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Wikipedia: Exemption from Liability in Case of Immediate Removal of Unlawful Materials

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Abstract

Three years after the enactment of the Loi sur la confiance numérique (Loi No 2004-575, 21st June 2004) the French Higher Court faces the application of the rules concerning the liability of an Internet content provider. The judgement shows useful hints for a comparison between the French and the Italian tort system – shaped from the implementation of the European Directive on e-commerce.

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1. The advent of information production and the dissemination of new forms

The Internet has become the richest and most pervasive means of information dissemination in the world – capable of providing data concerning any type of issue in a few clicks of a mouse.¹ Such information, however, is no more embedded exclusively in a system of property rights, where each author holds a right over his own piece of information.² More and more frequently we face a new form of information creation where the traditional property right system cannot fit for the purpose, due to the *social* feature of this process.³ In this case, all non-economic players participate in the construction of knowledge, without receiving (or aspiring to receive) any remuneration or profits from their contribution to the development and/or to the production of this new knowledge.⁴

This has been allowed by the development of technology, both in terms of the increasing potentialities of computers and widespread network connections. One of the examples of these new forms of development and distribution of information is the virtual encyclopaedia *Wikipedia*.

Wikipedia is a multi-lingual encyclopaedia freely available on the Internet, which, following the self-definition available on the website, is based on “the certainty that everyone has some knowledge that can share with others.”⁵ Wikipedia “believes that every person has the right to learn, but also that everyone has something to teach to others.” For this reason, any user who wishes to contribute to the project can join, add and/or edit any text already available – publishing them on the website. Participants are therefore volunteers and free to decide whether to register on the website (providing a user-name and password) or to remain anonymous (since registration is not mandatory).⁶

This model, like others already available on the Internet, has as key elements the use of decentralised forms of information production, and the involvement of non-economic actors, whose cooperation is basically free and disinterested. This approach claims not to diminish the efficiency, sustainability and productivity levels in comparison to traditional forms of production and dissemination of information.⁷

¹ M Castells, *The Internet Galaxy: Reflections on the Internet, Business, and Society* (Oxford: OUP, 2001); L Lessing, *Code Version 2.0* (New York: Basic books, 2006).

² R Posner, *Economic analysis of law*, 7th ed (New York: Aspen Publishers, 2007), at 36 ff; R Posner and R Landes, *The Economic Structure of Intellectual Property Law* (Cambridge, MA: Belknap Press, 2003); R Coase, “The problem of social cost” (1960) 3 *Journal of Law & Economics* 1-19.

³ See Y Benkler, *The Wealth of Networks* (New Haven: Yale Press, 2006), at 4.

⁴ See, on the general problems of knowledge creation, S Scotchmer, “Standing on the Shoulders of Giants: Cumulative Research and the Patent Law” (1991) 5 *Journal of Economic Perspectives* 29-41.

⁵ See the information available at: <http://en.wikipedia.org/wiki/Wikipedia:About> (accessed 18 Sept 09).

⁶ See the statistics concerning registration and editing activity by users available at <http://stats.wikimedia.org/EN/TablesWikipediaZZ.htm> (accessed 18 Sept 09).

⁷ Y Benkler, see note 3 above, at 4.

However, this interpretation is not free from criticism,⁸ since the final user of this knowledge faces two major problems. First, those who were not involved in the social production process cannot perceive the difference in the outcome (nonetheless, such a result is not characterised by those features of reliability and quality that traditional processed knowledge has).⁹ Secondly, the anonymity granted by the Internet¹⁰ may release the author from any burden of fairness and correctness in the information disseminated.¹¹ So, the social process of production and dissemination of information offers new issues to be tackled by end-users, since the latter will have to define new criteria and tools to assess reliability and accuracy of the knowledge at hand.

It is exactly the potential damage caused by the information available on the Internet, and especially concerning the so-called *wikis*, that the current judgement of the Supreme Court of Paris is focused on.

2. The case

On 8 October 2007, MB, PT and FD¹² appealed to the Tribunal de Grand Instance in Paris in order to get the conviction of the Wikimedia Foundation Inc – a non-profit company based in San Francisco and head of the Wikipedia project – in light of two specific allegations.

On the Wikipedia website a page was hosted that focused on the association and its workers/plaintiffs: the first one as chairman, and the others as managers. In the section of the web-page devoted to “Particularism”, the following sentences were available:

Cited many times by the gay and lesbians associations as a firm where is nice to work when one is homosexual. MB has an emblematic role in this movement, ready to enhance it also in the firm – her working teams are managed by young professionals from the homosexual community which show clearly their orientation: XJ, PT, FD are the pillars of this new generation of professionals.

⁸ See L Strahileviz, “Wealth Without Markets?” *Chicago Law & Economics, Olin Working Paper No. 315*, available at <http://ssrn.com/abstract=946479> (accessed 18 Sept 09).

⁹ P Swire, “A Model for When Disclosure Helps Security: What Is Different About Computer and Network Security?” in M Grady and F Parisi (eds), *The Law and Economics of Cybersecurity*, (New York: CUP, 2006) 29-72, at 60.

¹⁰ Although it is possible and mandatory (due to *Directive n. 2006/24/EC of the 15th March 2006*) that Internet Providers identify users connected online, this is only related to the current hardware used, i.e. the computer. See *Applause Store Production Limited and Matthew Firsh v Grant Raphael*, [2008] EWHC 1781 (QB). On the directive, J Rauhofer, “Just Because You're Paranoid, Doesn't Mean They're Not After You: Legislative Developments in the Relation to the Mandatory Retention of Communications Data in the European Union”, (2006) 3 *SCRIPT-ed* 322-343.

¹¹ See in particular: P Mathias, *Le Cité Internet* (Paris: Presse de Science Po, 1997), at 26; J Dickie, *Producers and Consumers in EU E-Commerce Law*, (Oxford: Hart Publishing, 2005), at 26; F Di Ciommo, “Internet e la Crisi del Diritto Privato: tra Globalizzazione, Dematerializzazione e Anonimato Virtuale” (2002) 21 *Rivista critica di diritto privato* 57-116, at 57.

¹² Note for the reader: French judgements do not provide the name and references of the actors when dealing with privacy issues.

This was followed by:

Thanks to her activism in the development of the rights for homosexual couples that M.B. could obtain in 2001 the consent of DDASS to the adoption of two children from Cap Verd.

The plaintiffs, therefore, claimed collectively for a violation of their privacy in relation to the first paragraph cited, since their alleged sexual orientation was made public without their consent. At the same time M.B. claimed for defamation concerning the second cited paragraph, since the reason of the consent to the adoption was justified only on her activism rather than on a regular procedure.

They requested the removal of the sentences, both from the active page on the website and from its web-history.¹³ Consequently, they asked for damages and, concerning defamation, the release by Wikimedia Foundation of the personal data of the author of the sentences.¹⁴

First, the French Court rejected the defendant's claim that the Wikimedia Foundation was to be regarded as a publisher in the management of the website – applying instead art 6.I.8 of *Loi 2004-575 sur la confiance dans l'économie numérique* (hereinafter LCEN)¹⁵ and defining the Wikimedia Foundation instead as a hosting service provider (*fournisseur d'hébergement*), which has neither a role nor any kind of editorial control.¹⁶ The Court applied the rules on liability of Internet Service Providers, as it acknowledged that the intervention of Wikimedia Foundation in the services provided by the Wikipedia website is practically non-existent.¹⁷ So, falling into the category of hosting service provider, in order to assess liability, the Court examined two key elements: the “actual knowledge of the unlawful content”; and the removal of content as a prompt reaction to such knowledge. In particular, the analysis focused on the exchange of information between the plaintiffs and the Wikimedia Foundation in order to verify if, when the latter received the notification concerning the unlawful content, it promptly removed such content.

¹³ On the website, each page is presented in its latest edited version, but it is also possible to browse the previous versions, where changes and discussions on the content are available.

¹⁴ As a matter of fact the user was not registered, but the website does record the IP address, which can help to identify the computer that sent the data.

¹⁵ Art 6.I.8 states that the judicial authority can prescribe directly or upon request, towards any of the people mentioned in para. 2 (i.e. service providers) or, by default, towards any of the people mentioned in para. 1 (i.e. access providers), all the measures apt to prevent damages or to stop a damage caused by the content of an on-line communication service, (transl. by the author).

¹⁶ It is difficult to understand why the Wikimedia Foundation claimed to be a publisher. Indeed, while it would have invalidated the order of the court, it could have also imposed a higher standard of liability. As matter of fact, the French press legislation, namely *Loi 29 July 1881 sur la liberté de la presse*, imposes on the publisher a liability due to a presumed content control on what is published, allowing as a defence only the protection of freedom of expression of the employees.

¹⁷ See in particular the disclaimer at http://en.wikipedia.org/wiki/Wikipedia:General_disclaimer (accessed 18 Sept 09).

As a matter of fact, art 6.I.7 of LCEN, as already laid down in *Directive 2000/31/EC on electronic commerce*,¹⁸ requires that information providers are charged neither by a general monitoring obligation concerning the information they diffuse or host, nor by a general obligation to search for facts and circumstances that reveal illegal activities. However, it provides a system of so-called “notice and take down”¹⁹ that allows the recipients of the service to request the limitation or the termination of on-line availability of the unlawful content.²⁰ Art 6.I.5 provides the basic elements that must be included in the notification to be sent to the provider in order to reach the presumption of knowledge. Concerning this issue, the Court acknowledged that the two notifications sent by the plaintiffs could not be considered complete in their wording and, therefore, could not be used to assess the prompt reaction of the provider. Instead, the Court used the date of the receipt of the injunction from the Court, after which the provider promptly removed the unlawful content. Hence, the court rejected the claims for damages.

Regarding the charge of defamation, however, the Court distinguished the role played by the service provider from that played by the access provider – including the Wikimedia Foundation in the former category. Thus, the access providers are those who possess and retain the identification information concerning any user who contributed to the creation of the content they host. In this case, the service provider only made available the IP address of the person who drafted the web-page, but, given the lack of registration to the site, it could not provide any additional data. The judge then addressed the plaintiff’s request to the access provider to identify the author of the defaming text.

3. Comparative analysis

An element of the French regulation that is interesting in a comparative perspective with the Italian system is the choice of the French legislature to define, in art 6.I.5 LCEN, a presumption of knowledge concerning the unlawful materials only as a result of a “qualified” communication. This differs significantly from the Italian legislation, which specifies – in art 16, lett b) of the *Decreto legislativo n 70, 9 April 2003* – that the provider is presumably unaware of any unlawful information transmitted through its services until it receives a “communication from the competent authorities.”²¹

¹⁸ See *Directive 2000/31/EC of the 8th June 2000*, OJ L 178, 17/07/2000, at 1.

¹⁹ “Notice and take down” system provided by the European directive was based on the American model defined in the *Digital Millenium Copyright Act*. On the influence of the American model on the European one, see G M Riccio, *La responsabilità civile degli Internet providers*, (Torino: Giappichelli, 2002), at 200.

²⁰ Art 6.I.5 identifies the following elements: the date of notification; the general information about the person notifying; the description of the presumed unlawful materials; and the motivation for the removal of the materials with a reference to legal provisions.

²¹ Art 16, Dlgs n 70/2003 provides that the service provider is not liable for the hosted information if he (a) has not the actual knowledge of the fact that the activity or the information are illicit and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent, and (b) when he obtains actual knowledge, upon notification from the competent authorities, he acts promptly to remove the information or to limit the access. (translation by author).

In both cases, the aim is to clarify the rules provided in *Directive 2000/31/EC*, where the wording of art 14 gave rise to many interpretative doubts concerning the way in which the service provider can become aware of facts or circumstances that clarify the illegal nature of the information.²² In particular, the directive did not provide any detail concerning the manner in which that knowledge could be achieved: if it could be possible through a communication from any third party, or only by a qualified source.²³

It should be noted that, the purpose of the directive was the balance between different needs. On the one hand, the European legislature tried to avoid the allocation of causal liability on the provider, which would have hindered the activity of the latter; on the other, it tried to prevent the opposite case of an absolute lack of liability on providers in compensation issues, which would have denied to the users any protection in the case of damages caused by anonymous or poorly solvent authors.²⁴ However, without a clarification from national implementing rules, such a provision would rest on ambiguity and was likely to steer service providers' behaviour, concerning the removal of information from their website, either towards an extremely closed attitude (with a tendency to intervene by removing all the dubious content), or an extremely open attitude (removing content only in cases where unlawfulness is truly macroscopic).

A simpler solution would have been to draft, at the European level, the concept of actual knowledge on the basis of the provisions of the US *Digital Millennium Copyright Act 1998* (hereinafter DMCA).²⁵ According to this act, in order to presume the knowledge of the provider is necessary and sufficient, there needs to be a formal notification by the alleged victim. The validity of such a notification, so as to be considered by the ISP, is based on two specific items to be included: an indication of the material allegedly wrongful or unlawful; and a brief explanation of the reasons for the alleged damage. Moreover, in the US system an additional rule is available for the proper functioning of the liability system: if the provider, after receiving a valid notification, has removed the content uploaded by another of its clients, but the notification is subsequently rejected by the court, compensation for the damages suffered by the client will be charged to the user who wrongly notified and not to the provider.²⁶

²² See that Art 14, para 3, dir 2000/31, concerning hosting service providers provides that “[t]his Article shall not affect the possibility for a court or administrative authority, in accordance with Member States’ legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of *establishing procedures governing the removal or disabling of access to information*” (italics added). See on the difficulties of the European directive, see L Edwards, “Articles 12-15 ECD: ISP Liability, The Problem of Intermediary Service Provider Liability” in L Edwards (ed), *The New Legal Framework for E-Commerce in Europe*, (Oxford: Hart Publishing, 2005) 93-136.

²³ See G Comandè, “Al Via l’Attuazione della Direttiva sul Commercio Elettronico, Ma ... Serve un Maggiore Coordinamento” (2003) 8 *Danno e Responsabilità* 809-815, at 809.

²⁴ L Bugiolacchi, “La Responsabilità dell’Host Provider alla Luce del Dlgs 70/2003: Esegesi di una Disciplina Dimezzata” (2005) 70 *Responsabilità civile e previdenza* 1-188.

²⁵ *Digital Millennium Copyright Act*, 28 October 1998, 112 Stat 2860 (1998).

²⁶ N Elkin-Koren, “Making Technology Visible: Liability of Internet Service Providers for Peer-to-Peer Traffic” (2006) 9 *New York University Journal of Legislation and Public Policy* 15-73; G Cassano and

This comparative analysis, however, was not addressed even by the Italian legislature that preferred to solve the ambiguity by focussing on the kind of sender of the notification. As mentioned, art 16 of the Italian regulation indicates the “competent authority” is to be responsible for informing the provider about unlawful content. Thus, the provider is not required to assess again the unlawfulness, previously confirmed by the Court.²⁷ Conversely, the French legislature – after a first implementation similar to the Italian one²⁸ – followed partially the US model, defining a qualified type of notification with a minimum set of information that could enable the provider to assess unlawfulness. In particular, art 6.I.5 LCEN requires a clear description of the facts and of the breached rules in order to justify the removal. However, it does not provide any additional rule concerning the standing in name and on behalf of the holder of the right, as provided by the DMCA.

Therefore, in both legal systems, there are difficulties in the implementation of the EU directive. Whilst the choice of Italy raised new problems due to the unclear definition of the different procedural stages to remove unlawful content,²⁹ the French system does not offer more guarantees. Indeed, the choice of defining a qualified notification shifts the burden to evaluate the unlawfulness on the provider that temporarily assumes the powers of a court, and this process takes for granted that both provider and user are sufficiently competent to provide legal evidence and opinion.³⁰

Applying these rules, the Wikimedia Foundation would have to verify any notification concerning unlawful disclosure of information on Wikipedia coming from France – taking into account the legal opinion of the user that sent the notification and its own. If the provider’s assessment is challenged and then quashed by the court, who is held responsible for the injury to the person who lawfully uploaded the materials? Is it the provider, or the user who sent the notification? Even if the assessment is correct, concerning defamation issues, should the provider avoid the court and provide the user the personal information of the author of such defamation? Or should the user still need to apply to the court for an injunction?

I Cimino, “Il Nuovo Regime di Responsabilità dei Providers: Verso la Creazione di un Nuovo ‘Censore Telematico’” (2004) *Contratti* 88-96.

²⁷ G Comandè, see note 23 above, at 809.

²⁸ See that the first, partial, implementation of the directive was similar to the Italian one, as at Art 43-8 of the *Code de la Consommation* provided that the host provider was not liable for unlawful content, except in case it does not react promptly when the competent judicial authority informs him. See A Lepage, “Du Sens de la Mesure en Matière de Responsabilité Civile sur Internet: la Loi, la Jurisprudence et le Fournisseur d'Hébergement” (2001) *Recueil Dalloz* 322-327.

²⁹ See P Sanna, “Il Regime di Responsabilità dei Providers Intermediari di Servizi della società dell'Informazione” (2004) *Responsabilità civile e previdenza* 279-302.

³⁰ See also the proposal of E Caprioli, “La Confiance dans l'Economie Numérique” (2005) 110 *Petites Affiches* 4. “Une voie médiane pourrait être adoptée : si l'information notifiée au prestataire n'est pas manifestement illicite, le prestataire n'aura pas à intervenir et pourra exiger des preuves supplémentaires de la part du plaignant. En revanche, dès lors que le plaignant parvient à démontrer l'illicéité manifeste de l'information, le prestataire aura l'obligation d'intervenir pour bénéficier de l'exonération prônée par la loi”. However, also in this case, the provider should have a basic knowledge of legal provisions, in order to be able to evaluate the information received.

There are still unresolved issues and, perhaps, the current system of protection has not yet effectively reached what the French legislature defined as “confiance” (translation: “trust”) in electronic communications.