

The liability of service providers in e-Research Infrastructures: killing the messenger?

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Abstract

Hosting Providers play an essential role in the development of Internet services such as e-Research Infrastructures. In order to promote the development of such services, legislators on both sides of the Atlantic Ocean introduced “safe harbour” provisions to protect Service Providers (a category which includes Hosting Providers) from legal claims (e.g. of copyright infringement). Relevant provisions can be found in § 512 of the United States Copyright Act and in art. 14 of the Directive 2000/31/EC (and its national implementations). The cornerstone of this framework is the passive role of the Hosting Provider through which he has no knowledge of the content that he hosts. With the arrival of Web 2.0, however, the role of Hosting Providers on the Internet changed; this change has been reflected in court decisions that have reached varying conclusions in the last few years. The purpose of this article is to present the existing framework (including recent case law from the US, Germany and France).

Keywords: service provider, hosting provider, liability

“Since the first messenger who told Tigranes that Lucullus was coming had his head cut off for his pains, no one else would tell him anything, and so he sat in ignorance while the fires of war were already blazing around him, giving ear only to those who flattered him” (Plutarch¹).

1. Introduction

Hosting Providers are defined as a category of Internet Service Providers whose services consists of – in general terms – the storage of data provided by another person (which is referred to as Content Provider or editor).

Hosting Providers, sometimes called “the postmen of the Internet” (Koelman, Hugenholtz, 1999), play an essential role in the development of Web 2.0 in general, and e-Research Infrastructures in particular.

Needless to say, data stored by Hosting Providers may often be of illegal nature; in particular, they may infringe third party's intellectual property rights. This is true not only for social media or video services such as YouTube, but also in case of e-Research Infrastructures.

If the general rules of civil liability (or tort law) were strictly applied to these cases, Hosting Providers could be found liable for every such infringement. Of course, the Content Providers can also be found liable for such infringements, but in practice – having the possibility to sue one or the other – right holders would usually sue the Hosting Provider, easier to identify and *a priori* more solvent than the Content Provider.

Therefore, in order to promote the development of e-commerce and other web services (which require a certain investment on the part of Internet Service Providers), the legislators on both sides of the Atlantic Ocean decided to

introduce a legal framework containing liability limitations for Internet Service Providers (the so-called “safe harbour” or “safe haven”). One of these limitations, concerning Hosting Providers, will be presented below.

2. Legal framework

Statutory limitations on Internet Service Providers' liability were introduced in the United States by the Digital Millennium Copyright Act of 1998 (DMCA) and in the European Union by the e-Commerce Directive of 8 June 2000 (Directive 2000/31/EC).

2.1. In the United States

The DMCA introduced § 512 in the Copyright Act (17 U.S.C.). According to its subsection (c) “A service provider shall not be liable (...) for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider”. This limitation, however, is subject to a set of conditions. First of all, the Hosting Provider can only benefit from the limitation if he does not have actual knowledge that the material is infringing. Secondly, he may not receive a financial benefit directly attributable to the infringing activity. Finally, upon obtaining a notification from copyright owners (the content of which is specified by the same section), he must respond expeditiously to remove, or disable access to the infringing material. Under § 512(c), if one of these three conditions is not met, the hosting provider can be held liable for infringement. A modification to this principle, particularly important from the point of view of e-Research Infrastructures, is contained in § 512(e). According to this subsection, if the service provider is a nonprofit educational institution, the knowledge of the data provided by its employees (faculty members and graduate students) performing teaching or

¹ All quotes from Plutarch from: Plutarch's Lives. The Translation Called Dryden's. Corrected from the Greek and Revised by A.H. Clough, in 5 volumes (Boston: Little Brown and Co., 1906)

research functions shall not be presumed (as it is the case when it comes to other data provided by employees). It means that the liability limitation is still available to nonprofit educational institutions, even if the data are provided by its members (which is often the case in e-Research Infrastructures).

Nevertheless, in *CoStar v. LoopNet*² the United States Court of Appeals for the Fourth Circuit held (citing *Religious Technology Center v. Netcom*³) that the DMCA was intended to be “a floor, not a ceiling of protection” and that – despite the failure to meet the criteria of § 512, an Internet Service Provider may still be exempted from liability for copyright infringement, e.g. if his conduit is of purely passive nature. It has to be noted here that such an approach (in which judges apply a limitation going beyond the scope of the statute) is only possible in *common law* jurisdictions.

Further analysis of the US legal framework falls beyond the scope of this article. However, as it is substantially similar to the one adopted in the EU, further sections of this article remain relevant to the situation in the US.

2.2. In the European Union

In the European Union, the liability of Hosting Providers is regulated by article 14 of the Directive 2000/31/EC, according to which: “Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service”. The EU framework is in fact much broader than the US framework; while § 512 of the Copyright Act applies only to copyright infringement, art. 14 of the Directive 2000/31/EC also protects from any other claims (e.g. for unlawful processing of personal data or for defamation). However, unlike the US solution, the EU solution does not protect against claims for injunction (recital 45 of the Directive 2000/31/EC).

Nevertheless, only the entities that meet the definition of a Hosting Provider can be eligible for this liability limitation, and only on a set of conditions.

2.2.1. Definitions

Art. 14 defines a Hosting Provider as a provider of an information society service that consists of the storage of information provided by a recipient of the service.

An “information society service” is further defined by the Directive 98/34/EC as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”.

Additionally, recital 42 of the Directive 2000/31/EC states that “[t]he exemptions from liability (...) cover only cases where the activity of the information society service provider is (...) of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is (...) stored”. This does not necessarily mean that the Directive requires that the Hosting Provider “is in no way involved in the

information transmitted” (this requirement expressed in recital 43 applies to other categories of Service Providers).

2.2.2. Conditions for liability limitation

According to art. 14-1 of the Directive 2000/31/EC, a Hosting Provider is not liable for the information that he stores on condition that:

- “(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of the facts or circumstances from which the illegal activity or information is apparent; or
- “(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information”.

Because of the “mere technical nature” of their activity Hosting Providers are presumed not to know the content of the information that they store (it can be called a “presumption of unawareness”). He can only obtain such knowledge upon being properly notified. The details of the notification procedure are not specified by the Directive and so they may differ across Member States; a detailed analysis of the notification procedure falls outside the scope of this article.

It should be noted, however, that also the obligations of a Hosting Provider after notification (i.e. upon obtaining the knowledge of illegal activity or information that he stores) is also not defined in a precise way; the Directive says only that in such cases the Hosting Provider is required to “act expeditiously to remove or disable access to the information”. This seems to leave some leeway to the Member States, e.g. in deciding whether to follow a “notice and take down” or a “notice and stay down” approach, i.e. whether to oblige Hosting Providers only to remove the illegal content, or also to prevent its reappearance in the future. Moreover, recital 48 of the Directive expressly allows Member States to require Hosting Providers to apply duties of care in order to detect and prevent certain types of illegal activities. On the other hand, according to art. 15 Member States cannot impose on Hosting Providers “a general obligation (...) to monitor the information that they (...) store, nor a general obligation to actively seek facts or circumstances indicating illegal activity.”

Finally, which is particularly important for e-Research Infrastructures, art. 14-2 of the Directive 2000/31/EC expressly states that the liability exemption should not apply when the recipient of the service (Content Provider) is acting under the authority or the control of the Hosting Provider. It means in practice that Hosting Providers are fully liable for the information that they store and that was provided by their employees. In such cases the “presumption of unawareness” cannot apply.

2.2.3. National implementations

The Directive 2000/31/EC, like all the EU Directives and unlike EU Regulations, does not apply directly in the Member States. In order to become binding law for EU citizens, it had to be transposed into the legal system of every Member State. As discussed above, the Directive

2 373 F.3d 544 (4th Cir. 2004)

3 907 F. Supp. 1361 (N.D. Cal. 1995)

leaves an important amount of leeway to national legislators. Therefore, national provisions regulating the liability limitations may differ in details, even though they must follow the EU framework outlined above. Specific solutions adopted in different EU Member States are outside the scope of this article; however, the French and the German solutions will be very briefly presented below. In France, the Directive 2000/31/EC was finally transposed by the *Loi no. 2004-575 pour la confiance dans l'économie numérique* of 22 June 2004⁴ (LCEN). Art. 6 of the LCEN contains a detailed provision regulating the liability of Hosting Providers. Art. 6-I-2 specifies that the liability limitation may apply to both natural and legal persons, and even if they offer their services without remuneration. Art. 6-I-5 provides a list of informations that have to be included in a valid notification, while art. 6-I-4 states that the fact of submitting a false notification to a Hosting Provider is punishable by one year of imprisonment and by a fine of 15 000 EUR.

In Germany, the relevant provisions of the Directive are finally transposed into the *Telemediengesetz* of 26 February 2007⁵ (TMG). Section 10 of the TMG has a very similar wording to the one used in art. 14 of the Directive; moreover, § 7 makes it clear that as a general rule, Service Providers are liable for the information that they store or transmit (unless one of the liability limitations apply). In the German system, apart from § 10 TMG, the doctrine of contributory infringement (*Störerhaftung*) plays an important role when it comes to Hosting Providers. The liability for contributory infringement can be engaged if:

- there is a link of causality between the actions of the Hosting Provider and the infringement;
- the Hosting Provider has a possibility to prevent the infringement;
- the Hosting Provider violated his duty of care (Nordemann, 2011).

The last element (duty of care) is decided on a case-by-case basis; the scope of the duty of care depends on the business model followed by the Hosting Provider, but it can be quite extensive (see e.g.: *Rapidshare v. Atari*⁶; Ewald, 2013).

3. Case law

Legal framework with such an amount of unclear notions (“mere technical, automatic and passive nature”, “act expeditiously”...) is subject to interpretation by judges. It should be noted that the nature of Internet services is in constant evolution; in 1998 or in 2000, when the DMCA or the Directive 2000/31/EC were adopted, Web 2.0 services like YouTube or Facebook did not exist.

This section will attempt to present a selection of most important European and US court decisions concerning the liability of Hosting Providers, with a special focus on France, Germany and the US.

4 JORF no. 0143 du 22 juin 2004, page 11168, texte no. 2

5 BGBl. I no. S. 179, 251

6 BGH I ZR 18/11 of 12 July 2012

As early as 1992 in what is believed to be one of the first Internet cases in the history of French law⁷, the French Court of cassation exempted a *minitel* host centre from any liability for the content that it stored. In 1995, the United States District Court for the Northern District of California held that claims of direct and vicarious infringement failed against the operator of an online bulletin board service where a user had uploaded copyrighted material – the case (*Religious Technology Center v. Netcom*⁸). Note that part of these holdings were codified in the DMCA and, in 2004, the Court of Appeals for the Fourth Circuit⁹ held that the DMCA did not supplant or preempt the holdings of this case). The problems started when new participative services emerged in the first decade of the 21st century.

In the 2009 German case *marions-kochbuch.de*¹⁰ the owner of an Internet portal in which users could post recipes (some of them with photos) were sued by a professional food photographer who found his photographs posted on the portal without his authorisation. The Federal Court of Justice decided that the liability limitation did not apply to the owner of the portal because it appropriated the users' content: it applied his own templates (including his logo) to the recipes sent by users (whose nicknames, however, were made apparent under the recipes) and the Terms of Use of the service specified that by sending the recipes the users allowed the owner of the portal to make them available to the public and to make commercial use of them. All these activities, according to the Court, suggested that the defendant's role wasn't of merely technical nature.

In 2010's *Tiscali* case¹¹ the French Court of Cassation refused the benefit of the liability limitation to an Internet company on the grounds that it exceeded merely technical role of a Hosting Provider by selling advertising space on the websites that it hosted. It should be noted that under the current wording of art. 6-I-2 LCEN, the liability limitation is available to Hosting Providers who offer their services with or without remuneration; the argument of selling advertising space can therefore no longer be used (Thoumyre, 2010).

Shortly after, a series of important preliminary rulings were rendered by the Court of Justice of the European Union¹². In 2010 in *Google v. Louis Vuitton*¹³ the Court held that the liability limitation may apply to the operator of an Internet referencing service (like Google AdWords) if he does not play an active role. In 2011 in *eBay v. L'Oréal*¹⁴ the Court held that the liability limitation did not

7 Cass Crim., 17 November 1992, no. 91-84.848

8 907 F. Supp. 1361 (N.D. Cal. 1995)

9 *CoStar v. LoopNet*, 373 F.3d 544 (4th Cir. 2004)

10 BGH I ZR 166/07 of 12 November 2009

11 Cass 1 Civ., 14 January 2010, no. 06-18.855

12 If a national court is in doubt about the interpretation of EU law (e.g. the Directive 2000/31/EC) it may ask the CJUE for advice; this advice is called a “preliminary ruling” (see: http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm)

13 C-236/08 to C-238/08 of 23 March 2010

14 C-324/09 of 12 July 2001; in 2007, eBay was sued by

apply to the operator of an online marketplace who provides assistance by e.g. optimising the presentation of the offers for sale or by promoting such offers. It should be pointed out here one year before this ruling the United States Court of Appeals for the Second Circuit exempted eBay from liability in a trademark case *eBay v. Tiffany and Co*¹⁵.

Finally, in 2012 in *SABAM v. Netlog*¹⁶ the Court of Justice of the European Union stated that no obligation to install a file filtering system can be imposed on a Hosting Provider.

These preliminary rulings had an impact on national judges. French judges applied the liability exemption e.g. to Dailymotion¹⁷ and to Google Images¹⁸ (Beurskens, Kamocki, Ketzan, 2013); more recently, however, in a personal data protection case, the *Tribunal de grande instance* of Paris found Google guilty of unlawful processing of personal data in Google Suggests, even though the Mountain View giant claimed that its activity is of purely automatic nature¹⁹. In Spain, the liability exception was applied to YouTube²⁰. German courts, however, applied extended duties of care (see above) to services such as YouTube or Rapidshare. When it comes to eBay, after the CJUE's preliminary ruling, is reported to have settled with L'Oréal²¹.

Meanwhile, in 2013's case *Columbia v. Fung*²² the United States Court of Appeals for the Ninth Circuit held that Gary Fung, the owner of several popular torrent websites, was ineligible for the DMCA's safe harbour provision on the grounds that he had "red flag knowledge" of the infringing activity on his systems. On the other hand, in the same year YouTube was held not to have such knowledge²³.

This abundant and constantly changing case law concerning the liability of Hosting Providers exposes the weaknesses of the existing framework: the fact that it is not adapted to Web 2.0 and that by not providing for a sufficient degree of legal security it may be an obstacle rather than a trigger to the development of Internet services.

4. Contractual Clauses

Hosting Providers, aware of the lack of legal security concerning the applicability of "safe harbour" provisions, often try to shield themselves from claims with contractual clauses. Nevertheless, these clauses may not provide for sufficient protection. In fact, there is a chance

L'Oréal in Belgium, Germany, the United Kingdom, France and Spain for selling counterfeit goods

15 600 F.3d 93 (2d Cir. 2010)

16 C-360/10 of 16 February 2012

17 Cass 1 civ., 17 February 2011, no. 09-67.896

18 Cass 1 civ., 12 July 2012, no. 11-15.165

19 TGI Paris, 23 October 2013

20 Madrid Court of Appeal, no. 11/2014 of 14 January 2014

21 See: ecommerce-news.eu , 17 January 2014

22 710 F.3d 1020 No. 10-55946

23 In *Viacom v. Youtube*, 1:07-cv-2103, no. 452 (S.D.N.Y Apr. 18, 2013)

that they may be declared invalid in the light of consumer protection rules.

Consumer protection law applies to contracts between a consumer (defined as "any natural person who is acting for purposes which are outside his trade, business, craft or profession"²⁴) and a trader ("any natural or legal person who is acting for purposes relating to his trade, business, craft or profession"²⁵). According to art. 3 of the Directive 93/13/EEC a contractual term is unfair if it has not been individually negotiated with the consumer and if it causes significant imbalance in the parties' rights and obligations under the contract. A limitation liability clause may therefore be regarded as an unfair term, and as such have no legal force.

More importantly, even if they are enforceable, contractual clauses do not have binding force on third parties. It means that a right holder whose rights are violated by the data deposited by a Content Provider may still sue the Hosting Provider (because the contractual provision according to which only the Content Provider is liable has no binding force on him). Moreover, as Hosting Providers are usually more solvent than Content Providers, they constitute a better target for monetary relief claims.

If a Hosting Provider is found liable for damages, a liability limitation clause in the deposition contract may give him a claim against the Content Provider. At this stage, however, the question of solvency is important again: the Content Provider may simply not be able to reimburse the damages that the hosting provider had to pay in the first time.

Therefore, a contractual clause – while still being a reasonable solution - may not provide for sufficient protection against claims for monetary relief.

5. Conclusions

As a general rule, "mere technical, automatic and passive" role of the Hosting Provider gives him access to legal protection against liability claims. In practice, however, the way in which judges interpret this "safe harbour" provision varies greatly and the situation of Hosting Providers lacks legal certainty. In particular, the application of the framework discussed in this article to e-Research Infrastructures remains a grey area.

6. Acknowledgements

The author wishes to thank Mr. Olivier Dacla and Erik Ketzan for their reliable advice, and Julia Wildgans for her assistance.

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24 Art. 2(1) of the Directive 2011/83/EU on consumer rights

25 Art. 2(2) of the Directive 2011/83/EU

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