

Liability of intermediary service providers in Romania

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Abstract

The purpose of this paper is to analyze the legislation, doctrinal opinions and relevant case law regarding the liability of intermediary service providers in Romania and to contribute to the current stage of knowledge in this matter. The objectives pursued by the author are: identification of the peculiarities of the transposition of the E-Commerce Directive into Romanian legislation; identification of problems that could arise from law's interpretation; issuing of the de lege ferenda proposals. According to Romanian Law, the rule is the liability of the intermediary service provider. The liability limitations apply to certain clearly delimited activities carried out by service providers, precisely defined by art. 12-15 from Law no. 362/2002, as: mere conduit, caching, hosting, search engines and hyperlinks. Romanian Law does not offer the possibility to impose on service provider an obligation to monitor the information they transmit or store or an obligation to actively seek out facts and circumstances, even if it could be only for specific, clearly defined individual case. The notice and take down procedures for illegal content is not a legal obligation according to Romanian Law. The Romanian Law is mandatory only for service providers established in Romania.

Keywords: provider of information society service, mere conduit, caching, hosting, search engine, hyperlink

JEL Classification: K33, K42

I. Introduction

The Internet is one of the most vibrant communication development platforms that mankind has ever seen since Gutenberg's press revolutionized the printing science.

The limitation of liability of intermediary Internet service providers is necessary both from the point of view of innovation and of investments in the Internet technology, as well as for the protection of the fundamental rights of citizens, including the right to private life and to freedom of expression².

The issue concerning the limitation of liability of intermediary Internet service providers was one of the first problems for the actors in the virtual environment.

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² Electronic Frontier Foundation, *Submission of the Electronic Frontier Foundation on the Consultation on the EU E-Commerce Directive (2000/31/EC)*, Available at <http://www.eff.org/files/filenode/international/EFFEUeCommerceDirectiveConsultationResponse.pdf> Last access date: 03.11.2011

In the late 90s, in the United States of America, two legal regimes were legislated, “vertically” setting (by matters) the conditions for exonerating the intermediary Internet service providers from liability:

- In 1996, the Communications Decency Act (CDA) – section 230 (c)³ regulated the exoneration from liability in any matter, except for intellectual property, if the content is supplied by someone other than the Internet service provider;
- In 1998, Digital Millennium Copyright Act (DMCA) - title 512⁴ regulated the exoneration from liability in the matter of copyright, but only under certain conditions⁵.

The most representative cases brought before the courts of law in the United States of America, having as object the liability of intermediary Internet service providers were the following: Zeran vs. American Online Inc.⁶, Cubby, Inc. vs. CompuServe⁷, Religious Technology Center vs Netcom⁸.

In the European Union, the liability of intermediary Internet service providers is regulated “horizontally” (for all matters, except for online games, private life and personal data) according to Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), as adopted on the 8th of June 2000⁹.

II. The regulatory framework regarding the civil liability of intermediary service providers based on Romanian law

In Romania, civil liability, in general, is regulated in Chapter IV from the New Civil Code of Romania¹⁰ which constitutes the common law norm in the

³ U.S. Congress, *Communications Decency Act*, 1996. Available at: <http://groups.csail.mit.edu/mac/classes/6.805/articles/cda/cda-final.html>, Last access date: 03.11.2011

⁴ U.S Copyright Office, *The Digital Millennium Copyright Act of 1998*. Available at: <http://www.copyright.gov/legislation/dmca.pdf>, Last access date: 03.11.2011

⁵ Lilian Efwards, *Role and Responsibility of Internet Intermediaries in the Field of Copyright and Related Rights*. Available at: http://www.wipo.int/copyright/en/doc/role_and_responsibility_of_the_internet_intermediaries_final.pdf, p. 7. Last access date: 03.11.2011

⁶ Decision No. 97-1523 from 21.11.1997, United State Court of Appeals for the Fourth Circuit, Available at: <http://www.techlawjournal.com/courts/zeran/71112opn.htm>, Last access date: 03.11.2011

⁷ Decision no. 776 F.Supp. 135 from 29.10.1991, United States District Court S.D. New York, Available at: <http://www.bitlaw.com/source/cases/copyright/cubby.html>, Last access date: 03.11.2011

⁸ Decision no. 907 F.Supp. 1361 from 21.11.1995, United States District Judge, Available at: http://www.law.cornell.edu/copyright/cases/907_FSupp_1361.htm, Last access date: 03.11.2011

⁹ European Parliament and Council, *Directive 2000/31/EC* on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, Official Journal of the European Community, L 178 from 17.7.2000, p. 257-272. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:en:NOT>

¹⁰ Romanian Parliament, *Law no. 287/2009 on the Civil Code*, Republished in the Official Gazette no. 505 from 15/07/2011, Part I and put in application by Law no. 71/20011 published in the Official

matter of civil liability.

Based on these common law norms, the Romanian legislator can establish special and derogatory regimes, in certain specific matters, which has priority of application against the common law norm, the common law norms remaining applicable only in the cases not stipulated by the special law.

The legal regime of the civil liability of intermediary service providers was regulated by Law no. 365/2002 on electronic commerce¹¹ („Romanian Law on Electronic Commerce”) in art. 11 – 15 which represents the special norm.

The Romanian law on electronic commerce transposes in the Romanian internal law the provisions of the Directive on Electronic Commerce.

When transposing the provisions of the Electronic Commerce Directive to the internal law, the Romanian legislator translated the Chapter (“Liability of intermediary service providers”) as “Liability of service providers”.

In *our opinion*, this erroneous translation creates a legal uncertainty in relation to determining the person that qualifies for benefiting from the legal exoneration from liability, given that the Romanian Law on Electronic Commerce defines the term “service provider” as any natural person or legal entity that provides to a determined or undetermined number of persons an information society service and not as a person that intermediates the providing of an information society service.

III. The legal regime of civil liability of providers of information society services in Romania

According to Romanian law, every person has the duty to comply with the conduct laws imposed by law or by custom, and must not be detrimental, by its action or non-action, to the legitimate rights or interests of other persons.

The one who *intentionally violates* this duty will be liable for all the *prejudices caused*, and must provide full remedy thereof (art. 1.349 par. 1 and 2 from the New Civil Code of Romania)

Based on those contemplated above, the general conditions for engaging tort liability according to Romanian law are: the existence of an illegal fact, the existence of a prejudice, the existence of a causality relationship between the illegal fact and the prejudice and the existence of guilt¹².

In the domain of service provider liability, the Romanian Law on Electronic Commerce establishes as *general principle, the liability of service providers for the information provided by them or on their behalf* (art. 11 par. (2) from Law no. 365/2002).

Gazette, Part I, no. 409 from 10/06/2011 and Regulation no. 15/2011 published in the Official Gazette, Part I, no. 694 from 30/09/2011

¹¹ Romanian Parliament, *Law no. 365/2002 on electronic commerce*, Republishing 1 in the Official Gazette no. 959 from 29/11/2006, Part I

¹² Stătescu Constantin, Bîrsan Corneliu, *Civil Law. General theory of obligations*, All Publishing House, 1997, Bucharest, p. 138

The liability of service providers can be engaged in any domain, including in the field of copyright, of industrial property law, pornography, violation of human rights etc.

The Romanian Law on Electronic Commerce established a series of *exceptions* (legal exonerations from liability) from the general principle of service provider liability, stipulated in art. 12-15, based on which service providers are not responsible for the information transmitted, stored or facilitated by them.

The enumeration of liability exonerations is stipulated by the law in an express and limitative manner.

In the same way as stipulated by the Directive on Electronic Commerce, the Romanian Law on Electronic Commerce establishes the special conditions of liability exoneration for service providers based on their functions.

The first exception concerns the exoneration from liability of the providers of information society services acting as intermediaries by mere conduit, regulated in Art. 12 from the Romanian Law on Electronic Commerce.

According to this article, if an information society service consists in the transmission within a communication network, of the information supplied by a consignee of the respective service or in providing access to a communication network, the provider of such service is not liable for the transmitted information unless the following conditions are cumulatively fulfilled:

- a) the transmission *was not initiated* by the service provider;
- b) *the person* which receives the transmitted information was not *chosen* by the service provider;
- c) *the content of the transmitted information was not influenced* in any way by the service provider, in the sense that it cannot be accused either of the selection of or of any possible modification of such information.

The transmission of the information and the providing of access, as mentioned above, also include automatic, intermediary and temporary storage of the transmitted information, to the extent to which such operation occurs only in order for the respective information to cross through the communication network and provided that the information is not stored for a period exceeding without justification the duration necessary for the transmission thereof.

The dispositions from art. 12 from the Romanian Law on Electronic Commerce reproduce almost identically the dispositions from art. 12 par. (1) and (2) from the Directive on Electronic Commerce.

In this case of exoneration of liability, the service provider must have a *signally passive* role, being just a channel for transmitting information for third parties, in which case it may not be held responsible either directly or jointly.

The condition stating that the “service provider was not the one who initiated the transmission” is fulfilled if the provider is not the one who decides on making the transmission. If the provider only performs automatically the initiation of a transmission upon the request of the consignee of its services, this condition is fulfilled.

The condition stating that the “person which receives the transmitted information is not chosen by the service provider” is fulfilled if the provider selects the receivers as an automatic response to the request made by the person which initiated the transmission.

The storage activities regulated by this article do not include the copies made by the service provider in the purpose of making the information available for certain subsequent users, as regulated by art. 13.

The term “automatic storage” makes reference to storage activities that take place through regular technology operations.

The term “intermediary storage” makes reference to the fact that the information is stored during transmission.

The Romanian case law does not include cases when Romanian courts were asked to interpret and apply the dispositions from art. 12.

The Music Industry Association of Romania, which represents the holders of rights related to copyright for music recordings preferred to act directly against users who provided music illegally within peer-to-peer networks¹³.

In exchange, in June 2007, in relation to the SABAM vs TISCALI (SCARLET) case¹⁴, the higher court from Brussels, being asked to interpret and apply the dispositions from the internal norm regarding the transposing of art. 12 from the Directive on Electronic Commerce:

- forced Scarlet, the Internet service provider, to terminate any violation of copyright by blocking the reception and transmission by its users, who were using a “peer to peer” software, of the electronic files that contained music works from the SABAM (collective management body for music works in Belgium) repertoire, under sanction of paying damages amounting to Euro 2,500/day in case Scarlet violated the court order for 6 months after the delivery thereof,

- forced Scarlet to communicate in writing to SABAM, within 6 months since the delivery of the court order which one of the 11 technical measures described in the expertise report it will apply in order to prevent the illegal downloading of electronic files containing music works from the SABAM repertoire.

This is the first order of the kind ever delivered in Europe.

SCARLET appealed, and the court of appeal apprised the European Court of Justice with the following two preliminary questions:

1. Based on Directives 2001/29 and 2004/48 corroborated with Directives 95/46, 2000/31 and 2002/58, construed in particular in the light of articles 8 and 10 from the European Convention for the Protection of Human Rights and Fundamental Freedoms, Member States are allowed to authorize national courts of law, apprised to judge the main issue of the matter on trial, and based on the

¹³ Music Industry Association of Romania, *AIMR collected evidence against 40 Internet users, users of DC++*, Available at: http://www.aimr.ro/index.php?option=com_content&view=article&id=91%3Ain-iunie-2010-aimr-a-strans-probe-impotriva-a-40-de-internauti-utilizatori-de-dc&catid=46%3Acomunicate-de-presa&Itemid=69&lang=ro, Last access date: 03.11.2011.

¹⁴ Decision no. 04/8975/A of 29 June 2007, District Court of Brussels, Available at: <http://www.cardozoaelj.net/issues/08/case001.pdf>, Last access date: 03.11.2011

statutory dispositions which stipulate that: „They (national courts of law) can also order obligatory measures against intermediaries whose services are used by third parties in order to violate copyright or related rights”, to force an Internet service provider (ISP) to introduce, for all its clients, in abstracto and as a preventive measure, on the exclusive expense of the ISP and for an unlimited period of time, of an electronic communication filtering system, for both input and output, for electronic communications crossing through its services, in particular those involving the use of peer-to-peer software, in the purpose of identifying within its network, of the sharing of electronic files containing music, cinematographic or audiovisual works, in relation to which the plaintiff claims to hold rights and consequently, blocking of the transfer of such files, either at the time when they are asked or at the time when they are sent?

2. If the answer to the first question is affirmative, then can these directives demand from certain national courts, asked to provide a solution to the requests for forcing intermediaries whose services are used by third parties in order to violate copyright, to apply the principle of proportionality when deciding in relation to the efficient and dissuasive effect of such required measures?¹⁵

The answer given by the European Court of Justice will provide the interpretation to be followed at the European Union level, in the case pertaining to the liability of Internet service providers for illegal activities carried out by their users.

Until now, the European Court of Justice has not given an answer to the two preliminary questions.

In our opinion, in case the interpretation provided by the European Court of Justice is in favor of the decision passed by the higher court in Brussels, then the impact will reach a European level, and all service providers in Europe should take technical measures for filtering the copyright carrying content in order to avoid being forced to take such measures, by the court of law.

The second exception concerns the exoneration from liability of providers of information society services which provide temporary storage of information, i.e. caching, regulated in art. 13 from the Romanian Law on Electronic Commerce.

Based on it, if an information society service consists in the transmission within a communication network, of the information provided by a consignee of such service, the provider of that service is not liable for the automatic, intermediary and temporary storage of the transmitted information, to the extent to which this operation takes place solely in the purpose of making more efficient the transmission of information to other consignees, based on the request thereof, if the following conditions are cumulatively met:

a) the service provider does not bring modifications to the transmitted information;

¹⁵ Reference for a preliminary ruling from the Cour d'appel de Bruxelles (Belgium) lodged on 5 February 2010 – Scarlet Extended SA v Societe Belge des auteurs, compositeurs et editeurs (SABAM), Official Journal of the European Union 113/20, 1.5.2010

b) the service provider fulfills the legal conditions regarding access to such information;

c) the service provider complies with the rules or customs related to the updating of information, as these are widely renowned and applied in the industry;

d) the service provider does not prevent the legal use by any person, of technologies widely renowned and applied in the industry, in the purpose of obtaining data about the nature or use of the information;

e) the service provider acts rapidly in order to eliminate the information it stored or in order to block access to it, from the moment when it effectively knew that the information transmitted initially was eliminated from the communication network or that access to it was blocked or the fact that the elimination or blockage of access took place based on the decision of a public authority.

These dispositions reproduce almost identically the provisions from art. 13 par. (1) from the Directive on Electronic Commerce.

The service provider offers this form of storage in the purpose of improving the performance and speed of the network.

The copies of the information provided online or transmitted to third parties are kept temporarily in the operator's system or in the network, in order to facilitate the subsequent access of a third party to such information.

Such copies are the result of a technological, automatic process and are "intermediary" between the location within the network where the information was provided the first time and the final user.

The Romanian case law does not include cases when Romanian courts were asked to interpret and apply the dispositions from art. 13.

According to the Survey on the liability of Internet intermediaries in 2007, these are not abundant at European level, as well.¹⁶

The third exception concerns the exoneration from liability of providers of information society services that insure permanent storage of information, i.e. hosting, regulated in art. 14 from the Romanian Law on Electronic Commerce:

According to it, if an information society service consists in storing the information supplied by a consignee of the respective service, the provider of such service will not be liable for the information stored based on a consignee's request, if any of the following conditions is fulfilled:

a) the service provider is not aware that the activity or the stored information is illegal and, in relation to actions for damages, it is not aware of facts or circumstances according to which such activity or information could violate a third party's rights;

b) being aware of the fact that the respective activity or information is illegal or about facts or circumstances according to which such activity or information could violate a third party's rights, the service provider acts rapidly in order to eliminate or to block access to it.

¹⁶ Thibault Verbiest, Gerald Spindler, Giovanni Maria Riccio, Aurelie Van der Perre, *Study on the Liability of Internet Intermediaries*, 12.11.2007, Available at: http://ec.europa.eu/internal_market/e-commerce/docs/study/liability/final_report_en.pdf, Last access date: 03.11.2011

The provisions of the above paragraph are not applicable in case the consignee acts under the authority or control of the service provider.

These provisions will not affect the possibility of the judiciary or administrative authority to ask to the service provider to cease or to prevent the violation of such data and also they cannot affect the possibility of establishing certain governmental procedures regarding the limitation or interruption of access to information.

As seen from the analysis of the legal dispositions concerning the exoneration from liability mentioned above, upon determining the existence and intensity of liability of the participants to the legal relationships from the electronic environment, maximum importance is given to the factors involving information knowledge and control, no matter whether an editorial or a physical control of information is involved.¹⁷

By confronting the text of the Directive on Electronic Commerce with that of the Romanian Law of Electronic Commerce, it can be seen that the dispositions from art. 14 par. (1) (a) from Law no. 365/2002 identically reproduce only thesis one of the dispositions from art. 14 par. (1) (a) from the Directive on Electronic Commerce, namely: the exoneration from liability of service providers operates when they *are not aware* that the activities or information stored by the user are illegal.

In relation to the second thesis from art. 14 par. (1) (a) from the Directive on Electronic Commerce, it was translated differently in the internal legislation.

Thus, while the Directive stipulates that in the case of action for damages, exoneration from liability operates if the provider *lacked the possibility to be aware of* facts or circumstances that generated the illegal activity or information, the Romanian Law stipulates that for the exoneration of liability in the case of the action for damages, the provider must *not be aware of* facts or circumstances generating the conclusion that the respective activity or information could violate a third party's rights.

As can be seen from the comparison drawn between the two texts of law, the Romanian legislator did not take over the distinction made in the Directive on Electronic Commerce between "being aware of" and "having the possibility to become aware of", the exoneration of liability according to the Romanian law operating only in the cases when the provider *is effectively not aware*, either of the fact that the stored actions or information are illegal, or of the existence of facts and circumstances which lead to the conclusion that the respective activity or information could violate a third party's rights, and not when it had the possibility to become aware of the nature of such facts.

This implementing particularity has consequences in terms of the rules of evidence, in the sense that, for engaging the provider's responsibility, based on the Romanian law, it must be proven that the provider was effectively aware of the illegal facts.

¹⁷ Marcel Bocşa, *Liability of traders in Internet service supply contracts*, "Commercial law magazine", no. 12/2009, p. 51.

The distinction from the Directive on Electronic Commerce between “being aware of” and “having the possibility to be aware of” was not taken over by Law no. 365/2002 either for the implementation of the dispositions of art. 14 par. (1) (b).

Art. 14 par. (1) (b) from the Directive on Electronic Commerce stipulates that: “the provider, as soon as it becomes aware of or has the possibility to know these, acts immediately in order to eliminate or block access to the information”.

In exchange, as per art. 14 par. (1) letter (b) from Law no. 365/2002: “being aware of the fact that the respective activity or information is illegal or about facts or circumstances that lead to the conclusion that such activity or information could violate a third party’s rights, the service provider acts rapidly in order to eliminate or block access to it.”

Service providers benefit from exoneration from liability also after becoming aware of the illegal information or activity of their users, if they act immediately in the sense of removing or blocking access to the illegal activity or information.

Law no. 365/2002 does not define the term “being aware of” and it does not establish the means by which the provider must become aware, which means that it may become aware of illegal activities or information, respectively of facts and circumstances that lead to the conclusion that such activity or information could violate a third party’s rights, including based on a notification addressed by the concerned party.

For that matter, this case of exoneration from liability has generated the most controversies at European level.

Member States have implemented differently art. 14 from Directive on Electronic Commerce, and national courts of law from Member States have made different ascertainments of the term “being aware of”.

Some Member States impose a formal procedure and an official notification from authorities in order to be able to consider that the provider is aware of, while in other States, courts of law have full authority to judge on the manner of “being aware”.

A third approach adopted in some Member States offers two possibilities of determining the meaning of the term “is aware of”: a procedure involving the notification and the interruption of service provision and the most traditional approach of notifying the provider according to national law.¹⁸

According to the above mentioned, one can conclude that in order to engage the liability of a trader which transmits the same information to several users, at the same time, one must examine in advance its relationship with the content of the transmitted message.¹⁹

¹⁸ Miquel Peguera, *Internet Service Providers’ Liability in Spain: Recent Case Law and Future Perspectives*, 1 (2010) JIPITEC 151, para. 1.

¹⁹ Joy R. McDaniel, *Electronic Torts and Videotext – At the Junction of commerce and communications*, 2002, 18 Rutgers Comp & Teach. L. Y. 773, pg. 823

In this sense, the first question to be asked is whether one can consider that the service provider has the obligation to be aware or not of the content of the message (information) it transmits, this fact being of major importance for establishing the party which has the task of providing the evidence.

Based on art. 15 point 1 from the Directive on Electronic Commerce, Member States will not impose to the providers of the services mentioned in art. 12, 13, 14 the general obligation to monitor the information they transmit or store, or the general obligation to actively pursue facts and circumstances that indicate an illegal activity.

The articles, however, cannot prevent the courts of law and the administrative authorities in Member States, from imposing monitoring obligations in specific, individually determined cases.²⁰

A similar disposition is found in the Romanian legislation, as well, namely in art. 11 par. (1) from the Methodological Norms regarding the application of the Law on Electronic Commerce, with the differences that will be discussed hereinafter.

Thus, in *our opinion*, we consider that, based on the Romanian law and the Community legislation, a service provider cannot be presumed to be aware of the content posted by third parties.

However, in 2010, a court of law in Turin (Italy) ordered the contrary, considering that Google (as provider of hosting) is liable for the filtering of the content posted by third parties and convicted 3 Google managers for not having immediately removed from www.youtube.com a film which featured an autistic child being dishonored²¹.

In 2009, the Bucharest Court of Law (Romania) was apprised with the sue petition lodged by the Music Industry Association of Romania against the website www.trilulilu.ro and the provider of hosting called Hostway, requesting the payment of damages by it, forbidding the use of phonograms and videograms from the AIMR repertoire and the establishment of certain technical measures for protection by digital impression.

The litigation was settled based on a transaction through which Trilulilu undertook responsibility to implement the technical measures required in this petition.

Moreover, Trilulilu undertook the commitment to conclude licensing contracts with all the AIMR members for the use of phonograms and videograms from their repertoire on the website www.trilulilu.ro.²²

²⁰ Stephen W. Workman, Esq, *Internet Law – Developments in ISP Liability in Europe*, IBLS E-Commerce University – Diploma Programs Student Contributions, 2008. Available at: http://www.ibls.com/internet_law_news_portal_view.aspx?id=2126&s=latestnews, Last access date: 03.11.2011

²¹ Raul Mendez, *Google case in Italy*, “International Data Privacy Law”, 2011, vol. 1 (2). Available at: <http://idpl.oxfordjournals.org/content/1/2/137.full>

²² Music Industry Association of Romania, *AIMR and Trilulilu – premiere regarding the compliance of copyright in Romanian online environment*, Available at: http://www.aimr.ro/index.php?option=com_content&view=article&id=83:aimr-i-trilulilu-premier-privind-respectarea-drepturile-

The European Court of Justice, when confronted with the interpretation and application of the dispositions from art. 14 from the Directive, in 2010, in the Google France and Google Inc. et al. vs. Louis Vuitton Malletier et al. cases, considered that Google is not responsible for the third parties' actions, carried out through the Adwords service, as long as its function was neutral, its behavior was strictly technical, automatic and passive and presupposing the lack of awareness or control over the data stored on it²³.

Also, the European Court of Justice showed in the motivation of its decision, that the referencing service was a pay service, that Google established the remuneration modalities or that it granted its clients information of general nature, which cannot have the effect of depriving Google from the derogations in terms of liability, as stipulated by Directive 2000/31.

In the same way, the concordance between the selected keyword and the search term introduced by an Internet user is not sufficient, in itself, so as to consider that Google is aware of or exerts a certain control in respect of the data that are uploaded in its system by persons publishing ads, data which is saved on its server.

The European Court of Justice decided that Article 14 from Directive 2000/31/CE must be interpreted in the sense that the norm stipulated in this article is applicable for the provider of an Internet referencing service when such provider did not play an active part which allowed it to be aware of or to control the stored data.

If it did not play such part, the respective provider may not be held liable for the data it stored at the request of a person publishing ads, except for the case when, becoming aware of the illegal nature of such data or of the activities of the person publishing ads, it failed to react promptly for removing or blocking access to the respective data.

Unlike the previous articles (art. 12 and art. 13) where the Romanian legislator did not implement paragraph (3) by law, in the case of art. 14 from the Directive of the European Committee, paragraph (3) was implemented as well, thus: "The provisions of this article will not affect the possibility of the judicial or administrative authority to request to the service provider to cease or to prevent the violation of data and also they cannot affect the possibility of establishing certain governmental procedures involving the limitation or interruption of access to information."

de-autor-in-online-ul-romanesc&catid=46:comunicate-de-presa&Itemid=69, Last access date: 03.11.2011

²³ Award of the Court (Grand Chamber) from March 23rd, 2010 - Google France, Google, Inc. v Louis Vuitton Malletier (C-236/08), Viaticum SA, Luteciel SARL (C-237/08), Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08), Official Journal C 134, 22/05/2010, P. 0002-0003

In the Romanian case law, there are cases when the dispositions of art. 14 par. (3) from the Romanian Law on Electronic Commerce were interpreted and applied only in pornography cases²⁴.

In exchange, in Belgium, in 2009, SABAM (collective management body for copyright in Belgium) sued Netlog (social network type of website) asking the engaging of its liability for the violation of copyright, by its users in Belgium, and the ordering of certain measures for blocking access to such materials.

The Court of First Degree in Brussels asked the European Court of Justice the following preliminary question: “Do Directives 2001/29 and 2004/48, corroborated with Directives 95/46, 2000/31, 2002/58 and in the light of Articles 8 and 10 from the European Convention for the Protection of Human Rights and Fundamental Freedoms allow Member States to authorize national courts of law, apprised to judge the main issue of the matter on trial, and based on the statutory disposition which stipulates that: „They (national courts of law) can also rule against intermediaries whose services are used by third parties in order to violate copyright or related rights”, to force hosting service providers to introduce, for all their clients, in abstracto and as a preventive measure, on their exclusive expense and for an unlimited period of time, a filtering system for the majority part of information stored on its servers, in the purpose of identifying on their servers music files, films or audiovisual works in relation to which SABAM claims to have rights and consequently to block the exchange of such files?”²⁵

The European Court of Justice has not answered this question yet.

The fourth exception concerns the exoneration from liability of providers of Search engines and Hyperlinks, regulated in art. 15 from Romanian Law on Electronic Commerce.

According to this article, the provider of information society services facilitating access to the information provided by other service providers or by the consignees of services provided by other providers, by making available for the consignees of its service, certain information search instruments or hyperlinks to other websites, it is not liable for the respective information, if any of the following conditions is fulfilled:

- a) the service provider is not aware that the activity or the stored information is illegal and, in relation to actions for damages, it is not aware of facts or circumstances according to which such activity or information could violate a third party's rights;
- b) being aware of the fact that the respective activity or information is illegal or about facts or circumstances according to which such activity or

²⁴ National Authority for Communications, *The telecom arbiter asked the blocking of access to 40 pornographic websites, being only nine notifications regarding such websites in the part two years*, Available at: <http://economie.hotnews.ro/stiri-telecom-5244280-update-arbitrul-telecom-cere-blocarea-accesului-40-site-uri-pornografice-doar-noua-sesizari-privind-astfel-site-uri-ultimii-doi-ani.htm>, Last access date: 03.11.2011.

²⁵ Reference for a preliminary ruling from the Rechtbank van eerste aanleg te Brussel (Belgium) lodged on 19 July 2010 – Belgische Vereniging van Auteurs, Componisten en Uitgevers (Sabam) v Netlog NV, Official Journal of the European Union, C 288/18, 23.10.2010.

information could violate a third party's rights, the service provider acts rapidly in order to eliminate or to block access to it.

The provisions of the above paragraph are not applicable in case the consignee acts under the authority or control of the service provider.

The service provider is liable for the respective information when the illegal nature thereof was ascertained by a decision given by a public authority.

This fourth exception is not stipulated in the Directive on Electronic Commerce, being particular to the Romanian legislation, and also to the legislations of other Member States.

As a consequence of the lack of regulation of this exception in the Directive, Member States have developed different rules applicable for this case of exoneration from liability²⁶.

In relation to the liability of providers that offer information search instruments, some States apply the rules of liability exoneration for Mere Conduit, others apply the general law principles, and others apply the rules of liability exoneration for Hosting.

In relation to the liability of providers that offer links to other websites, some States apply the rules of liability exoneration for Hosting, and others apply the general civil liability rules.

By comparing the dispositions from art. 15 with the previous dispositions from art. 14 from the Law on Electronic Commerce, it can be seen that in our internal law, such exoneration from liability of providers that offer information search instruments and links to other websites, was assimilated to the liability of hosting service providers.

Consequently, the liability of providers of information search and links to other websites services, is conditioned by the absence of awareness of the illegal nature of the activity or information to which they provide access and respectively, in terms of action for damages, by the absence of awareness of the prejudicial nature of the respective activity or information.

Also, just like in the exoneration case stipulated in art. 14, as soon as it becomes aware, the provider must act rapidly to eliminate the provided possibility to access or to block the use, in order to benefit from exoneration from liability.

The difference between the two cases of exoneration is that in the case of exoneration for providing information search instruments, illegality refers to the facilitated content, not to the stored content²⁷.

Until the present, the Romanian case law has not registered cases of service providers offering information search instruments and links to other websites, which were sued.

Spain, the same as Romania, has regulated exoneration from liability of providers offering information search instruments and links to other similar websites with exoneration from liability for hosting.

²⁶ Miquel Peguera, Internet Service Providers' Liability in Spain: Recent Case Law and Future Perspectives, 1 (2010) JIPITEC 151, para. 1, p. 17.

²⁷ *Idem*.

In this context, no court of law from Spain has been confronted yet to a case of liability of the provider offering information search instruments²⁸.

In exchange, in relation to the liability of the provider offering links to other similar websites, a court of law from Spain forced the holder of a website which contained a link to a P2P network, to remove its own website and to insert the following text instead: "This website was blocked based on an ordinance in the context of a criminal trial".²⁹

Another particularity of the Romanian legislation is represented by the dispositions from art. 16 par. (3) from Law no. 365/2002 which stipulate, as a general rule, the fact that: "service providers are forced to temporarily or permanently *interrupt* transmission within a communication network or the storage of the information provided by a consignee of the respective service and especially *through the elimination* of information or *blocking* of access to it, access to a communication network or the provision of any other information society service, if these measures were ordered by the public authority defined in art. 17 par. (2) [the authority of the public administration with tasks concerning the regulation in communications or the court authority]; this public authority may act *ex officio* or as a consequence of the complaint or intimation lodged by a concerned party."

This article is practically a partial transposing of paragraph (3) from articles 12 and 13 from the Directive on Electronic Commerce.

As seen from the studying of the dispositions of the Romanian Law on Electronic Commerce and of the Methodological Norm from 2002 regarding the application of Law no. 365/2002 on electronic commerce³⁰ (Methodological Norm), another particularity of the Romanian legislation is that the Romanian legislator did not transpose into the Romanian law the possibility for a court of law or an administrative authority to ask service providers to *prevent* violations.

Namely, at the current time, in Romania, there isn't any legal base for imposing on service providers the obligation to install an electronic communication filtering system, in particular cases.

This particularity is also supported by the manner in which the general obligation in terms of supervision was transposed into the internal law.

Thus, while the Directive on Electronic Commerce stipulates that Member States must not impose on providers the *general* obligation to supervise the information they transmit or store, or the *general* obligation to actively search for facts or circumstances leading to the conclusion that the activities are illegal (Art. 15 par. 1 from the Directive on Electronic Commerce), the Romanian internal law stipulates that service providers do not have the obligation to monitor the information they transmit or store, or the obligation to actively search for data concerning activities or information that appear to be illegal in the domain of information society services that they provide.

²⁸ *Idem*, p. 88

²⁹ *Idem*, p. 94

³⁰ Romanian Government, *Methodological Norms from 2002 regarding the application of Law no. 365/2002 on electronic commerce*, Official Gazette no. 877 from 05/12/2001, Part I

Making abstraction of the lack of unity of expression, it is interpreted that, in the Romanian law, providers do not have the general or particular obligation to monitor, or the general or particular obligation to actively search for facts or circumstances leading to the conclusion that the activities are illegal.

Therefore, no liability could be established for the lack of an active monitoring activity³¹.

According to art. 11 par. 3 from the Methodological Norm, service providers must implement a free of charge procedure used to transmit to them complaints or intimations from any person in relation to activities that appear to be illegal, which are carried out by the consignees of their services or about the information that appears to be illegal, supplied by them.

The procedure must:

- a) be available through electronic means, as well;
- b) ensure the reception of complaints or intimations within at most 48 hours since the delivery thereof.

The provider must make the procedure public on its website.

But the sanction for service providers which fail to implement this procedure is not stipulated.

In *our opinion*, such notification creates the presumption that the provider is aware of the illegal nature of the stored activity or information or of the prejudicial nature thereof.

However, in the absence of a legal obligation to interrupt the transmission of services based on the reception of a notification from the prejudiced person, can the provider interrupt the provision of services?

In *our opinion*, the provider will be able to cease the provision of services based on a simple notification received from the prejudiced person, only if the service supply contract stipulated such possibility. But, this procedure involving a simple notification may entail abuse.

A *de lege ferenda* proposal might concern the set up of a procedure regarding the notification and counter-notification, as stipulated by DMCA in the American law.

For example, the Google procedure set up based on DMCA through which the provision of Youtube services can be interrupted, stipulates the necessity of a notification from the holder of the violated rights.

After that, the user whose content was eliminated or blocked has the possibility to lodge a counter-notification containing its own defense.

This counter-notification is communicated to the first plaintiff with the notification that if within 10 working days, it fails to start an action against the user before the courts of law, the content will be posted again.

Although the law does not impose the prior notification of the service provider as a preliminary procedure, in practice, the holder of the violated rights notifies the service provider before addressing the court of law or the

³¹ Marcel Ionel Bocşa, *Înceierea contractelor de comerț internațional prin mijloace electronice*, Universul Juridic, 2010, p. 157

administrative authority.

We mention for exemplification purposes, the notifications addressed by AIMR in relation to the suspension of torrents type of websites in Romania by service providers³².

IV. Application in space of the dispositions of the Romanian Law on Electronic Commerce regulating the civil liability of service providers

The Romanian law on electronic commerce is applicable for service providers established in Romania and for the services provided by them (Art. 3 from Law no. 365/2002 r1).

Starting from the effective date of the Romanian Law on Electronic Commerce (2002), the information society services are subject:

a) exclusively to the provisions in force of the Romanian laws which are part of the coordinated legislation, in case they are provided by service providers established in Romania;

b) exclusively to the provisions in force of the laws of the respective State which are part of the coordinated legislation, in case they are provided by service providers established in a Member State of the European Union.

The free circulation of the information society services supplied by a provider established in a Member State of the European Union may not be retrained in Romania by the application of certain legal provisions that are part of the coordinated legislation.

In conclusion, the liability of a service provider established in a Member State of the European Union may not be engaged according to the Romanian law.

As far as the engaging of liability of a service provider established in Romania offering services in the European Union is concerned, this will be performed according to the Romanian law, if the law in the respective State stipulates stricter requirements.

For this purpose, recently (October 2011), when confronted with a preliminary question regarding the interpreting of art. 3 from the Directive, the European Court of Justice stated that: "article 3 from Directive 2000/31/CE of the European Parliament and Council from the 8th of June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) must be interpreted in the sense that it does not impose a transposition in the form of a specific norm for the regulation of conflicts between laws. In spite all that, in relation to the coordinated domain, Member States must make sure that, under the reserve of derogations authorized based on the conditions stipulated in article 3 paragraph (4) from Directive 2000/31, the provider of an electronic commerce service is not subject to certain

³² AIMR, *hitclub.ro, website suspended by AIMR for the publication of links to unauthorized reproductions*, Available at: <http://refresh.ro/2009/07/hitclub-ro-site-suspendat-de-catre-aimr-pentru-publicarea-de-link-uri-catre-reproduceri-neautorizate/>, Last access date: 03.11.2011.

stricter requirements than those stipulated by the material law applicable in the Member State where the above mentioned provider is established.³³

V. Conclusions

In Romanian law, there are specific legal provisions applicable to the exemption from liability of the service providers under which implemented consistently the provisions of the art. 12-14 from the Electronic Commerce Directive (Mere Conduit, Caching, Hosting) and added two others: Search engines and Hiperlinks.

It also noted the lack of legal basis to impose monitoring obligation on the providers of services in individual cases and the lack of legal procedures for notification and counter-notification.

Knowledge of the legal regime of liability of service providers in Romania is of importance both in terms of doctrine, contributing to the completion of the current state of knowledge in the field and from a practical perspective.

This article did not examine the liability of intermediary service providers established outside the European Union, the subject is open for future research.

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