Peer-to-peer privacy violations and ISP liability: data protection in the user-generated web

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1. Introduction: user-generated contents and third parties' privacy

In the era of the so-called web 2.0 most content available on line is user-generated: many (and potentially all) users of the Internet participate in continuously re-writing the web's hypertext, and they mostly do that by interacting with their fellows, in unprecedented forms of collaboration. As Tapscott and Williams[2] put it:

> "We're all participating in the rise of a global, ubiquitous platform for computation and collaboration that is reshaping nearly every aspect of human affairs. While the old Web was about Web sites, clicks, and 'eyeballs', the new Web is about the communities, participation and peering. As users and computing power multiply, and easy-to-use tools proliferate, the Internet is evolving into a global, living, networked computer that anyone can program."

"Programming" here needs to be understood in the broadest sense, including any way of "writing" the web: uploading textual or multimedia content in on-line repositories, creating one's personal blog and linking it to other blogs or pages, creating one's image and establishing connections with one's fellows in a social network, participating in collaborative enterprises aimed at producing software or works of authorship.

In the context of the web 2.0 the relationship between providers of web-hosting and addressees of such a service had significantly changed. In 2000, when the E-Commerce Directive was passed,[3] web hosting consisted mainly in websites (html pages and related documents) completely developed by the recipient of the hosting service, including the way the content was posted, the structure of the websites and so on. The host-provider only made available the server (disk-space and processor) for storing the website, the connection from that server to the internet, and the software (the web-server) that would provide access to the website (by typing a domain name or using a search engine). While the recipient of the service had the largest freedom in developing its website according to his or her tastes and preferences, editing Web pages

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[2] Tapscott, D. and Williams, A. D. (2008). Wikinomics: How Mass Collaboration Changes Everything. Portfolio. P. 19.

[3] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178, 17.7.2000, p. 1.

was relatively difficult and complicated, and thus the Web could not be considered as a creative space for the majority of people.[4]

Web hosting has dramatically changed in the last years. Now platforms are available that facilitate the creation and distribution of on-line contents, thus enabling everyone to participate actively in these activities. Among the most popular platforms used almost worldwide we can name i-Tunes and Youtube for videos, Facebook for personal information, Wordpress for blogs, Twitter for short messages, e-Bay for auctions; the list is far from being exhaustive. Google, whose mission is "to organize the world's information and make it universally accessible and useful"[5] is a tool exemplary of this new era. Such platforms, to a different degree, support the creative activity of the users: first, they provide facilities (and constrains) for creating content, such as page templates, ways to organise the information and link it, apps for an infinite variety of functions; secondly, they facilitate the retrieval of the user-generated materials, by indexing, classifying, ranking them (usually by aggregating users' preferences and choices). Such platforms are mostly run by commercial companies that usually make profit by associating advertisements to the user-generated materials, often by selecting the ads on the basis of the content of such materials.

The web 2.0 represents such an evolution whose scope goes beyond computing, internet and the technical dimension of the ICT domain, to reach the whole system of media, information and communication. It is not a case that freedom of internet is considered nowadays among the parameters to measure the level of democracy of a state; and that the new media (from mobile phones to social networks) allegedly have played the role of catalyst in the recent political turmoil in the North African states.[6] Thus, in the framework of the web 2.0, the web has become a forum where everyone can, among others, effectively exercise civil and political rights. It is also the place when one can develop one's social personality, present him or herself to others and engage in social relationships.

This is supported by the activity of profit-seeking private companies, whose service provides the precondition for the exercise of such rights, and pre-determine to some extent the ways in which such rights are exercised.

As we all know, the activity of the content-producers not always is rightful and socially beneficial: one could consider for instance defamation, violation of intellectual property, support of criminal activity, incitement to hate, child pornography, etc. This raises a number of legal issues which have been extensively discussed in the literature in the last years.[7] Here we shall mostly focus on one legally problematic aspect of user-generated content, namely, the inclusion of personal data concerning third parties.

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[4] SARTOR, Giovanni; VIOLA DE AZEVEDO CUNHA, Mario. The Italian Google-Case: Privacy, Freedom of Speech and Responsability of Providers for User-Generated Contents. In International Journal of Law and Information Technology. Oxford University Press (2010). P. 15.

[5] Google's mission statement from the outset. From Wikipedia, http://en.wikipedia.org/wiki/Google

[6] We refer to Egypt's protests in 2011, which have been defined in the blogosphere as "a social media revolution", at http://diversity.prsa.org/index.php/2011/02/a-social-media-revolution-the-egypt-protests-and-the-role-of-new-media/. Accessed 14 April 2011. See also http://www.blogworld.com/2011/01/28/social-medias-role-in-the-egyptian-protests/. Accessed 14 April 2011.

[7] See, for instance, Lesli C. Esposito. Regulating the Internet: The New Battle Against Child Pornography. 30 Case W. Res. J. Int'l L. 541 (1998); Patel, Sewali K. Immunizing Internet Service Providers from Third-Party Internet Defamation Claims: How Far Should Courts Go. 55 Vand. L. Rev. 647 (2002); Todd M. Hinnen, The Cyber-Front In The War On Terrorism: Curbing Terrorist Use Of The Internet. Colum. Sci. & Tech. L. Rev., 2004; Catherine Fancher and G. Harvey Dunn, III. The Trend toward Limited Internet Service Provider (ISP) Liability for Third Party Copyright Infringement on the Internet: A United States and Global Perspective. 2002 Bus. L. Int'l 143 (2002).

We must point out that the web and providers' platforms are also used by people to put information about themselves, to tell others about themselves, for the most different purposes. It may consist just in expressing one's attitudes, tastes, preferences, capacities; it may be directed at advertising oneself, for the purpose of getting access to economic or social opportunities, or it may even be part of one's professional activity, which may include informing the public about one's skills, interests, published work, previous work relations, etc. This use of the Internet appears to be incompatible with some paternalistic data protection rules, literally understood. Consider for instance the provision contained in various EU member states data protection regulation according to which health data can be published only with the authorisation of the data protection authority.[8] Assume that a gay person decides to come out of the closet, and to declare in his blog, or in his public Facebook profile his sexual identity. It would appear that he has published sensitive private data with the consent of the data subject (himself), but without the authorisation of the data protection authority, committing therefore a punishable offence. The same crime would have been committed by the provider, if he is considered responsible for data protection offences committed by using its platform). The same would apply to a person affected by cancer, who tells on her on-line blog how she is bravely fighting against her illness, without losing hope and interest in life, to encourage others to do the same. She would be engaging in an illicit activity, for publishing health information without the required authorisation.

While it seems absurd to bind through data protection rules self-presentations on the web and no sensible judge would endorse the literal application just described, the problem is much more complex when data concerning others are published on-line.

The on-line distribution of user-generated content including third-parties personal data can involve a violation of data protection rights, since it may take place outside of the conditions established in the data protection legislation (in particular, without the consent of the concerned individual). The data protection violation is actually realized by the fact that once data have been distributed over the Internet, data subjects lose any possibility to further control the circulation of the innumerable copies of them that are created on the web.

However, the publication of materials containing third-parties personal data may also pertain to the exercise of fundamental civil and political rights. Consider for instance the case when a person publishes on-line third-parties information having public relevance (e.g., concerning the activity of individuals having a significant political or economic role, or a significant social visibility). This may well fall within the domain of freedom of expression and even of the freedom of the press (by broadly understanding as "press" any publication which affords a vehicle of information and opinion[9]). Or, consider the case when one publishes information about oneself, that also concerns others, as (more or less artistic) pictures of oneself with others, or diary pages pertaining to one's life encounters. Consider on-line stories which give clues linking the fictional narration to particular individuals (here the freedom of communication or artistic expression would be at issue).

All those cases involve what we frame as peer-violation of privacy-interests, but they are very different from the usual interferences in privacy and data protection. Rather than the disproportionate relationship between an individual and a big organisation, be it a public or private "big brother", we are considering the equal interactions between private persons; rather than the clash between individual rights and corporate or public interests we have the clash between conflicting individual rights

[8] It is the case of the Italian legislation, referred below, under paragraph 4.1.

[9] Benkler, Y. (2011). A free irresponsible press. Harvard Civil Rights-Civil Liberties Law Review.

(privacy v. freedom of expression, freedom of association or freedom to develop and express one's personality).

In the following pages we shall consider how providers' liability for peer-to-peer privacy violation has been addressed in the case law of different countries. In particular we will consider whether liability exemptions for providers are applicable also to data protection violations regarding third parties' information uploaded by users; and, in the affirmative, under which circumstances this exemption can still be justified. These issues will be answered through a comparative case law analysis of the liability of host providers for user-generated content, in particular with regard to data protection. We will take into account ECJ's decisions, EU members states' and third countries' case law, as well as opinions of the national data protection authorities. First, the European legal framework for data protection will be presented, in order to examine the balance between privacy and freedom of expression. Another section will illustrate the exemptions of liability for ISP in the E-Commerce Directive, based on the principle of neutrality. The article will then move on to analyse the judicial experience on cases involving ISP liability for user-generated content, giving special attention to issues related to data protection violations. The paper will conclude with some observations and proposals.

With the next paragraph the legislative framework will be presented, beginning with data protection, and then moving to the E-Commerce Directive.

2. Third-parties personal data between privacy and freedom of expression: an outlook on the European legal framework

While in the US privacy issues are dealt with on a self-regulatory, market based approach,[10] in Europe personal information is a matter of legislation, at both fundamental rights and ordinary legislation levels. In any case, the protection of personal data is a high priority in the legal and policy agenda: recently for example, the Lisbon Treaty has modified the status of the EU's Charter of Fundamental Rights, giving it legally binding force, and also establishing the legal basis for the accession of the EU to the European Convention on Human Rights.[11] The latter instrument protects the privacy of the individual in the framework of its Article 8, devoted to the respect of one's private and family life, home and correspondence, whereas the former text, mainly drafted in 1999-2000, has a specific provision for data protection. Article 8 of the Charter indeed states that "Everyone has the right to the protection of personal data concerning him or her."

The EU Charter, the most recent codification's work on fundamental rights, is extremely important, spelling out clearly fundamental rights in the context of data protection: these are due process, the principle of consent of the data subject, the right of access and of rectification.[12]

[10] There are some sectoral rules which regulate the protection of personal data, such as, for example, the Fair Credit Reporting Act.

[11] Article 6 TEU.

[12] Article 8(2) of the Charter: "2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified. (…)"

Some clarification as to the scope of personal data derived from the UK case of *Durant v Financial Services Authority*.[13] A British Court of Appeal ruled that personal data is information which is "biographical in a significant sense; has to have the individual as its focus; and has to affect an individual's privacy whether in his personal family life, business or professional activity".[14]

Most of the principles of the Charter of Fundamental Rights represent the constitutionalization of the legislative framework, i.e., the Data Protection Directive (hereinafter DPD).[15] This text offers a comprehensive legal basis for the processing of personal data when no contract is involved (which is the case of third party personal information posted by users of an ISP): the consent of the data subject. For the processing of sensitive data, the consent has to be express and many EU member states have also required an authorization from the national data protection authority for such processing activity to take place.[16] The E-Commerce Directive, in its turn, establishes some exemptions for ISPs where they work as "Mere conduits", host or catch providers, making them non-liable for user-generated content in these situations. This legislative framework has the aim of ensuring the proper functioning of the internal market by ensuring the free movement of information society services and of personal data between the Member States, establishing a series of duties and rights for all stakeholders, and, secondly of governing the exceptions to the main framework, i.e. the situations where these roles do not fully apply.

In this respect, an important issue to be discussed is the one that analyses the exemption for freedom of expression and, in particular, literary and artistic expression, regarding the protection of personal data.

Recital 17 of Directive 95/46/EC states that "as far as the processing of sound and image data carried out for purposes of journalism or the purposes of literary or artistic expression is concerned (...) the principles of the Directive are to apply in a restricted manner (…)".

In the same direction is recital 37, which recognizes that "the processing of personal data for purposes of journalism or for purposes of literary of artistic expression (...) should qualify for exemption from the requirements of certain provisions of this Directive"

Moreover, article 9 of the Directive creates an obligation for member states to adopt, in their national laws, exemptions or derogations from the provisions of chapters II, IV and VI for the processing of personal data carried out solely for journalistic purposes or for the *"purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression"*. Chapters II, IV and VI of the Directive set provisions and principles relating to data quality, criteria for making data processing legitimate, data subject's rights, processing

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[13] [2003] EWCA Civ 1746, Court of Appeal (Civil Division), available at http://www.bailii.org/ew/cases/EWCA/Civ/2003/1746.html. For a comment, see L. Edwards, Taking the "Personal" Out of Personal Data: Durant v FSA and its Impact on the Legal Regulation of CCTV (2004). SCRIPT-ed, Vol. 1, Issue 2, 2004. Available at SSRN: http://ssrn.com/abstract=1159606.

[14] B. Bercic & C. George, Identifying Personal Data Using Relational Database Design Principle, 17 *International Journal of Law and Information Technology* (2008), 223, 224.

[15] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data; available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31995L0046:en:HTML. Accessed 24 February 2011.

[16] See, for instance, the Italian and the French data protection Laws.

of sensitive data, transfer of personal data to third countries and the powers of the supervisory authorities.

Furthermore, the E-Commerce Directive recognises that “The free movement of information society services can in many cases be a specific reflection in Community law of a more general principle, namely freedom of expression”.[17]

Some questions arise here: would these exemptions, in the web-era of user-generated content, cover, for example, videos, photos containing third parties' information posted in Youtube and Facebook-like websites? Under which circumstances are such exemptions justified?

The most recent European legislation seems to confirm the legal position of the provider. Indeed, Directive 2009/136/EC,[18] amending the Universal Service Directive,[19] the Directive on privacy and electronic communications[20] and the Regulation on consumer protection cooperation,[21] retains the ‘mere conduit’ rule for the ISP, as established in the E-Commerce Directive. It is not a provider's task to define what is lawful or harmful as to content, applications and services, but for the member states.[22]

Usually member states' legislation tries to ensure the respect and the balance of those conflicting values - the freedom of expression and privacy. As it has already been pointed out by two of the authors in an earlier research,[23] the Italian legislation should be interpreted in such a way that the provider's exemption from liability also covers the on-line distribution contents that are illegitimate because of the violation of data protection rules. Moreover, Article 137 of the Italian Data Protection Code establishes that no consent from the data subject is required and no authorisation from the Data Protection Authority is needed, *“for the purposes of publication or occasional circulation of articles, essays and other intellectual works also in terms of artistic expression.”* Thus, in Italian law, if a video is considered as an artistic expression of thought (even though an aberrant one), data protection law will not apply: nevertheless the production and delivery of the video may well be illegitimate on other grounds. As a consequence of this, the ISP does not bear any liability related to data-protection. In the same direction goes the legislation in France and in the UK, just to mention some examples.

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[17] Recital 9.

[18] Directive 2009/136/EC of the European Parliament and of the Council of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 337, 9 18.12.2009, p. 11.

[19] Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, OJ L 108, 24.4.2002, p. 51.

[20] Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector, OJ L 201, 31.7.2002, p. 37.

[21] Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 364, 9.12.2004, p. 1.

[22] “In the absence of relevant rules of Community law, content, applications and services are deemed lawful or harmful in accordance with national substantive and procedural law. It is a task for the Member States, not for providers of electronic communications networks or services, to decide, in accordance with due process, whether content, applications or services are lawful or harmful. The Framework Directive and the Specific Directives are without prejudice to Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), which, inter alia, contains a ‘mere conduit’ rule for intermediary service providers, as defined therein.”

[23] SARTOR, Giovanni; VIOLA DE AZEVEDO CUNHA, Mario. Op. cit.

Therefore, domestic legislations have widely accepted the principle according to which data protection, which is connected to the right to privacy, has to be balanced with the right of expression, receiving a special legal consideration in connection to journalistic, artistic or intellectual expressions. *Mutatis mutandis*, we can infer that the same principle applies to user-generated contents, thus limiting the application of the data protection rules to the provider, since the latter is providing information society services as established in the E-Commerce Directive.

3. The exemptions of liability for the ISP in the e-commerce Directive: the principle of neutrality

Article 2 of the E-Commerce Directive, borrowing the definition contained in Article 1(2) of Directive 98/34/EC as amended by Directive 98/48/EC,[24] considers a service provider as any natural or legal person providing *"any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services"*[25] and recipient of services as *"any natural or legal person who, for professional ends or otherwise, uses an information society service, in particular for the purposes of seeking information or making it accessible"*.[26]

For the purposes of analyzing the liability of ISPs for user-generated content, the activity to be taken into account is the one of hosting. The definition provided for by Article 14 of the E-Commerce Directive comprises an information society service *"that consists of the storage of information provided by a recipient of the service"*. In that situation, the Directive exempts the ISPs from liability regarding the content generated by users under two conditions: (a) the provider has no actual knowledge of the illegal information or (b) it does act expeditiously to remove or to disable access to the information after obtaining such knowledge."[27]

According to recital 42 of the E-Commerce Directive, the exemptions of liability cover only cases where the activity of the ISP "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."

The European Court of Justice had the occasion to give its interpretation in the case *Google v. Louis Vuitton*,[28] a preliminary reference raised from the French *Cour de Cassation*. The ECJ interpreted the role of the host provider[29] according to recital 42 as follows:

> "it follows from recital 42 in the preamble to Directive 2000/31 that the exemptions from liability established in that directive cover only cases in which the activity of the information society service provider is 'of a mere technical, automatic and passive nature', which implies that that service provider 'has

[24] In the same sense is Recital 17 of the E-Commerce Directive.
[25] Article 2(a) of Directive 2000/31/EC.
[26] Article 2(d) of Directive 2000/31/EC.
[27] Article 14(a)(b) of Directive 2000/31/EC.
[28] Joined cases C-236/08 to C-238/08, Google France and Google v. Louis Vuitton.
[29] *"In summary, the Court has accepted under certain conditions the extension of the sphere of application of Article 14 to sponsored links services. This is an important verdict as many third-party content service providers will now be able to rely on the lack of knowledge or control over data argument to avoid liability."* Paul Przemyslaw Polanski. Technical, Automatic and Passive: Liability of Search Engines for Hosting Infringing Content in the Light of the Google ruling, Journal of International Commercial Law and Technology. Vol. 6, Issue 1(2011). P. 49.

> neither knowledge of nor control over the information which is transmitted or stored'."[30]

Then, the court extracted the neutrality principle as the basis for the exemption of liability provided for by the Directive:

> "Accordingly, in order to establish whether the liability of a referencing service provider may be limited under Article 14 of Directive 2000/31, it is necessary to examine whether the role played by that service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores."[31]

This 'neutrality principle' was recently underlined by Advocate-General Jääskinen in his opinion in the case L'Oreal v. eBay[32] (the case is still pending in the Court). The case is about L'Oreal suing eBay for the use of its trade marks in relation to infringing goods.

> "The judgement in Google France and Google seems to suggest that the hosting provider referred to in Article 14 of Directive 2000/31 should remain neutral in relation to the hosted data. It has been argued before the Court that eBay is not neutral because eBay instructs its clients in the drafting of advertisements and monitors the contents of the listings."

In his Opinion, however, the Advocate General reiterates the necessity to exempt ISP from liability though it criticized this should be based on the neutrality principle. The Advocate General is of the opinion that "*'neutrality' does not appear to be quite the right test under the directive for this question.*" Moreover, he highlights that he "*would find it surreal that if eBay intervenes and guides the contents of listings in its system with various technical means, it would by that fact be deprived of the protection of Article 14 regarding storage of information uploaded by the users.*"[33] The Advocate General suggests avoiding to "sketch out parameters of a business model that would fit perfectly to the hosting exemption",[34] that such an attempt would be probably very soon outdated. Advocate General Jääskinen proposes, instead, focusing on a type of activity "and clearly state 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, such as damages liability and criminal law liability."[35] Therefore, for the case of eBay, the hosting of information generated by a client may benefit from the exemption provided for by

[30] Paragraph 113.
[31] Paragraph 114.
[32] Case C-324/09: Advocate General Jääskinen, however, is of the opinion that the neutrality test is not the right test under the directive. Paragraph 145 of his opinion on L'Oreal v. Google. Available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=c-324/09&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&docppoag=docppoag&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mots=&resmax=100&Submit=Rechercher. Accessed 26 February 2011.
[33] Advocate General Jääskinen, Opinion on the case L'Oreal v. Google. Paragraph 146.
[34] Ibidem, para. 149.
[35] Ibidem, para. 149.

Article 14 of the E-Commerce Directive. Nonetheless, this exemption would not "exempt eBay from any potential liability it might incur in the context of its use of a paid internet referencing service".[36] We think that the interpretation of the provider's exemption given by Advocate General Jääskinen could fall under neutrality broadly understood, which applies to an activity which is meant to enable or facilitate the activities in which the user autonomously engages in his or her own behalf. The advocate urges us indeed to rethink the foundation of the exemption of the ISP from liability. We should consider the specific activity performed by an ISP, and understand neutrality as appropriateness with regard to the purpose of that activity.

The next section will turn to the experience of member states and third countries. It will look at whether litigation on ISP has reached courts and which answers have been given.

4. A review of the cases on ISP, user-generated content, and data protection

In this section, we will analyse the experiences of EU and non EU states regarding the liability of ISPs for user-generated content, with a special focus on violations of third party privacy.

4.1. The experiences of EU member states

The issue of liability of ISPs for peer-violations of data protection got recent visibility when an Italian judge held three Google executives guilty for violating data protection law, in connection with the online posting by a private user of a video showing a disabled person being bullied and insulted. The judge grounded the criminal conviction of the Google executives on the fact that Google processed the video without taking adequate precautionary measures, adequate to avoid privacy violations, and in particular without properly informing the users (the students uploading the videos) of their data protection obligations (not to post illegally third party's personal information and in particular health data). Thus, according to the judge, Google (and its executives) were considered criminally liable for the data protection crimes consisting in processing health data without the necessary precondition: informing the data subject, obtaining his or her consent, having the authorisation by the Data Protection Commissioner. Actually, the Italian Legislative decree which implemented the E-Commerce Directive into Italian Law, states that "issues concerning the right to privacy with regard to the processing of personal data in the telecommunications sector " fall outside its scope.[37]

Nevertheless, in Europe the country that has more cases decided by courts regarding user-generated contents is France. Most of the cases decided by French courts deal with copyrighted materials posted by users, but some of them also deal with violations of privacy. We will analyse here some of these cases.

According to French law, host-providers should not be liable for user-generated content, unless they do not act expeditiously once they are informed about the

[36] Ibidem, para. 151.

[37] Article 1.2.b of the Legislative Decree 70 of 9 April 2003 (*Decreto legislativo 9 aprile 2003, n. 70 Attuazione della direttiva 2000/31/CE relativa a taluni aspetti giuridici dei servizi della società dell'informazione, in particolare il commercio elettronico, nel mercato interno*). Available at http://www.interlex.it/testi/dlg0370.htm. Accessed 25 February 2011. Unofficial translation by the authors.

illicit activities.[38] The victims of rights' violations caused by user-generated contents can notify the ISP to exclude the contested content, however, the French regulation requires that a valid notification contains all information required by Article 6.I.5 of the French Act 2004-575,[39] which might appear an excessive burden on the internet user, if one considers that she has to indicate also the legal provisions violated.[40] The French Act, in contrast to the Italian one (and to the E-Commerce Directive) does not exclude from the application of the provider's exemption the processing of personal data or the data protection legislation.

However, the jurisprudence of the French courts has showed that uncertainties remain on ISP's exemptions from liability for illegal user-generated contents.

The exemption was upheld in one case, decided in 2005, involving the posting without authorization of copyrighted publications, the *Tribunal de grande instance de Paris*[41] decided that an ISP should not be considered as a content-provider by the simple fact that it provided to its users the technical means to create their own webpages and to post materials (even copyrighted ones).[42] Nevertheless, the *Cour d'appel de Paris* (Paris

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[38] Article 6.I.2 of the French Act 2004-575 (*Loi n° 2004-575 du 21 juin 2004 pour la confiance dans l'économie numérique*). Available at http://www.legifrance.gouv.fr/html/actualite/actualite_legislative/decrets_application/2004-575.htm. Accessed 24 February 2011.

[39] "*5. La connaissance des faits litigieux est présumée acquise par les personnes désignées au 2 lorsqu'il leur est notifié les éléments suivants :*
- la date de la notification ;
- si le notifiant est une personne physique : ses nom, prénoms, profession, domicile, nationalité, date et lieu de naissance ; si le requérant est une personne morale : sa forme, sa dénomination, son siège social et l'organe qui la représente légalement ;
- les nom et domicile du destinataire ou, s'il s'agit d'une personne morale, sa dénomination et son siège social ;
- la description des faits litigieux et leur localisation précise ;
- les motifs pour lesquels le contenu doit être retiré, comprenant la mention des dispositions légales et des justifications de faits ;
- la copie de la correspondance adressée à l'auteur ou à l'éditeur des informations ou activités litigieuses demandant leur interruption, leur retrait ou leur modification, ou la justification de ce que l'auteur ou l'éditeur n'a pu être contacté."

[40] "*5. La connaissance des faits litigieux est présumée acquise par les personnes désignées au 2 lorsqu'il leur est notifié les éléments suivants :*
- la date de la notification ;
- si le notifiant est une personne physique : ses nom, prénoms, profession, domicile, nationalité, date et lieu de naissance ; si le requérant est une personne morale : sa forme, sa dénomination, son siège social et l'organe qui la représente légalement ;
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- la description des faits litigieux et leur localisation précise ;
- les motifs pour lesquels le contenu doit être retiré, comprenant la mention des dispositions légales et des justifications de faits ;
- la copie de la correspondance adressée à l'auteur ou à l'éditeur des informations ou activités litigieuses demandant leur interruption, leur retrait ou leur modification, ou la justification de ce que l'auteur ou l'éditeur n'a pu être contacté."

[41] "*En France, le tribunal de grande instance (TGI) est la juridiction de droit commun (par opposition aux juridictions d'exception) en première instance : il connaît des litiges qui ne sont pas spécialement attribués à une autre juridiction. Par ailleurs, il dispose de compétences spéciales dont certaines sont exclusives.*" In http://fr.wikipedia.org/wiki/Tribunal_de_grande_instance_(France). Accessed 26 February 2011.

[42] In this case the court, at the end, found the ISP liable for not having provided the necessary information to allow the copyright owners to identify the infringers. Dargaud Lombard, Lucky Comics / Tiscali Média. Tribunal de grande instance de Paris 3ème chambre, 1ère section Jugement du 16 février 2005.

Court of appeal) overruled this decision and considered the ISP as an editor (content provider) by the fact that it was making profit through advertisement in the webpages containing the infringing materials, although the advertisement did not relate to such materials.[43]

In another case, decided in June 2007, this time related to the posting of copyrighted videos, the same *Tribunal de grande instance de Paris* concluded that *"in effect, by imposing a structure for presentation through frames, which it makes available to users and by promoting advertisements during every consultation, from which it clearly makes profit, it has the status of an editor and should be liable"*[44] for infringing materials posted by users.[45]

In July 2007, the *Tribunal de grande instance de Paris*, ruled a case involving again the posting of copyrighted videos by users of ISP services, and concluded that the mere fact of making profit through advertisements in the webpages containing the infringing materials is not enough to transform the ISP from a host-provider into a content-provider. However, in the same decision the Court considered that the ISP is liable by the fact that it provides the necessary means for the infringement to take place (although it recognised that there is no duty of surveillance).[46] This decision was overruled by the Court of Appeal, which this time changed its view and considered that the activity carried out by the ISP in this case is of a host-provider, stating that the fact of making profit through advertisement does not qualify the ISP as an editor (content-provider). Furthermore, the Court of Appeal also considered that the ISP only has the obligation to exclude the contested content if the 'victim' informs the ISP with all the details needed to the identification of the infringing material by the latter.[47] This decision of the Court of Appeal was confirmed by the *Cour de Cassation*[48] in a ruling of 17 February 2011.[49]

Available at http://www.legalis.net/jurisprudence-decision.php3?id_article=1420. Accessed 26 February 2011.

[43] Tiscali Media / Dargaud Lombard, Lucky Comics. Cour d'appel de Paris 4ème chambre, section A Arrêt du 7 juin 2006. Available at http://www.legalis.net/jurisprudence-decision.php3?id_article=1638. Accessed 26 February 2011. A similar conclusion was adopted by the *Tribunal de Grande Instance de Naterre* in two cases decided on 28 February 2008. In these cases a violation of private life was into discussion. See Olivier D. / Aadsoft Com and Olivier Dahan / Eric Duperrin. Available at http://www.legalis.net/jurisprudence-decision.php3?id_article=2260 and at http://www.juriscom.net/documents/tginanterre20080228.pdf. Accessed 26 February 2011.

[44] Jean Yves L. dit Lafesse / Myspace. Tribunal de grande instance de Paris Ordonnance de référé 22 juin 2007. Available at http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=1965. Accessed 26 February 2011.

[45] This decision was considered void by the Paris court of appeal on the grounds of lack of summons. Myspace / Jean Yves Lafesse et autres. Cour d'appel de Paris 14ème chambre, section A Arrêt du 29 octobre 2008. Available at http://www.legalis.net/jurisprudence-decision.php3?id_article=2471. Accessed 26 February 2011.

[46] Christian C. / Dailymotion. Tribunal de grande instance de Paris 3ème chamber, 2ème section. Jugement rendu le 13 Juillet 2007. Available at http://www.juriscom.net/documents/tgiparis20070713.pdf. Accessed 26 February 2011.

[47] Dailymotion / Nord-Ouest production et autres. Cour d'appel de Paris 4ème chambre, section A Arrêt du 06 mai 2009. Available at http://legalis.net/spip.php?page=jurisprudence-decision&id_article=2634. Accessed 26 February 2011.

[48] *"The French Supreme Court of Judicature (French: Cour de cassation) is France's court of last resort having jurisdiction over all matters tryable in the judicial stream but only scope of review to determine a miscarriage of justice or certify a question of law based solely on issues of law."* In http://en.wikipedia.org/wiki/Court_of_Cassation_(France). Accessed 26 February 2011.

[49] Nord-Ouest Production et autres / Dailymotion. Cour de cassation 1ère chambre civile Arrêt du 17 février 2011. Available at http://legalis.net/spip.php?page=jurisprudence-decision&id_article=3104 . Accessed 26 February 2011.

The same *Tribunal de grande instance de Paris*, in a decision of 19 October 2007, in a case related to Google videos and the posting of a copyrighted documentary by a user, did not considered Google as a content provider together with its users. Nonetheless, the court stated that once the ISP is informed about the illegality of a specific content by a notification from the 'victim' it has to implement all necessary measures to prevent further dissemination of the illicit material.[50] The same approach was adopted in another case against Google, this time decided by the *Tribunal de commerce de Paris*, another first instance court under French law.[51]

The issues of the provider's liability for user-generated content violating privacy rights of third parties was addressed in a case decided by the *Tribunal de grande instance de Paris*, against Dailymotion, a Youtube-like site. The court highlighted the fact that the ISP should not be considered liable for undue use of the image and name of a person, but only the users who posted the videos. In this decision, the court changed the opinion it adopted in the *Zaig v. Google* case and concluded that the 'victim' of the illicit or infringing material has the duty to notify the ISP, providing all necessary information regarding the videos that are violating his rights, in a way to allow the ISP to identify these videos amongst the ones posted in its website. According to the court, the victim has to give *"a description of the facts and of their precise location and the reasons for which the contents must be removed including the reference to legal provisions or facts."*[52] Only after having received such information the ISP can be considered liable for not having excluded the contested content.

The conclusion reached by the *Tribunal de grande instance de Paris* that an ISP is not liable for user-generated content was confirmed by the Paris Court of Appeal in the *Olivier v. Bloobox Net Case*, where the plaintiff claimed that the ISP was liable for violations of his private life as a consequence of hyperlinks as well as titles of news posted by users in its website. In its decision, the court concluded that the activity of *"structuring and classifying information made available to the public according to a classification determined by the provider with the aim of facilitating the use of its service fits the mission of the host-provider storage and does not give him the quality of editor(content-provider) since it is not the author of titles and hyperlinks"*.[53]

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[50] Zadig Productions et autres / Google Inc, Afa Tribunal de grande instance de Paris 3ème chambre, 2ème section, Jugement du 19 octobre 2007. Available at http://www.legalis.net/jurisprudence-decision.php3?id_article=2072. Accessed 26 February 2011.

[51] Flach Film et autres / Google France, Google Inc. Tribunal de commerce de Paris 8ème chambre Jugement du 20 février 2008. Available at http://www.legalis.net/spip.php?page=jurisprudence-decision&id_article=2223. Accessed 26 February 2011.

[52] Jean-Yves L. Dit Lafesse / DailyMotion. Tribunal de grande instance de Paris, 3ème chamber, 1ère section, jugement rendu le 15 Avril 2008. Available at http://droit-finances.commentcamarche.net/jurisprudence/cour-d-appel-2/1097506-tribunal-de-grande-instance-de-paris-chambre-civile-3-15-avril-2008-08-01371. Accessed 26 February 2011. Free translation from the authors. This same approached was adopted by the same *Tribunal de grande instance de Paris* in another case against Daylimotion decided on 15 April 2008. Omar SY / Daylimotion. *Tribunal de grande instance de Paris* 3ème chamber, 1ère section, jugement rendu le 15 Avril 2008 Available at http://droit-finances.commentcamarche.net/jurisprudence/cour-d-appel-2/1097503-tribunal-de-grande-instance-de-paris-chambre-civile-3-15-avril-2008-08-01375. Accessed 26 February 2011. In this case the Court reaffirmed the position that the ISP is not liable for user-generated content and that the mere fact it makes profit from advertisement does not change its role of a host-provider and that the user is the one liable for undue use of name or image of third parties.

[53] Bloobox Net / Olivier M.. Cour d'appel de Paris 14ème chambre, section B Arrêt du 21 novembre 2008. Available at http://www.legalis.net/jurisprudence-decision.php3?id_article=2488. Accessed 26 February 2011. In the first instance proceedings, the *Tribunal de grande instance de Paris* had decided that the ISP was liable for the user-generated content but this decision was overruled by the Court of Appeal. See Olivier M. / Boobox Net. Tribunal de grande instance de Paris, ordonnance de référé rendue

In conclusion, in the French case law we can observe a recent shift on the issue of the liability of the provider for user-generated contents. While in the first decisions French courts were not even applying the safe-harbour clause to ISPs for copyright infringements by user-generated contents, considering that by providing the technical means to users to commit the infringements[54] or by making profit through advertisement, ISPs should be considered as editors (i.e., content providers) and, therefore, liable. In contrast to this first trend, in more recent cases French Courts have changed their views, evolving in the direction of not considering ISPs liable for user-generated content,[55] even in cases dealing with third parties' privacy.[56]

In Spain, the National Data Protection Authority, without mentioning the safe harbour contained in article 16 of Law 34/2002 (which implemented the E-Commerce Directive), has affirmed that only the users are liable for data protection violations as a consequence of images posted in Youtube.[57] As in the French Act, the Spanish law does not make any reference to data protection law in the e-commerce regulation. Thus it does not exclude from the application of the provider's exemption the processing of personal data.[58]

Liability for user-generated contents has been disputed also in the Netherlands, a country having a service-based economy, and high-quality IT infrastructures.

Let us first consider two cases concerning litigation among private persons for information posted in social networks. In a first case[59] a couple of divorced parents went to court because the father posted pictures and videos of their 5-years old (at the time the application was lodged) son in Hyves, a Facebook-like social network very popular in the Netherlands; more precisely, the father made various materials available on-line at different times, some in the public part of his profile, some in the private part of it. Among several complaints, the mother argued that the father was misusing parental care and breaching the child's privacy, which needed special protection, considering that both parents were working (in the past and at the time of the proceedings) with socially vulnerable persons.

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le 26 mars 2008. Available at http://www.juriscom.net/documents/tgiparis20080326.pdf. Accessed 26 February 2011.

[54] Edwards, Waelde. 'The Fall and Rise of Intermediary Liability Online'. In Edwards; Waelde (editor). *Law and the Internet*. 3.ed. (Hart Publishing: Oxford and Portland, Oregon 2009). P. 72

[55] *"(...) l'hébergeur ne pourrait devenir éditeru seulement parce qu'il organise son site de manière logique (...). L'hébergeur ne saurait non plus engager sa responsabilité éditoriale parce qu'il tire profit de son activité d'hébergeur."* Julien Taïeb. Prestataires techniques de l'Internet: le sens de responsabilités. Juriscom.net, 19 mai 2008. P. 3. Available at http://www.juriscom.net/documents/resp20080519.pdf. Accessed 26 February 2011.

[56] "Privacy is valuable because it allows one control over information about oneself, which allows one to maintain varying degrees of intimacy. Indeed, love, friendship and trust are only possible if persons enjoy privacy and accord it to each other. Privacy is essential for such relationships on Fried's view, and this helps explain why a threat to privacy is a threat to our very integrity as persons." In Stanford Encyclopedia of Philosophy. Available at http://plato.stanford.edu/entries/privacy/. Accessed 24 February 2011.

[57] See, for instance, http://www.agpd.es/portalwebAGPD/resoluciones/procedimientos_sancionadores/ps_2008/common/pdfs/PS-00479-2008_Resolucion-de-fecha-30-12-2008_Art-ii-culo-6.1-LOPD.pdf and http://www.agpd.es/portalwebAGPD/resoluciones/procedimientos_sancionadores/ps_2009/common/pdfs/PS-00055-2009_Resolucion-de-fecha-20-07-2009_Art-ii-culo-6.1-LOPD_Recurrida.pdf. Accessed 25 February 2011.

[58] Article 16.1 of Spanish Law 34/2002, requires ISPs to exclude the contested content by request of a competent authority. Available at http://noticias.juridicas.com/base_datos/Admin/l34-2002.t2.html#a16. Accessed 24 February 2011.

[59] Rechtbank Almelo, 15 October 2009, *Nederlandse Jurisprudentie Feitenrechtspraak* 2009 – 49, No. 489.

In the assessment of the judge, the mother was right in claiming that the privacy of the minor child had been violated by the publication of the information in the public part of the social networks; instead for the information posted in the private part of the father's profile, in principle only accessible to his friends, the judge did not find a violation of privacy, or any other legal violation. This concerns a fully private litigation, where the role and function of the ISP is not even mentioned. However it is particularly interesting since it distinguishes the private and public parts of a user's page in a social network, and limits data protection to the latter.

In another case[60] the claimant, a lawyer, asked removal, rectification and compensation for alleged damages caused by negative comments posted by a user in her Hyves profile. The conflict opposes a woman, the Hyves user, and a lawyer. Among other negative comments, the woman asserted that the lawyer was a convicted pedophile. The comments, deleted by the user after a maximum of 55 hours, had been posted in the chat section of the web, whose access is limited to user's 'friends' and 'friends of friends'; it is therefore an area where a restricted amount of people has access to information. The interesting part of this case is that the issues at stake are about freedom of expression and right to honor and reputation. The internet is thus only a new tool offering a new platform for expression and communication, where old issues are examined and dealt with. The judge balanced the conflicting rights, making an assessment of factual circumstances. According to the judge, freedom of expression, a constitutional right, also includes talking in a negative way of a person. However, freedom of expression is limited by the right to honor and reputation. Here it was assessed that only the accusation of being a convicted pedophile infringed the lawyer's honor and reputation, the other parts of the text posted referred to a conflict between the parties at dispute; therefore the comments were permissible value judgments concerning parties in conflict. Also in this case, an appeal lodged according to an urgency procedure, the ISP was not been involved in a private dispute.

The provider's liability is directly at issue in a the following case[61], where individual has sued an ISP because it refused to remove a movie of her from its website. The facts are the following: GeenStijl (literally: 'no style') operates two websites where users can publish movies. In 2007, a then 20-years old girl was filmed at night in a public area of Amsterdam (Leidseplein), drunk with a friend. The video was realized through a montage in which several pictures and sounds recording taken from the original footage were repeated a number of times. In the movie the "drunk" girl first asks the cameraman to go away and then she starts answering his questions, revealing details about her private life. The video was first (2007) published in the Internet by the cameraman/producer (Mister X) and the Vereniging Studenten-TV, and later on (July 9, 2009) Studenten-TV published the film on its own website. In the same month (July 16, 2009) the movie was published by GeenStijl on its website www.dumpert.nl. In the introductory text the girl is addressed by her first name. Upon request of the (lawyer of) the girl, GeenStijl removed the film on July 23, 2009.

On July 24, 2009 the girl summoned Studenten-TV, Mister X and GeenStijl to appear in court, asking to remove and to keep removed the film and any comments that have been posted, to pay damages, and to declare that duplication, possession and publishing the movie is illegitimate. At the time when the girl started the lawsuit, the film had been watched about 200.000 times and several trivial comments were added.

[60] Gerechtshof Amsterdam, 23 February 2010, *Computerrecht* 2010 – 3, No. 75.

[61] Rechtbank Amsterdam, 11 September 2009, […] versus GeenStijl (GS Media B.V.), *Computerrecht* 2010 – 2, No. 38.

On September, 9 2009 another website (www.campus.tv) reported about the girl, the movie published by GeenStijl, the claim for damages and part of the speech by the girl's lawyer. The day after (September 10, 2009) the movie was once again placed on the websites of GeenStijl, with the name of the girl, and with information on the procedure she started, and publication of the correspondence with her lawyer. Additionally, GeenStijl published the video once again, this time with a balk in front of the girl's face, arguing that they had to defend themselves. On the same day the claimant was conferred copyright by Mister X, the cameraman/producer.

The court considered that GeenStijl was liable since it had autonomously published the video, even though it was not the author. GeenStijl was held liable also for the comments it placed on the website as well as for the third-parties comments it kept on its website after receiving the request of removal. The court justified this conclusion considering that GeenStijl besides providing the opportunity to place comments was the final editor of its sites. For this reason, the court rejected the argument presented by GeenStijl that its role in the posting of the video corresponded to a mere technical transfer of data.

The reasoning of the court goes on considering copyrights law. Being the girl recognizable in both versions of the movie, the same constitutes a portrait according to Article 21 Copyright Act, which prohibits the disclosure of a portrait without the consent of the portrayed person, whenever a reasonable interest prevents the disclosure. Reasonable interest in the sense of Article 21 includes the protection of that person against violations of her right to the respect of her privacy.

Whether there is a violation of someone's privacy depends on factual circumstances, and on the resulting balance between the right to privacy and the freedom of expression (Article 10 ECvHR). The court affirmed that the right of expression is not absolute, but can be restricted (Article 10(2) ECvHR) if such a restriction, as in this case, is provided by law and is necessary in a democratic society to protect other interests, such as reputation and rights of others.

Thus the court concludes that the rights of the girl have been violated, as demonstrated by the evidence of damage for her reputation she suffered. The removal of the video and comments are therefore to be considered as justified and proportionate in a democratic society. As to the request of the girl for a ban on comments on the judicial proceedings, the court thought that this went too far, since in these regard freedom of expression prevailed.

This case is particularly interesting because it deals with an ISP performing a hybrid role. In the case at hand the ISP was not a mere host, but was also or rather a content editor, therefore it could not benefit from the safe harbour logic of the E-Commerce Directive. The court has assessed as dominant the role of content editor of the ISP.

A case decided by the District Court of Amsterdam[62] concerns pictures of the children of the Royal Family, namely young Princess Amalia and her cousins Anna and Lucas. The plaintiffs were Crown Prince Willem-Alexander and spouse, Princess Máxima (for Princess Amalia), and his cousin Prince Maurits, and spouse, Princess Marilène (for Anna and Lucas. The defendant was Vereniging Martijn, an association which defines itself as a "platform for discussion about pedophilia", fighting for the "social and societal acceptance of child-adult relationships", holder of the website www.martijn.org.

[62] Rechtbank Amsterdam, 1 November 2007, members of the Royal Family versus Vereniging Martijn, *Computerrecht* 2008 – 1, No. 8.

On 25 October 2007 a picture of Princess Amalia was posted by a forum-member on the forum of the website of the association, with the comment: "Our royal house has produced a whole new generation of princes and princesses, and luckily so!". The picture was taken from the Royal Family official website, which allows use of those pictures upon certain conditions. On the same day the Department in charge of the website (RVD - Kingdom's Communication Department)[63] asked the association Martijn to remove that picture. In a letter of the day after, the lawyer complained that after the first message, other pictures of Princess Amalia and her cousins Anna and Lucas were posted on a private part of the website. On the same day the association reacted stating that the restricted-access section of the forum was accessible only to five persons, and therefore there was no violation of her privacy or portrait rights.

The main claims concerned violations of copyright laws (1) and (2) violation of privacy and portrait rights by the Association Martijn. The court dismissed the claim against the ISP, as the pictures under dispute were published by a user and not by the ISP. Therefore according to the court, the plaintiffs should address their claims against the user. The association provides a forum where members can, among others, post pictures. The association did not post those pictures, nor can it be expected to know, or have to, that with the publishing of a picture the copyright of a third person can be violated. It cannot be required that the owner or operator of a website should check the content of what is posted in a forum, in order to prevent possible breaches of law.

The second claim concerns the violation of the right to privacy and of portrait rights. The court finds that it is undisputed that paedophilia as a sexual orientation is socially disapproved, public declarations are undesirable and exposure of children to paedophile behaviours is to be condemned. Nevertheless freedom of expression, as protected by Article 10 of the ECvHR and by the Dutch Constitution (Article 7), protects the public debate over paedophilia. Therefore the Association Martijn is entitled to this guarantee. Freedom of expression means not only to divulgate your own opinion, but also to spread other peoples' opinions, within the limits of the law.

However, the court affirmed that the law's limits are violated when one person's privacy is violated because she or her children get involved into this debate, without him or the general interest requiring so. Consequently, the court held that the publishing of a photo on a website such as the one under dispute, especially on the public forum, puts the child's picture in connection with paedophile wishes and actions, and constitutes an unacceptable violation to the privacy of the child and her/his parents and violates the portrait right of the child.

The court also held that considering the special nature of the association's website, the defendant must be aware of and must be apprehensive of misuse and (what the association self can find) undesirable usage of her website. For this reason it could be expected from the defendant – unlike from other owners or operators of websites that do not have to watch out for such misuse or unintended usage – that it takes adequate precautionary measures when operating the website and the forum. Such measures should make it impossible for persons who do not know the limits of their freedom of (expression of) opinion to use the website to make publications which violate the rights of others – only because the association provides for the possibility to make such publications.

[63] Unofficial translation by the authors.

Therefore, the court denied the application of the safe harbour clause[64] to this case: the Association Martijn is not an ISP only providing for (technical) access to a communication network nor does it only help with temporarily and interim automated saving of data of others. Rather Martijn selects the persons to whom it grants active access to the forum and uses the forum to reach its own goals. For this reasons, the role of Martijn cannot be deemed as mere "hosting", but more like a content editor.

The Association Martijn claimed it was excessive to require from it, a small organization, to 'police' its website from possible abuses. The court rejected this argument, stating that organizational inability does not justify the violation of others' rights, suggesting also some practical solutions, like setting up the forum in such a way the Association has to accept a contribution before it becomes visible. The delay of publication of users' opinions would not mean that the right to freedom of (expression of) opinion of would be undermined. Therefore the court imposed the ban, considering that it was provided by law and necessary in a democratic society, in order to ensure the right of others than the defendant.

Also in this case, the role of the provider has been assessed as content editor, as therefore could not enjoy of the 'safe harbour'. The trend of the case law in the European states we have considered shows that, after some (French) hesitations, ISP are exempted from liability for user generated contents, provided it is proved that they perform merely a "hosting" function. As the latter case shows, however, the nature of the information hosted by a provider may require that the provider takes a more active role, adopting appropriate precautionary measures.

4.2. The experiences of non-EU states: the examples of Brazil and the US

'Safe harbours' limits to ISPs' liability have been introduced not only in EU member states but also in other countries. Here we discuss two particularly significant cases, Brazil and US.

In Brazil, there is no general data protection legislation[65] nor legislation providing for safe harbours in terms of ISPs liability. However, the Superior Court of Justice[66] in a recent ruling concerning offensive user-generated materials related to the name of a woman posted in a social network managed by Google, decided that Google was not liable. According to the court, Google had no duty to previously control the content posted by users because this control could lead to restrictions to freedom of expression. However, the Court stated that as soon as the ISP is aware of the existence of illegal information in its websites it has the obligation of removing it immediately.[67]

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[64] Article 6:196c of the Dutch Civil Code, implementing the safe harbour clause of the E-Commerce Directive.

[65] The Brazilian Ministry of Justice recently launched a public consultation on a draft bill of law on data protection and privacy. See http://culturadigital.br/dadospessoais/files/2010/11/PL-Protecao-de-Dados.pdf. Accessed 26 February 2011.

[66] *"The Superior Court of Justice (Superior Tribunal de Justiça, STJ) is the Brazilian highest appellate court for non-constitutional issues, having, also, original jurisdiction to some cases."* In http://en.wikipedia.org/wiki/Superior_Court_of_Justice_(Brazil). Accessed February 13, 2011.

[67] Superior Tribunal de Justiça**.** Google não pode ser responsabilizado por material publicado no Orkut. 20 January 2011. Available at http://www.stj.gov.br/portal_stj/publicacao/engine.wsp?tmp.area=398&tmp.texto=100532**.** Accessed 12 February 2011. A draft bill of law, which goes in a similar direction of the decision adopted by the Superior Court of Justice, is being analyzed by the Brazilian Ministry of Justice and will be probably sent to the Parliament soon. See http://www2.camara.gov.br/agencia/noticias/COMUNICACAO/192871-CAMARA-DEVE-ANALISAR-NESTE-ANO-MARCO-CIVIL-DA-INTERNET.html. Accessed 20 February 2011.

This decision goes in the same direction of the safe harbour clause contained in the E-Commerce Directive and lead to the conclusion that this reasoning would apply to all cases involving violations of third parties' rights by user-generated content.

In the US, the Digital Millennium Copyright Act (DMCA) provided for safe harbours limiting the liability of ISPs regarding copyright infringements by user-generated contents. The approach adopted by the US is different from the one of the EU, which *"expressly chose not to focus exclusively on copyright, but rather to tackle the issue of ISP liability in a so-called horizontal manner – that is, drafting the safe harbours to cover intermediaries' liability for any kind of unlawful content provided by their users, whether it constituted copyright infringement, trademark infringement, defamation, unfair competition, hate speech or any other type of illicit material."*[68] Although some scholars advocate that the E-Commerce Directive safe harbours limit liability of ISP in all areas,[69] when it comes to data protection violations the issue is still not settled yet.

Non-copyright related violations are addressed in the US by Communications Decency Act of 1996 (CDA), which states in its section 230(c) that *"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another content provider."*[70] This clause apparently exempts providers from liability also with regard to regard privacy violations through user-generated content.[71] As highlighted by Edwards, the CDA provides a broader exemption that the DMCA:

> "[the DMCA] exempts ISPs from liability for hosting copyright infringing materials in a set of 'safe harbours', but only on certain terms, such as the disclosure of the identity of infringers on request, subscription to a detailed code of practice relating to notice, 'take down' and 'put back', and the banning of the identified repeat infringers from access. By contrast, section 230(C) of the Communications Decency Act (CDA) provides total immunity in respect of all kinds of liability bar that relating to IP, so long as the content in question was provided by a party other than the ISP."[72]

Even before the adoption of the DMCA or of the CDA the US Supreme Court has applied, in the field of copyright law, the 'safe harbour clause' which *"provides immunity from liability for technology that is 'capable of substantial non infringing uses.'"*[73] This happened in the famous case involving Sony, which at that time was producing the video recorder Betamax, and the Court considered that it *"could not be held liable for making technology that was capable of copying for fair use purposes."*[74]

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[68] Miquel Peguera. The DMCA Safe Harbors and Their European Counterparts: A Comparative Analysis of Some Common Problems. Columbia Journal of Law & Arts. Vol. 32. 2008-2009. P. 482. *"The rationale behind this approach appears to be that a service provider is carrying out the same technical activity – whether transmitting, caching or hosting third-party content – regardless of the type of content involved."*

[69] See, for instance, Miquel Peguera. Op. cit. P. 484. *"In contrast with the bifurcated statutory scheme of the CDA and the DMCA, the European safe harbors, as noted, cover all possible sources of liability."*

[70] Available at http://www.fcc.gov/Reports/tcom1996.txt. Accessed 29 April 2010.

[71] Miquel Peguera. Op. cit. P. 484.

[72] Edwards. The Fall and Rise of Intermediary Liability Online. In Edwards and Waelde (editors), *Law and the Internet*. 3.ed. (Hart Publishing: Oxford and Portland, Oregon 2009). P. 64.

[73] *Apud* Edward Lee. Decoding the DMCA Safe Harbors. 32 Columbia Journal of Law & the Arts 233. P. 268.

[74] Edward Lee. Decoding the DMCA Safe Harbors. 32 Columbia Journal of Law & the Arts 233. P. 268.

Finally, we need to consider that content that would be considered illegal on data protection grounds in Europe would not be considered such under US law, where freedom of expression usually takes precedence (unless copyright is involved). Thus in same cases, the issue of the provider's liability for user-generated content would not even emerge, since the users themselves would not be considered liable. As an extreme example of this approach, we can mention the recent case Lalonde v. Lalonde (Kentucky Court of Appeal, 2011), concerning the use in a trial of one person's photos taken from Facebook, where they were published without her consent. The court allowed the use of the photos, saying that: *"There is nothing within the law that requires her permission when someone takes a picture and posts it on a Facebook page. There is nothing that requires her permission when she was 'tagged' or identified as a person in those pictures."*

5. Can the exemption be extended to data protection with regard to third parties data?

Article 1(5)(b) of Directive 2000/31/EC clearly states that it does not apply to *"questions relating to information society services covered by Directives 95/46/EC."* The same approach is contained in recital 14 of this Directive.[75]

At first sight, it could lead to the conclusion that the safe harbour clause for the exemption of liability of host-providers for user-generated content would not apply to cases involving third parties' data protection. Nevertheless, the interpretation of this provision is not undisputed.

The European Parliament, in its resolution on the EU Commission communication on a European Initiative in Electronic Commerce, recognized *"the horizontal nature of the liability problem, covering diverse issues such as copyright, consumer protection, trademarks, misleading advertising, protection of personal data, product liability, obscene content, hate speech, etc."*[76]

Moreover, the European Commission in its first report on the application of Directive 2000/31/EC states clearly that "The limitations on liability provided for by the Directive are established in a horizontal manner, meaning that they cover liability, both civil and criminal, for all types of illegal activities initiated by third parties."[77]

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[75] *"(14) The protection of individuals with regard to the processing of personal data is solely governed by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data(19) and Directive 97/66/EC of the European Parliament and of the Council of 15 December 1997 concerning the processing of personal data and the protection of privacy in the telecommunications sector(20) which are fully applicable to information society services; these Directives already establish a Community legal framework in the field of personal data and therefore it is not necessary to cover this issue in this Directive in order to ensure the smooth functioning of the internal market, in particular the free movement of personal data between Member States; the implementation and application of this Directive should be made in full compliance with the principles relating to the protection of personal data, in particular as regards unsolicited commercial communication and the liability of intermediaries; this Directive cannot prevent the anonymous use of open networks such as the Internet."*

[76] Resolution on the communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on a European Initiative in Electronic Commerce (COM(97)0157 - C4-0297/97). Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A4-1998-0173+0+DOC+XML+V0//EN&language=MT#top. Accessed 23 February 2011.

[77] REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE. 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

Furthermore, the Article 29 Working Party in its opinion concerning online social networking affirmed that when users go beyond a purely personal or household activity (such as when they use "other technology platforms to publish personal data on the web") they become data controllers. Thus, they are subject to data protection obligations, and in particular have to collect the consent from the data subjects whose information (or images) they are making available on the internet.[78] However, the Article 29 Working Party added that the service provider should be required to inform the users:

> "about the privacy risks to themselves and to others when they upload information, (...) that uploading information about other individuals may impinge upon their privacy and data protection rights" and "that if they wish to upload pictures or information about other individuals, this should be done with the individual's consent."[79]

All these documents and decisions delivered by courts and national data protection authorities of EU and non-EU member states lead us to the conclusion that the safe harbour clause for host-providers contained in the E-Commerce Directive applies (or should apply) to violations of third parties privacy caused by user-generated content and, then, ISPs should not be considered as liable, when it has no active role. This conclusion is in line with the recommendations made by the International Working Group on Data Protection in Telecommunications[80] on its 'Report and Guidance on Privacy in Social Network Services.[81]

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aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce). Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2003:0702:FIN:EN:PDF. Accessed 23 February 2011. P. 12.

[78] Article 29 Data Protection Working Party. 'Opinion 5/2009 on online social networking'. Adopted on 12 June 2009. P. 6. Available at http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2009/wp163_en.pdf. Accessed 25 February 2011.

[79] *Ibid*. P. 7. In the same sense is the position adopted by the International Working Group on Data Protection. In Telecommunications. Report and Guidance on Privacy in Social Network Services. P. 5. Available at http://www.datenschutz-berlin.de/attachments/461/WP_social_network_services.pdf. Accessed 25 February 2011.*"Information of users should also refer to third party data: Providers of social network services should – on top of informing their users about the way they treat their (the users') personal data, also inform them about the do's and don'ts of how they (the users) may handle third party information contained in their profiles (e.g. when to obtain the data subjects' consent before publication, and about possible consequences of breaking the rules). Especially the huge quantities of photos in user profiles showing other people (in many cases even tagged with name and/or link to the other persons' user profile) are an issue in this context, as current practices are in many cases not in line with existing legal frameworks governing the right to control one's own image."*

[80] *"The Working Group was founded in 1983 in the framework of the International Conference of Data Protection and Privacy Commissioners at the initiative of the Berlin Commissioner for Data Protection, who has since then been chairing the Group. The Group has since 1983 adopted numerous recommendations ("Common Positions" and "Working Papers") aimed at improving the protection of privacy in telecommunications. Membership of the Group includes representatives from Data Protection Authorities and other bodies of national public administrations, international organisations and scientists from all over the world. Since the beginning of the 90s the Group has in particular focused on the protection of privacy on the Internet."* In http://www.datenschutz-berlin.de/content/europa-international/international-working-group-on-data-protection-in-telecommunications-iwgdpt. Accessed 25 February 2011.

[81] *"Re-thinking the current regulatory framework with respect to controllership of (specifically third party-) personal data published on social networking sites, with a view to possibly attributing more*

It is our opinion that the reading of 1(5)(b) of Directive 2000/31/EC refers to the processing of personal data carried out by the host-provider itself, in relation to personal information of its users or of third parties, when not dealing with user-generated content. Providers themselves may take initiatives that violate the interests (and indeed the rights) of their users. They may violate the EU data protection requirements by collecting or transmitting personal data without the users' consent or in any case beyond the limits established by the law. In those cases where the EU data protection law applies, providers should obviously be liable for all civil or criminal violation they commit by illegally processing personal data of their users. The case we are considering, however, pertains to a different issue, namely, to the liability of the providers for processing illicit information about third parties uploaded by their users.[82]

6. Conclusion

In this difficult conflict between individuals (the ones posting the information and the data subject), the role of the host provider can be perceived and constructed in very different ways. On the one hand, it could appear to be co-responsible to the violation of privacy: the provider contributes with the means (the platform) through which the privacy violation is committed, and does that for a profit. It contributes to make the information accessible and searchable so enhancing to its illicit circulation.

On the other hand, its role as co-author of privacy violation can hardly be distinguished from its role as the enabler. In fact, by providing users with the possibility of free and uncensored use of the provider's platform the provider may contribute, while aiming at its profit, to the free development of citizen's personalities, to the growth of civil and political debate and to the creativity of the Internet. There is an on-going debate, on whether and to what extent a provider should be liable for illegal user-generated contents. In this article we considered how provider's liability is governed by EU law. Just to sum up, for the provider to block or remove illegal content (so preventing the violation or their continuation) two aspects are involved. First of all the provider must be aware that a certain activity has been accomplished by the user. Secondly, he must determine that the user-generated content violates somebody else's rights (in particular privacy rights).

Generally to support exclusion of liability the first aspect has been considered (the provider cannot reasonably control all user generated contents). However, we think that also the second aspect needs to be considered since to establishing that a user-generated content is illegal, concerning the peer-violation of privacy, a difficult and uncertain balancing exercise is likely to be involved in any legal assessment. The legality of the distribution of the content depends on whether, under the particular conditions of the case, the uploader's civil rights (and in particular his or her freedom of expression) should prevail over the third party's privacy rights. By making the provider liable for privacy violations there is the risk of favouring an excessively caution attitude in the provider's slide, who would indulge in censorships whenever there is the smallest risk of a judicial decision in favour of privacy, thereby unduly restricting freedom of expression. There is also the risk that the threat of a suit for privacy violation will be used by all those who want to prevent the distribution of information about themselves to have providers censor the concerned content.

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responsibility for personal data content on social networking sites to social network service providers." Working Group on Data Protection in Telecommunications. Op. cit. P. 4-5.

[82] SARTOR, Giovanni; VIOLA DE AZEVEDO CUNHA, Mario. Op. cit. P. 21.

This is the fundamental legal and political issue that lies under the more specific apparently technical questions involved in this subject matter, namely the issues of whether the provider or the user is the data controller, of when on-line distribution can be considered as a private activity (to which data protection is inapplicable) having limited accessibility, of whether and to what extent the liability exemption for host providers also concerns violations of privacy.

As discussed in this paper, it seems to us that even with regard to third parties' data protection violations, the current rules limiting the liability of host providers with regard to the contents published by users in their websites would give the most appropriate balance between the interests and the rights involved. This conclusion does not exclude the need that providers take some initiatives concerning the education of their users with regard to data protection. In particular, platform providers should be urged (by the competent data protection authorities) to provide their users with better information about the need that other people's privacy rights are respected, as suggested by the Article 29 Working Party.[83] We think that such precautions would be fully consistent with the limitation of the provider's liability since they do not impose any censorship on users, but are only meant to make them aware of their pre-existing data protection duties.[84]

Furthermore, a review of the E-Commerce Directive, in order to make clear that the exemptions of liability apply also with regard to cases dealing with violation of third parties' data protection by user-generated content would be very welcomed. It is not by chance that the European Commission launched a *"Public consultation on the future of electronic commerce in the internal market and the implementation of the Directive on electronic commerce (2000/31/EC)."*[85]

[83] Article 29 Data Protection Working Party. 'Opinion 5/2009 on online social networking'. Adopted on 12 June 2009. Available at http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2009/wp163_en.pdf. Accessed 30 March 2011. P. 7.

[84] SARTOR, Giovanni; VIOLA DE AZEVEDO CUNHA, Mario. Op. cit. P. 23.

[85] Available at http://ec.europa.eu/internal_market/consultations/2010/e-commerce_en.htm. Accessed 24.02.2011.