

PRACTICAL GUIDE THE LIABILITY OF THE INTERNET HOSTING SERVER

Today, the internet offers previously unimaginable possibilities that we can delight in. But, the multitude of services offered on the internet increases the risk of harming third parties and consequently the possibility or chance of being liable for those harms.

Provider of internet hosting services, here are the duties you must respect and the measures to take in order to avoid liability.

➤ DEFINITION

Article 6-I-2° of law n° 2004-575 dated June 21, 2004 for confidence in the digital economy (“LCEN”) defines internet hosting servers or providers of internet hosting services as “natural persons or legal entities that ensure, even for free, making available to the public by online communication services storing signals, text, images, sounds or message of any nature supplied by the recipients of these services.”

If the emergence of community sharing sites (Web 2.0 sites), like blogs, discussion forums, or websites like Youtube or Dailymotion, were able to sow doubt regarding the qualification to be given to these “managers of Web 2.0 platforms,” today courts seem to recognize their classification as internet hosting servers if they do not determine the content put online on their website and they do not control the editorial content of personal information on their site.

Consequently, the managers of Web 2.0 platforms can benefit from the reduced system of liability granted to the internet hosting server.

➤ A REDUCED LIABILITY

After multiple modifications, the LCEN establishes today a system of reduced liability.

▪ Civil Liability

Pursuant to the provisions of article 6-I-2° of the LCEN, the internet hosting server cannot be civilly liable unless:

- He was aware that illegal data was stored or aware of facts and circumstances that made the illegality evident, or
- If, as of the moment he became aware of the illegal nature of the data, he did not promptly act to remove this data or render its access impossible.

Thus, in order to be liable, three elements must be present: *power*, *knowledge* and *inertia*: the internet hosting server had the power to intervene (*power*), he knew (*knowledge*), but he did not do anything about it (*inertia*).

Uniting these three elements does not in itself condemn the internet hosting server. The judge must also evaluate whether, considering the concrete facts, the internet hosting server can be held liable.

▪ Criminal Liability

The system of criminal liability established by the LCEN is equivalent to the civil liability system discussed above. Thus, by virtue of article 6-I-3° of the LCEN, the internet hosting server cannot be criminally liable unless:

- He was aware of the illegal activity or information, and
- As soon as he was aware of the illegal nature of the activity or information, he did not promptly act to remove this information or render its access impossible.

➤ NOTIFICATION

Article 6-I-5° of the LCEN establishes that the internet hosting server is presumed to have been aware of the illegality of the data and/or of the information hosted and/or of the activity, when he receives a notification stating:

- the date of the notification,
- if the notified is a natural person: his last and first name, profession, residence, citizenship, date and place of birth,
- if the notified is a legal entity: its form, its denomination, its head office and the legal body representing it,
- the name and residence of the recipient of the notification or, if it is a legal entity, its denomination and head office,
- a description of the facts in litigation and their precise location,
- the reasons for which the content must be removed.

The notified must also prove that he made a demand to the creator of the illegality or prove that the latter could not be contacted.

➤ DUTIES OF THE DE INTERNET HOSTING SERVER

By the extension of the reduced liability, the internet hosting server is not subject to a general duty of surveillance of stored information nor to a general duty of seeking out the facts or circumstances giving way to the illegal activities (*article 6-I-7° LCEN*).

On the other hand, to offset the reduced liability, the internet hosting server must adhere to certain duties:

- He must hold onto and conserve information permitting the identification of whoever contributed to the creation of content or one of the contents of the services he provides (*article 6-II paragraph 1 LCEN*).
- He must contribute to the fight, among others, against justifying crimes against humanity, inciting racism or child pornography. To this effect, the internet hosting server must implement an easily-accessible, visible device permitting everyone to inform the internet hosting server of this type of data (*article 6-I-7 paragraph 3 and 4 LCEN*).
- He is also required to promptly notify the appropriate authorities of all illegal activities that he is informed of and that exercise the recipients of the service he provides.
- Lastly, he is required to publish the means that he uses to contribute to the fight against illegal activities.

➤ SANCTIONS

In the absence of saving and storing the identifying data of persons having contributed to the creation of a content or one of the contents of the services which he provides and/or in the absence of obeying all duties regarding the fight against certain delinquencies (justifying crimes against mankind, inciting racism, child pornography), the internet hosting site can be condemned to a year in prison and a fine of 75,000 euros.

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