



## OLD ECONOMY V. NEW ECONOMY: INTELLECTUAL PROPERTY, GLOBAL WRONGS AND PRIVATE REMEDIES<sup>1</sup>

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**ABSTRACT.** During the last decade both US and Europe have regulated internet service providers liability (hereinafter referred to as ISPs). In 1998, the Congress has approved the Digital Millennium Copyright Act (DMCA) which has modified the Copyright Act of 1976, stating that ISPs are not liable if their activity is limited to a mere technical role which consists in transmitting information on digital networks. The same inspiration has been followed by the E-commerce directive (directive 2001/31/EC) which has imitated, verbatim in some cases, the American law. Two are the main differences among these laws. Firstly, the DMCA covers exclusively copyright infringements, while e-commerce directive can be applied both to criminal and civil liabilities. The latter difference is that e-commerce directive is limited to some activities developed by ISPs (mere conduit; caching; hosting), while the DMCA also regulates liability of search engines (like Google) and hyperlinks. The DMCA as well as the EU directive is based on the neutrality principle: ISPs are not liable as long as they do not select contents or recipients of the information transmitted. The most remarkable issue, however, is probably the fact that both regulations have refused to apply strict liability to ISPs. Starting from these regulations, the paper will analyze some examples of private regulations. It will be specifically examined YouTube's Video ID and eBay's Vero Program, probably the most relevant examples of cooperation between ISPs and IP holders, and the recent cases which has involved these tools in US, Spain, France and Italy. The paper aims at demonstrating that IP violations are not the crucial matter of these legal actions, which reflects a clash between different business models. Private remedies for IP violations, even if efficient, have not reached their goals. The reason is probably extralegal and is given by the fact that new economy services are attracting customers in the entertainment sector from traditional media (people watching YouTube rather than TV programs) and are diverting luxury brands consumers from traditional shops (people buying luxury products on eBay rather than on local dealers).

**SUMMARY:** 1. Introduction. – 2. Examples of private enforcement: Vero Program and Video ID. – 3. American and European approach. – 4. The clash of business models: Old economy v. new economy. – 5. EBay and French courts. – 6. Cases involving YouTube. – 7. Final Remarks.

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<sup>1</sup> This paper was originally presented at the Journal of Comparative Law Workshop on “Global Wrongs and Private Law Remedies and Procedures”, organised by the Law School of the University of East Anglia (UEA) and the School of Oriental and African Studies (SOAS) and which took place in London, 28<sup>th</sup> and 29<sup>th</sup> 2009, then revised and updated for the publication in this law review.



1. What is the role of self-regulation – and, in general, of private remedies – in cyberspace? What is the support that a regulation not directly connected to the authority of a specific State can offer in relation to intellectual property infringements committed via cyberspace? It is extremely difficult to answer to this question properly. We probably need to take a step back, briefly analyzing what happened during the last decade.

During the '90s, some American scholars tried to diffuse the idea that the Internet, as a free virtual place, should also be free from any form of regulation. More cautiously, some other scholars suggested the use of forms of self-regulation, most famous among them being Netiquette<sup>2</sup>. Not surprisingly, these proposals soon manifested their limits. Self-regulation works for small groups with similar purposes and activities (such as physicians, lawyers), but it is much less successful with heterogeneous groups<sup>3</sup>.

Considering the evolution and the diffusion of the Web, it could be argued that at the very beginning of the nineties, when the Internet was overwhelming “populated” by university researchers or by computer scientists, self-regulation and Netiquette might have been a good solution. However this same solution does not fit with the Internet in its current state. Not only in cyberspace, but in every sector and in every environment, regulation is restricted to matters falling within national boundaries.

The Internet is not a brave new world, as someone would argue. It is a mass-media and, even if the most innovative one, it must be treated as such<sup>4</sup>, regardless of the cultural, social and economic revolution it has provoked<sup>5</sup>. And it would be frankly naive to imagine that in a market, whose value was more than 600 billion dollars in 2008<sup>6</sup>, conflicts do not arise or that these conflicts could be regulated by Netiquette, which lacks enforceable remedies. This is the reason behind suggestions for the adoption of narrower forms of self-regulation. In fact, even though general self-regulation failed to regulate the Internet, other interesting examples of private remedies developed by ITC companies have been created in recent years.

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<sup>2</sup> I. Trotter HARDY, *The Proper Legal Regime for “Cyberspace”*, 55 U. Pitt. L. Rev. 993 (1994); David G. POST, *Governing Cyberspace*, 43 Wayne L. Rev. 155 (1996); David R. JOHNSON, David G. POST, *Law and Borders: The Rise of Law in Cyberspace*, Stanford Law Review 1367 (1996).

<sup>3</sup> See e.g. Margaret J. RADIN - R. Polk WAGNER, *The Myth of Private Ordering: Rediscovering Legal Realism in Cyberspace*, 73 Chi.-Kent L. Rev. 1925 (1998); Neil WEINSTOCK NETANEL, *Cyberspace Self-Governance: A Skeptical View from Liberal Democratic Theory*, 88 Calif. Law Rev. 433 (2000).

<sup>4</sup> Jack L. GOLDSMITH, *Unilateral Regulation of the Internet: A Modest Defence*, 11 European J. of Int'l L. 135 (2000): “The Internet is not a separate place removed from our world. Like the telegraph and the telephone it is a means of transborder communication in which someone can cause real-world harms”.

<sup>5</sup> See for instance Marc LE GLATIN, *Internet: un séisme dans la culture?*, Editions de l'Attribut, Paris, 2007.

<sup>6</sup> According to the data collected by Digiworld during the last year.



2. The most relevant of these remedies are probably eBay's Vero Program<sup>7</sup> and YouTube's Video Identification (or Video ID)<sup>8</sup>. Compared to Netiquette, these models of self-regulation are quite different. First of all, the Vero Program and Video ID have been created by a single party, a private entity, and are not the result of a previous agreement among these companies and the other stakeholders. Stakeholders (such as copyright holders) can adhere to the agreement, but they can not modify the terms of it. Secondly, these examples of self-regulation are considered to be part of the general law, and not alternative to it. This means that these tools could be an efficient way of avoiding all the legal problems related to the Internet, such as judicial competence, applicable law, and so on.

Ebay's Vero Program is one of the oldest examples of self-regulation, or rather of cooperation between intellectual property owners and ISPs. It is an agreement between eBay and private companies, which allows the companies to ask for the removal of auctions if they consider that these auctions violate their rights. Counterfeiting is the most common infringement committed via eBay, but not the only one. Once an authorized representative of the rights owner properly reports – following the specified procedure – that an item may be counterfeit, the Vero Program removes the auction. After the removal, eBay contacts the seller, forwarding him the e-mail sent by the rights owner. In this way, if the item is not counterfeited, the seller can sue the rights owner. The Vero Program can be considered an efficient solution to the problem of IP infringements in cyberspace, as it is quick and cost-free for rights owners. On its side, eBay has a strong interest in ensuring that infringing bids are removed from the site since the success of the auction platform is essentially based on the trust of its users. Removing counterfeited items raises the level of trust in the site, as buyers will be surer of the both quality and the originality of the items.

This procedure is interesting for at least two reasons. The first reason is that the removal of the bid is without the prior authorization of the sellers. According to the user agreement, eBay may issue users “with warnings, limit, suspend, or terminate our service and user accounts, restrict or prohibit access to, and your activities on, our sites (including, without limitation, cancelling bids and removing listings), delay or remove hosted content, remove any special status associated with the account (including, without limitation, PowerSeller status), reduce or eliminate any discounts, and take technical and legal steps to keep you off our sites if [...] we think that you are infringing the rights of third parties”. The second interesting aspect is that the eBay procedure is modeled upon the notification system under the Digital Millennium Copyright Act, which modified the Copyright Act of 1976<sup>9</sup>. According to this Act, as soon as they are informed of assumed infringing

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<sup>7</sup> <http://pages.ebay.com/help/policies/programs-vero-ov.html>

<sup>8</sup> [http://www.youtube.com/static?hl=en-GB&template=video\\_id\\_about](http://www.youtube.com/static?hl=en-GB&template=video_id_about)

<sup>9</sup> The Digital Millennium Copyright Act has ratified the WIPO Treaties of 1998 (Copyright Treaty and Performances and Phonograms Treaty), see generally Pamela SAMUELSON, *The U.S. Digital Agenda at WIPO*,



information, internet service providers (ISPs) are expected to begin the procedure. Before disabling or removing the material, the ISP has to send a formal notice to the content provider. The content provider, in turn, is entitled to send to the host provider a counter-notification (which must mention the same information about the notification), declaring that the material is not unlawful.

YouTube's copyright policies are also modeled upon the notification (and counter-notification) system, although with slight differences to the e-Bay procedure. In addition to the "manual" takedown procedure, YouTube has developed particular software, called Audio ID and Video ID. Rights holders deliver YouTube reference files (audio-only or video) of content that they own and metadata describing that content. Once the technology finds a match and identifies the copyrighted content, the rights holder can decide whether or not to block users' access to this content.

3. Despite the financial efforts made by eBay and YouTube, the companies have been recently sued for IP infringements in different countries. Before analyzing these judicial disputes, it is useful to consider articles 12-15 of directive 2000/31/EC of June 2000, on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, which regulates ISP liability in Europe.

The European directive has imitated, verbatim in some cases, the above mentioned Digital Millennium Copyright Act<sup>10</sup>. There are two main differences between these laws.

Firstly, the DMCA covers exclusively copyright infringements (vertical approach), while the e-commerce directive can be applied both to criminal and civil liabilities (horizontal approach)<sup>11</sup>. This means that the e-commerce directive is limited to some activities developed by ISPs (mere conduit; caching; hosting), while the DMCA also regulates the liability of search engines (like Google) and hyperlinks. Neither of them explicitly covers services like YouTube or Google Video or auction platforms like eBay. The DMCA, like the EU directive, is based on the neutrality principle: ISPs are not liable as long as they do not select the contents or the recipients of the information transmitted. The most interesting similarity, however, is probably the fact that both laws have refused to apply strict liability to ISPs.

This kind of legal transplant should be applauded for several reasons. To begin with, the aim of the directive is harmonization. It is significant, indeed, that this process of legal uniformity involves, on one side, EU members and – on the other side, in a broader view -

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37 Va. J. Int'l L. 369 (1997). Title 2 of the Act (Limitations on liability relating to material online) has introduced the § 512 into the Copyright Act of 1976, which is expressly dedicated to ISP liability.

<sup>10</sup> The e-commerce directive has imitated the DMCA, but also the German Act (TeledienstGesetz of 1997).

<sup>11</sup> Rosa Julià BARCELO, Kamiel J. KOELMAN, Intermediary Liability in the E-Commerce Directive: So Far So Good, But It's Not Enough, in 16 Computer Law & Security Report 231, 232 (2000); Etienne MONTERO, La responsabilité des prestataires intermédiaires de l'Internet, Revue Ubiquité 101 (2000).



the U.S. legal system. This directive could, therefore, be considered as a first step towards a “soft” worldwide law. From a comparative perspective it is notable that the DMCA has deeply influenced the EU directive. This legal framework (DMCA and EU directive), in its turn, has influenced third countries: not only the applicant states which are trying to join the EU, but also the countries that are trying to improve their commercial relations with the European economic area (e.g. the northern Africa countries and some South American countries).

Similarly to the DMCA, the directive considers the activities actually engaged in by the ISPs and not their abstract role. This prevents the application of a strict liability regime, as in the French law on the press with its *responsabilité à cascade* (“waterfall” liability).

The European directive covers three different roles developed by ISPs, mere conduit, caching and hosting.

Article 12 exempts access providers from liability, if they: (a) do not initiate the transmission; (b) do not select the receiver of the transmission; and (c) do not select or modify the information contained in the transmission. The directive, in this way, guarantees an almost absolute immunity for these intermediary functions (referred to by article 12 as “mere conduit”), treating access providers as if they were common carriers like telecommunications operators. Caching and access providing are treated differently. In the case of caching, the directive imposes a higher diligence standard. In fact, in certain circumstances, it is expected, for example, that ISPs will remove the infringing information or otherwise comply with technological rules.

The third activity mentioned by the EU directive is hosting. Even in this case, the provider who acts only as an intermediary is not liable, if:

(a) it does not have actual knowledge of the illegal activity or information and, in relation to claims for damages, is not aware of facts or circumstances from which the illegal activity or information can be discerned;

(b) upon obtaining such knowledge or awareness, it acts expeditiously to remove or to disable access to the information.

Host providers liability is probably one of the most controversial issues of Internet regulation and article 13, because of the terminology used, does not explain it sufficiently. First of all, the concept of actual knowledge has a specific meaning in the American copyright law context<sup>12</sup>, but in the field of ISP liability its boundaries are unclear. It should also be mentioned that article 13 is applicable only when there is effective knowledge and not in cases where it is impossible to know whether the information is legal. The directive’s reference to apparent illegality is to blame. Frankly speaking, it does not make sense. An activity or some information can be legal or illegal, but never apparently illegal. The only way to interpret this expression is to say that the ISPs are not liable if they remove information that is manifestly illegal (e.g. in case of child pornography, but not in case of

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<sup>12</sup>*Aro Manufacturing Co. v. Convertible Top Replacement Co.*, 377 U.S. 476 (1964). See also *RCA Records Inc. v. All-Fast Systems Inc.*, 594 F. Supp. 335 (S.D.N.Y. 1984).



copyright infringement)<sup>13</sup>. The host providers, in fact, could find themselves playing the role of “institutionalised censors”, because they are required to remove all illicit information as soon as they have knowledge or awareness of it<sup>14</sup>. But article 14 does not specify who is authorized to inform the host provider, nor does it specify the notice and take down procedure that the host provider has to follow. The greatest risk is that the host provider removes – after being informed by a third person – information which is not illicit. And, in this case, it could be sued by content providers because it has violated its contractual obligation.

Finally, article 15 has solved the complex problem of monitoring the activities of content providers. The article establishes that Member States can not impose a general obligation on providers to monitor the information which they transmit or store, or a general obligation to search actively for evidence of illegal activity.

The EU directive has drawn a clear line between those who develop content for the Internet, and those who, in their capacity as technological intermediaries, provide the means and the tools to make this content publicly available. Refusing the application of strict liability, despite the suggestions of some European (and especially French) courts, the directive has realized several positive goals.

First of all, it has avoided a reduction in the number of the operators. Indeed, the application of a strict liability regime would have limited the access to the market to only those parties with deep pockets, that is, operators with significant economic resources. In the same way, imposing strict liability on ISPs would have also jeopardized the “quality” of information. If an ISP were always liable, regardless of its efforts to prevent illicit conduct by third parties, it would probably choose to provide its services exclusively to the content provider supplying comfortable information<sup>15</sup>. For example, in such a situation it would be economically more efficient, and less risky, for an ISP to host a web site dedicated to French cuisine rather than a web site discussing political events. Ultimately, it seems very likely that the application of a liability regime based on fault avoids a chilling effect in the marketplace for information. Accordingly, this approach should also lead the legislative

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<sup>13</sup> Antonio DELGADO PLANÁS, Responsabilidad de los operadores en el proyecto ley de servicios de la sociedad de la información y de comercio electrónico, 43 Rev. Electrónica de Derecho Informático 2 (2002).

<sup>14</sup> For further details see: Giovanni M. RICCIO, La responsabilità civile degli internet providers, Giappichelli editore, Torino, 200-214 (2002).

<sup>15</sup> See also Christian C.M. BEAMS, The Copyright Dilemma Involving Online Service Providers: Problem Solved...for Now, 51 Fed. Comm. L. J. 823, 830 (1999): “The added burden of monitoring every message that passes through an OSP would dramatically increase overhead costs. Many smaller service providers have been forced out of business. It follows that OSPs that would still have had to be quite discriminating as to whom they granted access. Regardless, these increased costs would be passed on the consumer. Fifteen dollars a month for Internet access would become a thing of the past. The Internet is for everyone, not just wealthy people who are able to afford an increase (probably significant) in access costs”.



process for search engines, web 2.0 operators and all the other providers of services not regulated by directive 31/2000, in order to safeguard the rapid growth of the Internet and the development of the new digital economy within the European Union.

4. During the last years both eBay and YouTube have been sued by several companies. The plaintiffs can be divided into two types: the so-called luxury brands (such as Hermes, etc.) have sued eBay for trademark infringement; and TV companies have sued YouTube for copyright infringement.

However it should be noted that the kinds of violations committed via e-Bay and YouTube involve infringements other than copyright infringement of TV programs or trademark infringement of luxury brands. For example, on YouTube it is not hard to find music transmitted by subjects who are not allowed to do it because they are not the copyright owners. But, as far as we know, there are just a few cases – and against YouTube they do not involve the so-called majors from the music sector. The same is true in relation to the movies. There are loads of clips excerpted from famous motion pictures on YouTube: despite this, the movie sector is not attacking the channels of distribution.

The situation can be properly understood only taking into account the peculiarities of the Internet market and how this market influences consumers' commercial behaviour and users' preferences. First of all, the Internet facilitates the creation of monopolies<sup>16</sup>. Regardless of the distances, since the Internet cuts across geographical barriers, if a specific tool or service is efficient, all users – or a large part of them, at least – will probably use this service instead of any other. Consider, for example, what happened with search engines. During the nineties, several search engines shared the market: Altavista, Yahoo, Google, and so on. After a few years, the vast majority of these web sites have lost their segment of market and changed their business activities. The same is happening to the auction platform. E-Bay has more than the 50% of the market and its only competitor – excluding some specific national competitors, like for example Ricardo in Germany – is Yahoo (and only in some specific areas of the world). This has happened because e-Bay has conquered the market by offering a tool considered by users as friendly and safe for their transactions. The nature (and the simplicity) of the creation of these monopolies (or rather “almost monopolies” as they must be considered more properly as operators in oligopolistic markets dominated by one player) has also caused an incredibly fast growth in the income of the companies. It is also interesting to note that the creation of monopoly is made faster by the fact that developing Internet businesses generally does not require major capital investment as it is based principally on an idea. For example, if a company wants to create a new car, it will need preliminary studies, designers, testing materials, prototypes, and so on. Nothing is generally required (at least at the moment of start-up) in a Internet business. Google was based on the idea of finding information using relatively simple software

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<sup>16</sup> See, in general, Mark NEWMAN, Albert-Laszlo BARABASI, Duncan J. WATTS, *The Structure and Dynamics of Networks*, Princeton University (2006).



(although at the very beginning, the new software was much more complicated), e-Bay on the idea that there are loads of people who are not so keen on some of the Christmas gifts they have received, Facebook on the idea that people are excited by being reconnected with the friends they had at school, and so on.

Finally, Internet services do not have geographical boundaries (all web sites are equidistant for a consumer), they are often free for the users (costs are generally paid for by advertising) and there are no specific difficulties in exporting these services. All these peculiarities have been critical to the growth of Internet empires, as confirmed by recent research, which shows that 6 out of 10 of the most valuable brands belong to the so-called new economy sector<sup>17</sup>.

Secondly, the explosion of the new economy has had positive effects on the old economy. This is because consumers have changed their commercial behavior, shopping on-line rather than in traditional shops. Economic rules regarding the effect of scarcity of resources in the market-place mean that if a consumer buys a Gucci bag on e-Bay for a better price than he would have paid in a Gucci store, he is unlikely to buy another Gucci bag in a Gucci store. Obviously, this will negatively affect Gucci's business, which will likely consider e-Bay a sort of competitor, even if they operate in different market sectors.

In the end the Internet is just the latest version of post-Fordism, in which an industry is based on the production of goods, but on services<sup>18</sup>. These services provide the tools for eliminating traditional selling and business models, which paves the way for new market-players (whether private individuals or established businesses) that offer more efficient solutions (like lower prices or better contractual conditions).

5. In 2004, Tiffany & Co. filed suit against e-Bay for trademark infringement, false advertising and unfair competition. The US District Court for the Southern District of New York ruled that e-Bay could not be held liable either for direct or for contributory infringement. According to the decision, "Tiffany must ultimately bear the burden of protecting its trademark. Policymakers may yet decide that the law as it stands is inadequate to protect rights owners in light of the increasing scope of Internet commerce and the concomitant rise in potential trademark infringement<sup>19</sup>. Nevertheless, under the law as it currently stands, it does not matter whether eBay or Tiffany could more efficiently bear the burden of policing the eBay website for Tiffany counterfeits – an open question left

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<sup>17</sup> Google is the most valuable brand of 2009 (value: 100,0039 \$M, with a 16% brand value change '09 vs. '08). Among the ten most valuable brands of 2009 there are also Microsoft (76,249 \$M), Apple (63,113\$M), IBM (66,622 \$M) and Vodafone (53,727 \$M).

<sup>18</sup> See Giuseppe MAIONE, *Le merci intelligenti*, Bruno Mondadori editore, Milano, 53-86 (2001).

<sup>19</sup> *Tiffany (NJ) Inc. and Tiffany and Company v. eBay, Inc.* 04 Civ. 4607 (RJS).



unresolved by this trial”. Similarly, in a Belgian case, the Court of Brussels ruled that e-Bay could benefit from the hosting safe-harbors provision of the e-commerce directive<sup>20</sup>.

Unlike these cases, in France, a Court has ruled against e-Bay, requiring it to pay a huge amount (1.7 million euros) to Moët Hennessy Louis Vuitton (LVMH) for trademark counterfeiting. This has been the first decision which has held an auction platform liable for a direct infringement<sup>21</sup>. However, in May 2009, another French court rejected a claim made by the cosmetics company L’Oréal, accusing e-Bay of profiting from the selling of counterfeited items on its site. According to the decision, e-Bay was not liable as long as it made reasonable efforts to prevent bids for fake goods<sup>22</sup>. The same approach has been adopted by other French courts, which have admitted the applicability of the hosting regime to auction platforms<sup>23</sup>.

6. Analogous lawsuits have involved also YouTube, which has been sued by several TV companies. In the U.S., Viacom, a television company, has filed an action for copyright infringement and inducement of copyright infringement against YouTube. According to the plaintiff, YouTube had committed a “massive intentional copyright infringement”, permitting users to watch on its network thousands of hours of Viacom’s programming<sup>24</sup>. The case, as far as we know, is still ongoing.

In Italy, in an interim decision, the Court of Rome has ordered YouTube to remove Mediaset’s materials from their sites immediately. The Italian broadcasting company complained that that it found 4,643 videos and clips (equivalent to more than 325 hours of transmission) transmitted on YouTube violating Mediaset copyright. The interim decision, so far, relates solely to the clips of the TV program “Big Brother 10”<sup>25</sup>.

The outcome of the Italian case follows a similar decision by a Spanish tribunal, which had granted an injunction to stop the distribution of videos without the express

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<sup>20</sup> “Les seules activités d’eBay critiquées par Lancôme sont celles par lesquelles eBay héberge (ou affiche) les annonces de vente émanant des candidats vendeurs”, Tribunal de commerce of Brussels, July 31, 2008. As far as we know, the decision is still unpublished.

<sup>21</sup> Tribunal de Commerce of Paris, June 30, 2008 (the text of the decision is available here: [http://www.legalis.net/jurisprudence-decision.php3?id\\_article=2353](http://www.legalis.net/jurisprudence-decision.php3?id_article=2353)).

<sup>22</sup> Tribunal de Grande Instance of Paris, May 16, 2008 (the text of the decision is available here: [http://www.legalis.net/jurisprudence-decision.php3?id\\_article=2306](http://www.legalis.net/jurisprudence-decision.php3?id_article=2306)).

<sup>23</sup> Court of Appeal Paris, November 9, 2007 (the text of the decision is available here: [http://www.legalis.net/jurisprudence-decision.php3?id\\_article=2560](http://www.legalis.net/jurisprudence-decision.php3?id_article=2560)); Tribunal de Grande Instance of Troyes, June 4, 2008 (the text of the decision is available here: [http://www.legalis.net/jurisprudence-decision.php3?id\\_article=2320](http://www.legalis.net/jurisprudence-decision.php3?id_article=2320)).

<sup>24</sup> *Viacom International, Inc., et al v. YouTube, Inc., et al.* The case documents can be found here: [http://dockets.justia.com/docket/court-candce/case\\_no-5:2008mc80211/case\\_id-208062/](http://dockets.justia.com/docket/court-candce/case_no-5:2008mc80211/case_id-208062/)

<sup>25</sup> Court of Rome, RTI (Reti televisive italiane)v. Youtube LLC, December 15, 2009, available here: <http://www.tgcom24.mediaset.it/res/doc/sentenzatribunale.pdf/>.



authorization of Telecinco, the commercial television owner of the copyright on the videos. However, in September 2010 the Federal Court of Madrid has rejected allegations of copyright infringement made by Telecinco, emphasizing two main aspects. On the one hand, Youtube is "only" a hosting platform, not liable for content being uploaded onto its site.

On the other hand, Youtube must not perform a precautionary control of content: broadcasters may already use the "content ID" tool, that allows them to delete, automatically and for free, online contents uploaded by users<sup>26</sup>.

Finally in July, 2011, the Court of Justice of the European Union has given judgment in the long-standing dispute between L'Oréal and e-Bay, concerning the sale, without L'Oréal's consent, of L'Oréal products on the online marketplace operated by eBay.

The ECJ has provided clarification on the liability of companies operating internet marketplaces for trade mark infringements committed by users. In summary the Court, following the trend of Google "AdWords" decision<sup>27</sup> (and its restrictive interpretation of article 14 of the Electronic Commerce Directive), rules that "*where the operator of the online marketplace has not played an active role within the meaning of the preceding paragraph and the service provided falls, as a consequence, within the scope of Article 14(1) of Directive 2000/31, the operator none the less cannot, in a case which may result in an order to pay damages, rely on the exemption from liability provided for in that provision if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised that the offers for sale in question were unlawful and, in the event of it being so aware, failed to act expeditiously in accordance with Article 14(1)(b) of Directive 2000/31*".

Furthermore the ECJ states that national courts must be able to order the operator of an online marketplace to take measures which contribute, not only to bringing to an end infringements of those rights by users of that marketplace, but also to preventing further infringements of that kind<sup>28</sup>.

Taking into account the cases involving e-Bay, it is possible to make some preliminary observations, which deal not with the legal aspects of the cases but rather with the business reasons which have led TV companies to attack YouTube.

The important point is that these companies (e.g. Telecinco or Mediaset) are not really worried about the copyright violations *per se*. Their real concern is that people spend their spare time watching video on YouTube instead of watching television. The fact that people are changing their habits radically influences commercial investments. Recent

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<sup>26</sup> The decision is available here: [http://danielelepido.blog.ilsolo24ore.com/files/sentenza-youtube\\_telecinco\\_anticipata-dal-sole-24-ore-5.pdf/](http://danielelepido.blog.ilsolo24ore.com/files/sentenza-youtube_telecinco_anticipata-dal-sole-24-ore-5.pdf/).

<sup>27</sup> ECJ (Grand Chamber), March 23, 2010, cases Google France SARL and Google Inc. v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA and Luteciel SARL (C-237/08) and Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others (C-238/08), in Reports of Cases, 2010, I-2417.

<sup>28</sup> ECJ, July 12, 2011, case C-324/09, L'Oréal SA v. eBay International AG, not yet published but available here: <http://www.curia.europa.eu/>.



research clearly shows this trend: in the first half of 2009, Internet advertising in UK grew by 4.6% to £1,752.1m. This data is impressive considering that, in the same period, the entire advertising sector has been reduced by 16.6%. The total share of the Internet advertising is now at 23,5% (£1.75 billion), while television advertising has decreased by up to 21.9% (£1.75 billion)<sup>29</sup>.

7. This quick (and necessarily incomplete) report of the cases which have involved YouTube and e-Bay is useful for showing how self-regulation is evolving in cyberspace. As stated above, now that the idea of a general and all-comprehensive regulation has been abandoned, some companies have developed unilateral forms of cooperation with other companies. Even if narrower and probably less ambitious, these kinds of cooperation can be a good answer to some frequent problems connected with Internet law, like jurisdiction and applicable law.

However the two examples discussed above demonstrate that this type of regulation is not efficient in relation to competitors or other opposed stakeholders. In fact, it is noteworthy that YouTube has been attacked by television broadcasters and not by record labels or video producers. These latter companies are using YouTube for promoting their new releases, with dedicated channels, and are not in a competitive relationship with it. So self-regulation efforts, regardless how efficient they might be, are going to be sacrificed in a clash between competitors (or rather between opposite business models), not in relation to a copyright issue. The same could be argued in relation to the e-Bay disputes. Even in this case, as already pointed out, trademark violations are not the breaking point and luxury companies are not aiming at singling out the real authors of the violations, but at discouraging a competitive activity.

The directive has not regulated either the activities of auction platforms operators, or of search engines and web 2.0 operators, nor has it affected notice and take-down procedures. We have already underlined why the neutral principle is a good approach, even if there is much pressure for the strengthening of the liability regime for ISPs across Europe. In particular, in France, the so-called Hadopy Law, strongly supported by the entertainment industry, has already increased the obligations which are imposed on ISPs, trampling on users' fundamental civil and human rights<sup>30</sup>.

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<sup>29</sup> See Internet Advertising Bureau, UK Online Adspend Study Results for the Half Year to the June 2009, available here: <http://www.iabuk.net/en/1/adspendgrows300909.mxs>

<sup>30</sup> The French Senate has passed the *Loi favorisant la diffusion et la protection de la création sur Internet* May 13, 2009, by 189 yeas against 14 nays (Hadopi is the acronym of the National agency created by the law, *Haute autorité pour la diffusion des oeuvres et la protection des droits sur internet*). The law introduced the 3-strikes procedure. According to this procedure, ISPs can be obliged to suspend users' internet access in case of repeated infringements committed via Internet. However, the Constitutional Court a part of the act unconstitutional as contrary to presumption of innocence and freedom of speech as consecrated in the Declaration of the Rights of Man and of the Citizen of 1789. For this reason the French Parliament has slightly modified the text of the



It is likely that some other EU Member States (Spain, Italy) might soon walk in the French footsteps. Unfortunately, this way frustrates all the efforts of self-regulation among different stakeholders, regardless how efficient these kinds of self-regulation are or could be, jeopardizing the development of the Internet and sacrificing it on altar of intellectual property high-handedness.

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act, passing a new law on September 15, 2009 (the so-called Hadopi 2). In 2012 the new President of France, François Hollande, have announced that he want to close Hadopi and replace it with “something else”.