

Is the fact that a website is accessible from France sufficient to establish the jurisdiction of French courts?

On the Internet, determining the location of a damage is particularly complex as such damage may occur in a multitude of places. In this context, the question arises as to what criterion should be applied to determine the court that is territorially competent to hear a tort claim seeking compensation for the damage that occurred on the Internet.

In a decision dated October 18, 2017^[1], the First Civil Chamber of the *Cour de Cassation* (French Supreme Court) recalled that the mere fact that the French audience has access to a website broadcasting a video ad that infringes copyrights is sufficient to establish the jurisdiction of French courts.

In the matter at hand, a French association claimed that it held copyrights on shows featuring characters from 7 to 12 meters high (“the Giants”) strolling in the streets under a recognizable choreography and scenography. The association argued that an ad broadcasted by Coca-Cola France in several countries displayed the characteristics of its original works and, consequently, infringed its copyrights. As such, the association filed a tort claim before the First Instance Court of Paris (France).

Coca-Cola France raised a procedural objection based on the fact that the ad was not intended for a French audience. The trial judges granted this objection as they considered that the ad was intended for a foreign audience and/or advertising and communications professionals for informational purposes only. Specifically, they held that French courts lacked jurisdiction because of the “*absence of a sufficient, substantial or significant link between these sites, the posted video ad and the French audience*”^[2].

The matter was ultimately brought to the *Cour de Cassation*. The First Civil Chamber of the *Cour de Cassation*,

relying on Article 46 of the French Code of Civil Procedure, quashed the lower court's judgment and held that *"the accessibility, from the geographical area of jurisdiction of the court before which the matter was brought, of a website broadcasting the contentious video ad is sufficient to consider that this court, as the court having jurisdiction over the place where the alleged damage occurred, is competent to hear the association's claim concerning the alleged breach of its copyrights"*.

Choice of jurisdiction

Pursuant to Article 46 of the French Code of Civil Procedure, in matters related to tort, the plaintiff may, at his discretion, *"initiate proceedings before the court having jurisdiction over the territory where the harmful event occurred or where the damage was suffered"*. As such, the plaintiff has the right to choose between the place where the event that gave rise to the damage occurred and the place where the damage itself occurred.

Concerning in particular harmful events that are, by essence, diffuse because they appear on the Internet, this choice of jurisdiction is difficult to implement since the damage may occur in multiple places.

In this respect, the First Civil Chamber and the Commercial Chamber of the *Cour de Cassation* disagree on the criterion that ought to be used to determine the competent court.

The First Civil Chamber considers that the accessibility criteria must be applied. It, therefore, has ruled that French courts were competent *"to hear claims concerning the prevention and compensation of damage suffered in France as a result of the operation of a website in Spain"* and considered that *"the website, although passive, was accessible from the French territory, which means that the alleged damage resulting merely from this broadcast was neither virtual nor potential"*^[3].

On the other hand, the Commercial Chamber of the *Cour de Cassation* promotes a stricter application of Article 46 of the French Code of Civil Procedure and disagrees with the application of the accessibility criterion. It considers, in particular, that it is necessary to determine whether the content published on the website is intended *"for a French audience"* and, for this purpose, to identify the intention of the content publisher. As such, according to the Commercial Chamber of the *Cour de Cassation*, the mere fact that a website is accessible from France is insufficient to ascertain the place of occurrence of the damage and, consequently, to establish that French courts have jurisdiction^[4].

In its decision dated October 18, 2017, the First Civil Chamber of the *Cour de Cassation* rejected the criterion based on the targeted audience of the contentious content and, again, enshrined the theory of accessibility.

Enshrinement of an "automatic" jurisdiction of French courts in case of infringements of personality rights on the Internet

Despite the conflicting view between the First Civil Chamber and the Commercial Chamber of the *Cour de Cassation*, the October 18, 2017 decision is fully consistent with the line of decisions rendered by the Court of Justice of the European Union ("CJEU"), according to which Article 5.3 of Regulation (EC) No 44/2001 of December 22, 2000, known as the "Brussels I" Regulation, must be interpreted as offering a choice of

jurisdiction to the plaintiff who claims to be the victim of an infringement of his personality rights as a result of contents published on a website.

According to the CJEU, the tort action can be initiated before different courts, depending on whether the plaintiff seeks a global compensation for all the damage suffered or a compensation for the damage that occurred in a specific territory^[5].

As such, the First Civil Chamber of the *Cour de Cassation* adopted a simplistic position: The mere fact that the contentious content is accessible is sufficient to establish that the courts of the territories where the damage occurred have jurisdiction. By ruling so, the First Civil Chamber of the *Cour de Cassation* set aside the requirement concerning the existence of a connecting link between the website in question and the French audience. The targeted audience of the content thus seems to be irrelevant since only the place of occurrence of the damage is contemplated.

Based on this decision, French courts appear to have automatically jurisdiction to hear tort claims related to an infringement of personality rights resulting from an access to contentious contents from France.

The actual reach of the decision rendered by the First Civil Chamber of the *Cour de Cassation* should, however, be assessed in light of the decisions that will be handed down in the future by the Commercial chamber in similar cases.

The practical implications of this outcome are highly important in international disputes as it increases the number of courts having jurisdiction. In particular, wherever a website that broadcasts contentious contents is accessible from France, French courts will automatically have jurisdiction and any legal entity or natural person whose personality rights have been infringed by such contents will be entitled to bring an action before these courts. Professionals that operate online must be extra vigilant about the contents published on their websites.

^[1] First Civil Chamber of the *Cour de Cassation*, October 18, 2017 - n° 16-10.428

^[2] Court of Appeals of Paris, October 22, 2015

^[3] First Civil Chamber of the *Cour de Cassation*, December 9, 2003 - n° 01-03.225

^[4] Commercial Chamber of the *Cour de Cassation*, March 29, 2011 - n° 10-12.272

^[5] CJEU, October 25, 2011 - eDate Advertising and Olivier Martinez, cases C-509/09 and C-161/10

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