

# WEB HOSTING LIABILITY after eBay v. L'Oréal

4 February 2013

# Main issues

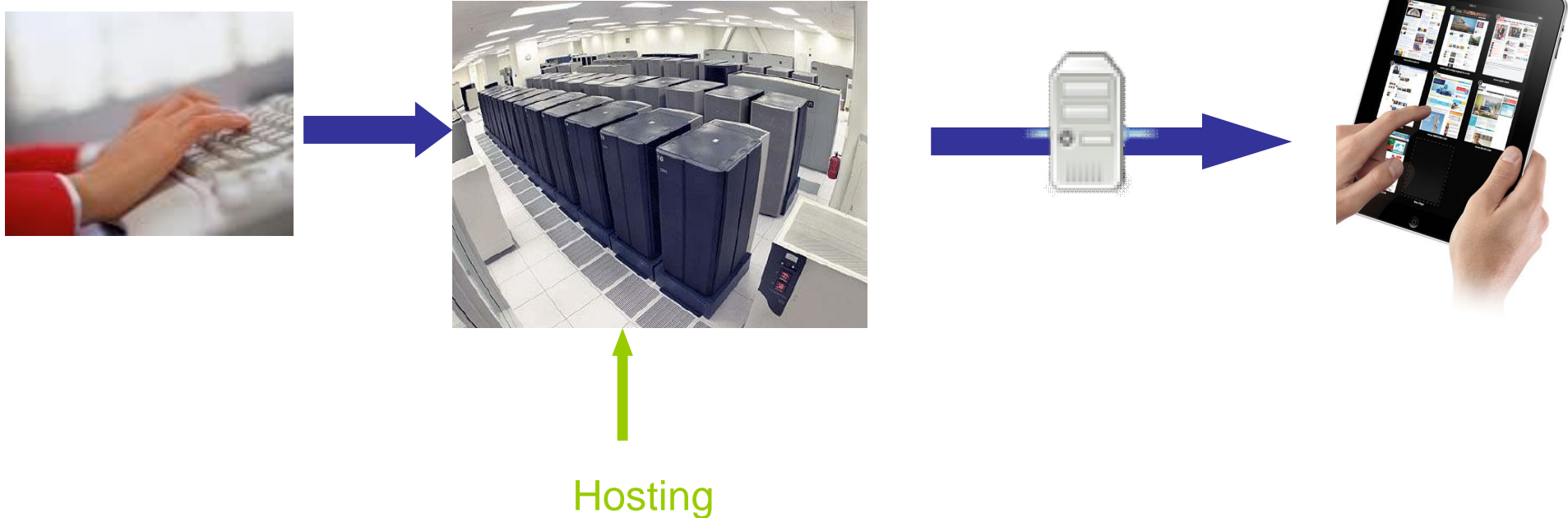
- Scope of the exemption of liability (for who, for what information and under what conditions ?) – “safe harbor”
- Liability outside the « safe harbor »
- Fundamental rights
- Scope of injunctions

# Introduction

« Without Internet intermediaries, there is no Internet »

# Introduction

- « Hosting » : “the storage of information provided by a recipient level, by trade, professional and consumer associations of the service”



# Introduction

- « Mere conduit » : service that consists of the transmission of information in a communication network
- « Caching » : the automatic, intermediate and temporary storage of the information, performed for the sole purpose of making more efficient the information's onward transmission to recipients



# Introduction

- Two arguments to support the development of the Internet:
  - Fundamental rights perspective: "*welcoming the opportunities offered by the new information technologies to promote freedom of expression and information*" (Declaration of the Committee of Ministers of the Council of Europe in 1999)
  - Economic perspective : "*both citizens and business must have access to inexpensive, world-class communications infrastructure and a wide range of services and that realising Europe's full e-potential depended on creating the right conditions for e-commerce and the internet to flourish*" (Declaration of the European Council Lisbon 2000)

# The legal framework

- European law (47 Member States of the Council of Europe) :
  - Article 10 of the European Convention HR : "freedom to receive and impart information"
  - Case law of the European Court of Human Rights : this freedom relates not only to the content of the information, but also the means of transmitting and receiving it (ECHR Autronic AG v. Switzerland, no. 12726/87)
  - Soft law :
    - Declaration of 28 May 2003 of the Committee of Ministers on freedom of communication on the Internet.
    - Recommendation on measures to promote the respect for freedom of expression and information with regard to Internet filters, CM/Rec(2008)6.
    - Recommendation on self-regulation concerning cyber content, Rec(2001)8.
    - Declaration on human rights and the rule of law in the Information Society, CM(2005)56 final.
    - Recommendation on promoting freedom of expression and information in the new information and communications environment, CM/Rec(2007)11

# The legal framework

- European Union law :
- Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), articles 12-15
- First Report, 21 November 2003, COM(2003) 702 final.
- Commission communication of 11 January 2012 :

*The Directive (...) is crucial to legal certainty and confidence for both consumers and businesses.(...) a revision of the Directive is not required at this stage. **It is, however, necessary to** improve the implementation of the Directive (in particular through better administrative cooperation with the Member States and an in-depth evaluation of the implementation of the Directive), **provide clarification, for example concerning the liability of intermediary internet providers**, and take the additional measures needed to achieve the Directive's full potential, as identified in the current action plan.*



# The legal framework

- Policy decision : since Internet intermediaries are necessary for the functioning of the Internet, we must protect their status
- **Two prohibitions** on the Member States :
  - The prohibition to hold an Internet intermediary liable for the information stored or transmitted **if** certain conditions are met (article 12-14 of the e-commerce Directive);
  - The prohibition to impose a general obligation on an Internet intermediary to monitor information or to seek facts or circumstances indicating the illegal nature thereof (article 15 of the e-commerce Directive).

# The legal framework

## Exemption of liability

- Article 14.1 : No liability if the provider:
  - (a) 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) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
- Article 14.2 : However, the exemption shall not apply when the recipient of the service is acting under the authority or the control of the provider.

# The legal framework

- The exemption from liability applies to any potential liability (civil & criminal):
  - Intellectual property rights infringement
  - Illegal and harmful contents
  - Misrepresentation
  - Unfair commercial practices

# The legal framework

- No prohibition to issue injunctions :
- Article 14.3. *“This 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.”*

# 1. Scope of the exemption of liability

- Cases C-236/08 to C-238/08 (Google France) :
- Google claims that it provides hosting services for the adwords posted on its site and reserved by advertisers based on keywords



# 1. Scope of the exemption of liability

- The ECJ **correctly** ruled that :
- It is irrelevant that :
  - Google's service is subject to payment,
  - Google sets the payment terms,
  - Google provides general information to its clients
  - Google checks the concordance of the reserved keyword and the search term entered by an internet user.
- By contrast, the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant.

# 1. Scope of the exemption of liability

- In particular, the ECJ ruled that in order to establish whether the exemption of liability applies :
- it is necessary to examine 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*”.
- Express reference to Recital 42

# 1. Scope of the exemption of liability

- Immediately applied by a French Court of Appeal in the LVMH & Dior / eBay case (3 September 2010)
  - eBay is NOT “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.”
  - Because... it’s activity “supposes” that eBay makes sure that the goods are genuine (???)



# 1. Scope of the exemption of liability

- Then came the ECJ eBay case (C-324/09)....
- The oral pleadings were mostly focused on discussing the Google decision and how it applies to eBay...
- The European Commission, as well as several intervening Member States, supported eBay

# 1. Scope of the exemption of liability

- eBay argued that the “neutrality test” created in the Google case comes from an incorrect and incomplete reading of Recital 42 of the Directive :
  - 'The exemptions from liability established in this Directive cover only cases where the activity of the information society service provider is limited to the technical process of operating and giving access to a communication network over which information made available by third parties is **transmitted** or **temporarily stored**, for the sole purpose of making the transmission more efficient; this activity 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 transmitted or stored.'
- This test could only apply to the mere conduit and caching liability regimes but should not apply to the hosting providers !
- The conditions for exemption of liability of hosting providers is set out **only** in Article 14.1 and 14.2 !

# First issue : Scope of the exemption of liability



- Opinion of the AG Niilo Jääskinen 9 December 2010 :
  - Para 139 “*I have some difficulties with this interpretation.*” (ie the decision of the ECJ in the Google case)
  - Para 146 : “*As I have explained, ‘neutrality’ does not appear to be quite the right test under the directive for this question. Indeed, I would find it surreal that if eBay intervenes and guides the contents of listings in its system with various technical means, it would by that fact be deprived of the protection of Article 14 regarding storage of information uploaded by the users*”

# 1. Scope of the exemption of liability

- Decision of 12 July 2011 (para. 111 to 116)
- 111 (...) *the fact that the service provided by the operator of an online marketplace includes the storage of information transmitted to it by its customer-sellers **is not in itself a sufficient ground for concluding that that service falls, in all situations, within the scope of Article 14(1) of Directive 2000/31.** That provision must, in fact, be interpreted in the light not only of its wording but also of the context in which it occurs and the objectives pursued by the rules of which it is part (see, by analogy, Case C-298/07 Bundesverband der Verbraucherzentralen und Verbraucherverbände [2008] ECR I-7841, paragraph 15 and the case-law cited).*
- 112 *In that regard, the Court has already stated that, in order for an internet service provider to fall within the scope of Article 14 of Directive 2000/31, it is **essential that the provider be an intermediary provider** within the meaning intended by the legislature in the context of Section 4 of Chapter II of that directive (see Google France and Google, paragraph 112).*
- 113 *That is not the case where the service provider, instead of confining itself to providing that **service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data** (Google France and Google, paragraphs 114 and 120).*

# 1. Scope of the exemption of liability

- 114 *It is clear from the documents before the Court and from the description at paragraphs 28 to 31 of this judgment that eBay processes the data entered by its customer-sellers. The sales in which the offers may result take place in accordance with terms set by eBay. In some cases, eBay also provides assistance intended to optimise or promote certain offers for sale.*
- 115 *As the United Kingdom Government has rightly observed, **the mere fact that the operator of an online marketplace stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers cannot have the effect of denying it the exemptions** from liability provided for by Directive 2000/31 (see, by analogy, Google France and Google, paragraph 116).*
- 116 *Where, **by contrast**, the operator has provided assistance which entails, in particular, **optimising the presentation of the offers for sale in question or promoting those offers**, it must be considered **not to have taken a neutral position** between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, in the case of those data, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.*

# 1. Scope of the exemption of liability

- Very unclear test
- More clarity should come from the Commission or by way of an amendment to the directive
- Important take away : the « safe harbor » is assessed with regards to the activities of the service provider regarding a particular information (and not in consideration of the service provider itself, as a whole)

## 2. Liability outside the exemption

- It is not because the exemption does not apply that the hosting provider may automatically be held liable !
- National laws will apply
- Unless there are specific national laws, common sense approach
  - Eg billboards, postal services, newspapers ads etc...

### 3. Fundamental rights

- As important players in the information society, just like the judges must do before granting an injunction, hosting providers should provide **fair balance** between different fundamental rights laid down in the European Convention on Human Rights and the EU Charter on Fundamental Rights:
  - The protection of property, including intellectual property (Art. 7 Charter)
  - Their own freedom to conduct their business (Art 16 Charter)
  - The fundamental rights of their users, including
    - freedom of to receive and impart information (Art. 11 Charter ) and
    - protection of personal data (Art. 8 Charter )
- Article 52.1. *“Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others. »*



## 4. Scope of injunctions

- Article 11 of Directive 2004/48/EC provides that :  
*“Member States shall also ensure that rightholders are in a position to apply for an **injunction** against intermediaries whose services are used by a third party to infringe an intellectual property right”*
- Liability ≠ Injunction
- How to combine such injunctions with
  - Art. 15 of the Directive (no general obligation to monitor),  
and
  - the principle of freedom of expression ?

## 4. Scope of injunctions

- Case C-324/09



only injunction to prevent the continuation of a specific and clearly identified act of infringement

L'ORÉAL

injunction to prevent future infringements of the same kind

## 4. Scope of injunctions



- Opinion of the AG Niilo Jääskinen :
  - 181 *“What is crucial, of course, is that the intermediary can know with certainty what is required from him, and that the injunction does not impose impossible, disproportionate or illegal duties like a general obligation of monitoring.”*
  - 182 *“An appropriate limit for the scope of injunctions may be that of a double requirement of identity.”*
  - *Same infringing third party and same right infringed*
  - Easy for hosting provider : *“Such an injunction could be followed by an information society service provider by simply closing the client account of the user in question.”*

## 4. Scope of injunctions

- Decision of 12 July 2011 (para. 139 to 144)
- 139 *First, it follows from Article 15(1) of Directive 2000/31, in conjunction with Article 2(3) of Directive 2004/48, that the measures required of the online service provider concerned cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property rights via that provider's website. Furthermore, a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly.*
- 140 *Second, as is also clear from Article 3 of Directive 2004/48, the court issuing the injunction must ensure that the measures laid down do not create barriers to legitimate trade. That implies that, in a case such as that before the referring court, which concerns possible infringements of trade marks in the context of a service provided by the operator of an online marketplace, **the injunction** obtained against that operator **cannot have as its object or effect a general and permanent prohibition on the selling, on that marketplace, of goods bearing those trade marks.***
- 141 *Despite the limitations described in the preceding paragraphs, injunctions which are both effective and proportionate may be issued against providers such as operators of online marketplaces. As the Advocate General stated at point 182 of his Opinion, if the operator of the online marketplace does not decide, on its own initiative, to **suspend the perpetrator of the infringement** of intellectual property rights in order to prevent further infringements of that kind by the same seller in respect of the same trade marks, it may be ordered, by means of an injunction, to do so.*

## 4. Scope of injunctions

- 142 *Furthermore, in order to ensure that there is a right to an effective remedy against persons who have used an online service to infringe intellectual property rights, the operator of an online marketplace may be ordered to take **measures to make it easier to identify its customer-sellers**. In that regard, as L'Oréal has rightly submitted in its written observations and as follows from Article 6 of Directive 2000/31, although it is certainly necessary to respect the protection of personal data, the fact remains that when the infringer is operating in the course of trade and not in a private matter, that person must be clearly identifiable.*
- 143 *The measures that are described (**non-exhaustively**) in the preceding paragraphs, as well as any other measure which may be imposed in the form of an injunction under the third sentence of Article 11 of Directive 2004/48, **must strike a fair balance between the various rights and interests mentioned above** (see, by analogy, Promusicae, paragraphs 65 to 68).*
- 144 *In view of the foregoing, the answer to the tenth question is that the third sentence of Article 11 of Directive 2004/48 must be interpreted as requiring the Member States to ensure that the national courts with jurisdiction in relation to the protection of intellectual property rights are able to order the operator of an online marketplace to take measures which contribute, **not only to bringing to an end infringements of those rights by users** of that marketplace, but also to **preventing further infringements of that kind**. Those injunctions must be **effective, proportionate, dissuasive and must not create barriers to legitimate trade**.*

## 4. Scope of the exemption of liability

- Cases C-70/10 and C-360/10
- Decision of 16 February 2012 (Netlog) (para. 47-51)
- 47 In those circumstances, it must be held that the injunction to install the contested filtering system is to be regarded as not respecting the requirement that a **fair balance** be struck between, on the one hand, the **protection of the intellectual-property right** enjoyed by copyright holders, and, on the other hand, that of the **freedom to conduct business** enjoyed by operators such as hosting service providers (see, by analogy, Scarlet Extended, paragraph 49).
- 48 Moreover, the effects of that injunction would not be limited to the hosting service provider, as the contested filtering system **may also infringe the fundamental rights of** that hosting service provider's service **users**, namely their right to protection of their personal data and their freedom to receive or impart information, which are rights safeguarded by Articles 8 and 11 of the Charter respectively.

## 4. Scope of the exemption of liability

- 50 Moreover, that injunction could potentially undermine **freedom of information**, since **that system might not distinguish adequately between unlawful content and lawful content**, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. In addition, in some Member States certain works fall within the public domain or may be posted online free of charge by the authors concerned (see, by analogy, Scarlet Extended, paragraph 52).
- 51 Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other (see, by analogy, Scarlet Extended, paragraph 53).

# Conclusions

- The scope of the exemption of liability has been made unclear : focus on the ongoing clarification efforts
- Potential liability outside the « safe harbor » is not automatic and must be assessed on a country per country basis
- Fundamental rights : strike a balance between interests before removing information
- Scope of injunctions