RESPONSABILITÉ DE L'HÉBERGEUR

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The Liability of Website Hosting Providers in France and in the United States: a Comparative Analysis

Stéphane GRYNWAJC,
avocat au barreau de Paris, attorney at law (NY State)
Joséphine WEIL,
juriste

À un même enjeu, celui de la responsabilité des hébergeurs de sites internet, les législateurs français et américain ont apporté des solutions différentes, inspirées de cultures législatives et jurisprudentielles elles-mêmes différentes. Après avoir, dans une première partie, exposé, à grands traits, la législation applicable en France et aux États-Unis, nous tâcherons, dans une seconde partie, de dégager certaines tendances communes aux deux régimes, ceci afin d'aider les acteurs transatlantiques de l'hébergement numérique à protéger leurs activités des deux côtés de l'Atlantique.

On both sides of the Atlantic, the legislative framework has been designed in such a way as to secure the continued and free movement of information and commerce through the Internet in observance of the principle of freedom of expression, on one hand, and the rights of third parties, on the other hand. From one continent to the other, ensuring a reduced responsibility of Internet intermediaries has been the keystone of this delicate balance.

1. The Legal Regime in France and in the U.S.

A. The French Legislation on Internet Intermediaries

In France, the legal status and exemptions from liability of Internet intermediaries are set out under the Law on Confidence in the Digital Economy of June, 21st 2004[1], which law implemented the European Directive on electronic commerce[2].

This directive permits some Internet intermediaries to be eligible to a limitation of liability. This reduced liability applies to any entity whose activity is limited to the "technical process of operating and giving access to a communication network"[3]. Based on this general concept, the French legislation creates 3 categories of Internet intermediaries:

- the Internet service provider, which is defined as an "entity offering access to online public communication service"[4];
- the website hosting provider, which is the "entity ensuring, for the general public accessing online publication

1. *L. n° 2004-575, 21 juin 2004 pour la confiance dans l'économie numérique : JO 22 juin 2004, p. 11168.*
2. *PE et Cons. UE, dir. 2000/31/CE, 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, et notamment du commerce électronique, dans le marché intérieur : JOUE n° L 178, 17 juin 2000, p. 1.*
3. *Dir. 2000/31/CE, préc., consid. 42.*
4. *L. n° 2004-575, préc., art. 6, I, 1.*

communication service, the storage of signals, written data, images, sounds or messages of any nature, provided by the online public communication service's user"[5]; and,

- the website publisher, defined as the entity publishing an online public communication service[6].

Whether Internet intermediaries will benefit from a limitation of liability will depend on the category to which they belong.

From the beginning, the above classification resulted in inconsistent jurisprudence regarding collaborative websites which were alternatively described as website hosting providers or website publishers. In order to guide the courts in their approach and treatment of the issue, the European judges brought some clarity to the concept of Internet intermediaries, ruling that the activity of the website hosting provider must be of "a mere technical, automatic and passive nature"[7]. Following the European jurisprudence, the Court of cassation, France's highest judicial court, held that video sharing websites which are acting as passive transmitters should be treated as website hosting providers[8], and, therefore, benefit from a limitation of liability with respect to the content which they host. According to article 6 of the Law on Confidence in the Digital Economy, they cannot be held liable for third-party activity on their website unless, upon obtaining actual knowledge of the disputed material or awareness of facts and circumstances indicating illegal activities, they do not act expeditiously to remove or block access to the material when it is obviously illicit. In a "Google AdWords" decision of March 23, 2010, the Court of Justice of the European Union established that an Internet intermediary would be classified as a website hosting provider from the moment that the intermediary did not play an active role with regard to the hosted content over which it has no knowledge nor the ability to exercise control[9].

Following that decision, the hosting provider must be a "neutral" intermediary, whose role must be purely technical, automated and passive. The same idea can be found in the L'Oréal v. eBay case of July 12, 2011[10]. The L'Oréal case went even further by introducing the notion of a "diligent operator", which, to some extent, revisited the Paris Tribunal of Grande Instance's opinion that the website hosting provider isn't held to a general supervisory or fact-finding obligation to uncover illicit activities on its website[11].

Despite no general obligation to monitor third-party material or to empower users to report illegal content by means of takedown notice or accessible and visible mechanism for notification of heinous content and illegal online gambling, websites have preventively developed and adopted their own identification tools and other means of self-regulation. In this context, the distinction between a website hosting provider and a website publisher may not always appear as conclusive, and the U.S. approach to limitations of liability based on the concept of actual knowledge may be a viable alternative to consider.

B. The U.S. Legislation on Internet Intermediaries

There is not a single statute equivalent to the Law on Confidence in the Digital Economy in the U.S. At a federal level, limitations on liability relating to online communication are split into section 512 of the Digital Millennium Copyright Act (DMCA) of 1998 relating to copyright infringement, the judge-made law of contributory trademark infringement, and section 230 of the Communications Decency Act (CDA) of 1996 for any cause of action arising out any defamation, invasion of privacy or misappropriation claims, as well as for negligence, unfair competition, etc.

Section 230 (c) of the CDA distinguishes between providers or users of interactive computer services, on one hand, and information content providers, on the other hand. The first category refers to entities eligible for immunity as intermediaries of third-party content that merely provide neutral tools for communications. Furthermore, regardless of whether the material posted is constitutionally protected, the interactive computer service will not be penalized because of any action taken to remove or block the access to allegedly unlawful contents. This category includes a wide range of entities, such as website hosting providers, Internet merchants, employers who provide Internet access to their employees and Internet search engines. The second category refers to any person or entity that is responsible for the creation or development of information provided online[12], and remains liable for claims arising from unlawful content. It includes entities such as website operators who directly create and publish the content that is posted on their websites.

The CDA's approach to immunity based on the active or passive role of Internet intermediaries is similar to the French Law on Confidence in the Digital Economy, but is different from the approach adopted under the DMCA and the theory of contributory trademark infringement, which place greater emphasis on the level of knowledge of the unlawful third-party content.

Section 512 of the DMCA creates 4 safe harbors for "service providers". Service providers are not liable for monetary relief for copyright infringement by reason of:

- "the provider's transmitting, routing or providing connections for material through a system or network";
- "the intermediate and temporary storage of material on a system or network";
- "the storage at the direction of a user of material that resides on a system or network"; or,
- "the provider referring or linking users to an online location containing infringing material or infringing activity, by

5. *L. n° 2004-575, préc,, art. 6, I, 2.*
6. *L. n° 2004-575, préc., art. 6, III, 1.*
7. *CJUE, 23 mars 2010, aff. C-236/08 à C-238/08 : JurisData n° 2010-007448.*
8. *Cass. 1re civ., 17 February 2011, n° 09-67.896 : JurisData n° 2011-001684.*
9. *CJUE, gde ch., 23 mars 2010, aff. C-236/08, Google France SARL and Google Inc. v Louis Vuitton Malletier SA, C-237/08, Google France SARL v Viaticum SA and Luteciel SARL andC-238/08, Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others.*
10. *CJUE, gde ch., 12 juill. 2011, aff. C-324/09, L'Oréal v. eBay : JurisData n° 2011-021879.*
11. *TGI Paris, 3e ch., 3 juin 2011, n° 10/12074.*
12. *See 47 U.S.C. § 230(f) (3).*

using information location tools, including a directory, index (…) hypertext link".

In order to be eligible for any of the above safe harbors, service providers should also adopt (and inform subscribers and account holders of the service provider's system or network) a policy that provides for the termination of those users who are repeat infringers[13].

The term "service provider" is defined very broadly as any "entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user's choosing, without modification to the content of the material as sent or received"[14]. This definition includes Internet access, website hosting, websites, online forums, e-mail services, etc.

Section 512 (c) of the DMCA is the most notable safe harbor provision. It protects service providers from liability for infringing materials posted or stored on systems or networks at the direction of users. Conditions for limitation on liability are similar to those stated in the Law on Confidence in the Digital Economy: no actual knowledge of the infringing activity, no awareness of facts or circumstances from which infringing activity is apparent or, upon obtaining such knowledge, expeditious removal of the material and, no financial benefit attributable to the infringing activity[15].

Similar standards apply to contributory trademark infringement. Service providers will be held liable only if they induce infringement, or knowingly supply the means to infringe[16]. In addition, service providers described under section 512 (c) must also designate an agent to receive notices of alleged infringement[17].

In determining whether the service providers have effective knowledge of the infringing material, some judges are inclined to attach particular importance to the efforts of self-regulation undertaken by the service providers to combat infringing material by means of identification tools and the like. In Tiffany v. eBay, the U.S. Court of Appeals for the Second Circuit held that despite eBay's notable efforts to control the merchandise sold on its website, it could not have known of the infringing material, unless it had specific knowledge of the particular infringing listings[18]. By contrast, in 1-800 Contacts, Inc. v. Lens.com, the U.S. Court of Appeals for the Tenth Circuit held that the fact that the defendant Lens.com had no knowledge of the infringing action of one of its affiliate did not preclude liability for contributory infringement when Lens.com had a simple way to control and stop the infringement by sending an email to all its affiliate[19].

In the U.S. and the EU standards for determining the limitations of liability are applied differently. Websites operating on both sides of the Atlantic are facing legal uncertainty regarding their status and, consequently, continue to develop preventive tools against communication of unlawful material. While, in the U.S., some judges have given as much importance to self-regulation as to legislation, the French Law on Confidence in the Digital Economy seems at odds with the practices of Internet intermediaries and a significant legislative reform might be required. The creation of a new category for collaborative websites using self-regulation tools with stricter obligations could be an option to consider.

2. Common Trends and Practical Guidance for Compliance

A. Common Trends

In both France and the U.S., courts, in recent years, have adopted a rather broad interpretation of the concept of website hosting provider (France) and online service provider (U.S.).

In France, since the adoption of the European Directive on electronic commerce in 2000, there has been an abundance of case laws involving the legal treatment of website hosting providers. The advent of the Web 2.0 digital economy has led to a new, broader, definition of hosting that goes beyond the mere storage of content, and ranges from the delivery of a pure technical service to capturing the greater diversity of services associated with the new Web 2.0. By way of example, courts have since recognized as website hosting providers, discussion forums[20], online auction sites[21], social networks[22], and search engines[23] resulting in some uncertainty as to the judicial treatment of website operators.

In the U.S., there has also been a plethora of decisions this past year under section 230 of the CDA, some denying online service providers the benefit of immunity for online marketplaces[24], social networks[25], review websites[26], ad networks[27], message board operators[28], search engines[29], or website operators[30], while

13. *See 17 U.S.C. § 512(I) (1).*
14. *See 17 U.S.C. § 512(k) (1) (A).*
15. See *17 U.S.C. § 512(c) (1).*
16. *U.S. Supreme Court, Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844 (1982), June 1, 1982.*
17. See *17 U.S.C. § 512(c) (2).*
18. *U.S. Court of Appeals for the Second Circuit, Tiffany (NJ), Inc. v. eBay, Inc., 600 F.3d 93 (2d Cir. 2010), April 1, 2010.*
19. "When modern technology enables one to communicate easily and effectively with an infringer without knowing the infringer's specific identity, there is no reason for a rigid line requiring knowledge of that identity", see *U.S. Court of Appeals for the Tenth Circuit, 1-800 Contacts, Inc. v. Lens.com, Inc., 722 F.3d 1229 (10th Cir. 2013), July 16, 2013.*
20. *TGI Paris, 18 févr. 2002. - TGI Lyon, 21 juill. 2005.*
21. *TGI Paris, 11 févr. 2003. - TGI Paris, 26 oct. 2004.*
22. *TGI Paris, réf., 13 avr. 2010, Facebook.*
23. *CA Paris, pôle 5, ch. 1, 26 janv. 2011, n° 08/13423, Google Images. - TGI Paris, réf., 24 janv. 2013, Twitter.*
24. *McDonald v. LG Electronics USA, Inc., 2016 WL6648751 (D. Md. Nov. 10, 2016)*, product liability claims.
25. *Cross v. Facebook, CIV 537384 (Cal. Superior Ct. May 31, 2016)*, publicity rights.
26. *Consumer Cellular, Inc. v. ConsumerAffairs.com, 3:15-CV-1908-PK (D. Ore.)*, star ratings.
27. *FTC v. LeadClick Media, LLC, 2016 WL 5338081 (2nd Cir. Sept. 23, 2016)*, deceptive ads.
28. *Enigma Software Group USA, LLC v. Bleeping Computer, LLC, 2016 WL 3773394 (S.D.N.Y., July 8, 2016)*, "moderator's" content.
29. *O'Kroley v. Fastcase, Inc., 2016 WL 3974114 (6th Cir. July 22, 2016)*, search results snippets.
30. *Jane Doe N.1 v. Backpage.com, LLC, 2016 WL 963848 (1st Cir. March 14, 2016)*, website structuring.

others granting immunity to services provided by companies such as Snapchat[31], Yelp![32], Twitter[33], Facebook[34], or Google[35].

On the DMCA side, a similar uncertainty prevails. Some recent decisions accepted safe-harbor defenses for the benefit of online marketplaces[36], video hosting sites[37], while others denied them to website operators[38] or other video hosting sites[39].

B. Practical Guidance for Cross-Border Compliance

Companies operating websites targeting consumers in both France and the U.S., and that are looking to avail themselves of the protection afforded to website hosting providers ("hébergeurs") under the French Law on Confidence in the Digital Economy, on one hand, and to providers or users of interactive computer services under the CDA and/or to service providers under the DMCA, on the other hand, face the difficulty of not only having to implement internal procedures and practices, but also having to draft Terms of Use for their users that meet the new overall obligation of diligence expected of them under French Law[40]. This obligation reaches beyond the mere passive and neutral role of technical intermediaries - in the U.S., it is entrenched in the stringent letter of the law which requires companies to satisfy each and every element of the DMCA 512(c) safe harbor, failing that the safe harbor is lost completely.

The U.S. approach to compliance is a "by design" approach that builds internal processes and procedures in adherence to each and every one of the elements of the rule of law. It follows a preventative approach that documents compliance by anticipation of a breach, tracking every development of the law and its application at the federal as well as the State level. Compliance teams in U.S. corporations are tasked with creating procedures and processes that map against the law and that are able to effectively document compliance. Non-U.S. companies looking to prove and demonstrate their diligence in complying with the law in other jurisdictions may benefit from the use of this U.S. approach.

As a general rule, to qualify for the DMCA's safe harbor protection, online service providers that store content uploaded by users must, among other things[41]:

- develop and implement a procedure for terminating the accounts of subscribers who repeatedly infringe the copyrights of others;
- promptly remove or prevent access to the alleged infringing content once being notified of the alleged infringement, and terminate the accounts of repeat infringers;
- not have actual knowledge of the infringement or be aware of facts or circumstances from which the infringing activity can be established, or upon gaining such knowledge or awareness, respond promptly to take the infringing material down or block access to it;
- designate an agent registered with the U.S. Copyright Office to receive notifications of any alleged copyright infringement; and,
- not receive a financial gain deriving directly from the infringing activity where the service provider has the right and ability to control such activity.

Separately, under section 230(c) (1) of the CDA, "no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider."[42] Accordingly the provider, so long as it is not participating in the creation or development of the infringing content, will be immune from defamation and other non-intellectual property[43] law claims arising from third-party content.

Therefore, in addition to the above recommendations for complying with the DMCA, the provider should ensure that:

it obtains all necessary third-party consents before using user content, including consent from the content's creator;

- it establishes an internal procedure to keep track of any takedown notices it receives and to maintain records of any resulting actions it takes; and,
- its Terms of Use explicitly prohibit the uploading or posting of infringing, defamatory, privacy-invading, or of other legally impermissible content. The Terms of Use should also mandate that users submitting content give appropriate representations, warranties, and indemnities.

In the EU, the CJEU Google and eBay decisions signal a departure from a line of thinking based on the traditional distinction between website publishers and website hosting providers based on the degree of neutrality of the service provider. The website operator could be found liable - even though it did not play an active role - from the moment it should have known of the illegality of a particular content and did not act in accordance with Article 14 of the 2000/31/EC Directive by promptly taking necessary measures to take down the content or prevent it from being accessed. This tends to create an obligation of vigilance on the part of the operator, acting as a "reasonable" actor in the circumstances. The focus now shifts to the nature of

31. *Maynard v. McGee, 16SV-89 (Ga. State Ct., Jan. 20, 2017).*
32. *Kimzey v. Yelp!, 2016 WL 4729492 (9th Cir. Sept. 12, 2016).*
33. *Fields v. Twitter, Inc., 2016 WL6822065 (N.D. Cal. Nov. 18, 2016).*
34. *Caraccioli v. Facebook, Inc., 2016 WL 859863 (N.D. Cal. March 7, 2016),* fake user account distributing nonconsensual pornography.
35. *Fakhrian v. Google Inc., 2016 WL 1650705 (Cal. App. Ct., April 25, 2016),* de-indexing of Ripoff Report.
36. *Hempton v. Pond5, Inc., 2016 WL 6217113 (W.D. Wash., Oct. 25, 2016),* stock music library.
37. *Capital Records, LLC v. Vimeo, LLC, 2016 WL 3349368 (2d Cir., June 16, 2016).*
38. *EMI Christian Music Group, Incorporated v. MP3tunes, LLC, 840 F3d 69 (2nd Cir., Oct. 25, 2016), MP3 file search and downloading engine.*
39. *Viacom International, Inc. v. YouTube, Inc., 10-3270-CV, 2012 WL 1130851 (2d Cir. April 5, 2012),* video syndication.
40. *Prop. de loi AN n° 2578 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre,* en lecture définitive à l'Assemblée nationale.
41. See *R. McHale, Esq. with E. Garulay, Navigating Social Media Legal Risks: Safeguarding Your Business: Copyright(c) 2012 by Pearson Education, Inc.*
42. See *47 U.S.C. s. 230(f) (2),* which defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."
43. See *47 U.S.C. s. 230(e) (2),* which removes intellectual property law claims from the scope of immunity provided by the statute.

the operator's functions. Consequently, based on the respective importance of these different functions, the operator may be qualified solely as a website hosting provider[44], or both as a website hosting provider and a website publisher[45]. Therefore, the website operator who seeks to avoid liability as a publisher will have to be particularly vigilant and take preventative measures against illegal content of which it becomes aware while not crossing the line and being seen as actively moderating the content posted his website.

The set of specific actions that online service providers operating in the U.S. market must adopt preventatively to take advantage of the DMCA safe harbor protection or the immunity of section 230(c) (1) of the CDA would certainly assist in satisfying the new duty of diligence of website hosting providers in France.

44. *CA Paris, 4e ch., sect. A, 7 juin 2006, Tiscali : JurisData n° 2006-305324.*
45. *TGI Paris, 3e ch., 13 sept. 2012, Dailymotion*, confirmé par *CA Paris, pôle 5, 1re ch., 2 déc. 2014, n° 13/08052 : JurisData n° 2014-029711 ; JCP E 2015, 1165.*