

PRACTICAL GUIDE NEW CHALLENGES FOR WEB 2.0 PARTICIPATIVE PLATFORMS

The Internet is advancing at lightening speed. New websites and online solutions for companies and customers have appeared, obviously increasing the typology of available websites.

As the owner of a participative platform, you may be interested in knowing the applicable legal framework, and the actions which you must take to deter unwanted legal proceedings against you.

Therefore, we shall offer a brief summary of the applicable regulations and some guidelines to ensure your compliance with these regulations.

➤ ISSUES RELATED TO WEB 2.0 AND PARTICIPATIVE PLATFORMS

▪ WHAT IS WEB 2.0 ?

The current evolution of the web has been termed Web 2.0 in a geek language. According to Wikipedia, *“Web 2.0” refers to a perceived second generation of web development and design, that facilitates communication, secures information sharing, interoperability and collaboration on the World Wide Web. Web 2.0 concepts have led to the development and evolution of web-based communities, hosted services, and applications; such as social-networking sites, wikis, blogs, and folksonomies* ¹(random and personal tags chosen by users to classify their content)”. Such websites can also be referred to as participative platforms.

As such, Web 2.0 also includes the many websites that have been challenged by numerous legal proceedings over the last few years, namely YouTube, Dailymotion, and eBay.

▪ WHY ARE WEB 2.0 WEBSITES’ HOSTING PROVIDERS MORE EXPOSED TO LEGAL PROCEEDINGS THAN OTHER HOSTING PROVIDERS?

Such exposure is directly related to the main features of web 2.0 websites, namely free upload and sharing of content by the users. Indeed, such opportunities highly facilitates the sharing of illicit or illegally uploaded content between users. Most illicit content made available by the users comprises of copyright-protected works such as movies or TV series episodes. The owners of the intellectual property rights of this content obviously suffer damages from such infringement. They often seek compensation for these damages. Additionally, if a user of such a platform uploads racist, discriminating or hateful content, other users may suffer from the content and may seek to implement retributive actions.

In that respect, many legal proceedings may be launched against owners of such participative platforms. The owner is often a profitable private company and is almost always the only known reference for the owner of the illegally-posted works.

¹ http://en.wikipedia.org/wiki/Web_2.0

➤ WHAT IS THE LEGAL FRAMEWORK APPLICABLE TO ONLINE FILE SHARING PLATFORMS?

Under French law, participative platforms' liability, as well as the liability of other Internet service providers, is governed by the EC Directive on electronic commerce n° 2000/31, dated June 8th, 2000, and the French Law n° 2004-575, dated June 21st, 2004 and called "*Loi pour la confiance dans l'économie numérique*" (LCEN).

▪ ARE YOU AN INTERNET SERVICE PROVIDER?

Internet service providers are defined in both European and French regulations as Internet operators providing Internet users with any kind of information or communication services (article 2 of the EC Directive, and article 1 of the LCEN).

Article 6 of the LCEN clearly distinguishes between three categories of Internet service providers:

- *access providers*, whose only role is to guarantee to the users has access to the network and to websites ;
- *website hosting providers*, whose only role is to enable editors to publish information on the websites ;
- *website editors*, which are in charge of controlling the editorial content posted on the websites.

▪ WHAT ARE YOUR LIABILITIES AS AN INTERNET SERVICE PROVIDER?

Pursuant to articles 4 through 15 of the EC Directive and article 6 of the French LCEN, each type of service provider has different obligations and liabilities.

Both article 15 of the EC Directive and article 6-1-7 of the LCEN highlight the most important point, referring to the obligations of Internet access providers and hosting providers. They cannot be compelled to monitor the information which they transmit or store, nor can they be compelled to actively seek facts or circumstances indicating illegal activity.

Therefore, pursuant to articles 12 through 14 of the EC Directive, article 6 of the French LCEN has enacted a specific civil liability scheme applicable to Internet service providers. Access providers and hosting providers only offer services which are qualified by the EC Directive as "mere conduit" (article 12), "caching" (article 13) or "hosting" (article 14). Pursuant to article 6-1-1 and 6-1-2 of the LCEN, **Internet service providers shall not be held liable, in theory, for the content of information available on the websites they host.** Only internet service providers classified as editors are held responsible for the information posted on their websites and for violations resulting from such content because they control what is posted.

Consequently, many claimants have tried to categorize file sharing websites as editors so that the websites could be held liable to compensate the claimants for any harm caused by illicit content.

▪ IN WHICH CATEGORY DO PARTICIPATIVE PLATFORMS' HOSTING PROVIDERS FALL IN?

For the past few years, French courts have been asked to rule on the liability scheme applicable to such file sharing websites to determine the legal qualification under which participative platforms fall.

Three very recent decisions should be taken into account to analyse the current position of French jurisdictions.

Firstly, the court of first instance of Paris rendered on November 14, 2008 a significant decision concerning the application of the hosting provider or editor qualifications (*TGI Paris, 3^{ème} chambre, Jean-Yves Lafesse c/ YouTube*). It is all the more important that the court which rendered the judgement is the only court specialised in intellectual property and information technology in France.

In this decision, a French comedian requested that YouTube compensate him because of the unauthorised reproduction of his shows on the website. The comedian alleged that YouTube was the editor of its website and its content pursuant to the EC Directive and the LCEN. The French judges decided that the editor status may not be applied to YouTube because:

- Youtube was not personally responsible for the content published on the website ; and
- The classification of the content cannot be considered as a sum of editorial choices but must be analysed as the supply of a software generating an automatic classification of the content, without selecting or applying a prior veto on such content, and thus such operation enters the natural scope of the hosting provider's duties.

Secondly, the Paris court of appeal rendered on November 21, 2008 a similar decision about the wiki blog Fuzz (www.fuzz.fr). A user of this website had created a link to another website containing pornographic photos of the famous actress Kylie Minogue. The Court ruled that the company hosting the wiki blog Fuzz cannot be categorized as an editor. It held that the creation and the design of a website providing the user with classification tools to enable him to upload content by himself can only be construed as a hosting provider's role.

Finally, a decision rendered on May 6, 2009 by the Paris court of appeal and based on similar arguments categorized the video sharing website Dailymotion (www.dailymotion.fr) as a hosting provider.

Therefore, participative platforms seem to be construed as hosting providers by French jurisdictions pursuant to both EU and French regulations. As such, their liability exposure shall be limited. However, this classification does not excuse them from abiding by certain specific mandatory obligations.

➤ LEGAL OBLIGATIONS TO BE FULFILLED BY PARTICIPATIVE PLATFORMS

Pursuant to article 14 of the EC Directive and article 6-I-3 of the LCEN, hosting providers may not be held liable for the violation of third parties' rights in certain circumstances.

- **DO YOU HAVE ACTUAL KNOWLEDGE OF THE ILLEGAL NATURE OF THE INFORMATION POSTED**, and are you aware of facts or circumstances from which the illegal nature of the information may be apparent?
- Upon obtaining such knowledge or awareness, **DO YOU ACT EXPEDITIOUSLY TO REMOVE OR DISABLE ACCESS TO THE INFORMATION?**

If you, as the hosting provider, fail to comply with these obligations, you may be held liable for the violation of third parties' rights resulting from the information posted on the website

you

host.

- IS THE CONTENT UPLOADED TO YOUR WEBSITE IN FULL COMPLIANCE WITH THE EC DIRECTIVE AND THE LCEN?

As a service provider, even though you are not compelled to monitor all information and content uploaded on your website, you are nevertheless expected to take serious measures to ensure the compliance of hosted participative platforms with the EC Directive and the LCEN.

These measures include:

- Offering the website users tools to alert any illicit content;
- Responding to requests which may arise in order to stop the diffusion of any illicit content;
- Informing the users/editors of their liability and collecting information that can serve to identify them;
- Providing the judiciary authorities such information upon request.

Therefore, to ensure the full compliance of participative platforms' hosting providers with EC Directive and the LCEN obligations, you may need to take action.

- Have you reviewed the structure of the website to ensure that technical tools exist to launch alerts on illicit content?
- Have you anticipating such alerts and created moderation tools to quickly disable access to any illicit information or content?
- etc.

Should these questions have triggered more questions on your specific situation or in the event you believe one or more of your internal processes may not be compliant with the applicable regulation, we are available to discuss further your particular case.

We do offer, on a regular basis, service packages to our client in order to assist them on this problematic. Our packages usually include audit of all internal processes, drafting/amendment of the internal contractual documentation, training of the operational teams, etc.

Ichay & Mullenex Avocats is a French law firm focusing on all legal issues related to the new technologies, the green business and the sustainable development in France and abroad. They are considered experts in intellectual property and Internet law, e-commerce, online gaming, data protection. Ichay & Mullenex Avocats also assists its clients on all issues related to financing, mergers & acquisitions, restructuring, etc. and advises them on their litigation and arbitration procedures.