



Copyrights

French Copyright Ruling Spells Trouble For eBay, Other Internet Service Providers

PARIS—A Jan. 14 decision by France's top appeals court could spell trouble for internet powerhouses like eBay, Yahoo, and the Microsoft Network because it eliminates a central copyright infringement liability defense they have employed in a variety of cases here, a Paris-based practitioner told BNA Jan. 22 (*Télécom Italia f/k/a Tiscali v. Dargaud Lombard*, Cour Cass., docket number not available, 1/14/10).

The Cour de Cassation ruled the site host provider Tiscali, now Télécom Italia, could not benefit from the infringement liability exception for host service providers under French law, because its services extended well beyond simple, technical hosting, to include publishing and providing advertising space.

"That is very important and that reasoning could be used exactly the same way against eBay, MSN, Yahoo and many, many other ISPs," according to Bradley Joslove of the Franklin law firm, Paris.

Joslove said the *Tiscali* decision and several recent decisions involving eBay demonstrate that several French courts are finding that activities of internet service companies are much more complicated than mere host service providing.

However, the courts in France are coming to different conclusions, leaving a lack of clarity, he noted. The problem, he said, is that French law is out of date.

False Contact Data Triggers Lawsuit

The Cassation court's *Tiscali* ruling, which upheld a June 7, 2006, ruling by the Paris Court of Appeals, concerned an allegation by comic book publishers Dargaud Lombard and Lucky Comics that a Tiscali-hosted website illicitly reproduced their copyrighted comic strips.

Tiscali removed the offending content, but when the publishers asked for the site owner's contact information, it turned out the owner had provided a false name and address and was never identified.

The publishers ended up suing Tiscali for failure to maintain proper contact information for the site owner and for copyright infringement. Tiscali argued that, as a hosting service provider, it was not liable.

"The court gave short shrift to that argument," noted Joslove.

The court's ruling said that although Tiscali did host websites, it also acted as a publisher, making it possible for internet users to create personal pages on its site, and that it also provided advertising space directly on these pages, as well as management, for which it received payment.

It said that based on these facts it was clear eBay's services exceeded simple technical functions of hosting or storage that are targeted by the law, and by the liability exception.

1986 Law Cited, but Current Law Applicable

The ruling cited France's old 1986 law on e-commerce, updated in 2000. "But it's directly applicable to the new LCEN law," Joslove said. The LCEN law is a 2004 law to establish confidence in the digital economy. The law transposed the EU electronic commerce directive (2000/31/EC) into French law.

"Basically in my opinion [this ruling] completely empties the hosting service provider exception of its sense. Today everyone is providing much more sophisticated services, so the role of every service provider goes beyond simply offering technical hosting service," Joslove said.

He said the case has implications for eBay, Yahoo, MSN, and even Google for some aspects of its services. "They should be worried," Joslove said. "It makes everybody vulnerable."

Recent eBay Key Decisions

Joslove cited three recent decisions involving eBay in which French courts have reasoned that the service provider has a complex service that goes beyond the technical aspect of hosting content.

In a June 2008 case *Parfums Christian Dior v. eBay*, the Paris Commercial Court decided that the hosting service that eBay provides is simply a technical means to provide what it said is eBay's principal service, that is, brokering between buyers and sellers.

"So it's saying eBay is not an HSP, it's a broker, and it therefore does not benefit from the exceptions to liability of HSPs," Joslove said. eBay was penalized 39 million euros (\$55.2 million) in that case, and another 1.7 million euros (\$2.4 million) in fines issued in December 2009, for failure to comply fast enough.

A May 2009 decision by the Paris Court of First Instance also focused on this complexity in a case pitting eBay against L'Oreal, but the court returned a more favorable ruling for eBay.

The court in that case said that internet commercial activities are more and more complex, making it impossible to reason based on what is a principal or accessory activity. It said it is necessary to look at each and every activity and determine the liability regime accordingly, Joslove said.

The court said one of eBay's activities is hosting and as a hosting service provider it benefits from the law's exception to liability. However, it also said it was not clear eBay had met its take-down obligations as an HSP.

The court ordered the parties to mediate their dispute over who is responsible for finding out whether advertisements on eBay are for legitimate or counterfeit products, so that illegitimate ones can be removed.

The court also noted eBay sells advertising space and promotes its site as a commercial service, and therefore it looked for its responsibility in that role.

"But it concluded those activities didn't lead in and of themselves to the harm caused to L'Oreal by people putting advertisements for sale of counterfeit products on eBay," Joslove said, adding, "The court said selling the space didn't make the problem better or worse."

Strasbourg Court Ruling

In a case made public Jan. 11 (*Jean L. v. eBay France*, Strasbourg TGI, Dec. 15, 2009), the Strasbourg Court of First Instance ruled that eBay is an internet host and not responsible for the acts of a dishonest seller who bilked a buyer out of about 847 euros (\$1,200).

The court, which simply assumed eBay is a HSP, said that eBay as an HSP had fulfilled its responsibility by taking down the offending seller's page as soon as notified.

However, the court also addressed the plaintiff's argument that eBay acted as an agent of the dishonest seller. It said the plaintiff had failed to prove eBay is the seller's agent, but even if eBay had played that role, the plaintiff had failed to prove that eBay had been responsible for harm.

"Every decision deals with the issue a little differently, but I think complexity is at the heart of every one. How the court looks at that and deals with that makes a difference in what their decision is," Joslove said.

"Unfortunately, there is no clear, obvious tendency and we are far from resolution. I think the problem is that the law [LCEN] is antiquated compared with the complex role of internet service providers today. The law's categories of HSP, or access provider, or caching service provider, are too simple," he said.

Joslove said the solution will likely be legislative, either updating French law, the E.U. e-commerce directive on which it is based, or both. "The E.U. courts could step in. That may be one way of getting some clarity," he added.

By Rick Mitchell

The text of the Cassation court's *Tiscali* ruling is available, in French, at http://www.legalis.net/jurisprudence-decision.php?id_article=2829

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