

# **The E-Commerce Directive Article 14: Liability exemptions for hosting third party content**



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## 1 Introduction

In June of 2000 the European Union passed the E-commerce Directive<sup>1</sup> (subsequently referred to as ECD or the Directive). Seeking to bring the benefits of the internal market to electronic commerce, the ECD set the standard for a common regulatory framework. Prior to the adaptation of the directive, the internet industry was suffering from “divergence in legislation and legal uncertainty as to which national rules apply.”<sup>2</sup> In the opinion of the Commission this had a negative effect on the working environment for both business and citizens. It feared this could lead to the Community losing out to competition from a more integrated market, such as the USA.

With the internet came a whole new spectrum of legal issues, concerning everything from privacy, defamation, child pornography to intellectual property rights. As targeting individual law infringers proved overwhelming, the focus shifted to on-line service providers. The question facing policy makers was who and to what extent should they be made responsible for the proliferation of illegal information on the internet. The distinctive and ever changing nature of the internet prevented any successful adaptation of preexisting legal structures. The ECD provided a legal framework, but also gave room for interpretation.

The focus of this assignment will be on the extent to which a third party (a host) can be exempt from liability for contributing to the circulation of illegal or infringing content. Through an examination of recent rulings across Europe this assignment will seek to uncover how Member States have come to terms with the ECD and in particular article 14, the provision regulating hosting liability.

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<sup>1</sup> Official name: 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.

<sup>2</sup> ECD recital 5.

Structurally, the first part of the assignment will explore the accepted methods of interpreting the ECD and what other sources of law are generally considered significant when seeking to understand an area of Community law. This will allow for a discussion as to the actual meaning of the requirements as set forth in article 14. Following on from that, each of the respective requirements as given in the Directive will be interpreted: what defines a hosting service (section 4), when is a host aware of illegal content being stored on its service (section 5) and finally, what does the Directive require a host to do in such circumstances if it wants to remain exempt from liability (section 6).

## **2 Method**

In answering these questions this assignment will analyze and interpret the ECD text and its structural framework in light of the different interests the legislators intended to protect. In addition, authoritative interpretations can be found in rulings by the European Court of Justice, opinions of the Advocate General and re-examination reports by the Commission. This section will explain the generally accepted methods of interpretation that are used when seeking to understand a directive.

This assignment will not discuss the direct effect of the ECD within Member State legislation. As such, certain issues fall outside the scope of this assignment. Such as, if and how the Directive applies rights and obligations to individuals and other legal bodies directly, whether a horizontal direct effect of the Directive is to be applied or a vertical direct effect.

### **2.1 The Directive**

When this assignment seeks to determine the liability structure facing e-commerce participants, the primary source of law is the ECD text. The wording of this document lacks the necessary precision to be a stand-alone source of law. The wording needs to be interpreted in light of the Directive's "no less than 65 recitals which explain its

purpose and guide its interpretation.”<sup>3</sup> Further sources include judicial legislation and recommendations and opinions by EU institutions, referred to as soft law.

To understand why the legislature passed the ECD as a directive one must understand the role of a European Community Directive. Article 249 of the Treaty Establishing the European Community (EC) states that: “A directive shall be binding, as to the results to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” In other words, a directive defines an end, the means by which Member States reach this end is left for them to decide based on what is most effect at a national level. In comparison, an EC regulation leaves no room for Member States to maneuver with regards to how and when it is implemented.<sup>4</sup>

The lack of accuracy in the Directive is a result of two factors. As a result of the intricacy of legal issues involved in the area of e-commerce a wording that is accommodative is necessary, allowing Member States to find the most suitable methods within their own legislative structure to implement the goals of the Directive. The vast nature of e-commerce makes for a set of complex legal issues, ranging from copyright infringement, defamation to child pornography. Many of these issues were already regulated at national level prior to the ECD, but not under one legislative act. Instead, the legislation was spread out and disparate across the Community and within Member States. Secondly, as a result of this the desire for a harmonized and integrated legal system regulating the e-commerce sector throughout the internal market required a flexible piece of legislation.<sup>5</sup>

## 2.2 Judicial legislation

Another source of EC legislation that will be used extensively in this assignment is what is commonly referred to as judicial legislation. It comprises “the entire

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<sup>3</sup> Case HC 07 C01978 of 22 May 2009, High Court of Justice of England and Wales, Chancery Division (UK).

<sup>4</sup> EC article 249 (2) states that “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.”

<sup>5</sup> ECD recital 3 and 5.

jurisprudence of the European Courts (not Member State's courts), embracing not only decisions, but general principles and even expressions of opinion.”<sup>6</sup> Particular relevance for this assignment is case law by the European Court of Justice (ECJ) and opinions by the Advocate General (AG).

According to EC article 220 the function of the ECJ is to “ensure that in the interpretation and application of this Treaty the law is observed.” As such, it “is the supreme authority on all matters of Community law”.<sup>7</sup> In so doing, it has the task of filling in the gaps where the Directive needs clarification and interpretation. It does this through a method of interpretation that is generally “described as purposive or teleological. ... Rather than adopting a narrow historical-purposive approach,<sup>8</sup> the Court tends to examine the whole context in which a particular provision is situated, and gives the interpretation most likely to further what the Court considers that provision sought to achieve.”<sup>9</sup> Besides interpreting directives and other secondary legislation, the ECJ will also rely on its own previous judgments in an effort to establish consistency. However, the Court is not bound by previous rulings and is free to depart from them as they have no binding power or formal authority, except for those involved in the case.

The role of the Advocate General (AG) is to assist the ECJ by giving his “submissions” to the Court.<sup>10</sup> The submission is a presentation of the relevant facts, legal issues and the AG's recommendation as to what the best result is. As the submission is the opinion of one person it is typically more comprehensible than a verdict delivered by several judges, whose opinion on the matter might differ. The AG's submission “does not bind the Court, but is very influential, and in fact is followed by the ECJ in a majority of cases.”<sup>11</sup> However, this was not the case in the Google France ruling<sup>12</sup>, where the Court only partly followed the opinion of the AG. As the Court is not obliged to make a

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<sup>6</sup> Steiner page 75.

<sup>7</sup> Steiner page 44.

<sup>8</sup> Purposive is a method of interpretation that seeks to find the purpose or aim of the authors of a text.

<sup>9</sup> Craig page 73-74.

<sup>10</sup> Article 20 of the Statute of the Court of Justice of the European Union.

<sup>11</sup> Craig page 70.

<sup>12</sup> Judgment of the ECJ of joined cases C-236/08 to C-238/08 of 23 March 2010.

reference to the opinion of the AG we do not know why this was the case. Nevertheless, it will be interesting to see whether the Court follows the AG 's opinion in the upcoming eBay UK case<sup>13</sup>.

These cases are significant sources of law to this assignment. The Google France ruling was the first and only case so far concerning hosting to be referred to the ECJ. The dispute centered on Google's paid referencing service called AdWords. Google was sued in France by several owners of trade marks, on the grounds that Google's AdWords service breached their trade mark rights. The two main questions put before the ECJ was whether the AdWords service infringed on the rights of trademark owners and, secondly, whether AdWords was a hosting service within the meaning of ECD article 14 and hence subject to its liability privileges. The Court found that it could be a hosting service provided that certain requirements were met. This assessment was left to the national courts to decide on a case by case basis. For this assignment the question of interest is whether article 14 in the ECD applies to AdWords and what criteria the ECJ based its decision on. This verdict will be analyzed in more detail in section 4.

Another important case is the referral made by the High Court of Justice of England and Wales, Chancery Division, concerning the dispute between L'Oreal and eBay (referred to as eBay UK). L'Oreal contends that eBay is liable for infringement of its trade marks by allowing users to sell counterfeit goods. Furthermore, L'Oreal questioned whether eBay was liable when it is buying keyword advertising services (such as AdWords) with L'Oreal's trade marks to promote listings on its site. The ECJ has not yet ruled on the case. However, the Advocate General has given his recommendations to the Court. His opinion will be examined in more detail in later sections.

### 2.3 Soft law

Directives and decisions make up part of what is referred to as formal law within the EU's legislative structure. Typically, in order to achieve completeness in a given area of regulation, formal law needs supplementary legislation. These additional sources are

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<sup>13</sup> Opinion of the AG in C-324/09 on 9 December 2010, paragraph 139.

commonly referred to as soft law. “Soft law includes all those rules or guidelines which aid the interpretation or assist in the application of enforceable Community law.”<sup>14</sup> This includes policy guidelines from the Commission, as well as recommendations and opinions<sup>15</sup>. Furthermore, article 249 makes it clear that soft law “shall have no binding force.” This is a result of its informal nature and lack of democratic accountability. As such there is “no clear cut view of their validity,”<sup>16</sup> instead a key factor determining their influence is the persuasiveness of their arguments.

ECD article 21 calls for the Commission to submit a report every two years “on the application of this Directive, accompanied, where necessary, by proposals for adapting it to legal, technical and economic developments” in the area of e-commerce. As such, these reports would constitute soft law. Interestingly, the Commission has not done so, only submitting the first report in 2003<sup>17</sup> and commissioned a study in 2007<sup>18</sup> that will be used in the second report. It is not clear why the Commission has failed to uphold its obligation to the ECD.

## 2.4 Member State legislation

Furthermore, according to recital 10, the measures provided for in the ECD are a minimum of what is needed in order to achieve the objective of the proper functioning of the internal market. As such this assignment will look at some of the major trends within e-commerce legislation across Europe. Even though the objective of the Directive is to harmonize legislation and case law across Member States, the Commission has provided a Directive that allows room for interpretation at a national level. Hence, member states have been given opportunity to interpret the directive in line with their preexisting national liability regimes and the values they place on the different interests at stake.

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<sup>14</sup> Foster page 123.

<sup>15</sup> EC article 249 (1)

<sup>16</sup> Foster page 124.

<sup>17</sup> EU Commission: *First Report on the application of 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.*

<sup>18</sup> Verbiest et al: *Study on the liability of internet intermediaries.*

### 3 ECD Section 4: Regulating the liability of stake holders

Section 4 of the Directive regulates the civil and criminal liability of intermediary service providers for distributing illegal information, including hosting. In doing so the challenge for the ECD is to strike a balance between the different interests at stake.<sup>19</sup> In the latest study commissioned by the European Commission on the ECD, the authors point out that “there are few legal areas where the conflict between stakeholder groups is greater than that between copyright holders and the telecommunication and E-commerce industry.”<sup>20</sup> With the advent of the internet came many new opportunities for both commerce and citizens, especially in terms of being able to reach a much wider audience. The flip side to this is that the ramifications of a single act, whether legal or illegal, have greater consequences than prior to the internet. In section 4 the legislator has tried to find a balance between a “consumer-friendly and pro-competitive legal framework ...designed to guarantee both freedom of expression and an appropriate remuneration for professional creators, who continue to play an essential role for cultural diversity.”<sup>21</sup>

Through the rules govern liability laid down in Section 4 of the ECD, the legislator hopes that the right balance of these interests can be found. As such this part of the assignment will first define whose liability ECD Section 4 regulates: the ‘intermediary service provider’. Secondly, the liability structure of the directive will be explained whilst illustrating how this meets the needs of different stakeholder interests.

#### 3.1 The Intermediary Service Provider – as defined in the ECD

An Intermediary Service Provider (ISP) is a term used in the ECD to describe an operator who provides a wide range of on-line services. As a generic term the acronym ISP commonly refers to an Internet Service Provider. This short form is frequently used to describe companies that provide any number of internet services. This assignment

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<sup>19</sup> ECD recital 41.

<sup>20</sup> Verbiest page 12.

<sup>21</sup> EU Commission. *Creative Content in a European digital single market: Challenges for the future. A reflection document of DG INFSO and DG MARKT*. Page 4.

will follow the terminology laid down in the ECD. Hence forth the acronym ISP refers to an Intermediary Service Provider.

Article 2 (b) in the Directive, defines an intermediary “service provider” as any natural or legal person providing an information society service. Thus the key to understanding who qualifies as an ISP is to understand what an information society service is. If an ISP provides an information society service as provided for under section 4 of the ECD it becomes subject to the liability exemptions of the Directive. This will be instrumental for any on-line service provider. Immunity (i.e. exemption from liability) provides economic certainty. Alternatively, being “outside the scope of the ECD, ISP liability is covered by the regulation of Member States.”<sup>22</sup> Where an ISP provides a service other than an information society service, it’s liability for illegal content is regulated by Member State legislation<sup>23</sup>. This is highly undesirable, as being faced with a mosaic of overlapping regulation is costly and time consuming.

The Directive provides guidelines as to how its definitions of an ISP and information society service are to be interpreted. As these guidelines are not exact they leave room for interpretation. In light of this, the Advocate General in the eBay UK case expressed that in his opinion “these provisions are better qualified as restatements or clarifications of existing law than exceptions thereto”<sup>24</sup> and as such should not be interpreted narrowly. Edwards makes a valid point when she argues for a broader interpretation in cases where the wording causes doubt as to the exact ramification of the definition “since the liability regime is designed on the whole to benefit rather than burden the service provider.”<sup>25</sup>

### 3.2 Information Society Service

The definition of an information society service in the ECD is defined within the existing meaning of article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC. As stated in recital 17 in the preamble to the ECD, an information society

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<sup>22</sup> Søren, page 5.

<sup>23</sup> Paragraph 107, Judgment of the ECJ of joined cases C-236/08 to C-238/08 of 23 March 2010.

<sup>24</sup> Paragraph 136, Opinion of the Advocate General in case C-324/09 of 9 December 2010

<sup>25</sup> Edwards page 95.

service is “any service normally provided for remuneration, at a distance, by means of electronic equipment for the processing (including digital compression) and storage of data, and at the individual request of a recipient of the service”. In the following subsection the components of this definition will be explained in more detail.

### 3.2.1 Normally provided for remuneration

A service that is subject to payment falls within the scope of this requirement, such as Google’s AdWords service<sup>26</sup>. However, it follows from recital 18 in the preamble that there is no prerequisite for the service to be provided on condition of payment by the user. Nevertheless, the service must “represent an economic activity.” A significant proportion of online-services are provided for free to the user, but they still represent an “economic activity.” The ISP will receive remuneration from other sources, typically some sort of access/merchant fee or most commonly through associating advertising with the content. In 2010 Google made USD 28 billion in advertising revenue<sup>27</sup>.

One must also bear in mind that non-commercial services can also represent an “economic activity.” For example the on-line activities of a government agency, political groups or non-governmental organizations are generally considered economic activities, even though the users of such services do not necessarily pay directly. As

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<sup>26</sup> AdWords: In addition to providing an internet search engine, Google allows anyone to buy an advertisement which is linked to one or more keywords. When an internet user executes a search request, in the search engine, which corresponds to those keywords that an advertiser has paid to be linked to that advertising link appears under the heading sponsored links. Advertisements are “displayed either on the right-hand side of the screen, to the right of the natural results, or on the upper part of the screen, above the natural results”. The advertisement is made up of several elements. A header is placed on top consisting of maximum 25 characters, followed by two lines of text used to describe the product or service being offered. Each line in the commercial text contains up to 35 characters and is followed by a line displaying a website address . Although Google does provide many tips, tools and services which allows the advertiser to create a more efficient advertisement “Google has set up an automated process for the selection of keywords and the creation of ads. Advertisers select the keywords, draft the commercial message, and input the link to their site.” (Paragraph 27, ECJ C-236/08 to C-238/08)

<sup>27</sup> Google Inc.

long as the service “broadly forms part of an economic activity”<sup>28</sup> the remuneration criteria is fulfilled.

### 3.2.2 At a distance

Another criteria is that the service must be provided at a distance. This means that the service provider and user cannot be physically present at the same time in the same place. As a result any service that is not in its entirety provided “at a distance” cannot be regarded as an information society service. Recital 18 goes on to list a few examples, such as the statutory auditing of company accounts in which case the auditor is required to physically see receipts or the capital on balance.

There are a few on-line services, which the Directive explicitly excludes even though they would otherwise qualify as information society services. According to article 1 (5) these include representing a client, gambling activities and the activities of a notoriety.

### 3.2.3 By means of electronic equipment

The information society service must be provided through the use of electronic equipment, and only in such a way where the equipment is used for processing and storage of data. According to Søren this means that by definition, an information society service is provided only when “both the sender and the recipient use data processing equipment, and where the service is transmitted via an electronic communications network, regardless of the underlying technology.”<sup>29</sup> Although not explicitly stated it should be noted that the Directive is based on the principle of technology neutrality.<sup>30</sup> Thus it is irrelevant if the electronic equipment used is a computer, mobile phone, tablet or television, even though the use of some of these technologies to access information society services was not conceived of at the time of adopting the Directive.

### 3.2.4 An individual request

A further requirement is that the service must be provided at the individual request of a recipient of the service. According to recital 18 in the ECD preamble this refers to so

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<sup>28</sup> Edwards page 95.

<sup>29</sup> Søren page 6.

<sup>30</sup> Søren page 9.

called on-demand services, such as video-on-demand. In other words, the Directive clearly states that television and radio broadcasting are not provided at the individual request of a recipient of the service, as the user has no control over the information transmitted. Therefore these services do not classify as information society services, even when they are being broadcasted over the internet. However, other parts of the service can qualify as information society service. For instance, if a radio station makes its programs available online in such a way that a user can individually request to listen to certain programs at a time of his or her choosing.

### 3.2.5 A recipient of a service

The final requirement is for the service to be provided to “a recipient of a service.” A recipient of the service as defined by article 2 (d) is “any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purpose of seeking information or making it accessible”.

## 3.3 The liability structure of the E-Commerce Directive

This section will outline the liability structure of the ECD. In the section that follows, the liability regime will be put into context by explaining the policy issues at stake. There are four chapters in the ECD. Chapter 1 holds the general provisions regarding issues such as legal definitions and the objective and scope of the ECD. Chapter 2 consists of four sections regulating amongst other things spam (article 7), electronic contracts (section 3) and ISP immunity (section 4). Chapters 3 and 4 regulate the implementation, transposition and re-examinations of the ECD. So far, most cases in national courts and all those referred to the European Court of Justice have centered around interpretations of article 12 and 14 with the latter causing the most controversy.

Section 4 in Chapter 2, entitled “Liability of intermediary service providers,” contains four articles regulating the liability of intermediary service providers (ISP). Three of them grant immunity, also referred to as liability privileges, on condition that certain criteria are met. Each of these clauses refer to a different type of intermediary service: mere conduit (article 12), caching (article 13) and hosting (article 14).

It is important to note that the legislator has made a distinction between the service provider and the activities of the service provider. Immunity is given to the activity or service, not the provider of the service as such. This matter was highlighted by the Commission in its first report on the ECD, where it states that “the limitations on liability in the Directive apply to certain clearly delimited activities carried out by internet intermediaries, rather than to categories of service providers or types of information.”<sup>31</sup> In other words, an ISP could be made liable for illegal content on some of its services, and at the same time is exempt from liability for illegal content stored or transmitted via services that fall under article 12 to 14. The Advocate General (AG) also underlined this point in his opinion to the ECJ regarding the eBay UK case, in which he stated “that while certain activities by a service provider are exempt from liability, as deemed necessary to attain the objectives of the directive, all others are not and remain in the “normal” liability regimes of the Member States.”<sup>32</sup> As such the AG advises the court to not hold eBay liable for trade mark infringements committed by its users in relation to eBay’s hosting service. “Yet the hosting exception does not exempt eBay from any potential liability it may incur in the context of its use of a paid internet referencing service”<sup>33</sup> such as its own advertising activities through referencing services of listings made by its users.

In the fourth clause (article 15) the Directive provides that there is no general obligation on ISPs to monitor the information and activities they transmit or store through such services as defined in article 12, 13 or 14. Such service providers should not have a general obligation to actively seek out facts or circumstances indicating the presence of illegal activities on these types of services. However, according to recital 47 in the preamble to the Directive, this does not prevent Member States allowing a competent public authority from “*imposing a monitoring obligation in a specific, clearly defined individual case.*”<sup>34</sup>

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<sup>31</sup> EU Commission. *First Report on the application of Directive 2000/31/EC*. Section 4.6.

<sup>32</sup> Paragraph 149, AG Opinion C-324/09.

<sup>33</sup> Paragraph 151, AG Opinion C-324/09.

<sup>34</sup> EU Commission. *First Report on the application of Directive 2000/31/EC*. Section 4.6.

### 3.3.1 Mere conduit

Article 12 regulates immunity given to mere conduits. This is a type of service provider that plays a passive role as a transmitter of information for content providers, hence the term *mere conduit*. A typical example would be an operator such as Telenor, which provides internet access to content providers and users<sup>35</sup>. In essence the operator is a “relay station” in much the same way as a phone company or post office<sup>36</sup> provides a telephone/post box and a distribution service to and from the telephone/post box. When an operator provides access to a communications network or a service that consists of transmitting information on the network (e.g. the internet), the operator is given immunity provided three conditions are met: The operator must not initiate the transmission, nor select the person receiving the information. Finally, the operator must not select, modify or manipulate the information. The findings of Verbiest in the most recent study on ECD for the Commission, suggest that there have been “few problems concerning the application and interpretation of the liability privileges regulated in article 12.”<sup>37</sup>

### 3.3.2 Caching

Article 13 gives immunity to ISPs, which provide a service called caching. Caching is when an ISP transmits information in a communications network, at the request of a recipient and stores that information for a shorter period of time in order to make further transmission of the same information more efficient. This is common practice as caching allows for a more efficient use of the available capacity on servers and internet cables, the result of which is faster internet. Immunity is conditioned on several factors, key among them is that the ISP does not modify the information and that it regularly updates the information in accordance with industry standards. There have been very few cases related to article 13 as the industry standards reflected in the law adequately meet the needs of all stakeholders.

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<sup>35</sup> In the Norwegian case RG.2010 s.171 the High Court dismissed an injunction calling for Telenor to block access to the website The Pirate Bay, as Telenor was granted immunity as a mere conduit.

<sup>36</sup> Edwards p.112.

<sup>37</sup> Verbiest p. 12.

### 3.3.3 Hosting

Article 14, the central focus of this assignment, regulates the liability of those ISPs providing hosting services. It has by far been the most controversial and contested immunity clause in the ECD. Hosting is a service where intermediary service providers store information provided by the recipient of the service. As such, hosting is a type of service that covers a wide range of different services. The underlying theme is that it is the recipient of the service, an independent third party, that generates the content on the hosts platform and the host, the ISP, provides space on its server to store the information and thus making it accessible to the public. Most hosts do not approve content prior to it being uploaded on their server, but as the owner of the server, they have the ability to “retroactively remove such content”.<sup>38</sup> With this ability to control information retroactively, lawmakers have constructed a unique liability regime for hosting, where hosts are excluded “from liability for third party content only until they gain knowledge of [the] illegal content which is stored on their servers”<sup>39</sup>.

The key factors in identifying the ramifications of article 14 is to understand what hosting is, who qualifies as a “recipient of the service” (a user), what level of knowledge is sufficient to deprive the ISP of immunity and, given that the ISP gains such knowledge, how much time an ISP is given to remove illegal content before losing its liability privileges. Through answering these questions in sections 4 to 6, this assignment will seek to clarify the meaning of article 14 and hosting. Article 14 section 1 provides as follows:

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

- (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

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<sup>38</sup> See Kleinschmidt p.345.

<sup>39</sup> See Klainschmidt p.345.

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

### 3.4 Key policy issues at stake when constructing a liability regime

The range of policy issues at stake are varied and complex, especially as they are intertwined with each other. This section will shed light on the central policy issues at stake when examining a liability regime. Due to the unique and ever changing nature of the internet many stakeholders, for instance copyright holders, have found that their interests have suffered significantly with the advent of the internet. This has made the task of creating a legal framework that meets the needs of all stakeholders difficult.

The first mention in the ECD of a common liability structure for intermediary service providers is in recital 40 of the preamble. The recital prioritizes the coordination of Member State legislation concerning liability for service providers in order to promote the growth of the European e-commerce sector. Second to this is the need to prevent or stop illegal activities through channels of communication. As such, one of the key policy issues of the Directive is to create a common legal framework that allows for the development of a competitive and profitable e-commerce sector within Europe. This will spur growth in on-line services as it allows for the development of cross border services and prevents distortion of competition among Member States. Constructing a common liability regime is a means to an end. The primary goal of the Directive is to protect the service provider from liability, allowing it space to develop and grow.

However, other policy issues must be taken into consideration as the ISP is not merely a messenger. It is a fact that ISPs provide the distribution channel upon which huge amounts of illegal information are spread. The very nature of most of these services gives a single person the ability to spread illegal content further than anything conceivable only a few years ago. As new and improved types of services are developed, the speed and sheer scale at which such content can spread increases. This has both negative and positive effects depending on the interests of the stakeholder. The underlying reason for wanting to prevent the spread of illegal content is to protect victims of this information.

If online services remained unregulated and without liability for any content they distributed, there is little chance the victims would ever be able to receive justice. The original perpetrator is in most cases not worth pursuing and in some cases virtually impossible to find. In the case of copyright and trademark infringement it is far more economical to have a liability structure that allows the victims to target the distribution channel. Such as when a user posts a music video on YouTube, pursuing the user who infringed on the rights of the copyright owner is time consuming and thus expensive. Whereas having the ability to target the hosting service is a far more attractive option. However, in cases of hate speech and child pornography the policy issues at stake are very different. The necessity to protect the victim dictates that the original perpetrator is targeted, but the ability to require the host to take action in removing or disabling access to the content is also important.

That being said, it follows from recital 46 that the “removal or disabling access has to be undertaken in the observance of the principles of freedom of expression.” Although certain obligations to take down illegal content rest on the service providers, they must respect the right to free expression. This can be a very complicated issue as the extent of this right varies from Member State to Member State depending on what values each society has. Even though the right to freedom of expression is guaranteed by the European Convention on Human Rights, discrepancies within the Member States will occur as national legislation has interpreted this in light of their cultural values.

This highlights another vital policy issue; maintaining a liability regime that is consistent throughout the Member States. If not, one will encounter problems concerning jurisdiction. For instance, in 2000 the auction site of Yahoo! was prosecuted in France for the violation of French anti-Holocaust legislation banning the sale of Nazi memorabilia. Yahoo! was found guilty. Even though the hosting service was based in the USA, it was accessible to French citizens and as such in breach of the law. In the US courts the hosting of auctions of Nazi memorabilia was protected under the First Amendment of the US constitution, guaranteeing the right of free speech. This is not an uncommon problem with these types of services. However, at a European level the problem of jurisdiction has been largely solved by the general principle that a Member

State “retains the right to take measures against a service provider that is established in another Member State but directs all or most of his activity to the territory of the first Member State if the choice of establishment was made with a view to evading the legislation that would have applied to the provider had he been established on the territory of the first Member State.”<sup>40</sup> That being said, at a broader international level the Directive acknowledges that this is an issue that needs to be solved. In recital 59 the Directive advocates that through a coordinated regulatory framework at European level a common and strong negotiating position will be achieved in international forums. This still remains open.

Although it is necessary to place responsibilities on service providers through a liability structure, this must not be so costly that it removes any economic incentive for the ISP. The question of how much liability to place on service providers is also dependent on their ability to provide a service at an affordable price. Adopting an off-line liability structure to on-line services is in many cases not an optimal solution, yet it is important that off-line and on-line services face a similar and coherent liability framework.

According to Edwards<sup>41</sup>, the consensus at the time of the passing of the ECD was for a liability structure based on a limitation of ISP liability coupled with a “notice and take down” approach. This was seen as the most pragmatic choice as it was the approach best seen as balancing the interests at stake. It recognizes that “ISPs will generally be unable to control all content they host or give access to, and so should not be treated as publishers or distributors; but on the other hand it recognizes that the gift of total immunity should be balanced against other policy factors, such as the need to protect ‘victims’ (including, especially, holders of intellectual property rights) and the public interest in controlling the growth in undesirable speech on-line.”<sup>42</sup>

An alternative to the notice-and-take-down model would be a total liability approach. Under this type of regulation all civil, criminal and administrative liability would lie

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<sup>40</sup> ECD recital 47.

<sup>41</sup> Edwards p. 106 and 129.

<sup>42</sup> Edwards p.107.

exclusively with the ISP. This approach is not uncommon in territories where ISPs are subject to state censorship. However, the idea of the ISP as a gatekeeper to the internet would come into conflict with many libertarian issues such as freedom of speech/ anti-censorship. Sartor and Cunha point out that any ISP facing this type of liability regime would exercise a preventive and proactive control over the distribution of content on its site. As a result, “users’ freedom to express their views and to participate in the creation of culture would suffer unacceptable constraints.”<sup>43</sup>

Further it would place an enormous burden on the carriers of information as they would have to pre-approve all content before distributing it. The costs associated with such measures would make most hosting services unprofitable. The monitoring of millions of sites would be impossible in practice and would result in disproportionate burdens on intermediaries and higher costs of access to basic services for users<sup>44</sup>. As a result, service providers could close their services.

At the other end of the scale is the total immunity approach. Under this regime ISPs would be totally immune from liability for the information they distribute. The theory behind stipulates that service providers will answer to the demands of its customers with respect to filtering material that they deem undesirable. However, this model has shown that ISPs will abuse their privilege at the cost of victims of illegal information.<sup>45</sup> Though this approach has advantages over the total liability approach, it clearly does not meet the legal standards we are accustomed to from traditional off-line services.

Another aspect to the problem is the interests of the rights holders to intellectual property, especially concerning works of an artistic nature. “A disregard for the rights of creative people can discourage creativity, but overzealous protection of copyrighted

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<sup>43</sup> Sartor page 377.

<sup>44</sup> EU Commission. *First Report on the application of Directive 2000/31/EC*. Section 4.6.

<sup>45</sup> US case of Zeron vs AOL: Mr. Zeron was subjected to an anonymous person pretending to be Mr. Zeron offering t-shirts glorifying the Oklahoma bomber Timothy McVeigh. As a result Mr.Zeron was subjected to extreme harassment. AOL refused to remove the post from its forum. When Mr.Zeron sued AOL as publishers of libel, they claimed immunity under the safe harbor clause of the Communications Decency Act section 230. Hence, Mr. Zeron was left to his own devices.

works can also be detrimental to rights holders.”<sup>46</sup> Similarly, ISPs who restrict content to avoid liability will severely restrict the distribution of a work to a wider audience. In so doing the cultural diffusion will be constrained. This is an issue that the Commercial Court of Madrid recognized in a recent ruling concerning videos uploaded on YouTube<sup>47</sup>. According to Benodio, “the challenge of companies in the new economy is not to protect acquired rights, but to create value in spreading contents, as the course of time highlights the sterility of artificial barriers. This confirms that these platform providers—by hosting videos and other files with the aim of making them available and sharing them—actively contribute to disseminate ideas and information and favor cultural diffusion.”<sup>48</sup>

The ECD is based on a liability structure where immunity from liability for providing illegal content, can only be attained provided that the service provider meets certain conditions. By doing so the Parliament hoped to “strike a balance between the different interests at a stake.”<sup>49</sup> Finding the right balance is proving difficult.

#### **4 What is a hosting service?**

When the ECD was passed in the summer of 2000 a typical hosting service would consist “mainly in websites (html pages and related documents) uploaded by the users. The host provider made available the server (disk-space and processor) for storing the website, connection from the server to the internet, and the software that would provide access to the website.”<sup>50</sup> Common hosting services at that time would have been email, chat room and web-hotel services. The host provider was typically seen as a provider of

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<sup>46</sup> Blazques page 7

<sup>47</sup> Judgment number 289/2010. General Identification Number: 28079 1 0000904 /2008. The case is explained in more detail below in section 4.

<sup>48</sup> Bonadio

<sup>49</sup> See recital 41 in the preamble to the ECD.

<sup>50</sup> Sartor page 370.

the technical infrastructure necessary for users to communicate their message. Hosting was very much detached from content creation.

A decade later many hosting providers have taken on a far more interactive role. Significant technological advancements within bandwidth capacity, storage capacity and software development have allowed e-commerce participants to provide new services, so called Web 2.0 services.<sup>51</sup> Many of these were not even conceivable at the time the ECD was passed. The earlier understanding of what a hosting service could be has become increasingly blurred.

In this section the assignment will identify what the Directive means by hosting, a key requirement for allowing an intermediary service provider (ISP) to be exempt from liability as set out in article 14. In total there are four conditions which must be fulfilled in order for an ISP to attain exemption from liability, amongst them is hosting. The other requirements are explained in their respective sections of this assignment. A useful quote from the Advocate General in the Google France ruling<sup>52</sup> explains the dynamics between the four requirements: “[liability] exemption applies where: there is an information society service; that service consists in the storage of information, provided by the recipient of the service, at the request of that recipient; and the provider of the service has no actual knowledge of the illegal nature of the information, or of facts which would make such illegality apparent, and duly acts to remove it upon becoming aware of its illegality.”<sup>53</sup>

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<sup>51</sup> The term Web 2.0 was first coined by Tom O’Reilly in 2004. Wikipedia.org defines Web 2.0 as a term “associated with web applications that facilitate participatory information sharing, interoperability, user-centered design and collaboration on the World Wide Web. A Web 2.0 site allows users to interact and collaborate with each other in a social media dialogue as creators (prosumers) of user-generated content in a virtual community, in contrast to websites where users (consumers) are limited to the passive viewing of content that was created for them.” (Available at [http://en.wikipedia.org/wiki/Web\\_2.0](http://en.wikipedia.org/wiki/Web_2.0). Quoted 31 March 2011)

<sup>52</sup> Joined cases C-236/08 to C-238/08.

<sup>53</sup> Paragraph 128, Opinion of the AG in joined cases C-236/08 to C-238/08 of 22 September 2009.

On the one hand, the definition of hosting in the ECD is sufficiently broad to accommodate a constantly changing e-commerce market. On the other hand, the lack of a precise definition has created uncertainty. In the most recent study commissioned by the European Commission on the liability of internet intermediaries operating in the European e-commerce market, the authors state that “doubts have arisen if providers hosting content for third parties [can] always be considered as host providers in the sense of Art. 14.”<sup>54</sup> This section will outline the meaning of “host” in light of current e-commerce services through analyzing the policy goals of legislators at European level, recent rulings by the European Court of Justice (ECJ) and opinions of the Advocate General (AG). To shed light on how ‘hosting’ has been interpreted in practice at Member State level, there will be made referrals to recent rulings by Member State courts.

In such circumstances, it is important to understand the underlying principles behind the definition of a hosting service. This assignment will argue for the motion that the principal criterion for a service to be considered a hosting service is that it is independent of the user, and vice versa. Independence is not explicitly expressed as a requirement in the Directive, but it follows from analyzing article 14 based on the preamble and recent case law. In the following section, this and other criteria regulating what a hosting service is will be explained in detail in the order of their appearance in article 14.

#### 4.1 Storing information

Given that the service in question is an information society service as defined in section 3.2. The first criteria that explicitly regards hosting, is that the service provider offers to users the storage of information. This follows from the wording of article 14 (1). It states that immunity is granted to any ISP who provides an information society service that “consists of the *storage* of information.” In Google France the ECJ defined storage as simply meaning to hold “in memory on its server, certain data.”<sup>55</sup> The definition of information is left open. The Court illustrated this with examples of how AdWords

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<sup>54</sup> Verbiest page 36.

<sup>55</sup> Paragraph 111, Judgment of the ECJ of joined cases C-236/08 to C-238/08 of 23 March 2010

provided storage of “the keywords selected by the advertiser, the advertising link and the accompanying commercial message, as well as the address of the advertiser’s site.”

As the sophistication and refinement of hosting services have led to an array of integrated services across different ISP platforms, the requirement to store data serves as a useful check. The eBay UK case illustrates an interesting point as to the range of this requirement. In the submission by the AG a clear distinction is made between when eBay provides for the users to make a listing on eBay’s website and when eBay uses that information to buy keyword advertising. In the first case eBay provides storage of information, such as “the text of the offers provided by the sellers who are recipients of the service and stored at their request.”<sup>56</sup> Hence, according to the AG the listings on eBay are a hosting service. However, when eBay uses “a paid internet referencing service [such as AdWords] and the use of a sign identical to a protected [trade]mark in sponsored links ... the information is not stored by this operator [eBay]... but rather by the operator running the search engine [e.g. Google].”<sup>57</sup> As such, eBay is not providing a hosting service in this instance and its actions provided under this service are not given immunity in accordance with article 14.

A point worth mentioning is that the ECD distinguishes between two types of storage: permanent and temporary. Article 13 states that caching requires the ISP to provide “automatic, intermediate and temporary storage” of information. In other words, when article 14 is read in conjunction with article 13, it follows that the “storage of information” excludes “temporary storage” as referred to in article 13.

Another aspect that does not appear explicitly in the text of article 14 (1) is that the storage of information on the ISP’s servers must be such that the information is made available in order for it to be removed if necessary. This follows implicitly from subsection (b) of article 14 which provides that the ISP must “remove or disable access to illegal information upon obtaining knowledge of its existence”. It is not clear to

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<sup>56</sup> Paragraph 143, Opinion of the Advocate General of case C-324/09 of 9 December 2010.

<sup>57</sup> Paragraph 144, Opinion of the Advocate General of case C-324/09 of 9 December 2010.

whom the information must be made available, but it is fair to assume that as minimum it must be available to the user (recipient) of the storage service.

#### 4.2 A recipient of the service

This criteria forms part of the broader definition of an information society service and as such is covered in section 3.2.5. However, with respect to hosting this definition is nuanced to accommodate the specific nature of hosting. According to article 14 (2) it is apparent that when someone receiving the service is acting under the control or authority of an ISP (a host), the ISP loses its liability privileges. This typically occurs in “an employment relationship or a parent/ subsidiary company structure.”<sup>58</sup> The Directive places a requirement on the host to have a degree of independence from the recipient of the service if it wants to maintain its liability privileges.

#### 4.3 Content is provided by a recipient of the service and stored at his request

The content must be supplied by the recipient of the service. This goes back to the idea of a passive host providing the infrastructure and the users of the service placing their content in this infrastructure. The content is the information and activities that a recipient of the service stores on the host site. When users provide content that contains illegal material, such as infringement of intellectual property right (IPR), hate-speech or defamation, the user is liable for his or her actions. But what is less clear, is to what extent the owner of the website is responsible.

In recent years the popularity of Web 2.0 sites has grown immensely. Their success is dependent on users providing massive amounts of content. Some of the more successful are YouTube, Facebook, Second Life and Twitter. YouTube has an estimated 2 billion views per day and 24 hours of content is uploaded by users every minute.<sup>59</sup>

The nature of the new interactive Web 2.0 sites complicate the matter. These sites allow recipients of the service to generate, upload and communicate information and activities

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<sup>58</sup> Jakobsen p. 16.

<sup>59</sup> Kincaid. *Five years in, YouTube is now streaming two billion views per day*. TechCrunch. Quoted on 13 April 2010. Available at <http://techcrunch.com/2010/05/16/five-years-in-youtube-is-now-streaming-two-billion-videos-per-day/>

on the site. By facilitating the active participation of users in generating and creating new content, the issue of liability privileges becomes thorny. The distinction between the creator of content and the service provider are no longer clear. On the one hand, the ISP is seen as a platform or distribution network that allows for and encourages users to collaborate in the creation of content. On the other hand, the ISP is seen as a publisher of user generated content and is thus accountable in the same manner as any other publisher would be.

#### 4.4 The Neutrality Test

Perhaps the most significant development of e-commerce liability following the Google France ruling was the establishment by the Court of what this assignment will refer to as the ‘neutrality test’. This is a test one applies to an ISP when determining if whether or not it is a host. In essence the neutrality test is an assessment of whether or not the role played by the ISP in providing the hosting service is in accordance with what the legislature intended article 14 to cover. This section will first explain what is meant by the neutrality test and then outline the critique made by the AG in his submission on the eBay UK case.

Article 14 (1) states that the liability exemptions for hosting apply to those who provide an information society service which “consists of the storage of information provided by a recipient of the service ... at the request of a recipient.” The Directive requires that the act of storing information must be done in a certain way: the data must be provided by a recipient of the service and stored at his or her request. In the Google France case the Court explains how it interprets the nature of such storage as required by the legislature. It underlines that in order for the service, i.e. the “storage of information”, to fall within the scope of article 14 it is “necessary that the conduct of that service provider should be limited to that of an ‘intermediary service provider’ [ISP] within the meaning intended by the legislature in the context of Section 4 of that directive.”<sup>60</sup> In other words, the Court explicitly states that the key requirement for an information storage service to qualify as a hosting service is that the nature of the conduct of the ISP is in compliance with the intentions of the legislator.

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<sup>60</sup> Paragraph 112, Judgment of the ECJ of joined cases C-236/08 to C-238/08 of 23 March 2010

This method of interpretation is in line with how a directive normally is interpreted. It is commonly referred to as a purposive or teleological method as explained earlier in section 2.1 - Method.

The ECJ takes recital 42 in the preamble of the Directive to express the legislature's opinion on what is the proper "conduct" of an ISP in this context. This follows from reading paragraph 113 of the ruling in conjunction with the foregoing paragraph, as is the intention of the Court when it states: "In that regard, it follows from recital 42 in the preamble to [the ECD]..."<sup>61</sup> Here it is referring to paragraph 112 as quoted above. For this reason the Court interprets recital 42 to express the legislature's opinion as to the nature of the required conduct of an ISP when it offers a storage service.

The Court underlines that recital 42 provides that the liability privileges of the ECD (article 12-14) only apply to "cases in where the activity [e.g. storage] of the information society service provider is [...] of a mere technical, automatic and passive nature, which implies that the service provider has neither knowledge of nor control over the information which is transmitted or stored".<sup>62</sup> The determining criteria is "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 (my emphasis)."<sup>63</sup> Hence, if the conduct of the ISP is such that its role is considered 'neutral', the service provider falls within the definition of a host as provided by the legislator, and is then subject to article 14's liability privileges. This is what I refer to as the neutrality test.

The outcome of Google France has been criticized in a recent submission by the Advocate General (AG).<sup>64</sup> According to him "neutrality does not appear to be quite the

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<sup>61</sup> Paragraph 113, ECJ C-236/08 to C-238/08.

<sup>62</sup> Paragraph 113, ECJ C-236/08 to C-238/08.

<sup>63</sup> Paragraph 114, ECJ C-236/08 to C-238/08.

<sup>64</sup> AG Opinion C-324/09.

right test.”<sup>65</sup> At the core of the criticism is the Court’s use of recital 42 as the foundation of the term ‘neutrality’ in characterizing a hosting service. The definition of a host becomes too narrow and “the objectives of the Directive would be seriously endangered and called into question.”<sup>66</sup>

At the centre of the AG’s criticism is whether “recital 42 at all concerns hosting referred to in article 14.”<sup>67</sup> As was explained previously, the ECJ used recital 42 as the source of the ‘neutrality’ requirement. In so doing the Court implicitly states that recital 42 applies not just to mere conduits and caching, but also to hosting. The AG is of the opposite opinion. The wording of recital 42 reads as follows:

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. (My emphasis)

The AG presents the view that although recital 42 “speaks of ‘exemptions’ in plural, it would seem to refer to the exemptions discussed in ... recital 43. The exemptions mentioned there concern – expressly – ‘mere conduit’ and ‘caching’.”<sup>68</sup> This interpretation is supported by the way recital 42 refers to those who are exempt from liability, namely those who provide a “technical process of operating and giving access to a communication network over which information made available by third parties is

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<sup>65</sup> Paragraph 139, AG Opinion C-324/09.

<sup>66</sup> Paragraph 142, AG Opinion C-324/09.

<sup>67</sup> Paragraph 140, AG Opinion C-324/09.

<sup>68</sup> Paragraph 141, AG Opinion C-324/09.

transmitted or temporarily stored, for the sole purpose of making the transmission more efficient.” In the AG’s opinion this “refers precisely to ‘mere conduit’ and ‘caching’, mentioned in Articles 12 and 13 of Directive 2000/31.”<sup>69</sup> In other words,, by strictly following the letter of the law, the ‘neutrality’ test outlined by the ECJ in Google France is not applicable in determining whether an ISP is providing a hosting service, as recital 42 does not explicitly refer to hosting. Accordingly, it is the opinion of the AG that the ‘neutrality’ test is only applicable to mere conduits and caching.

Furthermore, according to the AG it is recital 46<sup>70</sup>, rather than 42, “which concerns hosting providers [as] mentioned in Article 14 of Directive 2000/31, as that recital refers expressly to the storage of information. Hence, the limitation of liability of a hosting provider should not be conditioned and limited by attaching it to recital 42.”<sup>71</sup> In the view of the AG, recital 42 and the ‘neutrality’ test do not apply to hosting as the recital does not explicitly refer to that type of service. If it was the legislature’s intention to have recital 42 apply to hosting it would have expressed this clearly, as it has in recital 46.

As one can see from the AG’s account of recital 42 and 46 he places a great deal of emphasis on the letter of the law, rather than using a purposive method of interpretation<sup>72</sup>. With respect to the interpretation of directives, a purposive or teleological method is more common as “a directive shall be binding, as to the results to be achieved.”<sup>73</sup> His strong emphasis on the wording of the Directive as opposed to

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<sup>69</sup> Paragraph 141, AG Opinion C-324/09.

<sup>70</sup> Recital 46 in the preamble to the Directive provides:

In order to benefit from a limitation of liability, the provider of an information society service, consisting of the *storage of information*, upon obtaining actual knowledge or awareness of illegal activities has to act expeditiously to remove or to disable access to the information concerned; the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level; this Directive does not affect Member States' possibility of establishing specific requirements which must be fulfilled expeditiously prior to the removal or disabling of information. (my emphasis)

<sup>71</sup> Paragraph 142, AG Opinion C-324/09.

<sup>72</sup> Please refer to section 2.1 regarding Method.

<sup>73</sup> Article 249 of The Treaty Establishing the European Community (EC).

looking at what the provision sought to achieve and “the whole context in which a particular provision is situated,”<sup>74</sup> one could argue that the AG’s method of interpreting the Directive is too strict and fails to grasp the essence of what the legislature is trying to achieve.

That being said, the AG does support this method of interpretation by referring to how the interpretation of hosting made by the ECJ in *Google France* will seriously endanger and put into question the objectives of the Directive<sup>75</sup>. Early on, he states that the objective of the ECD is to enable “the provision of information society services without the risk of legal liability which the service provider cannot prevent beforehand without losing the economic and technical viability of the business model.”<sup>76</sup> The AG maintains that this policy goal is achieved by defining a host as it has been defined in article 14 alone, without having to refer to requirements specified in the preamble. Accordingly, hosting is a service consisting of the storage of information provided by a recipient of the service at the request of a recipient. In the case of eBay the information its users upload onto their listings, such as “the text of the offers provided by the sellers who are recipients of the service and stored at their request”<sup>77</sup> is an act that falls within the definition of hosting according to literal interpretation of article 14.

Thus, in the opinion of the AG hosting is in its entirety defined in article 14 and not subject to a ‘neutrality’ test as would follow from recital 42. Furthermore, he claims the ‘neutrality’ test is such that there is a possibility that it will deprive eBay of its hosting status “because eBay instructs its clients in the drafting of the advertisements and monitors the contents of the listings.”<sup>78</sup> If applying the ‘neutrality’ test on eBay would result in it not being covered by the liability exemptions of article 14, it would be “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

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<sup>74</sup> Craig page 73-74.

<sup>75</sup> Paragraph 142, AG Opinion C-324/09.

<sup>76</sup> Paragraph 53, AG Opinion C-324/09

<sup>77</sup> Paragraph 143, AG Opinion C-324/09

<sup>78</sup> Paragraph 145, AG Opinion C-324/09

regarding storage of information uploaded by the users.”<sup>79</sup> The ECJ has not given a final ruling on this referral.

As discussed in section 2, the Court is neither bound by the opinion of the AG nor are previous ECJ rulings binding on future cases, it will therefore be interesting to see how the Court relates to the AG’s criticism of the neutrality test. In the Google France case, the AG submitted an opinion that was completely ignored by the Court. In this case the AG endorsed a view that article 14 “should not apply to AdWords,”<sup>80</sup> as it would go against the underlying aim of the Directive as a whole. A key point of the AG’s position was that Google had a “direct interest in internet users clicking on the ad’s link” from a monetary stand point and as such AdWords was not a “neutral information vehicle.”<sup>81</sup> The Court did not follow the advice of the AG, to the relief of the e-commerce community.

With respect to service providers seeking to profit by charging users for their services, it is clear that doing so will not in itself affect their ‘neutrality.’ This follows from the definition of an information society service in recital 18, which states that the service is “normally provided for remuneration.” Furthermore, the ECJ made it explicitly clear in the Google France ruling where the Court provides that “it must be pointed out that the mere facts that the referencing service [AdWords] is subject to payment, that Google sets the payment terms or that it provides general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31.”<sup>82</sup> It was important that the Court made it absolutely clear that there is no connection between qualifying for liability privileges and seeking a profit, as had been suggested by the AG. Not addressing this would have a negative effect on e-commerce services, as they are in large part private companies seeking a revenue source to at least cover costs, if not a profit.

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<sup>79</sup> Paragraph 146, AG Opinion C-324/09

<sup>80</sup> Paragraph 141, AG Opinion joined cases C-236/008 to C-238/08.

<sup>81</sup> Paragraph 145-6, AG Opinion joined cases C-236/008 to C-238/08.

<sup>82</sup> Paragraph 116, ECJ C-236/08 to C-238/08.

Although the AG has given a thorough deliberation of the law and thought through the consequences of his interpretation, his criticism of the ‘neutrality’ test as presented in the Google France case can be questioned. Central to the AG’s criticism is the interpretation of recital 42. Any recital in the preamble has to be read in light of the legislature’s intentions and in that context the wording of the recital is not the single decisive factor by which one interprets its content.

There are a number of factors that need to be taken into account when evaluating the meaning of recital 42. Firstly, it should be noted that recital 42 does not name any types of services exempted from liability. Only in recital 43 is ‘mere conduit’ and ‘caching’ explicitly mentioned and one could therefore argue that 43 applies only to them. Recital 42 refers to ‘transmitted,’ ‘temporarily stored’ and ‘stored’ in a haphazard manner, making an interpretation reliant on other factors, such as the context of the recital and the objective of the Directive. The recital gives the impression of forming part of a general introduction to the issue of liability exemptions, which starts in recital 40 and 41. Underlining this is the order in which the recital is placed in the preamble and the first line of text within it, which states that “the exemptions from liability established in this Directive cover only cases where...” This is an unambiguous, though poorly phrased, reference to the liability exemptions in section 4, including article 14. Hence one can conclude that recital 42 should be read in connection with the foregoing recitals and not recital 43 as suggested by the AG.

Furthermore, in the opinion of the AG recital 46 is the only recital which concerns hosting providers, since it refers to it expressly. However, it should be noted that recital 46 only refers to a service “consisting of the storage of information.” Although this is the definition of hosting as given in article 14, recital 46 only refers to hosting by definition, not by name. When analyzing recital 42 in this light, one can argue that it also concerns hosting as it refers to information which is “stored”. In the Google France case, the ECJ interprets recital 42 to express the intentions of the legislator in defining an ISP in general, not just ‘mere conduits’ and ‘caching.’ This is conceivable as recital 46 does not provide any criteria regarding the proper conduct of a hosting provider prior to receiving knowledge of illegal information.

This is another aspect that arguments against the use of recital 46 as suggested by the AG, in that it is only concerned with the requirements placed on a host in the aftermath of discovering the presence of illegal information. In contrast, recital 42 regulates the required behavior of a service provider irrespective of whether or not it has knowledge of the presence of illegal information. In other words, recital 42 sets the framework for how a service provider attains liability exemption, whereas 46 refers to how it is lost.

Finally, the AG suggests that the use of recital 42 as the framework defining a hosting service will result in the reach of article 14 being too narrow in respect to the intentions of the legislature. I find it difficult to agree with this notion. The clarification provided in recital 42 and adopted by the ECJ in its ‘neutrality test’ does not exclude eBay.

#### 4.5 How ‘hosting’ has been interpreted across Europe

The ECJ has not explicitly ruled on whether AdWords is a hosting service, but has rather provided a guideline for a ‘neutrality’ test. It found that the national courts were best served by assessing on a case by case basis whether the role played by the service provider in question is neutral, as “corresponds to that described in paragraph 114”<sup>83</sup> of the Google France ruling. Leaving the task of defining ‘neutrality’ to case law on basis of what is most appropriate in regard to how the ECD has been implemented in the respective Member States.

In recent rulings plaintiffs have presented their cases before the ECJ and higher level European courts. At Member State level the outcome has not been consistent. There are two recent rulings that illustrate this divergence within Member States. In a Spanish ruling<sup>84</sup> YouTube was found to be a host, whereas in an Italian case<sup>85</sup> the court found Google’s video service, Google Video, not to be a hosting service. The paradox is that it is exactly this type of divergence that the Directive intended to prevent.

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<sup>83</sup> Paragraph 119, ECJ C-236/08 to C-238/08

<sup>84</sup> Judgment number 289/2010. General Identification Number: 28079 1 0000904 /2008.

<sup>85</sup> Sentenza n.1972/2010. Tribunale Ordinario di Milano in composizione monocratica. Sezione 4 Penale.

The Spanish case concerns a recent ruling by the Commercial Court of Madrid Number 7 on September 20<sup>th</sup> 2010 between Telecinco and YouTube. In which the Court finds that YouTube is a hosting service and as such it is exempt from liability for the copyright infringements committed by its users.<sup>86</sup> In another ruling the Tribunal of Milan ruled on February 24<sup>th</sup> 2010 in criminal proceeding against Google, that three executives were given six months suspended jail sentences for the violation of data protection law. Although the Court did not explicitly state so, it follows from the ruling that it did not view the Google Video service as a hosting service. “According to the judge, Google was a content-provider rather than a mere host-service provider”<sup>87</sup> and as such not exempt from liability as provided in the Italian implementation of the ECD.<sup>88</sup>

YouTube and Google Video are typical Web 2.0 services. They allow users to upload, create, edit and distribute video content. Instead of posting a video on their own webpage, users upload the video onto the service platform. In order to do this the user has to conform to the technical requirements of the service provider, which in the case of YouTube means the users has to convert the video file to a format known as Flash. It is then stored on the service provider’s server and made available to the public.

In the Spanish YouTube case the Court concluded that YouTube is a hosting service as it merely “uses software which converts videos into a format known as Flash and stores them on its server”<sup>89</sup>. An additional factor was that the Court found it technically impossible to control all the five hundred million videos uploaded users of YouTube. Furthermore, the ‘suggested videos’ function did not amount to an editorial function and was also considered a hosting service, as the videos were selected through an automatic process based on objective criteria, such as a videos popularity rating or the number of viewings.

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<sup>86</sup> Bonadio and Mula

<sup>87</sup> Sartor page 361.

<sup>88</sup> Legislative Decree number 70 of 9 April 2003.

<sup>89</sup> Bonadio and Mula

In the Italian Google case the judge did not find Google's video service to be a hosting service, rather it was a content-provider. The ruling has been criticized as it fails to understand the nature of the service provided by Google Video. Sartor and Cunha interpret the judge to mean that as "Google provides its platform as a commercial activity, and, as part of such activity, stimulates the upload of user-created videos without control. Thus, the inclusion and subsequent delivery of the contents have to be seen as part of the commercial activity of Google itself, and not only as an activity of its users."<sup>90</sup> Hence the videos were 'published' by Google Video, not the users themselves.

In general, Member States treat Web 2.0 services, such as YouTube, as hosting services. "On the other hand, Dutch courts seem to make a distinction according to the extent of modifications made by the provider of the content provided by third parties."<sup>91</sup>

This question was also addressed by the Court in the Italian Google case. In his opinion when Google Video "enables uploading of content, its preparation, and its subsequent distribution, indexes such content to facilitate retrieval, and links it to advertising, and does all that for a profit. The judge's conclusion was that Google was no mere host provider, it is an 'active hosting provider', and thus a content provider."<sup>92</sup> For this reason the Italian Court maintained that Google could not be seen as 'neutral' and was hence not exempt from liability as provided for in the Italian implementation of the ECD.

Although, the critiques of this ruling provide that ISPs "are fully liable when they generate the content or skew the functioning of the platform toward their particular interests (in detriment of neutrality). As long as the provider's profit is achieved by enabling the user, there is no conflict between search for profit and provider's exemption."<sup>93</sup> That being said, in this case the service provider has provided an information society service well within the 'neutrality' test of the hosting framework, as

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<sup>90</sup> Sartor page 361.

<sup>91</sup> Verbiest page 103.

<sup>92</sup> Sartor page 370.

<sup>93</sup> Sartor page 378.

set up in article 14. As such Google Video should be considered a host provider, not a content provider.

#### 4.6 Section summary

According to the AG's opinion in the eBay UK case, determining whether someone is a host is straightforward: storing information that is provided by a user. As the ECJ in Google France points out, in addition to storing information the host must play a neutral role if it is to be given immunity from liability. This is a second criteria, which the Court has found to exist in the preamble. The AG in eBay UK says this is too restrictive and that "hosting" immunity should not be limited to ISPs with a neutral role.

The ECJ ruling on eBay UK is expected any time soon. It is a fair assumption that the ECJ will continue to leave issues unanswered, thereby leaving it up to the national courts to conclude. As case law across Europe has shown divergence, this approach will frustrate stakeholders. In this respect Schubert and Ott make a valid point by quoting a French jurist in reference to the Google France case "You must bear in mind that the court is in France, the claimant is French, the defendant is American. Where do you think this will lead?"<sup>94</sup> Hopefully, the Court will seek to clarify the meaning of hosting.

With this in mind, this assignment maintains that the 'neutrality' test still holds and will be confirmed by the ECJ in the upcoming eBay UK case. Supporting the motion that the key requirement in determining whether an ISP is providing a hosting service is whether the relationship between the ISP and can be characterized as independent.

## 5 What constitutes actual knowledge and unawareness?

When an ISP provides a hosting service, it becomes subject to the liability privileges of article 14 on condition that it does not have knowledge of the unlawful nature of the content. The Directive contains separate knowledge requirements for content that is in breach of criminal law and in breach of other peoples civil rights (such as copyright).

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<sup>94</sup> Schubert and Ott.

Criminal liability occurs when a host has ‘actual knowledge’ of illegal activities or information being stored on its service. With respect to ‘claims for damages’ the host is exempt from civil liability as long as it is ‘not aware’ of facts or circumstances from which the illegal activity or information is apparent.

When a service provider does obtain adequate knowledge of the “unlawful nature of those data or of that [user’s] activities”<sup>95</sup> stored on its server, it must act appropriately if it wishes to remain exempt from liability. This issue will be dealt with in section 6. In particular it will interpret the requirements for obtaining this knowledge and for removing illegal content by the so-called notice and take down procedure. The aspects dealt with in section 5 and 6 are all closely interrelated. Identifying their distinct attributes is challenging due to their overlapping nature.

This section will clarify the of type knowledge the Directive refers to. Identifying the knowledge criteria in the provision is significant as it defines the degree of the service provider’s liability. A provider of a hosting service could find itself liable despite being covered by the liability exemptions of article 14.

Although not explicitly stated in the Directive, the authors of the latest EU Commission study on liability of internet intermediaries<sup>96</sup> interpret the Directive as differentiating between two types of knowledge. The first subsection will analyze the first type, which is knowledge and awareness of the *presence* of the content itself. The second type will be explained in the second subsection, which refers to knowledge and awareness of the *unlawfulness* of the content. This distinction is important. When a hosting service provider is made aware of the presence of copyright infringing material (a complex area of law), it probably does not have the “resources necessary to assess the illegality of the hosted content.”<sup>97</sup> It would not know for certain whether the content is in fact illegal.

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<sup>95</sup> Paragraph 120, ECJ C-236/08 to C-238/08

<sup>96</sup> Verbiest page 36.

<sup>97</sup> Verbiest page 36.

Removing content that later proves to be legal could put the service provider in breach of his contractual obligations to the user. Furthermore, it could also be in breach of the user's right to freedom of expression.<sup>98</sup> In this scenario "an ISP might fairly consider itself hard done: damned if it does take down [content] and damned if it doesn't."<sup>99</sup>

### 5.1 Knowledge and awareness of the presence of the actual content

Many hosting services receive huge amounts of content each day.<sup>100</sup> For the most part there is simply too much information to be controlled by people employed by the service provider. That being said, there is no obligation upon service providers to know what content is being stored on its servers. The Directive prohibits a general obligation to monitor content. This follows from article 15 which provides that "Member States shall not impose a general obligation ... to monitor the information they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity." When reading article 14 in conjunction with article 15, it follows that the service provider "must have actual knowledge of, and not a mere suspicion or assumption regarding, the illegal activity or information."<sup>101</sup>

In the Google France case the ECJ provided that what should be taken into consideration when analyzing whether Google had knowledge of the presence of infringing data, is whether or not its role was neutral. It was noted that "concordance between the keyword selected and the search term entered by an internet user is not sufficient of itself to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server."<sup>102</sup> Hence, the required level of knowledge or awareness must be viewed in light of the framework established by the neutrality test. That being said, a more precise definition can be found in case law and soft law.

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<sup>98</sup> Recital 9 in the preamble to the ECD states that the Directive must ensure that the regulation of information flows is done in light of the general principle of freedom of expression as enshrined in article 10 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>99</sup> Edwards page 116.

<sup>100</sup> Please refer to section 4.3.

<sup>101</sup> Paragraph 162, AG Opinion C-324/09

<sup>102</sup> Paragraph 117, ECJ C-236/08 to C-238/08

The authors of the EU Commission study on liability of internet intermediaries identified that “actual, positive human knowledge instead of virtual, automated computer knowledge”<sup>103</sup> is sufficient to evaluate whether a service provider has knowledge of unlawful content. As regards to civil liability, a host is exempt from liability if it is not aware of facts or circumstances from which the illegal content is not apparent. In many countries this is interpreted as the host not being grossly negligent, in other words the ISP could not reasonably be expected to know.<sup>104</sup> This was confirmed by the Spanish YouTube ruling which stated, according to Bonadio, that it rests on the party claiming the presence of unlawful content to carefully identify and report to the service provider the specific content (in this case videos) which they deem to be unlawful.<sup>105</sup> Hence, affirming that article 15 also applies to the ‘constructive’ knowledge of content giving rise to civil liability, prohibits any obligation on service providers to actively seek awareness of such information.

This specific knowledge requirement appears to exclude a host provider being made liable for future events. However, the AG in the eBay UK case claims that the host is no longer exempt from liability for content posted by a user in the future so long as it forms part of the same continuous ‘activity.’ The AG states that the ECD “mentions ‘activity’ as one objective of actual knowledge. An ongoing activity covers past, present and future.”<sup>106</sup> He suggests that a host can be liable “in cases where the electronic marketplace operator has been [properly] notified of infringing use of a trade mark and the same user continues or repeats the same infringement.”<sup>107</sup> This is a valid point as it would be extremely time consuming for rights holders and other victims of such information to have to inform the ISP of its presence every time the same user uploads the content.

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<sup>103</sup> Verbiest page 36-37.

<sup>104</sup> Verbiest page 37.

<sup>105</sup> As translated by Bonadio and Mula.

<sup>106</sup> Paragraph 167, AG Opinion C-324/09

<sup>107</sup> Paragraph 168, AG Opinion C-324/09

The ECD seems to suggest that the ISP must be made aware of the exact location of a specified content. This speaks “in favor of a new notification for each concrete case of infringement [either illegal activity or information].”<sup>108</sup> Although this would be the result of interpreting the ECD text literally, it would not promote the Directive’s objective of boosting the European e-commerce sector, as it would place “too heavy a burden on the shoulders of the rights holders.”<sup>109</sup> Therefore it appears reasonable to follow the opinion of the AG with regards to his interpretation of the reach of a single ‘activity’.

## 5.2 Knowledge and awareness of the unlawfulness of the content

The criteria ‘actual knowledge’ and ‘awareness’ concern not just the expected knowledge of the service provider towards the presence of certain content, but it also concerns the awareness level of the content’s unlawfulness. Due to the vague wording of these criteria, the question left for the courts to decide is the circumstances under which “a host provider can be assumed to know or be aware of the unlawfulness of the indicated content.”<sup>110</sup>

A problem that service providers and other stakeholders complain about is “being pressured into the role of an illegitimate judge since they are supposed to assess the unlawfulness of content – sometimes on the basis of a vague private notice – in order to decide whether the information should be removed or access disabled.”<sup>111</sup> The Directive provides little guidance as to what kind of notice is qualified to make the service provider aware of the unlawful nature of the content.<sup>112</sup>

One approach is to use a good faith requirement, as proposed by the Mads Bryde Andersen. “The service provider must act as bonus pater and not as a legal authority. A person that finds themselves entitled to request that the alleged infringing information

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<sup>108</sup> Blazquez page 4.

<sup>109</sup> Blazquez page 5.

<sup>110</sup> Verbiest page 37.

<sup>111</sup> Verbiest page 37.

<sup>112</sup> Section 6 will give

should be removed has a strong duty to prove the reality of their claim.”<sup>113</sup> Without formal requirements for notices, “much will depend on the credibility and authority of the person or entity who has given a notification of unlawful content to the intermediary.”<sup>114</sup>

Regarding ‘actual knowledge’ of content that is clearly criminal, it can be expected that the service provider will know that the content is illegal once it has been given a clear notice identifying the information. The authors of the EU Commission study on liability of internet intermediaries noted the development of a trend which provides for a ‘pre-existing’ knowledge or awareness of content that is manifestly or obviously unlawful, irrespective of whether the service provider has received adequate notice. In the Italian Google case, the judge expressed that an obligation should be placed on ISPs “to take precautionary measures, which would not be so strict as to require the human examination of every single uploaded video, but would be effective to render providers liable for defamation in cases like this one.”<sup>115</sup>

### 5.3 Section Summary

As stated at the beginning of this section the Directive distinguishes between two types of knowledge. The first concerns awareness of the actual content which implies that “actual knowledge means knowledge of past or present information, activity or facts that the service provider has on the basis of an external notification or its own voluntary research.”<sup>116</sup> As this quote from the AG highlights, there are few guidelines that determine when a service provider has knowledge of unlawful content. Consequently “it can be problematic for the hosting provider to know when the knowledge requirement in the law is actually met. There will thus be a danger that the hosting provider, to be on the “safe side”, removes all material which is claimed to be illegal by a third party.”<sup>117</sup> It is important that one avoids “an environment in which the incentive to take down content from the internet is higher than the potential costs of not taking it

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<sup>113</sup> Andersen page 736 (my translation).

<sup>114</sup> Verbiest page 41.

<sup>115</sup> Sartor page 360.

<sup>116</sup> Paragraph 164, AG Opinion C-324/09

<sup>117</sup> Ot.prp.nr.4 (2003-2004) page 23. (my translation)

down” as this will stifle the growth of e-commerce, to the detriment of the intentions of the Directive.

## **6 Acts expeditiously**

According to article 14 (1) subsection (b), when a hosting provider obtains such knowledge as stated in the previous section, it is required “to act expeditiously to remove or disable access to the illegal information”. If a service provider does not comply with article 14 (1) (b) it will no longer be exempt from liability for the information stored at the request of the user. This section will discuss what the Directive means by obtaining knowledge and acting expeditiously to remove or disable access to the illegal content.

### **6.1 Obtaining knowledge: The notice and take down procedure**

The notice and take down procedure as set out in the Directive puts in place a framework by which a hosting provider removes or disables access to illegal content on receiving a notice. Central to the notice and take down procedure is what makes the said notice sufficient to constitute ‘obtaining knowledge’. As previously explained there is no general obligation on the service provider to monitor the content that it stores. Hence, it is up to others to identify the specific infringing files in order for the service provider to gain actual knowledge of the infringement. Although this can be burdensome for copyright owners, this is how the policy issues have been balanced in the ECD.

As already touched upon in section 5.2 the “requirements for notifications are particularly important for establishing the preconditions of knowledge or awareness for the intermediates’ liabilities.”<sup>118</sup> In its first report on the ECD the EU Commission stated that “the conditions under which a hosting provider is exempted from liability, as set out at article 14(1)(b) constitute the basis for the development of notice and take down procedures for illegal and harmful information by stake-holders. ...At the time

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<sup>118</sup> Verbiest page 41.

when the Directive was adopted, it was decided that notice and take down procedures should not be regulated in the Directive itself. Instead article 16 and recital 40 expressly encourage self-regulation in this field.”<sup>119</sup>

As the Directive does not provide a framework which regulates this process of defining whether content is unlawful or not, many different methods have developed across Member States. Some provide formal requirements, others do not. Within these two categories there is an abundance of different requirements as set out by national legislators. In Finland a notice may only be issued by a court, in compliance with a notice and take down procedure and in accordance with section 22 of the national implementation of ECD or where the content clearly constitutes a serious criminal offence any form of notice will do.<sup>120</sup> Where as in Germany there are no formal requirements and as such anyone can give a notice, however German courts have set a minimum standard.

## 6.2 What is “acts expeditiously” – undue delay?

In order for the ISP to remain exempt from liability upon obtaining knowledge of the illegal content it must ‘act expeditiously’ to remove the content. As such there is no initial liability once obtaining knowledge of the unlawfulness. In the opinion of the AG in the eBay UK case the Directive provides a period of grace in which the service provider has time to assess the validity of the claim. The Directive sets no timeframe, however recital 46 does provide some guidance. It states that “the removal or disabling of access has to be undertaken in the observance of the principle of freedom of expression and of procedures established for this purpose at national level.” This could suggest that the service provider must act fast, but not so fast as to damage the “principle of freedom of expression.”

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<sup>119</sup> EU Commission. *First Report on the application of Directive 2000/31/EC*. Section 4.6.

<sup>120</sup> Verbiest page 44.

Given the constantly changing nature of hosting services and the varied character of the content it would be unreasonable to establish a clear time frame. A pragmatic solution is to consider the facts of each case in its own merits.<sup>121</sup>

### 6.3 What is does it mean to “remove” or “disable access to”?

The point here is to take measures that alleviate the presence of illegal content. As regards to hosting services the most effective way of dealing with such content is to prevent the public from accessing it. However, as the unlawfulness of content seldom depends on who is viewing it, for all practical purposes the user who uploaded the information will also be denied access.

## 7 Conclusions

Although the ECD is vague in its wording, and in so doing has left many questions unanswered, it provides a decent framework from which a hosting liability framework can be developed. That said, the dynamic environment in which e-commerce operates makes the task of balancing the interests of stakeholders difficult. This in turn makes it challenging for legislatures to pinpoint an exact structure regulating exemption from liability. For this reason, it is perhaps most appropriate to leave the task of refining these rules to case law and cooperation amongst stakeholders

Despite the lack of a precisely defined rule governing hosting liability there are principles that can govern the way in which liability exemptions are applied. This assignment maintains it view that independence of the ISP and the user of the service is a key principle governing the question of whether a service provider is a host. Key to this principle is the use of the ‘neutrality’ test as provided by the ECJ in the Google France ruling. Although the use of this test is a step in the right direction, there is still room for further precision of the liability framework. The upcoming ECJ ruling in the

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<sup>121</sup> Ot.prp.nr.4 (2003-2004) page 30.

eBay UK case will be of significant interest in this respect. Paraphrasing the AG in the Google France ruling, we are still seeking.<sup>122</sup>

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<sup>122</sup> Paragraph 1 of Opinion of the AG C-236/08- C-238/08: The act of typing a keyword into an internet search engine has become part of our culture, its results immediately familiar. The actual inner workings of how those results are provided are, it is fair to say, mostly unknown to the general public. It is simply assumed that if you ask, it shall be given to you; *seek, and you shall find*. (Paraphrasing Matthew 7:7)

## 8 Bibliography

### 8.1 Case law

#### 8.1.1 ECJ practice

C-236/08 to C-238/08 of 23 March 2010 (Google France vs. Louis Vuitton Malletier and others).

C-278/08 of 25 March 2010 (Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH vs. Günter Guni,trekking.at Reisen GmbH)

#### 8.1.2 Norwegian case law

Rt. 2005 s.41 Napster of 27 January 2005 (TONO, NCB, EMI Norsk AS, MBG Norway AS, Sony Music Entertainment Norway AS, Universal Music AS vs. A)

RG. 2010 s.171 of 9 February 2010 (Telenor vs. Nordic Records Norway AS and others)

#### 8.1.3 Other European case law

*eBay Belgium*. No. A/07/06032 of 12 August 2008, Brussels Commercial Court, Lancome Parfums (O’Loreal) vs. eBay Int’l AG.

*eBay UK*. Case HC 07 C01978 of 22 May 2009, High Court of Justice of England and Wales, Chancery Division (UK), L’Oreal & others vs. eBay & others.

*Google Video Italy*. Sentenza n. 1972/2010. Tribunale Ordinario di Milano in composizione monocratica. Sezione 4 Penale. P. 108. (Google/ Youtube vs Milan prosecutor)

Case 153/2009 of 27 May 2010 (Telenor vs. IFPI Denmark)

*YouTube Spain*. Judgment number 289/2010. General Identification Number: 28079 1 0000904 /2008. Commercial Court of Madrid Number 7.

### 8.2 Legal texts

EU Commission. *First Report on the application of 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*. 2003. (Quoted from eur-lex.europa.eu)

EU Commission. *Creative Content in a European digital single market: Challenges for the future. A reflection document of DG INFSO and DG MARKT*. 22 October 2009. (Quoted from ec.europa.eu).

Opinion of the Advocate General of 22 September 2009. C-236/08, C-237/08 and C-238/08. Google & others vs. Louis Vuitton & others.

Opinion of the Advocate General of 9 December 2010. C-324/09. L’Oreal & others vs. eBay & others.

Ot.prp. nr 4 (2003-2004). Om lov om endringer i lov om visse sider av elektronisk handel og andre informasjonssamfunnstjenester (ehandelsloven).

Verbiest et al. *Study on the liability of internet intermediaries*. 2007. Markt/2006/09/E. Service Contract ETD/2006/IM/E2/69. (Quoted from [http://ec.europa.eu/internal\\_market/e-commerce/directive\\_en.htm#consultation](http://ec.europa.eu/internal_market/e-commerce/directive_en.htm#consultation))

### 8.3 Litterature

Andersen, M. B. *IT-retten*. Gjellerup, Copenhagen. Second edition, 2005.

Beaty, T.N. *Navigating the safe harbor rule: The need for a DMCA compass*. Marquette Intellectual Property Law Review. Volume 13. 2009, page 207-227 (Quoted from HeinOnline).

Bikoff, Heasley and Marano. *Trade marks and copyright: Louis Vuitton holds ISP accountable for combined \$21.6 million*. Journal of Intellectual Property Law and Practice. Vol: 5, No. 8. 2010. (Quoted from [jiplp.oxfordjournals.org](http://jiplp.oxfordjournals.org)).

Blazquez, F.J.C. *User-generated content services and copyright*. IRIS Plus – Legal observations of the European Audiovisual Observatory. No. 5, 2008 (Quoted from [http://www.obs.coe.int/oea\\_publ/iris/iris\\_plus/index.html](http://www.obs.coe.int/oea_publ/iris/iris_plus/index.html))

Bonadio and Mula. *Madrid court confirms YouTube’s host status*. Journal of Intellectual Property Law and Practice. Vol: 6, No. 2. 2011. (Quoted from [jiplp.oxfordjournals.org](http://jiplp.oxfordjournals.org))

Clark, B. *Trade marks: ECJ decides in French Google Adword referrals: more seek than find?* Journal of Intellectual Property Law and Practice. Vol: 5, No. 7. 2010. (Quoted from [jiplp.oxfordjournals.org](http://jiplp.oxfordjournals.org)).

Craig and De Burca. *EU Law: text, cases, and materials*. Oxford University Press, UK. Fourth Edition, 2008.

- Edwards, L. *The new legal framework for e-commerce in Europe*. 2005. Hart Publishing. United Kingdom.
- EurActive 27.1.2010. *Ehandel i Italia og ehandelsdirektivet*. Lov og Data nr.101. 2010 (Quoted from Lovdata).
- Foster, N. *Foster on EU Law*. Oxford University Press, UK. Second edition, 2009.
- Jakobsen, S.S. *Mobile commerce and ISP liability in the EU*. International Journal of Law and Information Technology. Spring 2011, page 29-52 (Quoted from [jiplp.oxfordjournals.org](http://jiplp.oxfordjournals.org)).
- Kleinschmidt, B. *An international comparison of ISP's liabilities for unlawful third party content*. International Journal of Law and Information Technology. Winter 2010, page 332-355 (Quoted from Westlaw).
- Lerner, T. E. *Playing the blame game, online: Who is liable when counterfeit goods are sold through online auction houses?* Pace International Law Review. Volume 22. 2010, page 241-267 (Quoted from HeinOnline).
- Manshaus, H. *Ord om AdWords*. Lov og Data nr.102. 2010 (Quoted from Lovdata).
- Manshaus, H. *Regulering av tilgang til tjenester – Telenor vs. Rettighetshaver*. Lov og Data nr.102. 2010 (Quoted from Lovdata).
- Mauren, A. *Nekter å blokkere nettbordell*. Aftenposten. 5. februar 2011.
- Montagnon and Smith. *L'Oreal v eBay – AG's Opinion*. 10 December 2010. Herbert Smith LLP. (Quoted from <http://www.herbertsmith.com/>)
- Osborne, D. *User generated content (UGC): trade mark and copyright infringement issues*. Journal of Intellectual Property Law and Practice. Vol: 3, No. 9. 2008. (Quoted from [jiplp.oxfordjournals.org](http://jiplp.oxfordjournals.org))
- Ott and Schubert. *"It's the Ad text, stupid": cryptic answers won't establish legal certainty for online advertisers*. Journal of Intellectual Property Law and Practice. Vol: 6, No. 1. 2011. (Quoted from [jiplp.oxfordjournals.org](http://jiplp.oxfordjournals.org))
- Peguera, M. *Telecinco v. YouTube: the ruling in its context*. ISP Liability. 26 September 2010. (Quoted from <http://ispliability.wordpress.com/2010/09/26/telecinco-v-youtube-the-ruling-in-its-context/>)
- Sartor and Viola de Azevedo Cunha. *The Italian Google-case: Privacy, freedom of speech and responsibility of providers for user-generated contents*. International Journal of Law and Information Technology. Vol.18, No.4, 2010, page 356-378. (Quoted from [jiplp.oxfordjournals.org](http://jiplp.oxfordjournals.org)).

Steiner and Woods. *EU Law*. Oxford University Press, UK. 10<sup>th</sup> edition, 2009.

Ziegler, A. N. *Online auction house liability for the sale of trademark infringing products*. Marquette Intellectual Property Law Review. Volume 14:1. 2010, page 215-235 (Quoted from HeinOnline).

#### 8.4 Other documents

Google Inc. *Investor relations: 2010 financial tables*. Available at <http://investor.google.com/financial/tables.html> (Quoted 10 February 2011).