

## Media & Entertainment - France

### TF1 loses copyright battle against YouTube

Contributed by **Nomos**

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#### Introduction

The Paris *Tribunal de Grande Instance* recently added to the case law on the liability of Web 2.0 sites. It confirmed the host status of YouTube, which came under fire from television channel TF1 and its subsidiaries (including web subsidiaries) for allegedly making protected content available online without authorisation.

Although not particularly novel in this respect, the decision reflects the court's consistency regarding the proof of rights held in the capacity of assignee or licensee, and joint possession by co-producers. TF1's claims were dismissed regarding the programmes that it produced, as the court found that broadcasters may invoke their authorisation rights only if there is a charge to access their programmes, which is not the case with YouTube.

The judgment also presented an opportunity for the court to examine clauses for assigning IP rights regarding posted content which YouTube imposes unilaterally on web users. It declared these unacceptable - due to time and space constraints and non-compliance with rules applicable to royalty-free assignments - and held that they could not be invoked by broadcasters.

#### Decision

Several subsidiaries of TF1 took action against YouTube in their capacity as producers or co-producers and broadcasters of their own programmes or of those shown under licence. Their action was based primarily on infringement of copyright and other related rights, and secondarily on trademark infringement, parasitism and unfair competition. The suit was rejected due to their failure to prove the rights claimed. In dismissing fault on the part of YouTube, the court confirmed the limitations on liability of a Web 2.0 site for content that is not made available online on its own initiative. However, the court called into question the clause on the assignment of rights by web users that was included in YouTube's general terms of use.

The court dismissed TF1's claims of copyright infringement, stating that the works for which infringement was alleged could not be established from screenshots taken from official reports. The court stated that in order to enable it to rule in this regard, the complainants had to:

- list precisely the programmes or content for which they claimed to hold rights;
- specify programme by programme when each was broadcast and match up the programme content with the screenshots; and
- specify the legal basis applicable to each company within the group and each type of content.

Accordingly, the court examined the alleged capacity and admissibility of legal action for each entity. A claimant would see its claims dismissed in the following circumstances:

- It presented itself as the producer or rights holder of content, but could not provide proof of exclusivity in this capacity (ie, if it had only been granted rights of use, as is the case for certain programmes viewed on-demand) and therefore did not possess the power to act in place of the rights holder;
- It presented itself as a co-producer, but failed to notify its jointly acting co-party of the writ and notably failed to prove that exclusivity had been granted; and
- With regard to the entity responsible for the web exploitation, it lacked the necessary

Author

**Armelle Furlon**



documents regarding its creation date, the nature of the programmes concerned and determination of those for which it claimed rights.

The channels within the TF1 group – TF1 and news channel LCI – clashed over the terms laid down for the protection of broadcasters with regard to proof of first broadcast. The court reiterated the doctrinal definition of an 'audiovisual programme' in the absence of any legal text. A 'programme' is defined as "a broadcast or series of broadcasts, made up of signs, sounds, images or data of any kind not having the nature of private correspondence". It deduced that only the investment is protected, not the work, with the condition of originality not being required. To benefit from the broadcasters' authorisation regime, a work must have been broadcast at least once before. The court found that it was not in a position to determine which programmes had been broadcasted at which time. LCI produced documents and data from official reports which were contradicted by other documents, and thus failed to provide sufficient evidence. However, claims by TF1 alleging, in particular, its rights concerning sporting events were declared admissible, as it produced a list of events alongside retransmission dates and proof of their repeat on YouTube.

Moreover, the claims for copyright infringement for certain programmes were rejected due to a failure to demonstrate the eligibility of the programmes for copyright protection. With regard to rights of use claimed to have been granted exclusively, the court again found the channel's claims to be inadmissible due to a failure to demonstrate:

- the exclusive nature of the rights;
- the acquisition of the right of use in video-on-demand, due to limitations linked to the terms of the assignments; and
- the provision of contracts related to retransmission of the sporting events.

On the grounds of not allowing the judicial basis for obtaining compensation for a single prejudice to exist concurrently, the channel's action based on copyright and with regard to its rights as programme broadcaster was also ruled inadmissible. It was in this latter capacity that the claims were considered in order to establish whether the repeat of programmes on YouTube constituted wrongdoing, in view of the site's liability status and regime.

To assess the status of the site and its liability regime, the court cited decisions of the Court of Cassation and the European Court of Justice which distinguished the following qualification criteria as publisher:

- purely technical re-encoding or formatting operations;
- the setting up of online frame tools for presentation and classification;
- the marketing of advertising space; and
- the storage of sales offers and determination of the operating terms for its service.

It added that the existence of proposed search terms, including 'most popular videos' and 'video selection', did not signify that the site organised or controlled content. The site could not be criticised for using these tools to promote content that was objectively most in demand, thereby increasing the value of its home page and boosting advertising.

Analysis of the site's general terms of use also revealed that it did not set up *a priori* or *a posteriori* control of the content posted, but limited itself to, on the one hand, its obligations to prevent paedophilia, crimes against humanity and the incitement of racial hatred, and on the other, its obligations as a host. The complainants failed to demonstrate that the site had exceeded the limits imposed on it in its role as host, and that its role was anything other than automatic and neutral in terms of storing content. The criticism linked to the marketing of advertising space was dismissed, since the legislation provides that hosting activities may be carried out free of charge or in return for payment, with recourse to advertising being *de facto* permissible.

YouTube's host status was therefore confirmed. The site was criticised for its failure to comply with its obligation of prompt withdrawal of disputed content once notified by a rights holder. The time period of five days was judged to be too long.

The court further held that the broadcaster could invoke its authorisation rights only for sites that charged a fee for access, which is not the case with YouTube.

The court also highlighted YouTube's Content ID service – which allows rights holders, once disputed content has been notified, to request its withdrawal – which the complainants had availed of, as well as an agreement entered into between the parties on December 16 2011, since which date no violation had occurred.

Trademark infringement was not found due to a lack of proof of:

- use of the trademark, since the mere presence of logos on videos was insufficient;

and

- demonstration of the violation of the trademark's function of origin.

The court rejected the subsidiaries' requests based on unfair competition and parasitism, which were declared inadmissible due to their failure to demonstrate proof of the investments and financial advantages for which they sought protection. For TF1, the specific facts were not reported. Diversion of revenues did not apply, as no fee was charged to access the site. The elements serving to quantify the prejudice were also dismissed, since the alleged figures were contested (the number of videos available, as well as the average loss of sales figures for each viewing). The court also stated that the economic model for the site was neither prohibited nor unlawful.

As a general premise, the court held that:

"companies hosting content exchange platforms are a new vector of communication which, like all new operators arriving on the market, have acquired part of the advertising revenues just as television companies did previously, compelling the printed press, radio and cinema to share advertising revenues."

It further pointed out that no loss of sales of programmes – particularly for repeats of news or reality television broadcasts – sold on DVD had been demonstrated, with displays on the site being limited to a few minutes only.

On examining YouTube's general terms of use, the court returned to the clause on assignment of copyright to emphasise that automatic and systematic acquisition of rights to content posted by users did not conflict with its activity as host. On the other hand, and to a greater extent than necessary – that is, beyond that argued by the parties – the court considered that this clause may be questionable with regard to copyright because of the failure to specify temporal and geographical limits, and to meet the criteria for royalty-free assignments. The clause stated that the assignment was rather granted for the "whole world" and was made "without financial compensation", but included no duration. This observation should encourage social media and networking sites to re-examine the wording of their assignment clauses.

This decision, handed down after four years of proceedings, is likely to be appealed.

*For further information on this topic please contact [Armelle Furlon](mailto:armelle.furlon@nomosparis.com) at Nomos by telephone (+33 01 43 18 55 00), fax (+33 01 43 18 55 55) or email ([armelle.furlon@nomosparis.com](mailto:armelle.furlon@nomosparis.com)).*

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