

# CLIENT ALERT

## ISP-Liability & Media Law

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### Dutch telecoms regulator wants to open up cable TV market

*The Dutch telecoms regulator OPTA has announced that it intends to open up the cable TV market in the Netherlands. Under recent draft decisions proposed in the framework of OPTA's analysis of wholesale and retail markets for TV services, cable operators would be required to make a wholesale (analogue) cable TV subscription available for reselling by alternative providers. The cable operators would also be required to transmit the digital TV offering of alternative providers over the cable.*

On July 15, 2008, the Dutch telecoms regulator OPTA ("Onafhankelijke Post en Telecommunicatie Autoriteit") presented several draft decisions regarding the cable TV markets. These drafts are currently the subject of a public consultation. They will also be submitted to the European Commission in the context of the procedure provided for in article 7 of the Framework Directive. It is OPTA's intention that the final decisions enter into force on January 1, 2009...

The draft decisions provide that cable operators UPC and Ziggo will have the obligation to make a wholesale (analogue) cable TV subscription available for reselling by competing, alternative providers. They will also have an obligation to transmit the digital TV offering of these alternative providers over the cable network. The combination of these measures would allow the alternative providers to take over the customer relationship with the end-user. The Dutch incumbent, KPN, would however be excluded from the benefit of the OPTA decision since it has the ability to offer TV services to end users over its own network.

OPTA expects that the draft measures will increase competition with respect to the offer of radio and television services to the end users.

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## Can a court impose permanent monitoring obligations upon ISP's and intermediaries? French Supreme Court approves, Belgian Commercial Court refuses

*The French Supreme Court upheld an injunction order that forced several ISP's to actively monitor and block racist content for an indefinite period of time. The Supreme Court's judgment seems to ignore the express prohibition on monitoring obligations set forth in the E-Commerce Directive. In Belgium, on the contrary, the Brussels Commercial Court refused to impose a permanent monitoring obligation in the Ebay-case.*

### Introduction

The E-Commerce Directive 2000/31 provides in its Article 15 that internet intermediaries such as internet access providers cannot be subject to any general monitoring obligation. Courts can only impose temporary monitoring obligations in specific cases. However, in earlier case-law, French and German courts seem to have ignored this provision (see [Crowell & Moring's first TMT & Privacy bulletin](#)).

Recent case-law in France and Belgium seems to go in two different directions:

- In a decision of June 19, 2008, the French Supreme Court (*Cour de Cassation*) has now confirmed a judgment of the Paris court of appeal of November 24, 2006, in which the main French ISP's were forced, for an indefinite period of time, to "*block access to the content currently available through the address [www.vho.org/aaargh](http://www.vho.org/aaargh).*"
- In a decision of July 31, 2008, the Belgian Court of Commerce has however refused to impose a permanent obligation upon online auction operator Ebay to monitor its platform for counterfeit products of perfumes manufacturer Lancôme.

### Background of the French case

In 2005, several French civil rights organizations initiated injunction proceedings against a number of French internet access providers. The aim of the court action was simple: the internet access providers needed to block access to certain racist and revisionist content posted online on websites accessible through the domains [www.vho.org/aaargh](http://www.vho.org/aaargh), [www.aaargh-international.org](http://www.aaargh-international.org) and [www.aaargh.com.mx](http://www.aaargh.com.mx).

Both in first instance and in appeal, injunctive relief was granted to the civil rights organizations. The injunction order granting the relief was not limited in time. In addition, the injunction order was not limited to a specific website: the order concerned the content *currently* available through the address [www.vho.org/aaargh](http://www.vho.org/aaargh), leaving open the obligation for the French internet access providers to monitor and to look for other, future websites on which the racist content could be found.

The internet access providers then appealed before the French Supreme Court, and submitted three basic objections. First, the injunction order would not be proportionate, since other relief could have been granted (in particular, the hosting provider or the website owner should have been sued rather than the internet access providers). Second, the injunction order would not be fair and would be against due process since both in first instance and in appeal, the courts had not specified which measures the internet access providers needed to take in view of blocking the litigious racist content. Third, the injunction order would not be acceptable since it contained a permanent blocking order and did not require the civil rights organizations to initiate proceedings on the merits. The French ISP's based these arguments on the European Human Rights Convention ("EHRC") and on Article 12 of the E-Commerce Directive, which provides that internet access providers cannot be held liable for the content they transmit (the "*mere conduit*" exception).

The Supreme Court rejected these three arguments.

### **Background of the Belgian case**

The Lancôme/Ebay judgment of the Brussels Court of Commerce is but one episode in a multi-jurisdictional litigation between the L'Oréal cosmetics group (of which Lancôme is a subsidiary) and online auction operator Ebay.

In Belgium, Lancôme launched proceedings before the Brussels Court of Commerce in order to prohibit Ebay from allowing vendors of Lancôme parallel imports, vendors of large quantities of Lancôme products and/or vendors with a history of selling counterfeit products.

In a first step, the Brussels Court of Commerce rightly held that Ebay qualified as a "host" under the E-Commerce Directive. In a second step, the Court held that Ebay benefited from the "safe harbour" provisions set out in the E-Commerce Directive. Finally, in a third step, the Court invoked Article 15 of the E-Commerce Directive and held that Lancôme's claims could not be allowed since granting these claim would be tantamount to imposing a general monitoring obligation upon Ebay.

### **Analysis and conclusions**

The decision of the Brussels Court of Commerce seems to make a correct application of Article 15 of the E-commerce Directive. The decision is very interesting since it stands counter to earlier decisions regarding online auction operators by the French lower courts and by the German Supreme Court (*Bundesgerichtshof*) (see [Crowell & Moring's first TMT & Privacy bulletin](#)).

On the contrary, the outcome of the French Supreme Court's decision is surprising and can be criticized for two reasons:

- First, the court case seems to have started on the wrong footing. As a matter of fact, the French access providers surprisingly based their three arguments on the wrong legal provisions, relying on Article 12 of the E-Commerce Directive and the EHRC. They did not in any way refer to Article 15 of the E-commerce Directive. It is precisely this provision that prohibits monitoring and blocking obligations that are either of a general nature or of an unlimited duration. The reference by the French ISP's to Article 12 of the E-commerce Directive and to the EHRC therefore seems inappropriate.
- Second, the French Supreme Court's reasoning is surprising. Since every European judge is held to construe national law in conformity with European law, the Supreme Court could have invoked Article 15 of the E-commerce Directive *ex officio*, even though the French access providers had not raised this provision. The French Supreme Court failed to do so.

**References:** Cour de Cassation, 19 June 2008, D 07-12.244 and Brussels Court of Commerce, July 31, 2008, A/07/06032

**Link:** <http://www.crowell.com/NewsEvents/Newsletter.aspx?id=951#mediaisp2>

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### **French EU Presidency pushes national initiatives on illegal downloading as the way forward**

*At an informal meeting of the Culture and Media Ministers of the European Union in Versailles on July 21-22 2008, the French EU Presidency has advanced cross-industry collaboration and "graduated response" mechanisms as the way forward in the combat*

*against illegal downloading. Stakeholders in all EU Member States should therefore carefully monitor government initiatives on a national level.*

In the fight against illegal downloading, national governments are increasingly pressuring the music and internet industry to reach negotiated solutions. In France, the 'Olivennes' commission was created by President Sarkozy in an effort to put all stakeholders in the illegal downloading debate around the table. In the United Kingdom, a number of larger ISP's have signed up to a non-binding agreement with the online content industry, committing themselves to discouraging the free downloading of music or films covered by copyright.

A common denominator in both France and the United Kingdom seems to be that ISP's are increasingly adopting the "graduated response" mechanism. According to this mechanism, illegal downloaders receive warning letters and ultimately see their internet access blocked or their subscription terminated in case of persistent downloading. The "graduated response" mechanism is in general not viewed favorably by the ISP community - since it arguably imposes a larger burden on the ISP's than what they are legally obliged to - but is sometimes nevertheless accepted due to severe political pressure.

At an informal summit of the European Ministers for audiovisual affairs, the French EU Presidency has now advanced its model of cross-industry collaboration and "graduated response" as the way forward, even though a majority in the European Parliament seems adverse to implementing any kind of "graduated response" mechanism via European legislation.

Stakeholders such as ISP's or other online intermediaries should therefore carefully monitor developments on the national level, and should the case being get into contact with the national authorities competent for audiovisual matters in order to intervene in any legislative process.

**Link:** [http://www.ue2008.fr/PFUE/site/PFUE/lang/en/informelle\\_des\\_ministres\\_de\\_la\\_culture\\_et\\_de\\_l\\_audiovisuel\\_principaux\\_resultats](http://www.ue2008.fr/PFUE/site/PFUE/lang/en/informelle_des_ministres_de_la_culture_et_de_l_audiovisuel_principaux_resultats)

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