

# Liability of Online Publishers for User Generated Content: A European Perspective

TIMOTHY PINTO, NIRI SHAN, STEFAN FREYTAG, ELISABETH VON BRAUNSCHWEIG, AND VALÉRIE AUMAGE

Free speech is thriving online with user generated content (UGC). People can more easily connect, through social networking, content hosting and discussion sites. There is a greater and more searchable marketplace of ideas and creativity than ever before. UGC drives website traffic, which may drive advertising revenue and marketing opportunities.

Importantly, apart from costs for setting up the website, the website owner does not generally pay the user to provide the content. However, there is no such thing as a free lunch. . . or is there? This article examines the potential European liability of online publishers for unmoderated online UGC. It does not cover the liability of the users themselves who are principally liable for the content they upload.

In the United States, website owners do not usually have to worry about actionable UGC,<sup>1</sup> unless they participated in creating or producing it, because of the general immunity provided by section 230 of the Communications Decency Act of 1996 and, for copyright infringement, the safe harbors provided by the Digital Millennium Copyright Act statutory notice and takedown procedures. The European position is not

as favorable to free speech. However, provided that the website is set up and operated in the right way, a website owner can usually escape liability, at least in practice.

## Spectrum of Online Intermediaries

In considering liability for UGC, it is important to appreciate that there is a spectrum of intermediaries that are more or less involved in the dissemination of the content. At one end of the spectrum is the company that operates the cables and routers that make up the backbone of the Internet. These mere conduits, by analogy with a postal or telephone service, are generally immune from liability for the content passing through their systems. Then there are the pure Internet service providers (ISPs), which do no more than enable the public to access the Internet.<sup>2</sup> Next are the entities that are technical hosts of websites, in the sense that they provide the servers on which the website is stored. Finally, there are those that control the UGC websites onto which users upload content. A key issue in European law is the extent to which website owners of UGC sites are immune from liability for actionable UGC over which they had no knowledge and did not create.

## Moderation

Before analyzing the European legislation, it is worth differentiating among different types of UGC websites. The more a website is involved with the UGC, the more likely its liability will be the same as for its own editorial content.

The first type of UGC website moderates (i.e., checks or vets) the UGC before it goes online. The website owner or its employee or agent typically checks for potential legal issues (see below) and inappropriateness<sup>3</sup> and makes a decision on what to upload and what to shelve. Sometimes, the UGC will be edited before it goes online. The advantage of such “pre-moderating” is that the website becomes a cleaner environment and

the likelihood of any infringing content being uploaded onto the site is reduced. The main disadvantages are the probable delay before content goes live, and the potential liability of the website owner (as an editor or publisher) for the UGC, even if it did not create the material. In addition, moderation can be costly and time-consuming.

Websites that do not moderate their UGC may be able to rely on an intermediary defense, provided that the website was set up appropriately, the website owner was not aware of the problem, and the operator took reasonable care and acted promptly to remove the content once on notice. The European and UK intermediary exemptions from liability are relatively untested, so for now the website owner will have to take the risk that they will provide protection in the circumstances.

In our view, the middle ground of “post-moderation,” that is, checking the UGC after it has been uploaded, is risky from a legal perspective although it may be a sensible compromise in practice. If the website owner can prove that it had not reviewed and was not aware of the content until put on notice and adequate safeguards were in place, it may be in the same position as an unmoderated website. However, if the moderators noticed the infringing content but let it through, or ought to have noticed it, the website owner may legally be in the same position as an editor or publisher of the content. Further, a claimant could claim that the website’s moderators should have spotted the infringing content more quickly and by not removing the content, the website owner was not taking reasonable care. A claimant could also claim that if the website could post-moderate all content, then it should have pre-moderated it. These arguments are currently untested, at least in the UK.

The worst of all worlds, from a European legal liability perspective, is to have strollers on the site. These are individuals who peruse the content and

---

*Timothy Pinto (t.pinto@taylorwessing.com) is a senior associate, and Niri Shan (n.shan@taylorwessing.com) is a partner in the London office of Taylor Wessing. Dr. Stefan Freytag (s.freytag@taylorwessing.com) is a partner and Elisabeth von Braunschweig is an associate in the firm's Munich office. Valérie Aumage (v.aumage@taylorwessing.com) is an associate in the firm's Paris office. The authors are part of Taylor Wessing's publishing and digital content group which comprises intellectual property, media, data privacy, and Internet lawyers. This article is intended for general guidance only. European law relating to liability for UGC is relatively untested and the views expressed may change in light of developing case law.*

sometimes interact with the discussion. It may not be clear what they have seen and what they have not at any one time. If they fail to take down infringing content, the website is likely to be liable by virtue of the fact that it will be deemed to have known of the infringement. Similarly, if the strollers do not access a particular thread, then the claimant could argue that the website did not take reasonable care because the strollers should have checked the thread in question.

### Overview of European Legislation

In the Member States of the European Union,<sup>4</sup> liability of online intermediaries is generally governed by the Directive on electronic commerce (2000/31/EC) (E-Commerce Directive). This Directive has been implemented by national law by each Member State.

## Worst of all possible worlds, from an EU perspective, is to have strollers on the site.

National courts interpret and apply the law, but where the national court considers that European law is unclear, it may or in some cases must refer the matter to the Court of Justice of the European Union (ECJ). Therefore, a body of case law will be built up by the ECJ, which is designed to harmonize any national court discrepancies. Nonetheless, in practice, even a large body of ECJ case law does not eliminate all national differences.

In brief, the E-Commerce Directive provides exemptions from liability for three types of intermediaries: (1) mere conduits, e.g., entities that provide the cables, routers, and other infrastructure of the Internet; (2) entities involved merely in caching, i.e., those whose servers are designed to speed up the Internet by mirroring the servers of the original website; and (3) hosts. This article focuses on the third category, i.e., hosts. None of the exemptions prevent a national court from granting injunctive relief and requiring the intermediary to terminate or prevent actionable content from being posted.

### The Hosting Exemption

The hosting exemption, under Article 14 of the E-Commerce Directive, states:

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:
  - i. 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
  - ii. the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.
3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

The hosting exemption appears to be of general application and covers, for example, liability for defamation, breach of confidentiality or privacy, intellectual property infringement, and criminal laws.<sup>5</sup>

Whether the hosting exemption applies to a website that carries UGC depends on the interpretation of the terms *information society service*, *hosting*, and the recitals to the Directive.<sup>6</sup>

### Potential Applicability to Online Publishers of UGC

*Information society service* covers "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 a service."<sup>7</sup> It includes economic activities such as hosting information provided by a recipient of the service and offering online information or commercial communications (even if the services are not remunerated by those who receive them).<sup>8</sup> These definitions and other aspects of the Directive await interpretation by the European Court of Justice.

Our initial view is that an online publisher that enables the public to post unmoderated content on its website is, on balance, likely to fall within the hosting defense *vis à vis* the UGC as being an information society service that consists of the storage of information provided by a recipient of the service. Although it is possible that the courts could limit the definition of a host to an ISP, which merely enables individuals to set up their own websites and stores a recipient's data, it would seem proportionate, bearing in mind the right of freedom of expression (which is expressly mentioned in Recital 46), for website owners hosting unmoderated UGC to be able to rely on the hosting exemption, provided that they meet other criteria (e.g., absence of relevant knowledge and prompt action once on notice). Otherwise, website owners with such UGC would face constant liability for unlawful content over which they had no control or knowledge. However, there is a contrary view, and it is difficult to predict which way the courts will go on this question. The contrary view is that the hosting exemption applies only to service providers that do no more than enable users to store data in a technical sense. If so, a website owner that publishes editorial, as well as user generated, content would not be able to benefit from the hosting defense. Moreover, a publisher that benefits from advertising revenue resulting from the UGC would therefore not be able to benefit from any immunity from liability. This argument is supported by Recital 42 of the Directive, which states that

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.

### Injunctions and Monitoring

Recital 45 confirms that the exemptions from liability for intermediary service providers do not affect the possibility of courts ordering injunctions requiring “the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.”

Recital 47 of the Directive states that Member States are prevented from imposing a general monitoring obligation on service providers. However, “this does not concern monitoring obligations in a specific case.” According to Recital 48, Member States may require hosts to “apply duties of care, which can reasonably be expected . . . in order to detect and prevent certain types of illegal activities.”

### Implementation in England

Article 14 of the Directive has been implemented into UK law as meaning that hosts of UGC that do not have the requisite knowledge or awareness and act expeditiously upon notice are not liable for damages, other pecuniary remedies, or criminal sanctions (Regulation 19 of the Electronic Commerce (EC Directive) Regulations 2002).<sup>9</sup> However, injunctive relief is still available to a claimant.<sup>10</sup>

In most UGC libel cases, the defendant would not be in a position to give a general undertaking not to repeat the underlying allegations or similar allegations, because it has no control over what users post on an unmoderated site. It could undertake that it will not itself repeat the allegations or similar allegations in editorial, as opposed to user generated, content and that it will not re-post the content that it previously took down. If the English court accepts this reasoning (which is likely in our view), the defendant has permanently taken down the specific post at issue, and there is no threat that the website owner would itself be making the allegations about the claimant, there would usually be little or nothing to enjoin.<sup>11</sup>

In practice, therefore, if the defendant takes down the content complained of as soon as practicable after it has been put on notice, the hosting exemption is likely to provide a complete defense in most cases. This conclusion has not so far been tested by the English courts. The German courts have required that the website owner take affirmative reasonable steps to prevent future similar postings. Given Recitals 47 and 48 of the Directive, such measures could be ordered in an English court. If there is a real threat that posters will repeat the libel, steps can be taken to suspend them. According to Regulation 22:

In determining whether a service provider has actual knowledge for the purpose of the hosting defense, the court shall take into account all relevant matters and, among other things, shall consider:

- (a) whether the service provider has received a notice through a means of contact, made available by the provider which makes it possible to be contacted directly, rapidly and effectively; and
- (b) the extent to which any notice includes –
  - (i) the full name and address of the sender of the notice;
  - (ii) the details of the location of the information in question; and
  - (iii) details of the unlawful nature of the activity or information in question.<sup>12</sup>

These factors tally with our general recommendation for online publishers to have a “report this post” facility and to insist that the claimant specifies the particular words complained of (at least in a libel action) and details of why the information is allegedly unlawful.

In the libel context, assuming a UGC website owner is a host, the Regulation 19 hosting defense is potentially easier to rely on than the so-called section 1 libel defense, which is explained below. This is because the knowledge requirement for section 1 relates only to whether the statement is *defamatory* (e.g., the meaning would make people think the worse of the claimant, whether there is a defense preventing liability), while Regulation 19 requires actual knowledge of *illegal* activity or information. For example, an allegation

that someone is a thief has a *defamatory* meaning, but the allegation is not *illegal* if it is true, i.e., he has been convicted of theft. However, in practice, we do not think that this distinction will make much difference in most cases once the website owner has been put on proper notice of the complaint by the claimant. The factors discussed below as regards the section 1 defense to libel are likely to be relevant to the more generally applicable Regulation 19 defense.

### Implementation in Germany

The E-Commerce Directive was implemented into German law<sup>13</sup> in 2001. The host is always liable for its “own” content.<sup>14</sup> Liability for UGC is governed by rules implementing the E-Commerce Directive as follows:

- Any liability under criminal law for third-party content is excluded if the host is not aware of the unlawful acts or content. Liability for damages for UGC is excluded if:
- i. the host is neither aware of the infringement nor of any facts or circumstances which render the unlawful act or information obvious, or
  - ii. the host acts expeditiously upon awareness of the unlawfulness and blocks the information or the access to it.<sup>15</sup>

However, these liability privileges for criminal responsibility and damages do not extend to claims for an injunction. According to the case law of the Federal Supreme Court,<sup>16</sup> once a host obtains knowledge of actionable content hosted on its site, it is not sufficient for the host just to delete or block this information, but it must additionally take “reasonable” measures to prevent future postings “of the same kind.” However, the precise extent of such duties of care for Internet providers are to be determined on a case-by-case basis and may vary depending on the type of online service provided. If the host does not take these adequate measures, the aggrieved party may obtain an injunction against the website owner.

It remains to be interpreted by the courts what measures are considered reasonable, and what further acts are held to be of the same kind. Consequently, a high degree of uncertainty prevails as to the obligations that a host has to



fulfill once it obtains knowledge of a claim based on UGC.

In cases against eBay concerning trademark infringements arising from counterfeit branded products offered by eBay users, the Federal Supreme Court<sup>17</sup> stated that the host has an obligation to use search software, which the court regarded as a reasonable measure to identify potential further infringements. Certain search terms would have to be entered into a search engine, the results examined manually (if necessary), and the infringing items taken down. According to the court, the limits of reasonable measures are reached if there are no suitable terms to enter into such a search engine.

Measures by which the website owner is ordered to do something that would undermine the whole business model of the website (provided that the business model of the website is not unlawful) are not considered to be reasonable.<sup>18</sup>

In a case concerning offers on eBay by users of products not suitable for minors, the Federal Supreme Court<sup>19</sup> stated that postings “of the same kind” not only include offers identical to those at issue, i.e., the same product by the same user, but also include offers of other improper products by the same user. Further, the host has to prevent the same products from being offered by other users.

### **Recommended Measures on Receiving Notice**

Once the host has become aware of any actionable content, at least the following measures should be implemented:

- immediately block and remove the content;
- inform the user;
- use search/filter software to identify, remove, and block contents “of the same kind,” i.e., identical and similar content by the same user; similar content by the same user; and identical content by other users; and
- manually review the results produced by the search/filter, if necessary.

### **Doctrine of Appropriation of Third-Party Content**

Several German courts (including at the appellate level and confirmed to a significant degree by a November 2009 decision of the Federal Supreme Court<sup>20</sup>)

have developed a doctrine of appropriation of third-party content. The doctrine states that if the host has appropriated the UGC, it can be made liable for the appropriated content as for its own content. This doctrine seems to contradict the E-Commerce Directive, but is nevertheless applied by a number of German courts. As a result of its recent confirmation by the Federal Supreme Court, the doctrine poses further threats to website operators who face claims in Germany.

Whether there has been an appropriation depends on the design of the website. In 2007, the Hamburg Court of Appeal<sup>21</sup> presumed the appropriation of UGC because recipes uploaded to the website by users, including infringing photos, constituted the entire editorial content of the website. The Federal Supreme Court confirmed this decision on November 12, 2009.<sup>22</sup> Because the full reasoning of the court had not been published when this article was prepared, a thorough assessment cannot yet be made. However, according to the published press release, the court seems to have followed the reasoning of the Hamburg Court of Appeal, which found that the host reviewed the recipes before activating them, was granted comprehensive rights of exploitation of the accompanying photographs in the website’s terms of use, and affixed its logo to them. According to the court, the host at a minimum should have ensured that the photographer’s name was identified when the photographs were uploaded. If that name was not the name of the party uploading the content, the upload would have to be refused.

In another decision handed down in 2008, the Hamburg Court of Appeal<sup>23</sup> confirmed an appropriation of UGC in the case of a host providing a platform for users to upload and share picture files. The users were able to register without identification and could then upload picture files and share them with third parties by sending or publishing links to their “public” album. Third parties were able to order prints of these picture files from the host for payment, while the uploading users did not receive any remuneration. The court argued that the host had appropriated the UGC because the picture files constituted the only substantial content of the website, the host enabled users to purchase the photos from him, the host issued an invoice for the sale, every photo was made accessible under the website’s

brand (as well as the user’s name), and the website terms granted the host comprehensive rights of exploitation.

In a 2002 case, the Cologne Court of Appeal<sup>24</sup> found the host of a photo community website to be liable for the infringement of Steffi Graf’s personality rights by a photograph uploaded by a user. The court reasoned that the host had, primarily but not exclusively in an automated process, enabled users to activate communities about certain themes chosen by the users on its website by requesting a short description of the community and an assessment of the target age group. In doing so, the host was found to have given the impression that it was vetting the third-party content beforehand and identifying itself with it.

Other decisions of the Hamburg Court of Appeal show a more differentiated application of the appropriation doctrine in regard to discussion forums, although there are no signs that the doctrine is being abandoned. In February 2009, the court<sup>25</sup> ruled that copyrighted photographs uploaded by a user in an unmonitored discussion forum were not appropriated by the host, reasoning that the content was posted in a section of the website labeled “community,” as opposed to the editorial part of the website, and the host had not influenced user content in any way. The facts that the host had provided the themes and structure for the discussion forum and that the website was to a certain extent financed by advertising were not seen as sufficient for an appropriation of the UGC.

In another decision, the court<sup>26</sup> applied the same reasoning, ruling that the provision of themes, structures, or forum rules regarding prohibited content was not sufficient for an appropriation. In that decision, the court stated that the host of a discussion forum was not obligated to implement technical measures against uploading photos in the forum from the outset. This rule also applies even if the host had become aware of one case of infringement through the upload of a photo.

In any case, hosts of discussion forums should be careful to prevent any impression that might enable the appropriation doctrine to be applied. An appropriation could be implied if the host, as a result of specifying the topic, would expect infringing contributions.<sup>27</sup> Generally, however, the host of a discussion forum is not obliged to monitor its

# PRACTICAL TIPS TO REDUCE LIABILITY IN THE EU

1. Do not monitor or edit UGC unless monitoring is effective and necessary, and the publisher is aware of the potential legal consequences. Do not “lightly” monitor.
2. Do not invite, encourage, or promote potentially infringing content. Instead, emphasize that such content is not acceptable.
3. Make sure that the website has an effective “report this post” facility and that it clearly identifies what is UGC and what is editorial content.
4. Make sure that website terms:
  - are expressly agreed to by users;
  - give the publisher the *discretion* to remove content and suspend or terminate the accounts of users but do not represent that monitoring is being undertaken on the website;
  - prohibit defamatory, private, and any other infringing content;
  - include (at least in the UK an appropriate irrevocable copyright license for the publisher to use and remove content, whether or not the user is still using or registered with the website. In Germany, however, such a license to use content may be construed as appropriating third-party content and establishing liability;
5. Put in place effective procedures for promptly dealing with complaints, including take-down procedures.
6. In general, notify the claimant after material has been taken down without admission of liability.
7. Notify the relevant user that the material at issue has been removed and the reason why. If appropriate, consider sanctions against such users, such as suspending or terminating their accounts.
8. Try to keep the users on board and always deal with them politely. They may publicize their grievances on the Internet.
9. Use technology to block music, photographs, and movie files, unless appropriate.
10. Have an internal policy on how to deal with requests for the identity of users. Note that these requests raise a number of issues that are beyond the scope of this article.
11. Take expert legal advice as appropriate, e.g., on setting up the website and dealing with claims.

content.<sup>28</sup> Monitoring content may make matters even more difficult for the host, for instance, if the host reserves the right to examine or “approve” third-party content prior to its upload. This could be interpreted by the courts as appropriation.

Website owners should avoid the following acts to minimize the risk that the German appropriation doctrine will be applied:

- vetting content before its posting by the host of the UGC, i.e., giving rise to awareness of the content by the host;
- compelling the user to grant comprehensive and/or commercial exploitation rights (beyond a mere consent to host the content) with respect to the UGC (compare with the recommendation under English law to obtain a copyright license);
- using the UGC for the commercial purposes of the host, e.g. if the host advertises its products by using the UGC, offers to sell or sublicense the UGC, or generates advertising revenue;

- influencing and controlling the way that the UGC is presented or provided, e.g., taking an “initiating and controlling” influence over the UGC by providing an environment that fosters illegal activities by users (by encouraging such activity through statements on the website or by strollers participating in the discussion in issue);
- presenting the UGC tagged with the host’s brand, even if the user’s name is also mentioned;
- presenting the UGC in a manner that makes it impossible for a reasonable third-party spectator to distinguish the UGC from branded/editorial content; and
- having personal involvement by the host in a discussing forum without distancing itself from the potentially unlawful UGC.

## Implementation in France

France implemented E-Commerce Directive 2000/31/EC on 21 June 2004.<sup>29</sup> Under French law, the key issue is whether the website publisher is the

publisher of the UGC or merely the host of the content.

There is a substantial amount of French case law on this issue. To summarize, the courts consider that the website owner is the publisher of the UGC if it made editorial choices in the posting of the content.<sup>30</sup> According to the 2008 decisions involving YouTube and Dailymotion, this criterion is not met for unmoderated content.<sup>31</sup>

These decisions are consistent with French defamation law, which states that the online publisher of a website is liable for defamatory content only if the content was uploaded by the website publisher, rather than being posted by a user without the publisher’s prior control.<sup>32</sup> By definition, the publisher has no prior control of unmoderated UGC.

The YouTube and Dailymotion decisions apply to defamatory content as well as to other legally actionable content (e.g., copyright or trademark infringement or invasion of privacy). If the UGC is not moderated, the website publisher will be considered as the hosting provider of the content.

Under French law, the only legal obligation for hosts of UGC is to remove the content promptly as soon as the host has knowledge that it is unlawful. The host is deemed to be aware of the nature of the content when a claimant provides the following information:

- date of the notice;
- claimant's contact details;
- host's details;
- description of the violation of law or rights;
- reasons why the content violates claimant's rights; and
- copy of a letter sent to the author of the content requesting that the content be removed, or proof that the author cannot be identified or contacted.<sup>33</sup>

Following proceedings brought by luxury trademark owners against eBay for counterfeit products sold on eBay, the French court ruled against eBay in 2008 and ordered it to pay damages.<sup>34</sup>

## To reduce the risk of liability, take down the disputed post as soon as practicable.

The online auction and shopping website was held liable for trademark infringement because it did not implement any measures, in particular, measures for the moderation of the eBay website, to prevent the sale of counterfeit products. Although seemingly inconsistent with other decisions, the court based its ruling on the fact that eBay was not only the host of the offers for sale, but also that it acted as an agent for setting up the business relationship between buyers and sellers. eBay was found liable because of its role in the transaction, not merely as the host of the website.

In a later, contrary decision, another French court made no reference to any agent activity. Instead, the court considered that eBay acted as a host for its online sales-related activities and as a publisher for its advertising management-related activities.<sup>35</sup> Consequently, the court decided that eBay was not liable for the offer for sale posted on its website by

the users. However, the court pointed out that the claimant and eBay had entered into discussions about the possible implementation of a basic monitoring system that could prevent the sale of counterfeit product. To encourage such an implementation, the court suggested a conciliation measure whereby the parties try to find an agreement with the help of a third-party appointed by the court. It is not known whether the parties accepted this measure.

An appeal has been lodged against both of these decisions, so the French position on this matter is not yet well established.

### English Defamation Law and the Section 1 Defense

A person has a defense under section 1 of the UK's Defamation Act 1996 if he shows that:

- he was not the author, editor or publisher of the statement complained of,
- he took reasonable care in relation to its publication, and
- he did not know, and had no reason to believe, that what he did caused or contributed to the publication of a defamatory statement.

### *Not the Author, Editor, or Publisher*

*Editor* means "a person having editorial or equivalent responsibility for the content of the statement or the decision to publish it," and *publisher* means "a commercial publisher, that is, a person whose business is issuing material to the public, or a section of the public, who issues material containing the statement in the course of that business."<sup>36</sup> Clearly, if a media company chooses to pre-vet or moderate all UGC, it will be considered as an editor, publisher, or both and will not be able to rely on the section 1 defense. In a rigorous post-moderation system, where it is clear what has been moderated and when, the website owner may be able to rely on section 1 up to the time of moderation, provided that the reasonable care and knowledge requirements are met. There is no case law on this point.

The English courts have also not yet assessed the argument that a commercial publisher, such as newspaper or magazine publisher with a website with news or other online editorial content, can never avail itself of a section 1

defense on the basis that it falls within the definition of a publisher. However, our initial view is that this argument is unlikely to succeed and that the important thing is whether the website owner had knowledge of, and control over, the contents of the user generated statement complained of through having pre-vetted, moderated, or edited the relevant words.

The contrary view is that the section 1 defense in relation to the Internet is more designed for pure ISPs that merely provide access to the Internet or those that provide other forms of technical assistance, rather than publishing or presenting any content. See also the arguments above as regards the likely applicability of the hosting exception.

A person shall not be considered the author, editor or publisher of a statement if he is *only* involved, for example:

- in processing, making copies of, distributing or selling any electronic medium in or on which the statement is recorded, or in operating or providing any equipment, system or service by means of which the statement is retrieved, copied, distributed or made available in electronic form;
- as the broadcaster of a live program containing the statement in circumstances in which he has no effective control over the maker of the statement; or
- as the operator of or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control.

The court may look to these and other examples "by way of analogy in deciding whether a person is to be considered the author, editor or publisher."<sup>37</sup>

In our view, an online publisher that has unmoderated UGC on its website is likely, so far as the UGC is concerned, to fall within the definition of a person who is only operating a service by means of which the statement is made available in electronic form or by analogy with the broadcaster of a live program.<sup>38</sup> However, this conclusion has not been tested in court.

The more the online publisher contributes to or provokes the website content, the more likely it will be deemed an

editor or publisher. For example, if the website owner invites users to contribute comments about a particular news article that is almost certainly going to cause defamatory UGC to be posted about the claimant (e.g., on whether the claimant is a terrorist), then the court is likely to hold that the website owner is the editor or publisher of the resulting UGC.

Similarly, if the online publisher provides users with a range of possible answers (some of which are defamatory of the claimant) and asks users to select which answer they think applies, the publisher is unlikely to be able to argue that it was not the editor or publisher, having provided both the question and possible answers.<sup>39</sup>

Online publishers that wish to stimulate public debate about certain controversial topics need to be aware of the risk of being held responsible for user-generated defamatory content. To minimize the risk of the claimant arguing that the publisher encouraged or contributed to defamatory comments, one solution is to not directly invite user-generated comments in relation to such topics. Another potential solution to this problem is to pre-vet such comments e.g., those about reports of criminal conduct, criminal court proceedings, or both.<sup>40</sup> However, the publisher will not be able to use a section 1 defense entirely because pre-vetting content before it goes online is tantamount to editing it, publishing it, or both.

Another untested factor is the extent to which the UGC needs to be visually separated from the editorial content. A site with separate webpages devoted only to UGC, apart from editorial content, may enable the court to more easily hold that the defendant is not an author, editor, or publisher of the UGC, even though it is clearly the publisher of the editorial content elsewhere on the site. However, we believe that, provided that it is clear what is UGC and what is editorial content, a news website that has UGC in a comments box below an article can still potentially rely on section 1 (subject to the other factors discussed above).

### **Reasonable Care**

The relevant factors used to determine whether a person took reasonable care, or had reason to believe that what he did caused or contributed to the publication of a defamatory statement, include:

- the extent of his responsibility for the content of the statement or the decision to publish it,
- the nature or circumstances of the publication, and
- the previous conduct or character of the author, editor or publisher.<sup>41</sup>

In *Godfrey v Demon Internet*,<sup>42</sup> the English court held that the section 1 defense failed in a case where the defendant ISP had been notified of the defamatory contents posted in one of its news group message boards but did not take them down. Therefore, online publishers should promptly take down a post when put on notice of a complaint if they wish to be able to rely on section 1.

The circumstances that are likely to be relevant to whether an online publisher has taken reasonable care may include whether the website has:

- user terms that prohibit defamatory material;
- a facility for people to report posts which they believe contain, for example, defamatory material; and
- an effective internal notice and take down procedure, so that posts are taken down promptly.

If the website owner encourages or promotes actionable content, then it is unlikely to be able to rely on the section 1 defense, either because it will be deemed the editor or publisher of the content, it will be deemed not to have taken reasonable care, or both. Similarly, anyone employed as a discussion board moderator or stroller should not participate in the discussion. Otherwise, the website owner may not be able to rely on section 1.

If the section 1 defense fails, the online publisher may not be in a position to defend the claim.<sup>43</sup> However, the EU hosting defense discussed above should also be considered.

### **Dealing with Libel Complaints**

The first suggested step for minimizing the risk of liability is to take down the disputed post as soon as practicable. Refusal to take down an arguably unlawful post after notification can be risky.

Under the UK's Pre-action Protocol for Defamation, a claimant should identify the words complained of. Sometimes claimants complain about defamatory content but do not specify the

words at issue. For example, they may complain about a whole thread or message board. It is generally appropriate following a libel claim to insist that the claimant specify the relevant post number, rather than to search out the defamatory post on behalf of the claimant (and thus engage in monitoring) or to take down entire threads where perhaps only one post may refer to and/or be defamatory of the claimant.

Next, we suggest that users be notified that their posts have been taken down and a brief description of the reasons why. This may help to establish that the publisher is taking reasonable care and reduce the risk of users repeating the allegations.

### **An Obligation to Monitor?**

If the online publisher has been notified of a defamatory post about a claimant and takes it down, does the media company have a duty to (1) monitor all UGC to ensure that no more defamatory content is posted about the claimant,<sup>44</sup> (2) bar the user from making any subsequent posts, or both? The position may be more complicated if there are a series of potentially defamatory posts about a claimant, perhaps by one user, which continues even after posts have been taken down.

The English courts have not yet answered these important questions. In doing so, they will need to balance the right of freedom of expression of the online publisher, the user, and the public against the claimant's right to reputation. They will also need to bear in mind that the online publisher is not generally in a position to know where the truth lies, because it stands in the middle between the poster of the content and the claimant. The claimant's primary claim, after all, is against the user.

If the website owner chooses to monitor all content for references to the claimant or all posts by users who have a history of defaming the claimant (despite their posts being taken down), it may minimize the risk of further defamatory posts. However, monitoring destroys the possibility of a section 1 defense because monitoring is likely to equate to editing and/or publishing. For this reason, we do not generally recommend this strategy. Once a website starts to monitor on behalf of one claimant, it will have set a precedent and may then be required to monitor



on behalf of another claimant, until the online publisher ends up monitoring its UGC on behalf of numerous claimants. This runs counter to the philosophy and business model of an unmoderated UGC site.

### Dealing with Repeat Offenders

If a user repeatedly defames the claimant, despite removal of previous posts and notification of the reasons why, the online publisher may need to suspend the user until satisfied that the user will stop the campaign, the allegations can be justified, or both.<sup>45</sup> Suspending or, in extreme cases, banning a repeat offender is likely to be seen by the courts as contributing to taking reasonable care.

### Comparison with the United States


In the United States, the broad protection provided by section 230 of the Communications Decency Act of 1996 means that websites generally do not have to face many of these issues. Section 230 provides that “no provider . . . of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”<sup>46</sup> *Interactive computer service* is broadly defined as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server.”<sup>47</sup> The most common interactive computer services are websites.

The immunity is lost to the extent that the publisher is an *information content provider*, which is defined as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet.” As the Ninth Circuit Court of Appeals explained in *Fair Housing Council of San Fernando Valley v. Roommates.com*<sup>48</sup>:

A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is “responsible, in whole or in part” for creating or developing, the website is also a content provider. Thus, a website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.<sup>49</sup>

In some very limited situations, therefore, a website may be potentially liable if it helped create the content at issue, as happened in *Roommates.com*. The website in *Roommates.com* had been designed to match individuals looking to rent a room with users who were renting out a room. The website required users to select options from drop-down and check-box menus about their age, sex, and sexual orientation, and whether children live in the household, and about users’ preferences on these subjects.<sup>50</sup>

The majority of the *Roommates.com* court held that, by “requiring subscribers to provide the information as a condition of accessing its service, and by providing a limited set of pre-populated answers, Roommate becomes much more than a passive transmitter of information provided by others.”<sup>51</sup> Thus, the defendant could not claim immunity from alleged violations of the Fair Housing Act as a mere “provider . . . of an interactive computer service,” as defined by Section 230.

On the other hand, and in stark contrast to the EU, under Section 230 immunity is not lost once the publisher is on notice of the allegedly defamatory content.<sup>52</sup> As a result, failure to take down a post, even one that gives rise to liability for the individual who posted it, does not take away the safe harbor for the website owner. 

### Endnotes

1. See *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.*, 489 F.3d 921 (9th Cir. 2007), *rev’d in part, vacated in part, aff’d in part*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

2. Under English case law, pure ISPs are not publishers at common law of material merely communicated via their systems: *Bunt v Tilley* [2006] ECHC 407 (QB). In this case, AOL, BT, and Tiscali were held not publishers of the allegedly defamatory words as there was “nothing to suggest knowing participation.” Eady J held that “for a person to be held responsible [as a publisher at common law] there must be knowing involvement in the process of publication of the relevant words. It is not enough that a person merely plays a passive instrumental role in the process.” In *Metropolitan International v Google* [2009] EWHC 1765 (QB), the same judge held that Google was not a publisher at common law for its (not paid for) search result “snippets” as there was no human involvement in their selection, which were generated by purely automatic search mechanisms.

3. Such as language, relevance, and whether the content is offensive or simply not to the liking of the moderator.

4. The European Union currently includes twenty-seven Member States.

5. There are some exceptions, e.g., taxation.

6. Recitals in EU legislation are almost or equally as important as the Articles themselves.

7. See Recital 17 of Directive 2000/31.

8. See Recital 18 of Directive 2000/31.

9. In *Karim v Newsquest Media* (27 October 2009), Eady J granted summary judgment to a website owner on the basis, among other things, that it could rely on the Regulation 19 hosting defense as regards the user comments related to an article on the site.

10. For example, section 97A(1) Copyright, Designs and Patents Act 1988 states that the High Court shall have power to grant an injunction against a service provider where the provider has actual knowledge of another person using its service to infringe copyright.

11. In *Karim v Newsquest Media* (27 October 2009), Eady J said that after the comments complained of had been taken down, an injunction became a “theoretical matter” on the facts of that case.

12. Regulation 22 Electronic Commerce (EC Directive) Regulations 2002.

13. Art. 10-14 E-Commerce-Directive has been implemented by Sec. 7-10 of the Telemedia Law (Telemediengesetz).

14. Sec. 7, para. 1 Telemedia Law (Telemediengesetz). The notion of “own” content is not used in the European Directive, but had been used in the previous German law on ISP liability and was therefore kept.

15. Sec. 10, sent. 1, nos. 1, 2 Telemedia Law (Telemediengesetz).

16. Federal Supreme Court, Decision of 12-7-2007–I ZR 18/04.

17. Federal Supreme Court, Decision of 30-4-2008–I ZR 73/05; Decision of 19-04-2007–I ZR 35/04.

18. Federal Supreme Court, Decision of 12-7-2007–I ZR 18/04; Decision of 19-04-2007–I ZR 35/04; Decision of 11-03-2004–I ZR 304/01.

19. Federal Supreme Court, Decision of 12-7-2007–I ZR 18/04.

20. Federal Supreme Court, Decision of 12-11-2009–I ZR 166/07.

21. Court of Appeal Hamburg, Decision of 26-09-2007–5 U 165/06.

22. Federal Supreme Court, Decision of 12-11-2009–I ZR 166/07.

23. Court of Appeal Hamburg, Decision of 10-12-2008–5 U 224/06.

24. Court of Appeal Cologne, Decision of



28-02-2002–15 U 221/01.

25. Court of Appeal Hamburg; Decision of 04-02-2009–5 U 167/07.

26. Court of Appeal Hamburg, Decision of 04-02-2009–5 U 180/07.

27. District Court Düsseldorf, Decision of 14-02-2002–2a O 312/01.

28. Court of Appeal Düsseldorf, Decision of 7-6-2006–I-15 U 21/06; Court of Appeal Hamburg, Decision of 04-02-2009–5 U 180/07.

29. Law n°2004-575 dated 21 June 2004 called “Loi pour la confiance dans l’économie numérique.”

30. Paris Court of Appeal’s decision of 21 November 2008, Paris Tribunal de Grande Instance’s decision of 14 November 2008.

31. Previously, French courts had concluded that if the website publisher made profits from advertising in conjunction with UGC, it was considered as the publisher of the UGC. The decisions of November 2008 overruled this analysis.

32. Article 93-3 of the law n°82-652 of 29 July 1982.

33. Article 6 I 5 of the law n°2004-575 referred to above as modified by the law

n°2007-297 of 5 March 2007.

34. Paris Commercial Court’s decisions of 30 June 2008.

35. Paris Tribunal de Grande Instance’s decision of 13 May 2009.

36. Section 1(2).

37. Section 1(3).

38. Arguably, a presenter of a live broadcast has more control over the content of the maker of the statement (albeit after the event) than a website owner does in relation to an unmoderated discussion board. The broadcaster can correct the position or immediately change the subject, whereas the website owner by definition is not usually even aware of what has been uploaded on an unmoderated site.

39. By analogy with the reasoning of the majority in the *Fair Housing Council of San Fernando Valley v. Roommates.com*, 489 F.3d 921, *aff’d en banc*, 2008 WL 879293 (9th Cir. Apr. 3, 2008).

40. Note the contempt of court risk in the U.K. of inviting comments about active legal proceedings.

41. Section 1(5).

42. [2001] Q.B. 201.

43. The defendant can see if it can defend

the claim using a substantive defense. However, as the defendant did not provide the UGC, it will be starting from a position of weakness (not to mention the general uphill task of defending libel claims under English law).

44. Contrast the position in Germany under the hosting exception.

45. Or that the publisher has some other substantive defense such as honest opinion or privilege.

46. 47 U.S.C. § 230(c).

47. 47 U.S.C. § 230(f)(2).

48. *Fair Housing Council of San Fernando Valley v. Roommates.com, L.L.C.*, 489 F.3d 921 (9th Cir. 2007), *rev’d in part, vacated in part, aff’d in part*, 521 F.3d 1157 (9th Cir. 2008) (en banc).

49. *Roommates.com*, 521 F.3d at 1162–63.

50. E.g., users had to use a drop-down menu indicating whether they were willing to live with “Straight or gay” males, only “Straight” males, only “Gay” males, or “No males,” or they could choose a blank response. *Id.* at 1165.

51. *Roommates.com*, 521 F.3d at 1166.

52. *See* *Blumenthal v. Drudge*, 992 F. Supp. 44 (D.D.C. 1998).