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The silver lining in Dailymotion's copyright cloud

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Introduction

Dailymotion is a video-sharing website that enables internet users to upload and watch videos online. However, it is more than just a repository for videos as it sports features allowing participation and interaction from the internet community. Users who have opened an account with *Dailymotion* can upload their videos but also rate and make comments on videos of others and join groups of people sharing the same interests. This focus on the internet community as a source of content and sociability is the hallmark of so called "Web 2.0" platforms, also known as User-Generated Content (UGC) services.

The problem faced by UGC services is that, in spite of their name, the content uploaded by users is not always created by them. This is particularly true of video-sharing websites where countless copies of music videos, television shows or movies produced by the media industry have been uploaded by users without the authorization of rightholders. This creates a tension between UGC services and the media industry over copyright issues. The problem is compounded by the fact that, although they are free of charge, many UGC services generate revenues through the sale of advertising space on their platforms. Many rightholders have therefore accused UGC services of profiteering from piracy and have launched lawsuits against them for copyright infringement.

The Paris-based Dailymotion has been under intense scrutiny from rightholders in France. On 13 July 2007, Dailymotion was held liable for copyright infringement by the *Tribunal de Grande Instance* (thereafter TGI) of Paris, the Paris court of first instance in civil matters¹. The decision was widely reported in the media given its potentially wide-ranging impact on Dailymotion and other UGC services². Indeed, the Paris TGI ruled that Dailymotion was, as a hosting provider

¹ Tribunal de Grande Instance de Paris, 3ème chambre, 2ème section, 13/07/2007. Available at Juriscom.net: <http://www.juriscom.net/documents/tgiparis20070713.pdf>, also available at Legalis.net http://www.legalis.net/jurisprudence-decision.php3?id_article=1977. COMMENTS: French ruling against video-sharing platform DailyMotion. EDRI-gram - Number 5.14, 18/07/2007 <http://www.edri.org/edrigram/number5.14/dailymotion-decision>; Lilian EDWARDS, Web 2.0 liability hits Europe - delete those borrowed cartoons fast, folks...Pangloss, 31/10/2007 <http://blogsript.blogspot.com/2007/10/web-20-liability-hits-europe-delete.html>; IRIS, Affaire DailyMotion: le TGI de Paris écrit la LCEN2.0. IRIS <http://www.iris.sgdg.org/info-debat/comm-dailymotion0707.html>, also available in Droit NTIC, 20/07/2007 <http://www.droit-ntic.com/news/afficher.php?id=416>; D.R. (La Gazette du Net), DailyMotion qualifié d'hébergeur et reconnu responsable de la mise en ligne d'une vidéo. Juriscom.net, 16/07/2007 <http://www.juriscom.net/actu/visu.php?ID=948>; Dailymotion, prestataire technique responsable. Legalis.net, 18/07/2007 http://www.legalis.net/article.php3?id_article=1980; Isabelle RENARD, Les acteurs du Web 2.0 vont-ils sortir vainqueurs de la bataille judiciaire? Journal du Net, 07/09/2007 <http://www.journaldunet.com/expert/le-net/16026/les-acteurs-du-web-2-0-vont-ils-sortir-vainqueurs-de-la-bataille-judiciaire.shtml>; Julie RUELLE, The Dailymotion case: a tough decision for Internet hosting providers? Bird & Bird, 24/10/2007 http://www.twobirds.com/english/publications/articles/Dailymotion_France.cfm; Brad SPITZ, DailyMotion: a "hosting provider" liable for copyright infringement. Juriscom.net, 18/07/2007 <http://www.juriscom.net/actu/visu.php?ID=949>.

² Hélène Puel, DailyMotion, condamné pour contrefaçon, va filtrer les vidéos des internautes. 01net., 16/07/2007, <http://www.01net.com/editorial/355007/dailymotion-condamne-pour-contrefacon-va-filtrer-les-vidéos-des-internautes/>; Guillaume Champeau, DailyMotion condamné pour violation de droits d'auteurs. Ratiatum.com, 16/07/2007.

deemed to have enabled and thrived on piracy, under the obligation to implement technical measures to prevent acts of piracy. The fact that an unauthorized copy of the movie "Joyeux Noël" (Merry Christmas in French) had been made available on the website by a user signaled Dailymotion's failure to comply with the obligation of prior control, thus entailing its liability for copyright infringement (Part 1). Dailymotion has appealed this worrying decision which greatly expands its liability. However, more lawsuits against Dailymotion and other video-sharing websites paint an even gloomier judicial picture for UGC services (Part 2). However, every cloud has a silver lining, as the saying goes. Looking through the prism of judicial activity gives an incomplete and distorted picture of Dailymotion's relationship with the media industry. Dailymotion has been taking a series of measures, such as implementing filtering mechanisms, and building partnerships with members of the content industry which should ensure a brighter future on the copyright front (Part 3).

1. The dark cloud of copyright infringement

The Paris TGI has ordered *Dailymotion* to pay the rightholders of the movie "Joyeux Noël" €23,001 in damages for copyright infringement (1.4). The court ruled that *Dailymotion*, by letting an unauthorized copy of the movie to be made available on its platform (1.1), had, as a hosting provider (1.2), failed to comply with its obligation to implement prior control mechanisms preventing all copyright infringements (1.3).

1.1 An unauthorized copy of "Joyeux Noël" is made available on Dailymotion

In early 2007, after having gathered evidence that the movie "Joyeux Noël" was available to watch, split in two parts, on *Dailymotion*, *Nord Ouest Production*, the producer of the movie, asked *Dailymotion* to withdraw the unlawful copy from its website. Observing that, in spite of Dailymotion's promises, a long extract of the movie remained available on the website, the producer and *Christian Carion*, the director of the movie, later joined by *UGC Images*, its distributor, launched an action against the website in April 2007, claiming €34,813 in damages for copyright infringement.

As is often the case in instances of alleged piracy, the rightholders chose to sue the internet company hosting the infringing copy rather than the individual responsible for its upload. Established companies such as *Dailymotion* are easier to identify, bring to court and made to pay when compared with potentially anonymous, overseas and penniless uploaders. This strategy however, pits rightholders against tougher opposition. Not only do internet companies have the financial means to fight protracted lawsuits, they also can claim the benefit of statutory provisions designed to protect them. Invariably they argue that as mere technical intermediaries they cannot be held liable for the actions of their users, claiming benefit of the service provider status which limits their liability in the event of unlawful material being made available through their services.

In that respect, the defense of *Dailymotion* was classical. It argued before the court that it was a hosting provider, a mere technical conduit, and as such should benefit from the limitation of liability granted to service providers. The Paris TGI agreed.

http://www.ratiatum.com/news5353_DailyMotion_condamne_pour_violation_de_droits_d_auteurs.html;
Dailymotion condamné pour avoir hébergé le film "Joyeux Noël". ZDNet France, 16/07/2007
<http://www.zdnet.fr/actualites/internet/0,39020774,39371362,00.htm>; Clarisse Fabre, Les sites hébergeurs dans le collimateur. Le Monde, 24/07/2007 http://www.lemonde.fr/web/imprimer_element/0,40-0_2-651865,50-938329,0.html; Karine Solovieff, Sur Dailymotion, le filtrage s'applique aussi aux chansons. 01net., 01/08/2007 <http://www.01net.com/editorial/355500/sur-dailymotion-le-filtrage-s-applique-aussi-aux-chansons>. MEDIA IN ENGLISH: Cade Metz, French court slaps poor man's YouTube. The Register, 26/07/2007 http://www.theregister.co.uk/2007/07/26/dailymotion_guilty_of_copyright_infringement.

1.2 Dailymotion is classified as a hosting provider and is, as such, eligible for the limitation of liability

Dailymotion convinced the Paris TGI it should be classified as a hosting provider. The rightholders thus lost the important battle over the legal classification of *Dailymotion*'s activity after having unsuccessfully argued it was a publisher. However, despite having failed to win the classification battle, some of the arguments put forward by the rightholders would eventually prove decisive in the court's final decision to hold the website liable.

1.2.1 The importance of being classified as a hosting provider rather than a publisher

Whether *Dailymotion* was classified as a hosting provider or a publisher was pivotal in determining its level of liability for copyright infringement. A publisher is liable as soon as the existence of unlawful activities can be established. By contrast, French law grants mere services providers, such as internet service providers or hosting providers, a limitation of liability under the "*Loi pour la Confiance dans l'Economie Numérique*" or LCEN (the law on the confidence in the digital economy), which was passed in 2004³ and which implements the European E-commerce Directive of 2000⁴. This limitation allows, under specific conditions, for hosting providers not to be held liable when unlawful activities took place on their services.

Indeed, under Article 6-I-2 LCEN service providers which store, for the purpose of making available on the internet, data provided by their users (also referred to as recipients) "*may not be held civilly liable for the activities or information stored at the request of a recipient of these services if they did not have actual knowledge of their unlawful nature or of facts and circumstances making this nature apparent, or if, as soon as they obtained such knowledge, they acted expeditiously to remove or to disable access to these data*"⁵. The obligation of service providers is thus to act diligently to put an end to infringements which they have become aware of. This is a far more limited liability than that of publishers which must prevent all acts of infringements from happening in the first place. This in turn makes it a lot harder for rightholders to hold a service provider liable for copyright infringement. Whereas in the case of a publisher, rightholders only have to establish the existence of an infringement to prove the publisher was at fault, in the case of a service provider, rightholders need to show that the service provider was aware of the unlawful act and failed to act fast enough to stop the infringement.

³ Loi n°2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique, available Legifrance <http://www.legifrance.gouv.fr/WAspad/Ajour?nor=ECOX0200175L&num=2004-575&ind=1&laPage=1&demande=ajour>.

⁴ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'); available Eur-lex (pdf version) http://eur-lex.europa.eu/LexUriServ/site/en/oj/2000/l_178/l_17820000717en00010016.pdf.

⁵ Personal translation of Article 6-I-2 LCEN. PROVISION IN FRENCH : « Les personnes physiques ou morales qui assurent, même à titre gratuit, pour mise à disposition du public par des services de communication au public en ligne, le stockage de signaux, d'écrits, d'images, de sons ou de messages de toute nature fournis par des destinataires de ces services ne peuvent pas voir leur responsabilité civile engagée du fait des activités ou des informations stockées à la demande d'un destinataire de ces services si elles n'avaient pas effectivement connaissance de leur caractère illicite ou de faits et circonstances faisant apparaître ce caractère ou si, dès le moment où elles en ont eu cette connaissance, elles ont agi promptement pour retirer ces données ou en rendre l'accès impossible. » FOR AN ALTERNATIVE TRANSLATION see Rueille, The Dailymotion case: a tough decision for Internet hosting providers? Bird & Bird, 24/10/2007, http://www.twobirds.com/english/publications/articles/Dailymotion_France.cfm: hosting providers "may not be held civilly liable for the activities or information stored at the request of a recipient of these services if they are effectively unaware of the illegal nature thereof or of the facts and circumstances revealing this illegality or if, as soon as they become aware of them, they have acted promptly to remove these data or make access to them impossible".

Those legal parameters dictated the strategies of the parties. *Dailymotion* wanting to be classified as a hosting provider, claimed its role was strictly limited to offering its users the possibility to create an online personal space where they could upload, store and share videos in streaming. According to *Dailymotion*, this meant that users were given sole control, and thus responsibility, over the type of content uploaded and the way it was referenced and shared on the service. In response, the rightholders claimed that *Dailymotion* was more than a mere technical conduit and had been acting as a publisher and could not, therefore, benefit from the limitation of liability.

1.2.2 The rightholders' claim that Dailymotion is as a publisher

To support their claim that *Dailymotion* was not a mere hosting provider, the rightholders argued, in essence, that its business model was that of a publisher. They pointed out that *Dailymotion* was not generating any revenues from data hosting. It did not, for instance, charge uploaders to store their data. Instead, the business model of *Dailymotion* was based on the sale of advertising space associated with the content made available on its pages.

The rightholders also explained that in this ad-based business model, the level of revenues was linked to the number of visitors on the website; that the only way to draw a large number of visitors was to provide access to compelling content; and that, overwhelmingly, the type of content susceptible to draw large audiences was well-known content produced by media corporations, not new content produced by amateurs.

For the rightholders then, the popular and commercial success of *Dailymotion* was based on a deliberate strategy to allow the broadcasting and the monetization of unlawful content. By adopting an ad-based business model, *Dailymotion* had, according to the rightholders, acted as a publisher and, implicitly, a reckless one at that by allowing and monetizing infringing activities.

1.2.3 The court's ruling that Dailymotion is a hosting provider

Ultimately, however, the court sided with the website, deciding that the nature of its business model was irrelevant to its classification. The court ruled that *"the sale of advertising space does not allow to classify Dailymotion as a content publisher whereas the said content is made available by users, which is what differentiates service providers from publishers, the latter being by their nature at the origin of, and therefore liable for, the broadcasting of the content."*

By classifying *Dailymotion* as a hosting provider, the court made it eligible for the more favorable liability framework. However, the court immediately warned that such framework only established *"a limitation not an exoneration of liability."* Indeed, service providers are subject to obligations, albeit far less extended than those of publishers, regarding unlawful activities on their services. The court, using the arguments put forward by the rightholders, eventually ruled that *Dailymotion* had failed to fulfill its duties and was therefore liable for copyright infringement.

1.3 Dailymotion is nevertheless liable for having failed to fulfill its obligation of prior control

Dailymotion claimed it was not liable for the unlawful content uploaded by its users since it had complied with the obligations imposed on hosting providers by the LCEN. After stressing that it was under no legal obligation to monitor its network for unlawful activities, *Dailymotion* pointed out it had been displaying to its users warnings against piracy within the terms of service and every time they uploaded a file. *Dailymotion* also argued it had immediately removed the copy of *"Joyeux Noël"* as soon as it was informed of its unlawful nature by the rightholders. Finally, the website said it had maintained data records enabling the identification of the user who made the unlawful upload, as the LCEN requires.

Surprisingly, the court did not examine these points although they were relevant to establish whether *Dailymotion* had complied with its obligations. Instead, it ruled that *Dailymotion* had failed to comply with an obligation to implement prior control systems to monitor and prevent unlawful activities. The court argued that *Dailymotion* was under this new obligation, because, having enabled and thrived on unlawful activities, it could not have failed to become aware of them and should have prevented them.

1.3.1 Dailymotion must have been aware of unlawful activities since it enabled and thrived on them

The court found that *Dailymotion* had deliberately enabled mass scale piracy, saying that “*it could not seriously be argued that the aim of the architecture and the technical means put in place by Dailymotion were merely meant to enable [any internet user] to share their home-made videos with their friends or the wider internet community, whereas they were meant to demonstrate [Dailymotion’s technical] capacity to offer the internet community access to any type of video without distinction, whilst leaving to users the care to fill the site in such fashion that it was obvious this would be done with works protected by copyright*”.

The court found that *Dailymotion* had not only enabled unlawful activities but also had benefited from them. Pointing to the argument previously made by the rightholders, it said “*that the success of Dailymotion necessarily implied the broadcasting of well-known works, the only ones able to increase the site’s audience, and thus ad revenues*”.

Because it had enabled and thrived on mass piracy, the court therefore found that *Dailymotion* must “*be considered as having (had) knowledge of, at the least, facts and circumstances leading it to assume that unlawful videos were being put online*”, the court then concluding that “*Dailymotion should face responsibility [for the unlawful activities] without being able to shift the blame solely on its users since it had deliberately made available to them the means to commit [these unlawful activities]*”.

1.3.2 Dailymotion had a duty to implement prior control systems to monitor and prevent these unlawful activities

Dailymotion tried to claim benefit from Article 6-I-7 LCEN which states that hosting providers “*are under no general obligation to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating unlawful activity*”⁶.

However, the court asserted that even if the law states that providers are under no general obligation to monitor for unlawful activities, this exoneration “*did not apply when the unlawful activities were generated or induced by the service provider itself*”. *Dailymotion* was thus, the court ruled, under a general obligation to monitor.

The court then observed that *Dailymotion* “*had not implemented any means to prevent access to the movie “Joyeux Noël”, if not after having been given notice to do so, once the harm had already been suffered by the rightholder*”, whereas, the court continued, “*Dailymotion had a duty to carry out prior control*”.

After asserting that *Dailymotion* had a duty to carry out prior control and observing that the presence of the unlawful copy of “*Joyeux Noël*” signaled its failure to comply with this obligation, the court ruled *Dailymotion* was liable for copyright infringement and should therefore pay damages to the rightholders.

⁶ Article 6-I-7 LCEN : «Les personnes mentionnées aux 1 et 2 ne sont pas soumises à une obligation générale de surveiller les informations qu’elles transmettent ou stockent, ni à une obligation générale de rechercher des faits ou des circonstances révélant des activités illicites.»

1.4 Dailymotion to pay €23,001 in damages

The damages would cover the breach of the economic and moral rights of the copyright holders.

1.4.1 Breach of the producer and distributor's economic rights: €23,000

Dailymotion was sentenced to pay damages of €13,000 to the producer and of €10,000 to the distributor for having breached their economic rights by broadcasting the movie without their authorization.

1.4.2 Breach of the director's moral rights: €1

The director argued that his moral rights had been breached on two counts: a breach of his paternity (also known as the attribution) right and a breach of his integrity right on the movie.

The director claimed his paternity right was breached because the uploader had inserted, before the opening title of the movie, his pseudonym followed by the expression "*presents Joyeux Noël*" thereby attempting to appropriate the work of the director. The court discarded this claim. It ruled there could not be any confusion on who was the author of the work since the name of the director appeared in the opening title of the movie. In the absence of confusion on the author of the movie, the paternity right of the director had not been breached.

The court, however, agreed with the director that his integrity right had been violated, as the unlawful copy lacked the quality and fluidity of the original. The court ruled that "*the broadcasting in streaming only allowed for poor quality viewing notably given the limited size of the video frame, which is not adapted for a feature film, and its jerky rendering*". The court also observed that "*the [artistic] unity of the movie was furthermore distorted by a two part cut-out*". The court deciding that "*there was a breach in the integrity of the work*", ordered *Dailymotion* to pay the director the symbolic €1 in damages he had asked for.

This level of damages is manageable for *Dailymotion*. However, the legal reasoning used by the court is cause for concern. The Paris TGI asserted that *Dailymotion*, because it had enabled and thrived on mass piracy, was under a general obligation to implement technical means to prevent unlawful activities. This obligation of prior control dramatically expands the duties of the hosting provider with regards to copyright infringement. Predictably, *Dailymotion* has appealed the decision before the Paris Court of Appeal⁷. Unfortunately for *Dailymotion* and other UGC, the judicial forecast looks somber beyond the "*Joyeux Noël*" case, as an increasing number of rightholders engage in confrontation with video-sharing websites.

2. The gathering storm over Dailymotion and other UGC services

Dailymotion, by appealing the "*Joyeux Noël*" decision, will have the opportunity to challenge the controversial obligation of prior control devised by the TGI (2.1). But although *Dailymotion* has a good chance of getting the obligation struck down, the decision of the Court of Appeal could prove even worse should it decide to classify *Dailymotion* as a publisher (2.2). Overall, the prospects of *Dailymotion* look bleak in the "*Joyeux Noël*" case and a series of ongoing copyright litigations paint an equally gloomy judicial picture for the UGC sector as a whole (2.3).

2.1 Challenging the new obligation of prior control imposed on Dailymotion

⁷ Ariane Beky, Joyeux Noël : Dailymotion fait appel. NetEco.com, 02/08/2007 <http://www.neteco.com/77704-joyeux-noel-dailymotion-appel.html>.

The new obligation of prior control devised by the Paris TGI raises numerous questions as it is possibly unnecessary, contrary to the law and ill-defined.

2.1.1 Was there a need for a new obligation?

Arguably, the TGI could have held *Dailymotion* liable by applying the law as it is, rather than by imposing a new obligation on the hosting provider. The facts of the case seem to indicate that *Dailymotion* had failed to remove all unauthorized copies of “*Joyeux Noël*” after having been given notice to do so by the rightholders. By failing to remove or disable access to these unlawful copies *Dailymotion* was in breach of its obligations under Article 6-I-2 LCEN. It could have therefore, on that basis only, been held liable for copyright infringement. The court did not need to impose a duty to implement prior control in order to protect the interests of the rightholders of “*Joyeux Noël*”. More importantly, it probably did not have the power to do so either.

2.1.2 Is there a legal basis for this new obligation?

The court’s assertion that *Dailymotion* was under a general obligation to implement prior control bluntly contradicts the letter of Article 6-I-7 LCEN which states that hosting providers are under no such obligation. In order to deny *Dailymotion* the benefit of the provision, the TGI stretched the legal framework of hosting providers’ liability. The reasoning of the court was as follows: The LCEN requires hosting providers to stop unlawful activities upon becoming aware of them. The court argued that *Dailymotion* must have been aware that its platform was being used for unlawful activities since it enabled, induced and thrived on them. Being aware of this mass piracy, *Dailymotion* had to implement solutions to prevent all unlawful activities. And since it had enabled and induced piracy, *Dailymotion* could not be exonerated from this duty of prior control. In this interpretation of the law, the unauthorized copy of “*Joyeux Noël*” thus signaled *Dailymotion*’s failure to comply with this obligation of prior control, entailing its liability.

By retroactively imposing a duty of prior control to *Dailymotion*, the court significantly modified its obligations as a hosting provider. From an obligation to be reactive in stopping specific acts of infringement, the court imposed an obligation to proactively prevent all acts of piracy. Such extension of *Dailymotion*’s duties upsets the balance set by the LCEN between the interests of service providers and that of copyright holders. Through the LCEN, the French Parliament wanted to cater for copyright holders, but also to protect service providers against crippling lawsuits, the threat of which could have deterred them from investing in the development of the digital infrastructure. The decision of the Paris TGI in “*Joyeux Noël*” significantly tilts the scales in favor of rightholders. The issue here is not to decide whether *Dailymotion* and other video-sharing sites should be held more accountable for acts of piracy. Actually, we will argue below that a greater degree of scrutiny on UGC services is understandable. The question is to know whether the Paris TGI had the power to impose on a hosting provider a new obligation which clearly contradicts the letter of the law.

In France, the role of courts is constrained to the interpretation and application of statutes passed by Parliament. In principle, and contrary to the common-law tradition of such jurisdictions as the United States or the United Kingdom, all French courts, even the supreme courts, are forbidden to create new rules. In that context, the Paris TGI has arguably overstepped its power by retroactively imposing a general obligation of prior control on *Dailymotion*, whereas the law clearly states otherwise. It is very likely that *Dailymotion* will raise the point before the Court of Appeal. However, if the Court of Appeal were to uphold this obligation, questions surrounding its definition, contour and extent would become highly relevant.

2.1.3 What is the extent of this new obligation?

The main question relating to the obligation of prior control is that of its extent. At what point will the courts be satisfied that *Dailymotion* has fulfilled this obligation? Will *Dailymotion* be under an obligation to prevent all acts of infringement or rather just under an obligation to make its best efforts to attain this result?

The question is crucial in a field where filtering and protection technologies are notoriously prone to be circumvented by ingenious teenagers, making it very difficult to guarantee their efficiency in the long (or even short) run. If the courts nevertheless decide that *Dailymotion* has to prevent all acts of piracy, then any infringing copy would automatically entail its liability. However, such would not be the case if Dailymotion was only under an obligation to make its best effort to prevent piracy. To avoid liability in such circumstances, Dailymotion would only need to establish that, despite all its efforts, it has been impossible to implement a fool-proof filtering mechanism.

It is easy to understand how the uncertainty concerning the extent of the obligation of prior control would be unsettling for *Dailymotion*. This is especially true since in its most stringent form, the obligation could cancel most of the benefits attached to the status of hosting provider. Indeed, under the least favorable interpretation, *Dailymotion* would be liable for any copyright infringement irrespective of its awareness of it and even if it tried to prevent it. In effect, *Dailymotion's* liability would, in such circumstances, be very similar to that of a publisher. If upheld, the obligation of prior control could therefore blur the distinction between the liability of service providers and that of publishers. There are therefore strong incentives for the Court of Appeal to strike it down, to the relief of *Dailymotion* and other hosting providers. However, this relief could be short-lived notably as the Court of Appeal might decide to reclassify *Dailymotion* as a publisher.

2.2 Treating Dailymotion as a publisher?

We have seen that the Paris TGI has classified *Dailymotion* as a hosting provider in spite of its ad-based business model. The Court of Appeal could decide otherwise. Some French courts, including the Paris Court of Appeal itself, have classified UGC services as publishers due to their business model. Furthermore, the fact that *Dailymotion* acknowledges that it sometimes acts as a publisher might help support such reclassification.

2.2.1 The relevance of the ad-based business model

The criterion of the ad-based business model has been used in two previous instances to classify UGC services as publishers.

A month before its “*Joyeux Noël*” decision, the Paris TGI decided that *MySpace*, a social networking site, was a publisher and as such liable for the copyright infringement made by one of its users on his personal page⁸. To classify *MySpace* as a publisher, the court used the criterion of the ad-based business model. The Paris TGI said that “[*MySpace*], by imposing a frame-based structure for users to present their personal information and by displaying [revenue generating] ads for each and every visit [made on the pages], had acted as a publisher”.

⁸ Tribunal de Grande Instance de Paris, Ordonnance de référé, 22/06/2007 Legalis.net : http://www.legalis.net/jurisprudence-decision.php3?id_article=1965. COMMENTS see: Nicolas JONDET, “French prankster wins copyright battle against MySpace”. French-law.net, 19/11/2007 http://french-law.net/index.php?option=com_content&task=view&id=71&Itemid=1; Jeanne MEHAUD, “Myspace considered as a publisher by a French tribunal and found liable for copyright infringement by its users”. Bird & Bird, 23/10/2007 http://www.twobirds.com/english/publications/articles/Myspace_publisher_copyright_infringement.cfm?; Brad SPITZ, “The Buttock’ sues MySpace for copyright infringement”. Juriscom.net, 11/07/2007 <http://www.juriscom.net/actu/visu.php?ID=942>.

As Jeanne Méhaud, a lawyer, pointed out, the reasoning in the *MySpace* case mirrors that made by the Paris Court of Appeal in the 2006 “*Tiscali Média*” decision⁹. Again, the case was about a copyright infringement made by a user of the *Tiscali Média* website on his personal page. The Paris TGI said *Tiscali* was a hosting provider¹⁰ and ruled it was not liable for copyright infringement¹¹. However, the Paris Court of Appeal overturned this classification. It decided that *Tiscali Média*, though originally a hosting provider, had also acted as a publisher by enabling internet users to create their personal webpage, and by commercially exploiting the website through the sale of advertising space on those personal pages.

The Court of Appeal could, like in its “*Tiscali Média*” decision, overturn the classification made by the Paris TGI, ruling that Dailymotion’s business model makes it a publisher. The fact that Dailymotion has been ever more proactive in the broadcasting of content might also support such reclassification.

2.2.2 Dailymotion’s foray into publisher territory

Dailymotion seems increasingly keen in taking a more active part in the broadcasting of both amateur and professional content, thus gradually embracing the role of publisher.

With regards to the broadcasting of amateur content, *Dailymotion* explicitly endorses the status of publisher when administering the “MotionMaker” program. The program is designed to allow *Dailymotion* to identify and promote original content and its creators¹². The account-holders with *Dailymotion* who have applied and have been accepted in the program are identified as “*MotionMakers*” on the website. The content they upload is then reviewed by *Dailymotion* and is, upon validation, made available on the website with the “*Creative Content*” label affixed to it. *Dailymotion* thus plays a pivotal role both before and after the content is put online. It has, according to the terms use of the program, absolute discretion in the selection of the applicants and the reviewing and promotion of their content¹³. This gives *Dailymotion* a much more active role than that of a mere hosting provider. Crucially, *Dailymotion* explicitly endorses the quality of publisher in the “*MotionMaker*” program, the terms of the program specifying that “*upon validation, Dailymotion will become the publisher and not merely the host [of the “Creative Content”]*”¹⁴.

Beyond amateur content, *Dailymotion* has also started to build partnerships with professional content producers. Well before the “*Joyeux Noël*” decision, Dailymotion has been signing deals with professional producers to broadcast their content. The first of such deals were signed in late 2006 - early 2007 with *Universal Music* and *Warner Music*, two major record labels, to broadcast their music videos¹⁵. Interestingly, the Paris TGI mentioned the impact of those deals on *Dailymotion*’s status. The court said that upon making these videos available online, *Dailymotion* would be changing of activity “*by becoming a publisher or a co-publisher (...) of the said videos.*”

⁹ Cour d’Appel de Paris, 07/06/2006 available at Legalis.net : http://www.legalis.net/jurisprudence-decision.php3?id_article=1638.

¹⁰ The law applicable to the “*Lucky Comics*” case was the 1986 French “Law on the Freedom of Communication”, modified in 2000 and later abrogated by the LCEN. Loi n°86-1067 du 30/09/1986 relative à la liberté de communication, dite «Loi Léotard », modifiée par la Loi n°2000-719 du 01/08/2000.

¹¹ Tribunal de Grande Instance de Paris, 16/02/2005 available at Legalis.net : http://www.legalis.net/jurisprudence-decision.php3?id_article=1420.

¹² The MotionMaker program will be discussed further in Part 3.4 below.

¹³ Conditions particulières MotionMaker, Article 3 <http://www.dailymotion.com/legal/motionmaker>.

¹⁴ Conditions particulières MotionMaker, Article 3: «En effet et suivant validation, DailyMotion en devient éditeur et non plus simplement hébergeur». <http://www.dailymotion.com/legal/motionmaker> The official translation in English uses the term “editor” to translate “éditeur”. We believe that, given the context, the term “publisher” is more appropriate.

¹⁵ These deals, as well as other licensing deals between Dailymotion and media corporations, will be discussed in Part 3.2, below.

It is important to note that the TGI did not say the licensing deals had made *Dailymotion* a full-blown publisher in all its activities and for all the content made available on the platform. As we have seen, the court eventually ruled that Dailymotion had acted as a mere hosting provider in relation to the unlawful copy of “*Joyeux Noël*”. The court only said that Dailymotion would be the (co)publisher of the content for which it had signed licensing deals with rightholders.

At first, such fine-grained reasoning by the Paris TGI could have been seen as a victory for *Dailymotion*. The court was seemingly willing to impose the higher liability of the publisher only for the activities over which *Dailymotion* has the most control, leaving it to enjoy the limited liability of the hosting provider for those over which it had little or no control such as unlawful content uploaded by its users. However, we have explained how the classification as a hosting provider was a pyrrhic and potentially short-lived victory. The Paris TGI may have classified *Dailymotion* as a hosting provider but has, in the same breath, imposed a new obligation of prior control, putting it under a liability very similar to that of a publisher. Besides, the Court of Appeal could still reclassify *Dailymotion* as a publisher. The point here is not to suggest that *Dailymotion*'s foray into publisher territory would be the determining factor in such reclassification. We believe that the use of the criterion of the ad-based business model could, on its own, determine the decision of the Court of Appeal. However, the fact that *Dailymotion* is willing to endorse the status of publisher in an ever-increasing proportion of its activities will encourage disgruntled rightholders to claim that it should not be benefit from the limited liability of hosting providers.

The question of the status of *Dailymotion* is far from settled and could take years to be solved, especially if the “*Joyeux Noël*” case goes all the way to the *Cour de Cassation*, the French Supreme Court in civil matters. And beyond this case, the whole UGC sector is affected by uncertainty as it finds itself under intense fire from assertive rightholders.

2.3 The increased scrutiny and legal uncertainty over Dailymotion and other UGC services

Whichever the legal reasoning, the future does not look bright for *Dailymotion* in the “*Joyeux Noël*” case. A flurry of lawsuits paints a bleak judicial picture for other platforms, too.

2.3.1 Predictions for the Dailymotion case

In the perilous exercise of predictions, we will venture in highlighting three of the main options available to the Paris Court of Appeal in dealing with *Dailymotion*. The less likely one is for the Court of Appeal to uphold the new general obligation of prior control devised by the lower court. This would be controversial. The Paris TGI arguably overstepped its powers by retroactively imposing on the hosting provider a new duty to control its servers for unlawful activities. The general obligation of prior control bluntly contradicts the text of the LCEN. By confirming this obligation, the Court of Appeal would equally stretch its power to the limit. It would also face the difficult task of having to define the nature and extent of this new obligation before assessing whether *Dailymotion* complied with it or not. The other two possibilities do not rely on the new obligation and are therefore much more likely to occur.

The Court of Appeal could, as in the *Tiscali* case, use the argument of the ad-based business model to decide that *Dailymotion* is a publisher. This would be the worst scenario for *Dailymotion*, such classification entailing automatic liability for the copyright infringement of “*Joyeux Noël*”.

The last, and perhaps most likely, option would be for the Court of Appeal to revert to an orthodox application of the LCEN. The Court would classify *Dailymotion* as a hosting provider but without subjecting it to the obligation of prior control. Instead, it would evaluate *Dailymotion*'s compliance with the existing statutory obligations of hosting providers. The Court of Appeal would re-examine the facts of the case to determine whether *Dailymotion* had acted diligently enough to stop the infringement of “*Joyeux Noël*” once it had been made aware of such infringement by the

rightholders. This scenario would be the most favorable for *Dailymotion*, albeit only marginally. Indeed, although *Dailymotion* would benefit from the limited liability of hosting providers, the fact that it apparently failed to remove all unlawful copies of “*Joyeux Noël*” after having been given notice to do so, could mean it will still be held liable.

It thus seems that, whichever the legal reasoning or classification, *Dailymotion* is ultimately likely to be held liable for copyright infringement in the “*Joyeux Noël*” case. This lawsuit as well as the many more launched against *Dailymotion* and other platforms cast a shadow on the UGC industry in France.

2.3.2 Facing the pressure from the media industry

French copyright holders have indeed been very active in reasserting their rights against UGC services. Apart from the *Tiscali* and *Dailymotion* cases, a series of lawsuits have targeted video-sharing websites. French documentary makers, comedians and television broadcasters have been particularly keen.

French documentary makers have been questioning *Google Video*'s actions. *Zadig Productions* has launched a lawsuit against the video-sharing site, asking €150,000 in damages for the unlawful broadcasting of the documentary “*Tranquility Bay*” (originally “*Les enfants perdus de Tranquility Bay*”). Then, the producer *Flach Film* claimed damages of €500,000 or €600,000 (depending upon the chosen news reports), for the copyright infringement of “*The world according to Bush*” (“*Le monde selon Bush*”)¹⁶. The comedian and prankster known as *Lafesse* (literally “*the Butt*” in French) is not amused by any of the video-sharing websites. The one we dubbed “the pain in the net” sued *MySpace* for €350,000 and *Dailymotion* and *YouTube* reportedly for €1.5 million and €8 million respectively¹⁷. In the *MySpace* case, *Lafesse* has already won €58,000 in provisional damages for the unauthorized broadcasting of sketches and images of him¹⁸. Finally, TF1, the largest private television broadcaster in France, is equally angered by the availability of pirate copies of its most popular shows, most notably the hit US series “*Heroes*”. It is reportedly threatening to launch copyright lawsuits against both *Dailymotion* and *YouTube*, claiming damages of €39 million and €100 million respectively¹⁹.

¹⁶ PRESS RELEASE : Google assignée par Flach Film pour contrefaçon. Communiqué Flach Film, 23/11/2006 <http://www.flachfilm.com/index.php?page=articles&id=540> ALSO AVAILABLE IN ENGLISH <http://www.flachfilm.com/index.php?page=articles&id=540> . MEDIA: Hélène Puel, Google Video poursuivi pour parasitisme et contrefaçon. 01net., 24/11/2006 <http://www.01net.com/editorial/334243/google-video-poursuivi-pour-parasitisme-et-contrefacon/>; Flach Film assigne Google pour contrefaçon et parasitisme. LeMondelInformatique.fr, 24/11/2006 <http://www.lemondeinformatique.fr/actualites/lire-flach-film-assigne-google-pour-contrefacon-et-parasitisme-21453.html>; Marc Rees, Google Video France attaqué pour contrefaçon et parasitisme. PCimpact.com, 24/11/2006 <http://www.pcinpact.com/actu/news/32956-google-bush-Flach.htm>; Jérôme G., Flach Film vs Google: le cinéma français se serre les coudes. Generation-NT.-com, 01/12/2006 <http://www.generation-nt.com/flach-film-google-video-actualite-19679.html>.

¹⁷ Anne Salomon, Jean-Yves Lafesse en guerre contre les pirates. Le Figaro, 15/06/2007 http://www.lefigaro.fr/medias/20070615.FIG000000154_jean_yves_lafesse_en_guerre_contre_les_pirates.html; Cédric Ledauphin, Jean-Yves Lafesse attaque les services de partage de vidéos. Ratiatum.com, 18/06/2007 http://www.ratiatum.com/news5202_Jean-Yves_Lafesse_attaque_les_services_de_partage_de_videos.html; Alexandre Laurent, Jean-Yves Lafesse attaque YouTube et Dailymotion. Neteco.com, 18/06/2007 <http://www.neteco.com/75307-jean-yves-lafesse-attaque-youtube-dailymotion.html>; Jean-Yves Lafesse attaque des sites d'hébergement de vidéos sur Internet. Le Monde, 18/06/2007 http://www.lemonde.fr/web/recherche_breve/1,13-0,37-994518,0.html.

¹⁸ See notably, Nicolas JONDET, French prankster wins copyright battle against MySpace. French-law.net, 19/11/2007 http://french-law.net/index.php?option=com_content&task=view&id=71&Itemid=1.

¹⁹ Emmanuel Berretta, TF1 va attaquer Dailymotion et YouTube. Le Point.fr, 13/12/2007 <http://www.lepoint.fr/content/medias/article?id=214671>; Julie de Meslon, TF1 veut traîner Dailymotion et YouTube en justice. 01net., 14/12/2007 <http://www.01net.com/editorial/367174/tf1-veut-trainer-dailymotion-et-youtube-en-justice/>; TF1 compte attaquer YouTube et Dailymotion. Ratiatum.com, 14/12/2007 http://www.ratiatum.com/breve6232_TF1_compte_attaquer_YouTube_et_Dailymotion.html; Dan Israel, TF1

Although UGC services are not bound to lose those cases, the sheer number of them and the prospect of more to come are worrisome. So much so that the question of how to deal with the question of piracy has become a matter of urgency for web platforms.

Pondering the consequences of the *Dailymotion* and *MySpace* decisions, the IRIS, a French internet advocacy group, argues that, to avoid any risk of being treated as publishers, UGC services should adopt an unequivocal business model. The IRIS recommends they abandoned the ad-based business model altogether and start generating revenues by charging users for the storage of their content. This, according to the IRIS, would allow the clarification of their role and let them fully benefit from the limited liability of hosting providers²⁰. We believe such drastic change is unlikely and will prove ultimately ineffective. First, it is hard to imagine companies such as *Dailymotion*, *MySpace* or *YouTube* ever contemplating giving up their free-to-use business model to start charging users for data storage. This is simply because they know paying customers would prove hard to find. Internet users are accustomed to the free-of-charge ethos of web 2.0 (and web 1.0) services and are therefore likely to desert paying services for their free competitors. Second, the sought-after status of hosting provider is in no way a guarantee of immunity. Even as pure hosting providers, video-sharing sites would still be under the scrutiny of rightholders, accountable as they are for the way and speed with which they respond to notifications of unlawful activities. The status of service provider, applied to UGC websites such as video-sharing platforms is, as we have seen, no panacea. Nor should it be.

We agree with Professor Lilian Edwards that the apparent willingness of French courts to please rightholders by holding UGC sites accountable for copyright infringements is understandable²¹. There is no reason why commercial platforms should be allowed to prosper at the expense of the media industry. The question here is whether the current legal framework, especially the distinction between service providers and publishers, allows the courts to appropriately address the issues raised by web 2.0 platforms. We believe it does. The liability of service providers, though lower than that of publishers, still allows for a reasonable protection of the rightholders' interests. Rightholders can hold websites liable as hosting providers if they fail to stop infringements when made aware of them. This gives rightholders a relatively useful tool to stop acts of infringement. However, the decisions mentioned above seem to suggest that some French courts think otherwise. By imposing a new obligation of prior control on *Dailymotion* or by classifying *Tiscali Media* and *MySpace* as publishers, courts have signaled their reluctance to let UGC platforms fully benefit from the limited liability granted of service providers. The sentiment, echoing that of rightholders, seems to be that, given the scale of the piracy problem, UGC services should be expected not only stop reported infringements but also to prevent them from happening in the first place.

However, despite the increased pressure from rightholders and the legal uncertainty about their status and liability, all is not doom and gloom for UGC services. Looking through the prism of the judicial activity gives an incomplete and distorted picture of the relations between UGC services and the media industry. Every cloud has a silver lining, as the saying goes. As Edwards points

attaque Dailymotion. Mais quand? Arrêt sur Images, 14/12/2007 (Registration required) <http://www.arretsurimages.net/contenu.php?id=67>; Baptiste Peyron (Etudiant CFJ), Droits de diffusion: Dailymotion attaqué par TF1? Rue89.com, 15/12/2007 <http://www.rue89.com/2007/12/15/droits-de-diffusion-dailymotion-attaque-par-tf1>; Jérôme Bouteiller, Dailymotion attend toujours la convocation de TF1. Neteco.-com, 17/12/2007 <http://www.neteco.com/88634-dailymotion-attends-convocation-tf1.html>. IN ENGLISH: David Hayhurst, TF1 may sue Dailymotion, YouTube. Variety.com, 14/12/2007. <http://www.variety.com/article/VR1117977699.html?categoryid=14&cs=1>.

²⁰ IRIS, note 1.

²¹ Edwards, note 1.

out, both industries are moving beyond the adversarial approach²². *Dailymotion* is a prime example of the bridges being built between internet companies and rightholders.

3. Dailymotion's ascension to copyright success

Dailymotion has been taking a series of measures, many of which initiated before the “*Joyeux Noël*” decision, to accommodate rightholders. It has been implementing filtering technology (3.1) and more importantly signing licensing deals with content producers to broadcast their content (3.2). It has also joined content producers and other internet companies in setting international guidelines to prevent piracy on UGC services (3.3). Not forgetting its stated aim of being a platform for amateurs, it has put in place a program to identify and promote new talent (3.4). Lastly, it has been able to secure millions of Euros in additional funding, proving that investors believe in its potential (3.5).

3.1 Implementing filtering technology

After the “*Joyeux Noël*” decision, *Dailymotion* had to face up to the inefficiency of its existing filtering mechanisms. Imposing limits on the duration and size of files uploaded was too rudimentary a method to satisfy the media industry and the courts. Spurred to perform better filtering, it implemented fingerprinting technology, the success of which depends on collaboration with rightholders.

3.1.1 The 20 minute limit on uploaded files

Early on, the founders of *Dailymotion* realized that they needed to prevent copyright infringements. One measure taken by *Dailymotion* to curb piracy was to impose a 20 minute length limit (and 150 MB size limit) on the videos users could upload²³. Since much of the sought-after content, such as television shows and movies, lasts more than 20 minutes, unlawful copies of, for example, a movie would have to be split in sections before being uploaded. The calculation was that such truncated versions would be so much less enjoyable to watch than the original that users would have little interest in watching them, let alone in uploading them.

This mechanism has three main flaws however. Firstly, it does not protect the many valuable cultural goods, such as music video clips, which only last a few minutes. Secondly, many viewers are quite happy to watch the latest Hollywood blockbuster for free on *Dailymotion*, even if it is cut-out in five or six parts. After all, American television viewers are willing to sit through as many ad breaks when the same movie is being broadcasted on their TV networks. Thirdly, as we have seen in the “*Joyeux Noël*” case, French courts could consider that such splitting-up violates the artistic integrity of the work and thus sentence *Dailymotion* to pay damages, albeit of a symbolic nature, to the copyright holder for breach of his moral rights.

Another side effect of the time limit could have put *Dailymotion* at odds with the community it wishes to cater for. An indiscriminate enforcement of the 20 minute length limit could have been perceived by legitimate amateur as too severe a constraint on their creativity. And rather than having their lengthy creations blocked by *Dailymotion*, many artists would have opted for another, less restrictive, video-sharing site. Aware of this pitfall, *Dailymotion* waived the 20-minute limit for users who registered with the “*MotionMakers*” program²⁴. (The waiver was later extended to professional producers registered with the “*Official Content*” program).

This tweaking of the mechanism, though welcomed by *Dailymotion*'s users, did not however address its more serious shortcomings. After the “*Joyeux Noël*” decision *Dailymotion* had to face

²² Edwards, note 1.

²³ Article 1 of the Terms and Conditions <http://www.dailymotion.com/legal/terms>.

²⁴ For more on the “*MotionMakers*” program see part 2.2.1 above and 3.4 below.

up to the inadequacy of its anti-piracy system. Spurred to implement better filtering tools, Dailymotion sought the helping hand of fingerprinting technology.

3.1.2 Implementing audio and video fingerprinting technology

In July 2007, days after the decision of the Paris TGI, *Dailymotion* announced it would immediately implement the audio fingerprinting technology of *Audible Magic*, an American company with which it had signed a partnership deal several months earlier²⁵. And then, in October, *Dailymotion* announced a deal with the *Institut National des Archives* (INA), the French National television archive, to use “*Signature*”, its video fingerprinting technology²⁶.

Fingerprinting technology allows video-sharing websites to compare, at the point of submission, the content uploaded by a user with that of rightholders, and block it when the two match. According to Wikipedia, “*video fingerprinting is a technique in which sophisticated software identifies, extracts and then compresses characteristic components of a video, enabling that video to be immediately and uniquely identified by its resultant fingerprint*”²⁷. The fingerprint represents the essence of the sequence²⁸, its DNA, to use the terms of the INA²⁹. The technology is used by rightholders to create a database of fingerprints of the works they want to monitor. This database is made accessible to the video-sharing service wishing to prevent unlawful activities on its platform. Every time an internet user uploads a file, the video-sharing service automatically creates a fingerprint for the file; compares the fingerprint of the candidate content with the fingerprints contained in the database and blocks the upload if there is a positive match.

Fingerprinting technology is seen by UGC services and the media industry as the future of content protection. It promises to be both more efficient and less cumbersome than other technologies such as watermarking or Digital Rights Management (DRMs). *Dailymotion* also offers an example of how it can be used in a flexible way to help users comply with music copyright, thanks to an application known as *Audio Remix*³⁰. When a user uploads a home-made

²⁵ PRESS RELEASES : Dailymotion choisit la solution de fingerprinting d'Audible Magic pour détecter les vidéos protégées par des droits. Communiqué Dailymotion, 13/07/2007 <http://www.dailymotion.com/press/AudibleMagic-Dailymotion.pdf>. IN ENGLISH: Dailymotion Selects Audible Magic's Fingerprinting Solution for Detecting Copyrighted Video. Dailymotion, 10/05/2007 <http://www.dailymotion.com/press/AudibleMagic.pdf>.

²⁶ PRESS RELEASE : Dailymotion renforce son dispositif de détection des vidéos protégées avec la technologie « Signature » de l'INA. Communiqué Dailymotion, 08/10/2007 http://www.dailymotion.com/press/CP_Ina-Dailymotion.pdf. MEDIA : Philippe Crouzillacq, Dailymotion adopte la technologie de l'Ina pour lutter contre le piratage. 01net., 08/10/2007 <http://www.01net.com/editorial/360994/dailymotion-adopte-la-technologie-de-l-ina-pour-lutter-contre-le-piratage/>; Estelle Dumout, Après Canal Plus, Dailymotion utilise la technologie de protection de l'INA pour filtrer les contenus. ZDNet France, 08/10/2007 <http://www.zdnet.fr/actualites/internet/0,39020774,39374190,00.htm>; Dailymotion reconnaîtra le watermarking de l'INA. Ratiatum.com, 08/10/2007 http://www.ratiatum.com/breve5791_Dailymotion_reconnaitra_le_watermarking_de_l_INA.html; Ariane Beky, Dailymotion adopte le marquage vidéo conçu par l'Ina. Neteco.com, 08/10/2007 <http://www.neteco.com/81926-dailymotion-marquage-video-con-ina.html>.

²⁷ Wikipedia: Digital video fingerprinting http://en.wikipedia.org/wiki/Digital_video_fingerprinting.

²⁸ “Technically, the fingerprints are computed from the luminance of certain areas of the images and from the motion information in the sequence.” In “Ina-Signature: protect and manage your contents” presentation by the Ina (in English) <http://www.ina.fr/entreprise/activites/recherche-audiovisuelle/signature-english.html>.

²⁹ “Ina-Signature: protect and manage your contents” presentation by the Ina (in English). <http://www.ina.fr/entreprise/activites/recherche-audiovisuelle/signature-english.html>; Estelle Dumout, Après Canal Plus, Dailymotion utilise la technologie de protection de l'INA pour filtrer les contenus. ZDNet France, 08/10/2007 <http://www.zdnet.fr/actualites/internet/0,39020774,39374190,00.htm>.

³⁰ PRESS RELEASES : Mise en place d'Audible Magic et d'Audio Remix. Le blog Dailymotion, 25/07/2007. <http://blog.dailymotion.com/fr/index.php/2007/07/25/mise-en-place-d-audible-magic-et-d-audio-remix/> IN ENGLISH: Launch of Audible Magic and Audio Remix. The Dailymotion Blog, 27/07/2007. <http://blog.dailymo->

video, *Audible Magic* scans the file for infringing material. If *Audible Magic* identifies an infringing sound recording, such as a famous movie theme for instance, *Dailymotion* does not block the upload altogether. Instead, *Audio Remix* offers the user the option to swap the infringing sound recording with one that is authorized³¹.

For all its promises, however, fingerprinting technology has a major point of weakness: its database. Any filtering system based on fingerprinting technology is only as good as the database it can rely on. A website whose database only contains one fingerprint, say, that of the “*Joyeux Noël*” movie, will only screen candidate content for unlawful copies of this particular movie, leaving millions of other works unprotected. Thus, the challenge for *Dailymotion*, as for any platform using fingerprinting technology, is to collect as many fingerprints as possible to expand its database and tighten its filtering net.

3.1.3 Searching for fingerprints, creating opportunities with rightholders

In its quest to build an extensive fingerprint database, *Dailymotion* does not start from scratch. The suppliers of fingerprinting technology also provide access to the large databases they have already built with their partners in the media industry. The *Audible Magic* and INA fingerprint databases are wide-ranging and they complement one another as Martin Rogard, director of content for *Dailymotion*, explained to *ZDNet France*, a technology news website³². Indeed, Audible Magic is focused on music and has partnerships with many record companies in the US, whilst the INA, as the French national archive, receives a constant influx of new content from radio and television broadcasters and already has a catalogue of more than 350,000 hours of digitized footage³³. This gives *Dailymotion* a good head start but still leaves a lot of ground uncovered, most notably in the area of movies or television shows originating from outside France. The fastest way for *Dailymotion* to tighten its filtering net is to reach agreements with content producers over fingerprints.

Dailymotion signed one such agreement in October 2007 with *Canal+*, a French pay TV channel, to “collaborate for a better protection of its content”³⁴. The press release does not specify exactly what this collaboration entails but it seems fair to assume, as the online news website *01net* does³⁵, that their field of collaboration would be based around the *Signature* technology which *Canal+* adopted a few months before *Dailymotion*³⁶. This will dramatically improve the reach of *Dailymotion*’s filters. *Canal+* is a European leader in television broadcasting, and is very involved in the production and distribution of European and US movies, through its subsidiary *Studio Canal*, and will therefore enrich *Dailymotion*’s fingerprint database with its large catalogue.

By having implemented filtering tools and by actively seeking collaborations to improve their efficiency, *Dailymotion* is in a stronger position vis-à-vis rightholders. First, it shows rightholders

[tion.com/2007/07/27/launch-of-audible-magic-and-audio-remix](http://www.dailymotion.com/2007/07/27/launch-of-audible-magic-and-audio-remix).

MEDIA: Karine Solovieff, Sur Dailymotion, le filtrage s'applique aussi aux chansons. *01net*, 01/08/2007, <http://www.01net.com/editorial/355500/sur-dailymotion-le-filtrage-s-applique-aussi-aux-chansons>.

³¹ Users currently have the choice between 50 songs provided by Jamendo, a platform for free music where artists make their work available under Creative Commons licenses. *Dailymotion* has promised to increase the number of songs available to swap.

³² Estelle Dumout, Après Canal Plus, *Dailymotion* utilise la technologie de protection de l'INA pour filtrer les contenus. *ZDNet France*, 08/10/2007 <http://www.zdnet.fr/actualites/internet/0,39020774,39374190,00.htm>.

³³ To know INA : <http://ina.fr/to-know-ina/home-page.html>.

³⁴ PRESS RELEASE : Accord *Dailymotion* et *CANAL+* pour une meilleure protection de ses contenus. Communiqué *Dailymotion*, 18/10/2007 http://www.dailymotion.com/press/CP_Accord_Dailymotion_CANAL.pdf.

³⁵ Julie de Meslon, *Dailymotion* protège les contenus de *Canal+*. *01net*, 18/10/2007 <http://www.01net.com/editorial/362682/dailymotion-protège-les-contenus-de-canal+>.

³⁶ Karine Solovieff, *Canal+* en appelle à l'INA pour protéger son catalogue. *01net*, 23/07/2007. <http://www.01net.com/editorial/355327/canal+-en-appelle-a-l-ina-pour-protéger-son-catalogue>.

and potentially the courts that *Dailymotion* is serious about combating piracy. Tactically, it allows the website to take the offensive in the debate with rightholders over piracy. As Martin Rogard candidly explained, *Dailymotion* now expects rightholders to cooperate over fingerprinting rather than launch lawsuits³⁷. *Dailymotion* considers that, having fulfilled its part of the bargain, it should not be blamed for acts of piracy resulting from rightholders' unwillingness to cooperate in perfecting its filtering tools. Whether such defense would hold up in court is open to debate, but at least *Dailymotion* will be able to argue good faith. Second, and perhaps more importantly, the technical collaborations over fingerprints may be a prelude for more serious partnerships with like-minded rightholders. The technical collaborations could blossom into licensing deals whereby rightholders authorize *Dailymotion* to broadcast their content. The website has already signed many such licensing deals with rightholders.

3.2 Signing licensing deals with rightholders

Dailymotion has signed a series of revenue-sharing deals with French and international content producers to broadcast their content both before and crucially after the “*Joyeux Noël*” decision. The platform has also introduced a program known as the “*Official Content*” program that identifies and promotes the content produced by a wide range of professionals.

3.2.1 Revenue sharing deals

The first series of deals signed in late 2006 - early 2007 covered the broadcasting of music video clips (as well as exclusive contents such as artist interviews or backstage clips) by established record labels. *Dailymotion* signed deals with the SPPF (*Société Civile des Producteurs de Phonogrammes en France*)³⁸, which represents independent music labels producing artists such as *Carla Bruni*, *Corneille* and *Justice*³⁹, and with *Warner Music*⁴⁰ and *Universal Music*⁴¹.

In October 2007, *Dailymotion* signed two more revenue-sharing deals, this time with television producers. One deal was signed with *Turner Broadcasting Europe*, a subsidiary of *Time Warner*, in order to make some of its content available to audiences across Europe. The deal covers content from *CNN International*, as well as from *Adult Swim*, an animation channel for adults, and clips from *Nuts TV*, a men's entertainment channel⁴². The other deal was a framework agreement

³⁷ Estelle Dumout, Après Canal Plus, Dailymotion utilise la technologie de protection de l'INA pour filtrer les contenus. ZDNet France, 08/10/2007 <http://www.zdnet.fr/actualites/internet/0,39020774,39374190,00.htm>.

³⁸ A one year “experimental agreement”, signed in December 2006, where the SPPF acts directly with Dailymotion on behalf of all its users. PRESS RELEASE: Dailymotion et les producteurs indépendants concluent un accord stratégique pour l'utilisation de leurs clips. Communiqué Dailymotion, 21/12/2006 <http://www.dailymotion.com/press/sppf.pdf>. MEDIA: Arnaud Devillard, Les producteurs indépendants partagent leurs clips sur Dailymotion. 01net., 21/12/2006 <http://www.01net.com/editorial/336482/les-producteurs-independants-partagent-leurs-clips-sur-dailymotion>.

³⁹ Justice page <http://www.dailymotion.com/justice/> Video clip : “D.A.N.C.E.” by Justice http://www.dailymotion.com/video/x1upou_justice-dance_creation.

⁴⁰ PRESS RELEASE : Warner Music et Dailymotion signent un partenariat stratégique concernant la distribution de vidéos avec des revenus. Communiqué Dailymotion, 22/01/2007 <http://www.dailymotion.com/press/warner.pdf>. MEDIA: Hélène Puel, Les clips de Warner Music bientôt sur Dailymotion. 01net., 22/01/2007 <http://www.01net.com/editorial/339345/les-clips-de-warner-music-bientot-sur-dailymotion>.

⁴¹ Accord Dailymotion-Universal sur la diffusion de contenus. LCI.fr, 06/03/2007 <http://tf1.lci.fr/infos/high-tech/0,,3406268,00-accord-dailymotion-universal-sur-diffusion-contenus-.html>; Guillaume Champeau, Dailymotion signe un accord avec Universal Music. Ratiatum.com, 07/03/2007 http://www.ratiatum.com/news4539_DailyMotion_signe_un_accord_avec_Universal_Music.html.

⁴² PRESS RELEASE: Turner Broadcasting Europe et Dailymotion signent un accord pour diffuser CNN, Adult Swim, et Nuts. Communiqué Dailymotion, 15/10/2007 http://www.dailymotion.com/press/CP_Turner-Dailymotion.pdf; MEDIA: IN ENGLISH : Turner Broadcasting Europe and Dailymotion Announce Agreement to Feature CNN, Adult Swim and Nuts Programming. PRweb.com, 15/10/2007 <http://www.prweb.com/releases/2007/10/prweb560817.htm>. IN FRENCH: Dailymotion travaille son image auprès des ayants droit. ZDNet

with the USPA (*L'Union Syndicale de la Production Audiovisuelle*)⁴³, which represents producers of television shows, particularly drama and documentary shows⁴⁴.

The deals call for two preliminary observations. The first observation is that most, if not all, of them appear to be non-exclusive to *Dailymotion*. Not only do the press releases fail to mention any exclusivity, but some of the producers have signed similar deals with competing platforms⁴⁵. For instance, the same video clips from *Universal Music* and *Warner Music* can be found on *YouTube*⁴⁶. The other observation is that, in the absence of financial details, it is impossible to know what share of the ad revenues will be redistributed to rightholders. It is also impossible to know the extent of their impact on *Dailymotion's* bottom line. Admittedly, such observations are those of an outside commentator and do not cast any doubt over the benefits of the deals for both parties.

For rightholders, it is an opportunity to increase the visibility and reach of their products. This is particularly interesting for independent producers who lack the financial means to access mainstream media. Larger companies can also use *Dailymotion* to test smaller and riskier projects. More generally, the deals are an opportunity for the industry to create new revenue streams from the internet, a media traditionally seen as their nemesis. For *Dailymotion*, the deals are the best indication yet that its business model can be viable, as they ensure it can legally rely on professional content to increase its traffic and revenues. They also reduce the number of potential copyright infringement lawsuits. With every new deal signed, *Dailymotion* makes an ally out of a potential plaintiff. First of all, when the content producer joins *Dailymotion* it enriches the platform's pool of fingerprints with its own catalogue, thus improving the filtering mechanism. Then, in the event of a copyright infringement, the rightholder has a strong incentive to deal with the matter directly and "internally" with *Dailymotion* rather than before the courts. Lastly, every new deal helps *Dailymotion* build momentum in convincing further producers to join its platform. The goal for *Dailymotion* is to create a virtuous circle whereby more professional content attracts a larger audience which generates more revenues to share, thus encouraging further rightholders to participate.

3.2.2 The "Official Content" program

To further attract professional content producers, *Dailymotion* launched in November the "*Official Content program*"⁴⁷, a vetted program whose stated aim is to "*enable professional content to be*

France, 16/10/2007 <http://www.zdnet.fr/actualites/internet/0,39020774,39374484,00.htm>.

⁴³ The framework agreement sets out the terms and conditions under which individual contracts between Dailymotion and the 110 users of the USPA can be reached, the most important being that they have to include revenue sharing provisions. PRESS RELEASE : Accord Dailymotion / USPA : de nouveaux programmes de télévision bientôt disponibles sur Dailymotion. Communiqué Dailymotion, 29/10/2007 http://www.dailymotion.com/press/CP_USPA-final.pdf. MEDIA : Les producteurs audiovisuels prêts à faire confiance à Dailymotion. ZDNet France, 29/10/2007 <http://www.zdnet.fr/actualites/internet/0,39020774,39374967,00.htm>; "Les vidéos auront une empreinte sur Dailymotion", propos recueillis par Guillaume Fraissard. Le Monde, 29/10/2007 http://www.lemonde.fr/web/article/0,1-0_2-3236,36-972324,0.html; Jérôme Bouteiller, V.O.D. : Du nouveau chez DailyMotion et Glowria. Neteco.com, 30/10/2007 <http://www.neteco.com/84184-dailymotion-glowria.html>.

⁴⁴ Incidentally, two users of the USPA (Zadig Productions and Flach Film) have launched copyright lawsuits against Google video: See Part 2.3.2 above.

⁴⁵ See part 3.5 below.

⁴⁶ Universal Music Group on YouTube : <http://youtube.com/user/universalmusicgroup>; Warner Music Group on YouTube: <http://youtube.com/user/warnermusicgroup>.

⁴⁷ Un nouveau programme pour les professionnels. Blog Dailymotion, 29/11/2007 <http://blog.dailymotion.com/fr/index.php/2007/11/29/un-nouveau-programme-pour-les-professionnels/>. IN ENGLISH: New program for professionals. Blog Dailymotion, 30/11/2007 <http://blog.dailymotion.com/2007/11/30/new-program-for-professionals>.

shared and spread across [the Dailymotion] platform"⁴⁸, mainly through specific labeling and promotion. Under this program, professionals, such as companies, individuals or non-profit organizations, must sign an agreement (which is only available on request) and be recognized by *Dailymotion* as "Official Users". Once registered as "Official Users", professionals can upload their content, on their dedicated page, under three privileged conditions.

First, the content uploaded by an "Official User" is not subject to the time-limit imposed on normal content. Second, it is identified with the "Official Content" vignette affixed to the video's thumbnail preview. Such labeling is meant to attract internet users towards the official content rather than its copy, if not necessarily out of an urge to comply with copyright law, at least by an interest for videos in better definition and exclusive content. The presence of clearly identified official content might also deter users from uploading numerous bootlegged copies. This, in turn could free space on *Dailymotion's* servers and also benefit users by de-cluttering the platform from countless ersatzes. The third advantage for "Official Contents" is that they are much more likely to be selected by the editorial team of *Dailymotion* for a showcase on its (much visited) homepage, increasing yet again their visibility.

The program has already attracted a large number of professionals, and not only those involved in the headline grabbing deals mentioned above. Going through the list of "Official Users" compiled by *Dailymotion*⁴⁹, one is struck by their number and range in terms of size, countries of origin and activity (newspapers, musicians, directors, broadcasters or sportspersons). Interestingly, some of these content owners have a high profile but their partnership with *Dailymotion* has not (yet) been widely publicized. This is possibly because they, so far, only have uploaded a small portion of their content, and wish to have a broader selection before alerting their demanding fans. As examples of professionals likely to scale up their presence on *Dailymotion*, we can cite the INA⁵⁰ and *Channel 4*, a British television network with shows such as *Peep Show*⁵¹, *Shameless*⁵² or *Skins*⁵³.

Some aspects of the "Official Content" program remain unclear however. One question is that of the criteria used by *Dailymotion* to grant access to the program. More importantly perhaps, it is not clear whether all "Official Users" enter revenue-sharing agreements with *Dailymotion*. We know, courtesy of press releases and media reports, that large corporations like Universal Music and Warner Music share ad revenues with *Dailymotion* (though we do not know how). However, we can only assume, without any certainty, that it is also the case for lesser known professionals.

In any case, the deals signed with rightholders and the success of the "Official Content" program show that the court's decision in *Joyeux Noël* has not cast *Dailymotion* as a "black sheep" in the eyes of the media industry. If anything, the decision has spurred *Dailymotion* to be increasingly active and successful in securing partnerships with copyright holders, thus positioning itself as a global champion for copyright.

3.3 Positioning itself as a global champion for copyright

In October 2007, *Dailymotion's* campaign of normalization with the media industry stepped up a gear when it agreed to the international Principles for User-Generated Content (UGC) services set by some of the most prominent content producers (CBS, Disney, Fox Entertainment, NBC

⁴⁸ Introduction to Official Content, Dailymotion website <http://www.dailymotion.com/content/official>.

⁴⁹ <http://www.dailymotion.com/users/official/1>.

⁵⁰ "Official User" page of INA: <http://www.dailymotion.com/ina>. Watch for instance a short clip retracing the last 60 years of the Cannes Film festival http://www.dailymotion.com/ina/video/x3f0n3_festival-de-cannes-2007-60-ans-dima_shortfilms.

⁵¹ "Official User" page of "Peep Show": http://www.dailymotion.com/c4_Peep_Show.

⁵² "Official User" page of "Shameless": <http://www.dailymotion.com/Official-Shameless>.

⁵³ "Official User" page of "Skins": <http://www.dailymotion.com/E4-Skins>

Universal, and *Viacom*) and internet companies (*Microsoft*, *MySpace*, *Veoh*; as well as *Dailymotion*)⁵⁴.

The Principles are a set of non-legally binding guidelines “to foster online innovation while protecting copyrights”⁵⁵. They notably require UGC services to implement state-of-the-art identification and filtering technology, including the blocking of infringing uploads before they are made available to the public; to promote the respect of copyright by notably informing uploaders on copyright compliance; and to remove the infringing content made available before the implementation of filtering technology. In exchange, content producers have agreed not to sue the UGC services who adhere to these principles.

There is much to say about the UGC Principles. Debates have been started on their validity⁵⁶, impact on fair use⁵⁷ and on privacy⁵⁸. This article however, will only highlight their strategic importance for *Dailymotion*. Most commentators have cast doubts about their long term success due to the noted absence of major players in both the media and the UGC industries. *Sony* and *Time Warner*, two media conglomerates, have not signed them. Nor have any member of the music industry. More damning still is the absence of internet giants *Yahoo* and above all *YouTube*, by far the most popular video-sharing website. But whereas these shortcomings might be prejudicial to the project as a whole, they make *Dailymotion*'s presence all the more remarkable. Were the Principles to be short lived, *Dailymotion* would still have had many reasons to embrace the process.

First, signing the UGC Principles allows *Dailymotion* to gain international visibility, particularly among the decision-makers in the technology and media world. *Dailymotion* is, so far, the only European signatory to the Principles, having managed to put the proverbial foot in the door of worlds dominated by American companies. This alone will not directly translate in increased viewership from regions outside *Dailymotion*'s mainly European base. However, a higher profile amongst media executives, technology analysts and commentators might just give *Dailymotion* the edge necessary to clinch new partnerships with global companies.

The second, much more immediate, benefit of being part of the UGC Principles lies in the pact of non aggression at their heart. Provided its filtering technology passes muster, *Dailymotion* will not be sued for copyright infringement by its fellow signatories. This, however, does not guarantee *Dailymotion*, nor any other UGC services, universal and unconditional protection against prosecution. Numerous rightholders worldwide have yet to adhere to the Principles and can freely sue until they do. And even amongst the signatories, their restraint is subject to their discretionary assessment of whether UGC services are respecting their part of the bargain. If they think the websites are not doing enough to stop copyright infringement, they are still at liberty to sue them.

⁵⁴ PRESS RELEASE: Internet and media industry leaders unveil principles to foster online innovation while protecting copyrights. UGC Principles, 18/10/2007 http://www.ugcprinciples.com/press_release.html. MEDIA: Caroline McCarthy, Studios unveil their copyright protection guidelines. CNET News, 18/10/2007 http://www.news.com/8301-10784_3-9799778-7.html; Merissa Marr & Kevin J. Delaney, Disney, Microsoft lead copyright pact. The Wall Street Journal, 19/10/2007 <http://online.wsj.com/article/SB119269788721663302.html>; Bill Rosenblatt, Video content owners and user generated content sites agree on filtering principles. DRMwatch.com, 25/10/2007 <http://www.drwatch.com/legal/article.php/3707261>.

⁵⁵ Principles for User Generated Content Services <http://www.ugcprinciples.com/index.html>.

⁵⁶ Sherwin Siy (Public Knowledge), Unprincipled "Principles" for User Generated Content. PublicKnowledge.org, 18/10/2007 <http://www.publicknowledge.org/node/1230>.

⁵⁷ Julie Hilden, The new guidelines for user-generated content services such as MySpace: why some will predictably inhibit “fair use.” Findlaw.com, 12/11/2007 <http://writ.news.findlaw.com/hilden/20071112.html>.

⁵⁸ EDRI-gram, Some Internet and media companies push for principles on user content. EDRI-gram - Number 5.20, 24/10/2007 <http://www.edri.org/edrigram/number5.20/user-generated-content-principles>.

Yet, these caveats must not be overstated. First of all, although the Principles do not guarantee immunity from prosecution, it is fair to assume that the parties will want to foster the climate of trust from which they stem. In the worst case scenario, this would at least encourage rightholders to allow UGC services some time to perfect their filtering technology before starting their saber-rattling. And in the best case scenario, media companies could spare their fellow signatories, choosing instead to focus their wrath exclusively against those competing platforms which are not party to the Principles. The other shortcoming of the Principles, namely that many rightholders are yet to adhere to them, is more ominous for the internet companies. However, it can be overcome through bilateral partnerships with content producers, as *Dailymotion* illustrates. Indeed, *Dailymotion* had already sealed various bilateral deals, whether in the form of collaborations on filtering technology or more substantial broadcasting deals, with media companies before participating in the Principles. Interestingly, none of the partners of *Dailymotion* became signatory to the Principles. *Dailymotion* has therefore two sets of alliances with media companies, one within and one outside the Principles, the two complementing one another. In all, the Principles have been an opportunity for *Dailymotion* to build relationships with rightholders other than those it had already contractual links with.

And that brings us to the last, most promising, benefit of joining the UGC principles. *Dailymotion* could use its participation to the Principles as a springboard to convince its co-signatories to enter deals to collaborate over filtering technology or better still, broadcasting deals.

Overall, the outlook on the relationship between *Dailymotion* and the media industry is far more optimistic than what the judicial news from France indicates. With the implementation of filtering technology and the prospect of more revenue-sharing deals, *Dailymotion* is cementing its position as a player in the world of content distribution for professionals. In parallel, *Dailymotion* also wants to remain a platform of choice for amateurs.

3.4 Identifying and promoting new talent

All the discussions about litigations and partnerships with the media industry must not obscure the fact that *Dailymotion* remains first and foremost a website dedicated to user-generated content. The core purpose of *Dailymotion* is to allow amateurs to share their original creations on the internet.

To identify and promote the best of the content produced by its users, *Dailymotion* has created the “*MotionMaker*” program (which later inspired the “*Official content*” program for professionals). The “*MotionMaker*” program is a vetted program where users who have been accepted by *Dailymotion* as *MotionMakers* see their content, upon validation, being uploaded without time restriction. Their original content is then clearly identified as “Creative Content” and gets a chance to be promoted by *Dailymotion*’s editorial team⁵⁹.

The program does not entail the remuneration of “*MotionMakers*” for the time being, at least. According to Martin Rogard, *Dailymotion* is currently exploring ways to remunerate its “*MotionMakers*”, but considers that remuneration does not constitute a major motivation for its users. They are much more interested in gaining visibility for their work.⁶⁰ One way *Dailymotion* responded to this desire for visibility was to create a monthly event to showcase a selection of the best works from the “*MotionMakers*” in the “*Cinema des Cinéastes*”, an art-house cinema in Paris⁶¹.

⁵⁹ Watch for instance: “In-sit-U” by Joseph Heissat & Benoit Buirtsch (Music by DJ Lynso), http://www.dailymotion.com/cluster/shortfilms/popular/video/x1z56r_in-sit-u_fun.

⁶⁰ “Les vidéos auront une empreinte sur Dailymotion”, propos recueillis par Guillaume Fraissard. Le Monde, 29/10/2007, http://www.lemonde.fr/web/article/0,1-0_2-3236,36-972324,0.html.

⁶¹ PRESS RELEASES: La première « Séance Dailymotion » au cinéma. Communiqué Dailymotion, 31/10/2007, http://www.dailymotion.com/press/PR_Dailymotion_seance-cinema_31-10-07_FR.pdf; Le

Catering for the needs of the community of users is ultimately the *raison d'être* of *Dailymotion* and also its best hope for growth. This could also help persuade skeptics that, to use of the terms of the Paris TGI, “the architecture and the technical means” put in place by *Dailymotion* are not designed to enable mass piracy.

Increasingly popular with internet users and members of the media industry, *Dailymotion* has also received further backing from its investors.

3.5 Securing new funding to grow and compete on the global stage

In August 2007, a month after the “*Joyeux Noël*” decision, *Dailymotion* announced it had raised €25 million from a consortium of investors in its second round of funding,⁶² bringing its total venture capital to €32 million.⁶³ This money will allow *Dailymotion* to face the challenges of its expansion.

3.5.1 Dailymotion accelerates

The start-up, created in 2005, has been doing increasingly well lately. In November 2007, *Dailymotion* was ranked as the 46th most visited website in the world by *Alexa Internet*, a web analytics company⁶⁴. This ranking puts *Dailymotion*'s popularity ahead of that of other independent video-sharing websites such as *Metacafe*⁶⁵, *blip.tv*⁶⁶, *Megavideo*⁶⁷ and others⁶⁸. Those competitors would undoubtedly point to other rankings, such as that of *Comscore*, a consultancy, indicating that *Dailymotion* and *Metacafe* have similar viewership figures⁶⁹. What is sure however is that, *Dailymotion* is not yet in the top tier of video-sharing sites which include *Microsoft's MSN Video*, *Yahoo Video*, *MySpace* or *Google Video*, all of whom being dwarfed by *YouTube*. But the level of judicial activity *Dailymotion* attracts might be an indicator that it is slowly but surely closing the gap.

meilleur des MotionMakers à la « Séance Dailymotion » du Cinéma des Cinéastes. Communiqué Dailymotion, 26/11/2007 http://www.dailymotion.com/press/PR_Dailymotion_Seance-Dailymotion_26-11-07_FR.pdf MEDIA: Dailymotion travaille son image auprès des ayants droit. ZDNet France, 16/10/2007 <http://www.zdnet.fr/actualites/internet/0,39020774,39374484,00.htm>; DailyMotion s'invite au Cinéma des Cinéastes. Ratiatum.com, 02/11/2007 http://www.ratiatum.com/breve5953_DailyMotion_s_invite_au_Cinema_des_Cineastes.html. Watch the opening title of “La séance Dailymotion” : http://www.dailymotion.com/video/x3c6dq_la-seance-dailymotion_news.

⁶² The consortium consisted of AGF Private Equity, Advent Venture Partners, CIC Capital Privé, Atlas Venture, Partech International. PRESS RELEASE : Dailymotion conclut une deuxième levée de fonds de 25 millions d'euros. Communiqué Dailymotion, 31/08/2007 http://www.dailymotion.com/press/CP_levee.pdf. MEDIA: Guillaume Deleurence, DailyMotion remplit son porte-monnaie. 01net., 31/08/2007 <http://www.01net.com/editorial/357617/dailymotion-remplit-son-porte-monnaie/>. IN ENGLISH: Nick Gonzalez, DailyMotion raises \$34 million; another copyright infringing success story. Techcrunch.com, 30/08/2007 <http://www.techcrunch.com/2007/08/30/dailymotion-raises-34-million-another-copyright-infringing-success-story/>; Richard Wray, 'French YouTube' raises \$34m in funding. The Guardian, 03/09/2007 <http://business.guardian.co.uk/story/0,2161676,00.html>.

⁶³ TechCrunch, CrunchBase: Dailymotion <http://www.crunchbase.com/company/dailymotion>.

⁶⁴ Alexa, Ranking of the most popular sites, checked 14/11/2007 http://www.alexa.com/site/ds/top_sites?ts_mode=global&lang=none.

⁶⁵ <http://www.metacafe.com>.

⁶⁶ <http://blip.tv>.

⁶⁷ <http://www.megavideo.com>.

⁶⁸ For a comparative analysis of the different actors in the ever-increasing field of video sharing read: Mark Hendrickson, Happy 1st anniversary YouTube and Google; now move over a bit. TechCrunch, 10/10/2007 <http://www.techcrunch.com/2007/10/10/happy-1st-anniversary-youtube-and-google-now-move-over-a-bit>.

⁶⁹ Ibid.

In the eyes of a lawyer, *Dailymotion* has already entered, in France at least, the league of *MySpace* and *YouTube*. Measuring the success of a company by the number of lawsuits it attracts may sound counter-intuitive and even slightly perverse. Yet, it establishes a ranking that mirrors that of the websites' popularity. Being sued for copyright infringement could almost be seen as a rite of passage into the elite of video-sharing sites; a badge of honor acknowledging that one's website is a force to be reckoned with by rightholders and competitors alike. *Dailymotion*, however, would be excused for not being enthusiastic about its judicial woes. *Dailymotion* not only has to deal with the "*Joyeux Noël*" case but is being sued by *Lafesse* for reportedly €1.5 million and could possibly face a €39 million lawsuit from TF1⁷⁰.

However, *Dailymotion* need not despair. First, being sued does not necessarily mean losing the case. It does not mean either that rightholders would be awarded the amount of damages requested. And even if they were, such defeat could, given the appeals process, take years to be confirmed. Second, these lawsuits (or threat of) relate to alleged infringements which occurred before *Dailymotion* implemented its filtering technology. The implementation of filters should diminish the number of infringements and thus of lawsuits. It might also convince the courts of its good faith in attempting to stop piracy and raise questions about the rightholders' decision to sue rather than to collaborate with the website to perfect its filtering mechanism. Lastly, the policy of signing licensing deals and joining the UGC Principles should lower the number of potential plaintiffs. In all, it seems unlikely that French copyright lawsuits could, on their own, bring down *Dailymotion*. At least, that is the €25 million bet investors have been willing to take.

The bulk of their investment will address more pressing matters for *Dailymotion*. On top of the list is the need for growth. Given its ad-based business model, *Dailymotion* needs to attract an ever-increasing number of visitors in order to generate more revenues from advertising. In turn, growth in traffic requires heavy investment, notably in the computing infrastructure in order to ensure that *Dailymotion's* bandwidth (schematically the speed at which it can transfer information) allows for a large amount of videos to be watched seamlessly by many people at the same time. Another important cost relates to the platform's necessary internationalization.

Generally speaking, the process of internationalization applied to a UGC service such as *Dailymotion* comprises two steps. The first step of internationalization consists in the translation of the interface so it can be used in the language of the target market. As a company based in France, *Dailymotion* was aware, from the very outset, that its global ambitions demanded the translation of its interface into as many languages as possible. Early on, *Dailymotion* became available in English and is translated in 14 languages, including Chinese. The second, more significant, step of internationalization is for the platform to become a place where users can find and share creative content relevant to their culture and local taste. To achieve this difficult task of building a community of local users, *Dailymotion* has created a series of dedicated editorial teams, covering specific countries in order to showcase localized content from any given market. The plan for *Dailymotion* is to become rooted abroad by opening offices in other countries. Unsurprisingly, the expansion outside its French base started in Europe with offices opening in the United Kingdom, Germany and Spain⁷¹. But to become truly global, *Dailymotion* has to succeed in the United States. Breaking the US market is a tall order for any European company, even more so in the technology and entertainment sectors where American companies dominate. Nonetheless, *Dailymotion* announced in July 2007, the launch of its US office⁷², headed by former executives from MTV, a music television network, and from *Time Warner*, a media conglomerate⁷³.

⁷⁰ See part 2.3.2 above.

⁷¹ Dailymotion devient espagnol ! Dailymotion, 06/11/2007 http://www.dailymotion.com/press/PR_Dailymotion_Daily-espagnol_06-11-07_FR.pdf.

⁷² PRESS RELEASE: Dailymotion launches largest independent online video entertainment site in the US. Dailymotion, 10/07/2007 http://www.dailymotion.com/press/dailymotion_us_launch.pdf.

By clearly stating its global ambitions, *Dailymotion* pits itself against mighty competitors who can rely on well-established global brands and the financial backing of corporate giants.

3.5.2 It's tough out there!

Some of *Dailymotion's* competitors can count on the support of technology giants or media conglomerates. Microsoft and Yahoo have their own video-sharing service. *MySpace* belongs to *News Corporation* which owns, amongst others, the *Fox television* network and the *20th Century Fox* movie studio. But Google-owned *YouTube* best illustrates the benefits of being part of a large corporation.

On the copyright front, the fact of being part of a large entity could initially be seen as an inconvenience rather than an advantage. Although the nature of the copyright challenges faced by *YouTube* is similar to those of *Dailymotion*, their magnitude differs. In France, when *Lafesse* reportedly sued *Dailymotion* for €1.5 million, he asked €8 million from *YouTube*. And when TF1 threatens *Dailymotion* with a €39 million lawsuit, the threat is raised to €100 million for *YouTube*. Also, *YouTube's* judicial woes are not confined to France. *Viacom*, a media conglomerate, has launched a \$1 billion lawsuit in the US against *YouTube*⁷⁴. Arguably, *Viacom's* decision to sue was prompted by *Google's* acquisition of *YouTube*. This ongoing lawsuit might also explain why *YouTube* has not adhered to the UGC Principles, *Viacom* being a signatory. However, *YouTube* is better equipped than most to handle copyright issues. *Google* could foot the bill even in worst case scenarios, should it, for instance, be ordered to pay \$1 billion in damages to *Viacom*, a luxury *Dailymotion* could not afford. Being bought by *Google* may also have helped *YouTube* secure the many partnerships it has entered with rightholders. *YouTube* has, for instance, entered partnerships with all four major record labels (*Warner Music*⁷⁵, *Sony BMG*⁷⁶, *Universal Music*⁷⁷ and *EMI*⁷⁸) and with television broadcasters CBS⁷⁹ and BBC⁸⁰. Many of these deals were announced the same day *Google* acquired *YouTube* for \$1.65 billion, in October 2006⁸¹. *Google*, it appears, made sure that as many media companies as possible would be on board before

⁷³ Catherine Mullen (MTV UK), Joy Marcus (Time Warner), Werner Brell (MTV Networks), Michelle Goff, Danny Passman (MTV Networks).

⁷⁴ Anne Broache & Greg Sandoval, *Viacom sues Google over YouTube clips*. CNET News.com, 13/03/2007 http://www.news.com/Viacom-sues-Google-over-YouTube-clips/2100-1030_3-6166668.html; Michael Geist, *The Viacom - YouTube lawsuit*. MichaelGeist.ca, 13/03/2007 <http://www.michaelgeist.ca/content/view/1801/196>.

⁷⁵ Warner Music Group, YouTube user channel : <http://www.youtube.com/user/warnermusicgroup>; PRESS RELEASE: Warner Music Group and YouTube announce landmark video distribution and revenue partnership. YouTube, 18/09/2006 http://www.youtube.com/press_room_entry?entry=vCfGHo5_Fb4.

⁷⁶ Sony BMG, YouTube user channel : <http://www.youtube.com/user/sonybm>. PRESS RELEASE: Sony BMG Music entertainment signs content license agreement with YouTube. YouTube, 09/10/2006 http://www.youtube.com/press_room_entry?entry=2cwCau7cKsA.

⁷⁷ Universal Music, YouTube user channel: http://www.youtube.com/profile_videos?user=universalmusicgroup. PRESS RELEASE: Universal Music Group and YouTube forge strategic partnership. YouTube, 09/10/2006 http://www.youtube.com/press_room_entry?entry=JrYdNx45e-0.

⁷⁸ EMI, YouTube user channel: <http://www.youtube.com/user/emiamericarecords> PRESS RELEASE: EMI Music, Google and YouTube strike milestone partnership. YouTube, 31/05/2007 http://www.youtube.com/press_room_entry?entry=lnX2vpoSGOM.

⁷⁹ CBS, YouTube user channel: <http://www.youtube.com/user/CBS>. PRESS RELEASE: CBS and YouTube strike strategic content and advertising partnership. YouTube, 09/10/2006 http://www.youtube.com/press_room_entry?entry=iXG7e1g-BWI.

⁸⁰ BBC Worldwide, YouTube user channel : <http://www.youtube.com/user/bbcworldwide> PRESS RELEASE: BBC and YouTube partner to bring short-form BBC content to online audiences. YouTube, 02/03/2007 http://www.youtube.com/press_room_entry?entry=0VMEPAJuK7Y.

⁸¹ PRESS RELEASES: Google to acquire YouTube for \$1.65 Billion in stock. YouTube, 9/10/2006 http://www.youtube.com/press_room_entry?entry=HvfQ0AKougw; Google closes acquisition of YouTube. YouTube, 13/11/2006 http://www.youtube.com/press_room_entry?entry=AwPf9c9qJDc.

buying YouTube. This strategy has been successful in avoiding a barrage of copyright lawsuits. Lastly, *YouTube* can count on *Google's* army of computer scientists to perfect its filtering technology, launched in October 2007, and named "*YouTube Video Identification*"⁸².

Google's backing has also been instrumental in *YouTube's* internationalization. When *YouTube* announced in June, perhaps pointedly in Paris, the launch of nine localized version of its service⁸³, the *Associated Press* reported *YouTube's* admission that its planned international expansion had only become possible after it was bought by *Google*. Not only did *Google* bring its technological prowess and financial means, it also brought its expertise on branching out. *Google* has had localized versions of its services, most notably its search engine, for many years and has opened offices around the world. It has acquired a wealth of knowledge on different cultures, legal environments and local tastes. *YouTube* has greatly benefited from this experience and international implantation.

Lastly, *YouTube* can benefit from *Google's* unmatched expertise in making money out of online advertising. This means that *YouTube*, by combining its high viewership with *Google's* expertise on how to monetize traffic, probably generates far more revenues than its smaller competitors. Whether these revenues are enough to cover the costs of running the service is another matter. However, being backed by *Google* also means that *YouTube* can operate at a loss for longer than its rivals.

Dailymotion thus faces tough competition for video-sharing websites which already have global appeal and the backing of corporate giants. Yet, what could be seen as *Dailymotion's* main weakness – its independence - might ultimately prove its best asset.

3.5.3 Small is beautiful

As a small, independent structure, *Dailymotion* may be an easier partner to negotiate with for the media industry. The power of companies behind other video-platforms may concern media executives. For example, movie producers or television broadcasters might be reluctant to collaborate with *MySpace*, considering that their content should not increase the revenues of a platform owned by *News Corporation*, the parent company of many of their competitors. Likewise, *YouTube* is currently the most popular video streaming platform, making it a destination of choice for any content producer. Yet, media companies may be wary of *Google's* clout. The precedent of *Apple's iTunes* online music store has taught media companies to tread carefully when collaborating with technology giants. The music industry is in two minds about the success of *iTunes*. On the one hand, it has been one of the few pieces of good news coming from the digital world for the music industry, *iTunes* managing to make people pay to download music they had become accustomed to get for free. On the other hand, it has put *Apple* in a strong negotiating position against the music industry, most notably on pricing. The media industry might nurture the same mixed feelings about *YouTube*. This wariness might ultimately push media companies to collaborate more closely with smaller (and less intimidating) partners such as *Dailymotion*.

Conclusion

⁸² YouTube Video Identification: http://uk.youtube.com/t/video_id_about . MEDIA: YouTube rolls out filtering tools. BBC News, 16/10/2007 <http://news.bbc.co.uk/1/hi/technology/7046916.stm>; Juan Carlos Perez (IDG News Service), Google testing YouTube antipiracy system. PCWorld, 16/10/2007 <http://www.pcworld.com/article/id.138493/article.html>.

⁸³ YouTube launched localized versions in Brazil, France, Ireland, Italy, Japan, Netherlands, Poland, Spain and the United Kingdom. PRESS RELEASE: YouTube speaks your language. YouTube.com, 19/06/2007 http://www.youtube.com/press_room_entry?entry=sbopYZ18uVQ&locale=en_US&persist_locale=1.

The judicial news from France currently casts a shadow over *Dailymotion*. It will find very little comfort in the fact that other UGC services are confronted with the same issues. Things on the judicial front may get worse before they get better.

However, *Dailymotion* has taken a series of measures to mend fences with the media industry. It has been implementing filtering technology to prevent piracy and has actively been seeking partnerships with content producers. This strategy has shown promising results. *Dailymotion* has entered revenue-sharing deals with many media companies to broadcast their content. It has also managed to position itself as a global champion for copyright.

These proactive measures towards copyright compliance and the links built with many content producers should help *Dailymotion* minimize the number of future copyright lawsuits to a level that would not jeopardize its survival.

This cautious optimism partly explains why, despite ongoing litigations, the financial backers of *Dailymotion* have invested a further €25 million to help the Paris-based start-up grow and compete on the global stage. It will be interesting to see what impact copyright issues will have on the future of the company.

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