

NEW TECHNOLOGIES

February 2008

Liability of companies that host file-sharing websites – “Wikipedia”, a web host found not liable

After the file-sharing websites “DailyMotion” and “MySpace”, it was the turn of the famous online, free and collectively-compiled encyclopaedia “Wikipedia” to be hauled before French courts.

The “Wikipedia” encyclopaedia is owned by the US-based Wikimedia Foundation and is entirely compiled and updated by the online community. It thus develops as and when Internet users – who are identified by their web address – make contributions.

The “Wikipedia” case illustrates the confrontation between Internet users’ freedom of expression, through their ability to put content online, and the enforcement of other parties’ rights on the web. Thus, the issue arose of the liability of a file-sharing website host as regards defamatory and/or insulting articles which were compiled and put online by Internet users.

In the present case, an Internet user put online on Wikipedia an article which notably revealed the sexual orientation of three people.

Since the identity of the Internet user responsible for the article was unknown, the Wikimedia Foundation was issued a writ of summons to appear in a summary proceeding in which it was accused of defamation and to withdraw the litigious text from Wikipedia’s past records and invasion of privacy.

The plaintiffs notably asked for €60,000 as a preliminary award of damages and for notification of the precise contact details of the Internet user responsible for the article under dispute.

By means of an order in judgment of the summary application, dated 29 October 2007, the President of the *Tribunal de Grande Instance* of Paris (TGI – higher district court of first instance in Paris) dismissed all of the plaintiffs’ claims.

The *Tribunal de Grande Instance* of Paris specified that under the terms of Article 6.I.2 of the Law of 21 June 2004, the Act to boost Confidence in the Digital Economy (known as “LCEN”):

“Hosting service providers cannot be held civilly liable for information stored by them if they are not actually aware of the illicit nature thereof or of acts and circumstances which indicate such a nature.”

Moreover, the Court noted that Article 6.I.5 of the LCEN Act provides that knowledge of the act under dispute is deemed to occur when all of the details required for full awareness of the hosting service provider have been notified thereto, viz. (i) a description of the facts under dispute and their precise location, (ii) the grounds upon which the content must be withdrawn, including details of legal provisions and (iii) the fact-based arguments therefore.

In the absence of such details, the host can neither verify the validity of the withdrawal request, nor quickly effect withdrawal of the litigious content, unless such content seems to it to be manifestly illicit.

Yet, in the case in point, these main elements had not been forwarded by the plaintiffs who, moreover, had not provided conclusive proof that the Wikimedia Foundation had received the notification.

Given such circumstances, since it was not deemed to have been aware of the illicit nature of the article in question, the Wikimedia Foundation was not obligated to remove the details under dispute.

Thus, in contrast to the “DailyMotion” case (Paris TGI, 13 July 2007) and the “MySpace” case (Paris TGI, 22 June 2007), the issue of the civil liability of web hosts was evaluated not from the perspective of the nature of the activity of the website under dispute (file-sharing websites) but in relation to the plaintiffs’ compliance with the host notification procedure.

Regarding withdrawal of the remarks under dispute, the Court noted that since the litigious passages had been removed on the day of the proceedings, the application to have the details removed from the Wikipedia website’s past records was no longer relevant.

Finally, on the ground that the Wikimedia Foundation’s capacity was that of a hosting service, the plaintiffs applied to the Paris TGI for the precise identity of the Internet user to be notified to them.

In reply, the Wikimedia Foundation argued that the plaintiffs already had several data, such as the IP address of the contributor, which corresponds to the personal computer used, and that only the Internet service provider was in a position to provide the data which would enable the user to be fully identified.

On this point, the President of the Paris TGI merely specified, without drawing any conclusions, that there was no doubt that the Internet service provider could identify the person in

question and that it had not been proved that the Wikimedia Foundation had any other identification data regarding that person.

We should wait and see how the case is decided on the merits, which should help us to better understand the legal provisions which apply to hosts of file-sharing websites.

AREAS OF LEGAL PRACTICE

• **MERGERS & ACQUISITIONS**

Engineering of takeovers and deal structuring, legal due diligence, restructuring operations, joint ventures, obtaining necessary administrative permits and licenses, drafting and negotiation of documentation (letters of intent, sale & purchase agreements, warranties that assets and liabilities are as stated, bank guarantees, shareholders' agreements, etc.), merger deals, takeovers of companies in difficulty or in the framework of collective procedures.

• **CAPITAL INVESTMENTS AND LBOs**

Representation of investment funds, issuers, targets and company officers, during the due diligence, advisory and negotiation processes.

• **COMPANY LAW**

"Long-term capital" transactions, capital increases, issuance of composite securities (convertible or repayable in shares, investment certificates, priority dividend shares etc.), stock option agreements, company founder share plans, temporary business combinations, management fees and cash management agreements, changes to charter/by-laws and legal secretariat services.

• **SECURITIES LAW**

IPOs and preparatory work, drafting of prospectuses, legal secretariat services for listed companies, relations with market authorities, securities litigation.

• **BANKING AND FINANCE**

Advice on loan and financing agreements, warranties/guarantees, syndication, banking regulations, financing of acquisitions and structured asset financing (particularly of real estate).

• **COMMERCIAL CONTRACTS / ECONOMIC LAW**

Advice and litigation with commercial contracts, i.e. service, sale, distribution, concession, franchise, commercial agent agreements, distributor/supplier relations, general terms of purchase/sale, commercial partnerships, manufacturing and subcontracting agreements, business sale agreements, management leases, consumer law, public and private procurement contracts.

• **ADVERTISING / MARKETING**

Advice and litigation work in advertising and marketing law (validation of advertising or promotional campaigns on all media and related litigation).

• **LABOUR AND EMPLOYMENT LAW**

Advice and litigation work in collective and individual disputes as well as in social security law and criminal labour law.

• **INTERNATIONAL LITIGATION / ARBITRATION**

Advice and litigation work covering all facets of business, company and securities law, as well as collective procedures and white-collar crime. Representation at all stages of the dispute, from pre-litigation to litigation before judicial or arbitral courts, protective measures and enforcement.

• **REAL ESTATE LAW**

Advice and litigation work in connection with commercial leases, real estate due diligences, purchase/sale of property and of preponderantly real estate companies, financing of real estate acquisitions.

• **REAL ESTATE LAW**

Advice and litigation work in connection with commercial leases, real estate due diligences, purchase/sale of property and of preponderantly real estate companies, financing of real estate acquisitions.

• **COMPETITION LAW (FRENCH AND EU)**

Advice and litigation work in respect of industrial cooperation agreements and structuring of distribution networks. Advice and representation before the competition authorities and courts in cartel, anti-competitive practices, abuse of a dominant position and unfair competition cases. Advice on the control of concentrations (conduct of feasibility studies, preparation of notification files, negotiation with the national and Community control authorities) and on State aids/subsidies.

• **NEW TECHNOLOGIES AND INTELLECTUAL PROPERTY LAW**

Advice and litigation work, notably in IT matters (development and integration of software, licenses, assignments and other software-related contracts, facilities management, maintenance of IT systems and software, software infringement), in the field of new technologies (multimedia, Internet, e-commerce). Creation and hosting of websites, affiliation, partnership, online auctions, ASP licenses.

• **INTELLECTUAL PROPERTY**

Literary and artistic property rights & neighbouring rights. Distribution license, rights of performing artists, infringement litigation. Industrial property, trademark, patent and/or design and model applications, licenses and assignments, transfers of technology and/or know-how, trademark, patent and/or design and model litigation (infringement, opposition proceedings, etc.).

• **AUDIOVISUAL AND MULTIMEDIA LAW**

Advice and litigation work in connection with the production, publishing, co-production, distribution and licensing agreements, in France and abroad, of motion picture and/or audiovisual and/or multimedia works and related agreements. Navigation of audiovisual and motion picture regulations and assistance with financing.

• **TELECOM**

Legal advice and preparation of applications for telecom operator licenses, legal aspects of foreign investments in the telecom sector, link leasing (cable and fibre), co-leasing, leasing of capacity, service and/or capacity supply agreements and general terms of service and/or capacity supply, legal aspects and local loop unbundling.

• **COLLECTIVE PROCEDURES**

Alert, restructuring and reorganisation procedures, conciliation and ad hoc representation procedures. Court-ordered reorganisation, preparation of reorganisation plans, sale and recovery plans, liquidation. Representation and assistance of creditors, company officers (action to make good the shortfall in assets, extension procedures, etc.).

Wide network of foreign correspondents

The Firm has developed a wide network of foreign correspondents in most industrialised countries and in certain developing countries.

ISO 9001

The Firm was the first Paris law firm to obtain ISO 9001 certification back in 1998.

31, avenue Hoche, 75008 Paris

Telephone: 33 (0)1 56 88 30 00

Fax: 33 (0)1 56 88 30 01

www.bersay-associés.com

cb@bersay-associés.com