

## Special Feature: The status of hosting services providers in France

Uncertainty remains after ECJ ruling

The Directive on electronic commerce ("e-commerce Directive")<sup>1</sup> and its adaptation to evolving practices has led to lively debates, particularly in Europe and in France. The notion of "hosting", defined in article 14 of the Directive as the storage of information provided by a recipient of the service, is still at the heart of disputes between rights' holders and Internet operators. The Directive, as implemented<sup>2</sup>, introduced a regime of limited liability for providers of storage services in relation to data provided by an Internet user. A provider of hosting services will not be liable for content placed online unless it was aware of the illegal character of the content or, having become aware of this, it failed to take prompt action to remove it from its site or disable access to it.

The courts of the member states have often had the opportunity to rule on the classification of the activities of operators. The French Supreme Court was the first to refer questions to the ECJ regarding the interpretation of article 14 of the Directive, in the context of Google's "AdWords" advertising referencing service. If the ECJ's rulings of 23 March 2010<sup>3</sup> and 12 July 2011<sup>4</sup> shed light on some issues, it did not answer all outstanding questions regarding the activity and corresponding liability of these operators.

Before the ECJ rulings, French case law was a source of great uncertainty in terms of what criteria should be used to determine whether to classify an operator as a hosting provider.

### DIVERGENCE OF APPROACH BETWEEN FRANCE AND OTHER MEMBER STATES

In France the classification of hosting providers has been ambiguous. The great majority of courts have, as in Belgium or in England<sup>5</sup>, favoured a distributive approach, which distinguishes and identifies the particular activity of a provider in question, in order to classify that alone; whereas some French decisions have opted for a more global approach, taking all activities of a provider into account.

Similarly, inconsistencies have arisen within French case law in relation to the impact that a site's architecture has on the provider's status. The Paris Court of Appeal has held that the structure and classification of content had no impact on a provider's status, because providers form part of a technical service aimed at facilitating access to such content.<sup>6</sup>

The commercial exploitation of the service offered on the site through either payment collection or placing advertisements on the site has also been widely debated in France.<sup>7</sup> Certain French courts have ruled that the fact that the service, or its commercial exploitation, was chargeable<sup>8</sup> could be a factor which indicates that a provider is not, in fact, a hosting provider,<sup>9</sup> while others have stuck closely to the letter of the implementing laws.<sup>10</sup> The French Supreme Court has ruled that the insertion of paid-for advertisements on a blog prevented the provider from qualifying as a hosting provider with regard to the blog content, even though the blog itself was published by an Internet user.<sup>11</sup> It is therefore clear that French courts have taken these points in a different direction from the rest of Europe in order to decide whether to grant the benefit of the limited liability regime provided for by the e-commerce Directive. This led to great legal insecurity for the actors concerned and resulted in a need for an ECJ clarification.

### QUALIFICATION CRITERIA CLARIFIED BY THE ECJ

The ECJ's ruling of 23 March 2010 is undeniably helpful. In order to ensure that an operator has no knowledge of, or has no control over, the stored content on its site, the ECJ held that it is necessary to determine whether its role remains neutral and technical with respect to the content (point no. 114).

The ECJ continued its reasoning in the *L'Oréal v. eBay* decision of 12 July 2011. According to the Court, the operator shall be considered as having played an active role in which it has knowledge of, or control over, the data stored, when "*it has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers*" (point no. 116). It can be inferred from the above that an operator putting in place automated tools would not have knowledge of or control over the data stored. Moreover, and even if the operator can rely on the exemption from liability referred to in Article 14.1 of the e-commerce Directive, it shall not be considered exempt when it had been aware, in one way or another, of content that a diligent economic operator should have identified as illegal, and it did not expeditiously remove such content, or disable access to it (points no. 119 to 124).

Those two clarifications will surely accelerate national courts' harmonization on the implementation of the limited liability regime created by the Directive. However they also imply that a case-by-case assessment should be performed by national judges who will determine, for specific content, whether or not the operator played an active role. This could lead to inconsistencies due to each judge's assessment of the facts.

### IMPLEMENTATION OF THE ECJ RULINGS BY NATIONAL COURTS

French courts have already implemented the criteria set by the ECJ with regard to Google AdWords. It has been held that the part played by Google in the drafting of advertising messages is not an active one, and that Google does not have sufficient control over the choice of keywords, as this choice is "*made by the advertiser*".<sup>12</sup>

French courts have also held that the collection of commission for online sales<sup>13</sup> or the sale of advertising space<sup>14</sup> has no effect on the determination of whether an operator is a hosting provider. National courts now consider that implementing purely technical measures with the aim of ensuring the proper functioning of the hosting service (re-encoding and formatting, classification, keyword database, presentation of results in the form of a mosaic of images, temporary storage of images in memory cache, design of the website, implementation of technical measures allowing Internet users to proceed with their sales or identical presentation for all listings) does not constitute an active role.

The provision of additional services (rating works placed online or on a discussion forum<sup>15</sup>) also has no impact on the status of hosting provider. However French case law seems to be less clear on the impact that the provision of extra services has on the status of e-commerce platforms.<sup>16</sup> A more consistent approach is nevertheless expected and welcome after the *L'Oréal* against *eBay* ECJ decision.

## Special Feature: France

Consequently case law now offers a balanced application of the status of hosting services provider, encouraging the development of e-commerce and freedom of speech. However, there remains some uncertainty which continues to be a source of legal insecurity for service providers.

### REMAINING UNCERTAINTIES RELATING TO THE REGIME APPLICABLE TO HOSTING PROVIDERS

In French law, a presumption has been introduced that, where certain conditions are satisfied, notice allows knowledge of the illegal content to be deemed acquired. The ways of establishing that the hosting provider has knowledge of the content<sup>17</sup> and the assessment of how expeditiously the information is removed<sup>18</sup> still raise questions in the courts of Member States. In the L'Oréal/eBay decision, the ECJ has stated that notification has to be taken into account by national courts when deciding whether a hosting provider "was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality" (point no. 122).

It is however the act of putting identical content back online once notification has been given that is the source of greatest uncertainty. French courts consider that this re-uploading makes the provider liable without the requirement of a new notification<sup>19</sup>. Some judges reproach the provider for failing to take the necessary steps to prevent re-uploading taking place.<sup>20</sup>

This creates considerable uncertainties for platform providers, some of whom already apply proactive measures to combat illegal activities by users of their sites (for example, eBay's VeRO system, INA signature, or Audible Magic systems). The constant evolution of available functionalities and processes used will certainly raise further questions as to the active role played by providers. The rules governing the Internet are far from set in stone, which poses a constant challenge to platform operators' legal security.



**Xavier Buffet Delmas**

Partner, Paris

T +33 1 53 67 47 82

xavier.buffetdelmas@hoganlovells.com



**Christine Gateau**

Partner, Paris

T +33 1 53 67 18 92

christine.gateau@hoganlovells.com

- 1 Directive no. 2000/31/EC of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, see in particular recitals 1 and 2
- 2 For example, in French law, article 14 of the e-commerce Directive was implemented in article 6-I 2 of law no. 2004-575 of 21 June 2004 for confidence in the digital economy (LCEN).
- 3 ECJ, 23 March 2010, Google v. Louis Vuitton Malletier, Viaticum, CNNRH and others, no. C-236/08 to C-238/08
- 4 ECJ, 12 July 2011, L'Oréal SA and others v. eBay International AG and others, no. C-324/09
- 5 In Belgium: Commercial Court of Brussels, 31 July 2008, eBay v. L'Oréal; see also in France: Paris Civil Court, 13 May 2009, L'Oréal v. eBay; or in England: High Court of England and Wales, 29 March 2010, Kaschke v Gray & Hilton, [2010] EWHC 690 (QB)
- 6 Paris Court of Appeal, 6 May 2009, Dailymotion v. C. Carion, Nord-Ouest Productions and UGC Images; Paris Court of Appeal, 16 September 2009, Lafesse v. Dailymotion; Paris Court of Appeal, 21 November 2008, Bloobox Net v. O. Martinez
- 7 Article 6-I 2° of LCEN states "even for free"
- 8 Paris Court of Appeal, 1 February 2008, GIFAM v. Google
- 9 Paris Civil Court, 12 March 2010, Dreamnax v. Sedo
- 10 Paris Civil Court, 13 May 2009, aforementioned
- 11 French Supreme Court, 1st division, 14 January 2010, no. 06-18.855
- 12 Paris Court of Appeal, 19 November 2010, Google France v. Syndicat français de la literie
- 13 Riom Court of Appeal, 14 April 2010, Fugam v. Régis and Tajana G.
- 14 French Supreme Court, 17 February 2011, no. 09-67.896 ; C. Manara, *Responsabilité des hébergeurs, la Cour de Cassation s'est enfin prononcée !*, Dalloz Actualités, 25 February 2011
- 15 Paris Court of Appeal, 9 April 2010, Google v. Flach Films and others; Paris Court of Appeal, 14 January 2011, Google Inc. v. BAC Film, the Factory, Google France
- 16 In favour of the absence of impact of the additional services provided on the status of hosting provider: Paris Civil Court, 13 May 2009 and 26 October 2010 aforementioned; *contra*: Paris Court of Appeal, 3 September 2010, eBay v. Louis Vuitton Malletier
- 17 Tribunale di Milano, 16 July 2007 X v. Yahoo; Tribunale di Roma, 20 March 2011, PFA Films v. Google, Microsoft, Yahoo
- 18 Prompt removal if in a period of between 15 days and one month: Créteil Civil Court, 14 December 2010, INA v. YouTube; *contra* not prompt removal if period longer than 2 weeks: Paris Court of Appeal, 4 February 2011 Google and Aufeminin.com v. André Rau, H & K
- 19 Paris Court of Appeal, 9 April 2010, Google v. Flach Films and others and 14 January 2011, aforementioned, and 3 December 2010, Daily Motion v. Zadig Production; Créteil Civil Court 14 December 2010, aforementioned
- 20 Paris Court of Appeal, 4 February 2011, aforementioned, Paris Civil Court, 11 June 2010, La Chauve Souris and 120 Films v. Dailymotion, Bundesgerichtshof, 11 March 2004, I ZR 304/01, "Internet-Versteigerung I"