JF Bretonniere Baker & McKenzie

Europe
Liability for internet host providers in the European Union: time for a reform?

While drafting the EU E-commerce Directive (2000/31/EC), the European Commission considered that one of the key elements for developing electronic commerce in Europe was the issue of service provider liability. For this reason the commission considered that the liability regime should be harmonised throughout the European Union. Therefore, Article 14(1) of this directive created a 'safe haven' regime under which providers of hosting, caching and mere conduit services cannot be held liable under certain conditions. Further, the directive clearly states that the providers of these services cannot be subject to any general monitoring obligation.

More than 10 years since this attempt at harmonisation and questions as to how to apply these provisions and which service providers can benefit from the liability exemption remain the source of erratic and controversial court decisions. Until recently there have been significant differences in the interpretation of the liability exemption between the courts of different countries. However, the legal uncertainty surrounding this question and the absence of a unified interpretation has now been highlighted by the European Commission as one of the possible reasons behind the limited development of e-commerce in the European Union.

There is therefore a real need to clarify the rules according to which a service provider can benefit from the liability exemption set out in Article 14(1). The Court of Justice of the European Union (CJEU) recently had the opportunity to provide clearer guidelines on the interpretation of the liability exemption in its eagerly awaited decision in *Google France v Louis Vuitton Malletier SA* (C-236/08 to C-238/08, issued March 23 2010). This decision has been widely discussed with regard to the trademark aspects, since the CJEU decided that Google's AdWord system did not infringe trademarks. Conversely, the ruling's impact on the interpretation of host provider liability has attracted far less attention, probably because the solution offered by the CJEU is far less straightforward and does not provide sufficient guidance to unify European case law on this issue.

Google France v Louis Vuitton and the liability exemption

As part of the three referrals submitted by the French Supreme Court, the CJEU was asked whether an internet referencing service such as Google's could constitute an 'information society service' for the purposes of the E-Commerce Directive. If so, the question then became whether this would make Google exempt from liability for infringing data before being informed of the advertiser's unlawful conduct.

With this referral, the European judges were faced with a key issue regarding the liability of online service providers. This question was raised in *Google* because grounds other than trademark infringement had been raised before the French courts to find Google liable for its AdWord system. Indeed, it could be held that even though Google did not engage in trademark infringement, it could still be found liable for contributory infringement and/or unfair competition for providing a list of keywords that included trademarks. Google had claimed the Article 14(1) liability exemption for host providers as a defence.

It was therefore necessary for the CJEU to determine whether Google could benefit from the liability exemption for hosting providers. While examining this matter, the CJEU stated that the conditions under which liability arises are determined by national law. However, under Section 4 of the E-commerce Directive, certain situations could not give rise to liability on the part of the intermediary service provider and these liability restrictions must be included in national law, since the period within which the directive had to be transposed had expired (Section 107).

Further, the CJEU had to determine which services could be considered to be 'information society services', as only such services can benefit from the liability restrictions set out in Article 14. More specifically, it had to decide whether a referencing service could be considered as such. The CJEU therefore referred to the provisions of Article 1(2) of the EU Directive on

Technical Standards and Information Society Services (98/34/EC), according to which an 'information society service' is defined as "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services". Applying this definition to Google, the CJEU found that Google's referencing service "features all of the elements of that definition".

As a result, the provisions of Article 14(1) of the E-commerce Directive could be applied to Google's referencing service. However, this was insufficient to determine whether Google may benefit from the liability restriction; rather, it could determine merely whether the service provided by Google was of a type that may benefit from the restrictions if the two following conditions, set out in Article 14(1), were fulfilled:

> *"(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of 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."*

However, the CJEU did not determine whether Google fulfilled these conditions but left this decision to the national courts, which are "best placed to be aware of the actual terms on which the service [...] is supplied". Therefore, the CJEU's decision remains ambiguous, as can be seen from the contradictory comments which followed it.

Passive or active services?

The European judges started by giving a restrictive definition of which providers may benefit from the liability restriction of Article 14. Indeed, by referring to Recital 42 of the E-Commerce Directive, the CJEU highlighted that exemptions from liability only cover cases "in which the activity of the information society service provider is 'of a mere technical, automatic and passive nature'", which implies that that service provider "has neither knowledge of nor control over the information which is transmitted or stored" (Section 114). Therefore, the court considered that in asserting whether the liability of a service provider may be limited, it is necessary to assess whether "the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores". This interpretation is rather restrictive and limits the cases where a service provider may benefit from the protection.

However, the CJEU's reasoning took a different turn in the final answer to the referral by the French court (Section 120). Indeed, while the judges, in their dicta, had given a positive definition of what a service provider must do and what conduct it should adopt to benefit from the liability exemption, the *ratio decidendi* of the decision was expressed differently, since the judges simply stated that the service provider may benefit from the exemption as long as "he has not played such an active role of such a kind as to give it knowledge of, or control over the data stored". As a result, the *ratio decidendi* of the decision provides a negative definition for service providers that may benefit from the liability exemption, thereby giving space for a much broader interpretation.

By providing a negative definition of the kind of services which may not benefit from the restriction and by refusing to define more precisely the criteria on which such a decision is to be made, the judges have made it much more difficult to grasp the exact conditions under which a service provider may be excluded from the exemption.

Indeed, the CJEU did not attempt to define what 'control' means, thereby leaving national courts with a lot of leeway. Certainly, 'control' cannot be perceived merely as the capacity to delete content, since every service provider is able to do this. The difficulty in appreciating 'control' also comes from the evolution of technical tools; Google's services are a strong example of how the control criterion has become incapable of providing a definite answer without further guidance. Indeed, since the directive's adoption, intelligent hosting has become common and few operators merely store information without providing ways to filter and value one element over another. However, the question remains whether this should be considered as sufficient control to deprive these service providers from the liability exemption. This depends on precisely who the liability exemption is intended to protect, and whether it is supposed to favour e-commerce or merely to protect intermediaries that are neutral with regard to the content that they host.

Nevertheless, the CJEU did provide a clear answer regarding one aspect of the assessment of the service provider's activities. Indeed, in some jurisdictions it had been raised and sometimes agreed by the courts that the liability exemption should not benefit services which were subject to a financial payment. In this decision, the CJEU clearly expressed that the fact that Google's referencing service was subject to payment had no impact on the way in which the service was assessed for falling within the liability exemption. This indication is

> **“The CJEU missed an opportunity to end controversies about the interpretation of the liability exemption for host providers within the European Union by providing clear guidelines”**

important with regard to previous French case law, and especially the French Supreme Court’s decision of January 14 2010 in *Télécom Italia v Dargaud Lombard*, where Tiscali, the host provider, was found liable for unauthorised copies of comics displayed on personal webpages it stored for its customer. The court considered that Tiscali’s role was not restricted to the technical tasks since it also offered advertisers the option of displaying, directly on these pages, paid advertising space. The CJEU’s *Google* decision seems to end the controversy which had followed *Télécom Italia* as to the relevance of this criterion.

However, in *Google* the CJEU has still avoided the main issues on this matter and, by refusing to provide clearer guidelines, left the door open to the various and erratic case law which has developed in the different EU countries. Indeed, in recent years and since *Google* was issued in March 2010, many decisions have been handed down by various European courts regarding the liability of service providers, several of which are difficult to reconcile with one another.

European and US case law

One of the most critical examples is that of eBay. In Europe, the German and English courts appear to have set high standards to find eBay liable, sharing the reasoning of US courts in *Tiffany v eBay*. However, in France, the Paris Court of Appeal, in three decisions of September 3 2010, recently considered that eBay was liable for the sale of products infringing the rights of LVMH companies. Interestingly, in its reasoning, the Paris appeal judges expressly referred to the CJEU’s decision in *Google*, quoting paragraph 113 to decide that eBay could not be considered as a mere hosting provider since it could not be said to have had “neither knowledge of nor control over the information which is transmitted or stored”. As a result, the French court decided that eBay was not merely a hosting provider, but was also a broker and could not benefit from the liability exemption.

The issue of service providers’ liability is also crucial with regard to video hosting websites, where European case law is also very unsettled. French courts have held that such sites are not liable unless they had constructive knowledge of the infringement (eg, Paris Court of Appeal, *Dailymotion v Nord Ouest Production*, May 6 2009 and *Dailymotion v Roland Magdane*, October 13 2010). Following the same line of reasoning, the Madrid Commercial Court recently decided that YouTube could benefit from the liability exemption, thereby rejecting claims according to which YouTube had a general obligation to monitor its content (*YouTube v Telecinco*, September 23 2010). However, this progressive construction of case law, which was joined by a similar ruling from the US courts (*Viacom v YouTube*, US District Court of New York, June 23 2010), has recently been undermined by the German courts. Indeed, in *Frank Peterson v YouTube* (September 3 2010) the Hamburg Regional Court considered that YouTube was treating the content added by users as its own and therefore had a duty to check this content before allowing it online.

The CJEU missed an opportunity to end controversies about the interpretation of the liability exemption for host providers within the European Union by providing clear guidelines. Fortunately, it will soon have another chance to unify the interpretation of the E-commerce Directive. In *eBay v L’Oreal* the High Court of Justice of England and Wales has referred to the CJEU the question of whether eBay could benefit from the liability exemption for using sponsored links to direct

people to listings, insofar as those listings are for infringing products, and whether this amounts to trademark infringement.

Conclusions

The legal uncertainty surrounding the question of service providers highlights the weakness of the E-commerce Directive on this matter. Indeed, the directive was designed to remove barriers to providers of information society services and to the cross-border provision of online services in the internal market, therefore giving both businesses and citizens legal certainty. The current state of European case law on this matter seems to indicate a failure in achieving this goal. Therefore, on August 11 2010 the European Commission launched a public consultation on the future of electronic commerce in the internal market and the implementation of the E-commerce Directive. The commission's objective is to study in detail the reasons for the limited development of e-commerce in the European Union. In its consultation the commission has pointed to several issues, among which are "the interpretation of the provisions concerning the liability of intermediary information society service providers". Indeed, the differences in interpreting the directive suggest that operators face different challenges in the markets in which they operate and that they find a different legal approach for each country, which is harmful for the development of e-commerce. This consultation could lead to proposals for reform in 2011. Ten years after the adoption of the directive, the time for an evolution in the EU legislation might have come.

JF Bretonniere
Partner
jf.bretonniere@bakermckenzie.com
Baker & McKenzie
France

JF Bretonniere heads the firm's French IP practice group. His practice focuses on the protection, defence and exploitation of IP assets. Mr Bretonniere represents clients in soft and hard IP litigations in the French and European courts and is an expert in international business alliances concerning IP rights. He was appointed counsellor for external trade by the French Ministry of Economy and Finance. Mr Bretonniere speaks French, English and Japanese, and has practised in Europe and Asia.