

IS EBAY AN EDITOR OR A HOSTING PROVIDER? FLASHBACK ON A LEGAL PUZZLE

Tiffany and L'Oréal have not been able to overcome the obstacle but LVMH has turned it into gold. The debate on the legal status of online auction websites and other participative platforms has been raised once again in France.

In a decision of the Paris Commercial Court dated November 30th, 2009, eBay was one more time sentenced to pay damages up to 1.7 millions Euros to the LVMH group. This decision confirms the position adopted by the same court in three famous decisions dated June 30th, 2008.

Further to these decisions, eBay had been sentenced, on the grounds of infringement and breach of a selective distribution network, to pay damages to various brands of the LVMH group for a record total amount of 38.6 millions Euros.

According to the Commercial Court, eBay had failed its legal obligations to ensure that its activities do not enable the commission of illegal acts. Moreover, the judgement stated that eBay could not be considered as a hosting service provider, provided that its main activity was actually the realisation of online auctions.

Despite all critics following this decision, Paris Commercial Court decided to confirm its position.

The argumentation of the judgement is ambiguous, though. According to the Paris Commercial Court, the auction website, which has an economic interest in facilitating the transaction, cannot be considered as having a passive role in the said transaction, and cannot therefore be granted a hosting provider status, as defined by French law.

The analysis of the Court seems logical, but should it create a precedent?

The ambiguousness may come from the law itself, i.e. the Law n°2004-575, dated June 21st, 2004 and called "*Loi pour la*

confiance dans l'économie numérique" (LCEN), which is the result of the transposition of the EC Directive on electronic commerce n° 2000/31, dated June 8th, 2000, from which interpretation issues arose.

Ambiguousness of the relevant status for eBay

The core issue in eBay case can be found in the distinction, more or less explicit, between the status of editor and that of hosting services provider, contained in Article 6-I-2 of the LCEN. The hosting services provider offers online storage to editors (along with various communication tools) through which the latter can publish their posts. Are considered as editors people who have control over the editorial content of the website by posting ads or by storing information on the platform.

This distinction is paramount with regards to the distribution of liabilities between these services providers. Article 6-I-2 of the LCEN has indeed enacted a specific civil liability exemption scheme applicable to hosting services providers, who cannot be held liable "*for activities or information stored and processed upon the request of the recipient of the services.*"

Such exemption of liability does apply if and only if (i) the hosting services provider does not have actual knowledge of the illegal nature of the said activities and information processed or stored on the website, and (ii) if he has acted promptly to remove or deny access to the public to such data upon learning about their illegal nature.

As for the editor, he can be held civilly and criminally liable for the information he/she posts on the website. For example, on June 25th, 2009, three eBay sellers were found criminally and civilly liable for offering counterfeiting software on the website.

As a conclusion, the judgement dated November 30th, 2009, following those delivered in 2008, denies eBay the protective status of hosting services provider, without clearly qualifying the latter as an editor as defined in the LCEN.

Should this decision be construed as a precedent and French case law as deliberately and systematically denying online auction websites the hosting services provider status?

That is far from certain. It should first be noted that the decision delivered on November 30th is merely an enforcement decision for the 2008 judgements, this according to the LVMH spokesman himself. As such, it does not really constitute a new decision, but only a decision aiming at sentencing eBay for not having adopted appropriate measures further to the 2008 decisions.

On the other hand, one shall not forget that the 2008 LVMH decisions were a first in their determination of eBay's legal status. Indeed, in a previous judgement, dated June 4th, 2008, by the Troyes ordinary court of first instance qualified eBay as a hosting services provider, although eBay was sentenced on the grounds of infringement. The Troyes court based its decision on the fact that eBay did necessarily have knowledge of the illegal acts perpetrated through its website.

Lastly, more recently, the Paris ordinary court of first instance adopted an innovative solution in a judgement dated May 13th, 2009. The court distinguished between editing activities and hosting activities. Thus, service providers would no longer need to be qualified by only one of these legal categories for all their activities ("Cumulative Qualification" according to Lionel Costes), but one may distinguish between a service provider's various activities and apply a different legal qualification to each one of them ("Distributive Qualification").

As a result, part of eBay's activities (pertaining to storage and uploading of ads) was qualified as a hosting service.

However, with regards to the sale of advertising spots redirecting to infringing ads, Paris court considered that eBay's role was no longer passive, and that the hosting provider status could not apply to eBay in this case.

This solution was confirmed by an other judgement of the Paris ordinary court of first instance, dated September 18th, 2009, which was also based on a Distributive Qualification, and which sentenced eBay to pay additional damages to LVMH.

The European Commission also delivered an opinion dated June 3rd, 2008, pursuant to which only one part of the auction websites managers' activity clearly falls within the scope of Article 14 of the EC Directive n° 2000/31, which provides for the exemption of liability: it refers to the mere storage of information supplied by third parties.

Lastly, it must be noted that, until now, only Commercial courts did expressly deny the qualification of hosting provider to eBay. This resistance could be explained by the economic interpretation made by Commercial courts of eBay's activities, mainly considered as an auctioneer, hosting providing activities being considered as accessory.

International solutions

The ambiguousness of French case law points out France among other countries, whose jurisdictions adopted different positions.

In Belgium and Great Britain, L'Oréal's claims were rejected as eBay as been deemed a hosting provider. Brussels Commercial Court also applied the Distributive Qualification (used by the Paris Commercial Court) to eBay in a judgement delivered on August 13, 2008.

Besides, in the United States, a decision favourable to eBay was rendered on July 14, 2008. In this judgement, the analysis of the court was mainly based on the trademark

infringement, or more precisely in this case, on the absence of infringement, when French courts only question the qualification of eBay's legal status.

At last, German jurisdictions seem to have adopted French commercial courts' position, by denying eBay, through two decisions, the status of hosting provider.

Within the European Union, the issue therefore remains unsolved, as member states

jurisdictions do not have a harmonized interpretation of the EC Directive 2000/31.

While the EU is aiming at harmonising all national jurisdictions, such divergence between national legal systems seems highly paradoxical.

(Please refer to our practical guide pertaining to the web 2.0 service providers' liability scheme for further details on this issue).

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