sent a warning letter to YouTube, demanding the removal of infringing videos posted by third parties on YouTube. YouTube removed the infringing content within five days.

The court held that YouTube qualified as a hosting service provider and was therefore liable for copyright and related rights infringement for providing online access to infringing videos posted on its site, only in cases in which it had "actual knowledge" of the infringement. The French Court stated that otherwise, YouTube's monitoring filters were sufficient. The court held that a five-day delay from the date of notification to remove infringing content was too long. However, it did not condemn YouTube for damages, since the plaintiffs did not provide evidence of damages suffered due to the infringement.

Standing

The first issue raised was the question of standing. The court held inadmissible the copyright and producer rights claims for lack of evidence of ownership. The only claims that were found admissible were those based on broadcasting rights, trademarks and unfair competition.

YouTube's classification as hosting service provider

In its complaint, TF1 had argued that YouTube was a publisher rather than a hosting service provider, and was therefore liable for infringement, because of YouTube's active role in the selection and promotion of the content posted on its site by users. The court rejected this argument and held that YouTube is a mere hosting service provider because it does not have an active role in organising or controlling the posted content. The argument that YouTube's income is generated by the advertising on its website was considered irrelevant as it does not receive a financial benefit directly attributable to the infringing activity.

YouTube conditions for infringement liability: actual knowledge of the infringement

Posting infringing content on the internet in order to make it available to the public constitutes copyright infringement. The question is whether the holder of the platform hosting the litigious video is also

primarily liable for infringement. The court answered by the negative and held that as a result of YouTube's status as hosting service provider rather than publisher or editor, it is not primarily liable for the content of the videos posted on its site until it has actual knowledge of the infringement.

The Paris Court applied the Court of Justice of the European Union's ("CJEU") decision in *L'Oreal v Ebay*,

"In situations in which that provider has confined itself to a merely technical and automatic processing of data... it may none the less only be exempt... from any liability for unlawful data that it has stored on condition that it has not had 'actual knowledge of illegal activity or information'."

TF1 claimed that formal notification to YouTube was not required to evidence "actual knowledge" of the infringement. The court, however, found that YouTube did not have the required "actual knowledge" before receiving TF1's warning letter.

YouTube monitoring and filtering obligations

The court explicitly stated that no monitoring or filtering action is required on the part of hosting service companies for the content posted online by their users and accordingly held that YouTube does not have any obligation to control preemptively the content of posted videos. Furthermore, the court held that YouTube fulfilled the obligations it does have with regard to its users by putting in place an alert system for videos with illicit content and by establishing warnings that users cannot post any videos without having obtained prior authorisation from the rightsholders. This holding may be criticised as YouTube's existing filters appear to be not sufficient enough to secure rightsholders interests. Additionally, YouTube should be obliged to add additional filters as proposed by the Hamburg Court in the *GEMA v YouTube* decision.

The court emphasised that YouTube cannot be held accountable in the same way it would be for posted videos that were obviously unlawful, such as those that contained content related to pedophilia, crimes against humanity or the incitement of racial hatred. Articles 6 and 7 of the Law on Confidence in the Digital Economy (LCEN²) stipulate only these three categories have a manifestly illicit character, such that there exists an obligation for hosting companies to immediately and voluntarily remove them.

Delay to remove unlawful content after actual knowledge and damages

YouTube removed the infringing content five days after receiving notice. The court held that such a delay cannot be classified as reasonable, since YouTube should remove contested content as quickly as possible once notified. However, the court did not hold YouTube liable for infringement because access to YouTube is free and TF1 did not provide

any evidence of damages suffered.

This last finding may indicate general non-liability for internet video or music sharing platforms. It could be criticised, however, on the ground that YouTube makes a profit from advertisements, so the fact that YouTube is free should not preclude a rightsholder from claiming damages.

Comparison with other YouTube cases in Europe and the US

Germany

A similar holding was issued by the Hamburg Court (*Landgericht Hamburg*) on 20 April 2012, in a dispute with Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA), the German society for musical performing and mechanical reproduction rights³.

The Hamburg Court held that YouTube was liable only in cases in which it “knowingly breached certain rules of conduct and control obligations” and that it was obliged to act only after being notified of the infringement.

“In contrast to the Paris Court decision, the Hamburg Court ruled that YouTube had to install, in addition to its existing content identification systems, keyword-based filters that would detect newly-uploaded content infringing copyrighted works.”

In contrast to the Paris Court decision, the Hamburg Court ruled that YouTube had to install, in addition to its existing content identification systems, keyword-based filters that would detect newly-uploaded content infringing copyrighted works related to infringing content about which YouTube already had notice. With such a system, once a rightsholder notifies YouTube of the existence of infringing content, YouTube will be declared liable for infringement if it does not install keyword-based filters to detect the same but newly-posted content. This system shifts the burden of monitoring infringing content to YouTube after the filing of a rightsholder declaration.

US

In April of this year, the US Court of Appeals for the Second Circuit addressed the issue of the “safe harbor” provision in the US Digital Millennium Copyright Act. This limits the liability of online service providers for copyright infringement that occurs by reason of the storage at the direction of the user⁴. Similar to the standard set forth by the Paris Court, the Second Circuit held that safe harbor requires knowledge or awareness of the specific infringing activity, a standard generally favourable to YouTube. The Second Circuit remanded the case, however, determining it was unclear whether YouTube lacked the requisite actual knowledge or awareness for this particular case. Like

the Paris Court and unlike the Hamburg Court, the Second Circuit did not hold YouTube responsible for implementing new filters to locate potentially infringing content.

Italy

The previous cases can be distinguished from a decision granted by the Rome Intellectual Property Court on 16 December 2009 brought by Reti Televisive Italiane (RTI), a subsidiary of Italian broadcaster Mediaset⁵. The Italian Court held that YouTube was liable for contributory copyright infringement because it was aware of the illegal nature of the content stored on its site, and because, beyond simply storing the content, YouTube can control the content on its site by selectively removing it. According to the Court of Rome, YouTube can be held liable for infringement if it was aware of the infringement. The “awareness” means either actual knowledge, or, the capability to verify the lawfulness of the content.

Summary

In Europe and the US, internet video or music sharing platforms that do not organise or control the content posted on their sites, qualify as online service providers with more limited liability than direct infringers. These platforms may be held liable for infringement for posted content only after they acquire actual knowledge of such infringing content. The criterion of awareness is the key. The Rome Court appears to be alone in finding that YouTube may not ignore – and was therefore aware of – the illegal nature of the content stored on its site, without any prior notification from the rightsholder. The Hamburg Court order against YouTube to install keyword-based filters to detect newly-posted infringing content appears a good solution to ensure a better balance between the interests of rightsholders and those of internet video or music sharing platforms. A prior rights declaration by the rightsholder should then be sufficient to shift part of the burden of monitoring infringing content on YouTube to find it liable.

Footnotes

1. *L'Oréal SA and Others v eBay International AG and Ors*, CJEU, C-324/09, 12 July 2011.
2. Loi pour la Confiance dans l'Économie Numérique.
3. *GEMA v YouTube*, Court of Hamburg, 310 0 461/10, 20 April 2012.
4. *Viacom International v YouTube*, US Court of Appeals for the Second 5. Circuit, 10-3270-cv, 5 April 2012.
5. *Mediaset v Google*, Court of Rome, 20 October 2011.

Authors



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