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Internet Liability in Québec Civil Law*

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The principles set out in the *Civil Code*, as supplemented by the prescriptions laid down in *An Act to establish a legal framework for information technology*[1], represent the foundation of the liability scheme for the distribution of misinformation on the Internet.

As soon as activities take place in cyberspace – this virtual place which appears to exist as a result of the interconnections between computers and other communications equipment – one must necessarily contemplate wrongful actions leading to damages. Hence, on the Internet, complaints have been made of injury to reputations, invasions of privacy, infringement of rights to one's image as well as the right to challenge the distribution of personal information without authorization.

In cyberspace, just as elsewhere, the person who personally took the prejudicial wrongful action is, obviously, the first to be liable therefor. However, in electronic environments, these actors are not always identifiable or they may be beyond reach, which is why it is important to determine the liability of the other persons intervening in the information transmission chain.

In many situations where the distribution of information causes damages, the criteria to determine liability are based on the roles assumed by the various participants in the information enhancement and distribution chain. The allocation of liability is essentially based on a comparison or a consideration of the similarities and differences between schemes developed in respect of situations somewhat analogous to communications in open electronic networks such as transportation by rail or the distribution of printed materials.[2] One, therefore, asks oneself who was playing the role of the editor, of a mere conduit, a broadcaster, a newspaper, etc. Indeed, the duties and liabilities inherent in these respective roles are well established in the law of liability.

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1 Voir Nicolas W. VERMEYS, « La diffamation sur Internet : à qui la faute? », (2007) Repères EYB2007REP649; Nicolas W. VERMEYS, « La responsabilité du Web 2.0 », (2007) *Repères* EYB2007REP607; Pierre TRUDEL, « La responsabilité des acteurs du commerce électronique», dans Vincent GAUTRAIS, *Droit du commerce électronique*, Montréal, Éditions Thémis, 2002, p. 607-649; Michel RACICOT, Mark S. HAYES, Alec R. SZIBBO et Pierre TRUDEL, *The Cyberespace is not a "No Law Land", A Study of the Issues of Liability for Content Circulating on the Internet*, Ottawa, Industry Canada, February 1997, 306 pages; Alain STROWEL et Nicolas IDE, *Responsabilité des intermédiaires : actualités législatives et jurisprudentielles*, disponible à < http://www.droit-technologie.org/dossier/details.asp?id=26 > (site visité le 20 mai 2008); Lionel THOUMYRE, « Responsabilités sur le Web : une histoire de la réglementation des réseaux numériques », *Lex Electronica*, vol. 6, n° 1, printemps 2000, < http://www.lex-electronica.org/articles/v6-1/thoumyre.htm > (site visité le 20 mai 2008); Pierre TRUDEL, « Responsibilities in the Context of the Global Information Infrastructure », [1997] 29 *International Information & Library Review*, 479-482; Pierre TRUDEL, « Les responsabilités dans le cyberespace », dans *Les dimensions internationales du droit du cyberespace, collection Droit du cyberespace,* Paris, Éditions UNESCO - Économica, 2000, 235-269; Pierre TRUDEL, « La responsabilité civile sur Interne selon la Loi concernant le cadre juridique des technologies de l'information », dans FORMATION PERMANENTE, BARREAU DU QUÉBEC, *Développements récents en droit de l'Internet*, n° 160, Cowansville, Éditions Yvon Blais, 2001, pp. 107-141.

2 Voir Pierre TRUDEL et Robert GÉRIN-LAJOIE, « La protection des droits et des valeurs dans la gestion des réseaux ouverts », dans CRDP, *Les autoroutes électroniques : usages, droit et promesses*, Montréal, Éditions Yvon Blais, 1995, p. 279, aux pages 306-307.

A strong nexus exists between control over the allegedly prejudicial information and liability arising therefrom. In *Vaillancourt* c. *Lagacé*[3], Justice Claudine Roy ruled that the applicants for an injunction had not established a colour of right with respect to statements made in a blog since:

> [TRANSLATION] *There is no evidence to show that one or several of the defendants exercise control over the statements made therein, or that they have the technical ability to remove certain comments. This decision confirms the significance which the factor of control over the information plays in the determination of liability which may arise therefrom. Hence, the greater the discretion to decide that which will be published (or distributed), the greater the liability arising from such a decision.*

In Québec, *An Act to establish a legal framework for information technology*[4] passed in June 2001 and which came into force in November of the same year,[5] provides rules governing the liability of service providers acting, in various capacities, as an intermediary in the hosting, archiving, search or transmission of documents. These rules are set out in Sections 22, 26, 36 and 37. These provisions set out the rules to determine the liability of technical intermediaries. They supplement the general civil liability principles set out in Article 1457 of the *Civil Code*.

Following a synopsis of the general principles governing liability of persons who decide to place information online, we will focus on the scheme implemented in Québec with respect to the liability of intermediaries pursuant to Section 26 as well as Sections 22, 36 and 37 of *An Act to establish a legal framework for information technology*.

I- Civil Liability of Persons Deciding to Place Information Online

In Québec, civil liability is based on fault. It is defined by a process which avoids having to determine what represents a wrongful action. Article 1457 of the *Civil Code* refers to the prudent and diligent person. It reads as follows:

> ***1457.*** *Every person has a duty to abide by the rules of conduct which lie upon him, according to the circumstances, usage or law, so as not to cause injury to another.*
>
> *Where he is endowed with reason and fails in this duty, he is responsible for any injury he causes to another person by such fault and is liable to reparation for the injury, whether it be bodily, moral or material in nature.*
>
> *He is also liable, in certain cases, to reparation for injury caused to another by the act or fault of another person or by the act of things in his custody.*

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3 2005, Can LII 29333 (QC C.S.) <http://www.canlii.org/fr/qc/qccs/doc/2005/2005canlii29333/2005canlii29333.html > (site visité le 20 mai 2008).

4 L.Q. 2001, c. 32, en ligne avec annotations à < http://www.msg.gouv.qc.ca/gel/cadre_juridique_intro.html > (site visité le 20 mai 2008); Pierre TRUDEL, « Notions nouvelles pour encadrer l'information à l'ère du numérique : l'approche de la *Loi concernant le cadre juridique des technologies de l'information* », [2004] 106 *R. du N.*, 287-339.

5 Décret n° 1229-2001 du 17 octobre 2001 (2001, G.O.2, 7271).

The principle set out in Article 1457 is of general application: it applies just as well to the behaviour of a neurologist as it does to that of a window cleaner. It applies to Internet users, whoever they might be, as long as the action took place in Québec. As an essential notion of a law relating to liability, fault arises from the failure to comply with general and specific behavioural duties. Where no specific behavioural standard has been provided, fault arises where, whether deliberately or negligently, one breaches the general duty not to harm others.

Although they have not yet had the opportunity of ruling on cases of defamation or other infringements of rights occurring on the Internet, it is quite clear that the Québec Courts called upon to assess the behaviour of an Internet user will refer to the abstract model of the reasonable person, namely one who is prudent and diligent. In order to determine if any fault occurred, the behaviour is analyzed taking into account the variance between the behaviour exhibited by the person against whom an action for liability is brought and the conduct which would have been exhibited by the abstract model.

Regarding statements made on the Internet, Justice Claudine Roy in *Vaillancourt c. Lagacé*[6] explains that it is necessary to show that the defendants have "control" over the wrongful statements made on the Internet site. The determination of the wrongful nature of the statements follows the structure of Article 1457 of the *Civil Code*. However, on the Internet, the salient issue is that of determining who is required to exercise control with respect to a site. While one can easily agree that the author of the wrongful statements is liable therefor, the issue of the liability of those who, without being themselves the author of the statements, contribute to their distribution, is a thorny one.

A person deciding to place information online or who acts in such a manner as to exercise control over the distribution thereof assumes liability arising from its illegal or tortious nature. By placing information online, one assumes an editorial function. An editor publishes information. Publishing means to communicate information to third parties knowing that this information will be read, seen or heard. Publishing information deliberately assumes knowledge of the contents of the information transmitted.[7] On the Internet, publishing may result from the transmission of files, discussions during electronic conferences, the sending of an E-mail to an indeterminate number of persons or making information available in files of documents which may be transferred through the network.

All these activities assume the transmission of "technology-based documents", that is to say, as set out in Sections 1 and 3 of *An Act to establish a legal framework for information technology*, documents created based on any information technology "whether electronic, magnetic, optical, wireless or other, or based on a combination of technologies". The concept of a "document" is defined as follows in Section 3 of *An Act to establish a legal framework for information technology*:

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6 2005, Can LII 29333 (QC C.S.).

7 Pierre TRUDEL, «Responsibilities in the Context of the Global Information Infrastructure», [1997] 29 *International Information & Library Review*, 479-482.

Loftus E. BECKER Jr., « The Liability of Computer Bulletin Board Operators for Defamation Posted by Others », (1989) 22 *Connecticut Law Review* 203-239, 217.

> *Information inscribed on a medium constitutes a document. The information is delimited and structured, according to the medium used, by tangible or logical features and is intelligible in the form of words, sounds or images. The information may be rendered using any type of writing, including a system of symbols that may be transcribed into words, sounds or images or another system of symbols.*

The exercise of control over the distribution of information is analogous to the exercise of an editorial function. It implies the power to select that which will be distributed, to decide to so distribute it and to determine to whom the information will be distributed. Hence, an Internet access provider who would examine all the messages prior to retransmitting them and would reserve the right to only forward those messages which he deems to be in keeping with his policies, would be acting in the same manner as an editor. Under such circumstances, there is one constant: the decision to publish is that of the editor. For him, it is an option: he is under no duty to publish. In the newspaper and editorial world, it is commonplace to argue that the publisher is able to control the information circulating as a result of his actions.[8] Liability for the transmission of prejudicial information stems from this power of control.

II- Liability of Intermediaries

In electronic environments, the players truly at the source of the tortious information may not always be identifiable or may be beyond reach: a victim may find himself or herself in a situation where only an intermediary may be held liable for the distribution of the wrongful material causing him or her harm. Intermediaries are often easier to identify and may be more solvent than the person who originated the distribution of the tortious document. Hence, it is important to determine where the liability of intermediaries intervening in the information transmission chain on the Internet beings and ends.

On the Internet, intermediaries are persons, businesses or organizations involved in the performance of a task between the starting point of a transmission of a document and the final point of receipt. What all these intervening persons have in common is that they exercise no right of control over the information transiting through their technological environments. Hence, intermediaries may be technology-based document storage services,[9] hosting services, technology-based document referral services, search engines, or service providers on a communications network. They may also be businesses offering technology-based document storage or transmission services, technology-based document transmission services or storage services on a communications network of technology-based documents provided by a client.

The status of intermediaries can take on infinite variations. On the Internet, an entity can perform one or several of the functions necessary to ensure the communication or transmission of

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8 Pierre TRUDEL, « Liability in Cyberspace », in Theresa FUENTES-CAMACHO, *The International Dimensions of Cyberspace Law*, Aldershot Ashgate Publishing, UNESCO, 2000, p. 189-211. David R. JOHNSON et Kevin A. MARKS, « Mapping Electronic Data Communications onto Existing Legal Metaphors : Should We Let Our Conscience (and Our Contracts) be Our Guide? », (1993) 38 *Vill. L. Rev.* 487, 492.

9 Selon l'article 3 de la *Loi concernant le cadre juridique des technologies de l'information*, les documents technologiques sont des documents dont le support fait appel aux technologies de l'information.

information. The designations which the players give themselves, such as "Internet access provider", connectivity provider, or mere conduit, do not always encompass the same activities. In each case, one must, therefore, carefully examine what the intermediary does in order to properly assess the liability which he assumes.

Contracts binding certain intermediaries with various partners may allocate liability which each incurs, as between contracting parties. For instance, hosting contracts include provisions providing that the hosted party undertakes to compensate the hosting party in respect of losses incurred as a result of the hosted content.[10] Excluding such situations, it is difficult to imagine how it could be legal for an intermediary to exclude its liability as against third parties who are not party to such a contract. The latter will always be able to seek redress against an intermediary who took part in the distribution of harmful information. If the intermediary has entered into a contract with another intervening party pursuant to which the latter undertakes to take up his defense, it will up to him to then seek redress against such party. Basically, with respect to third parties, neither the intermediary nor any other person may exclude his duty to be answerable for his actions.

In the laws of general application in matters of civil liability of several countries, the ability to seek redress against technical intermediaries where a tortious document has been transmitted is a matter of uncertainty. When Internet use started to spread, the courts in several countries handed down contradictory decisions with respect to the duties incumbent upon such intermediaries.[11] Indeed, it is tempting to state that intermediaries who choose to perform tasks contributing to the transmission of messages derive a benefit therefrom. It is, therefore, plausible that they should bear the risks inherent therein. On the other hand, it has been acknowledged that the liability of intermediaries raises important issues regarding freedom of expression and the protection of human rights. If the liability of intermediaries is too easily incurred, the latter might be tempted, in order to protect themselves, to reject outright any messages with risky content. However, if they are able to escape all liability, they would have no incentives to take reasonable steps in order to put an end to illegitimate activities taking place on their information systems. The challenge is to strike a balance in order to ensure the protection of human rights and those of intermediaries. One must, however, avoid creating a situation in which the intermediaries are driven to take censorship action which would lead to a restriction in the flow of information or would harm those who wish to use the Internet to transfer information.

In many countries, rules have been implemented in order to better identify the circumstances under which intermediaries may incur liability. One of the most authoritative instruments in this respect is the *European Directive on Electronic Commerce*.[12] This instrument streamlines certain

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10 Antoine LEDUC, « Le contrat de création et le contrat d'hébergement d'un site web : éléments de négociation, de rédaction et d'interprétation », dans FORMATION PERMANENTE, BARREAU DU QUÉBEC, *Développements récents en droit de l'Internet*, n° 160, Cowansville, Éditions Yvon Blais, 2001, p. 143 spécialement p. 200.

11 Thibault VERBIEST et Étienne WÉRY, *Le droit de l'Internet et de la société de l'information*, Bruxelles, Larcier, 2001, 648 p. n° 393 et ss.

12 Directive 2000/31/CE du Parlement européen et du Conseil du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, et notamment le commerce électronique, dans le marché intérieur (« directive sur le commerce électronique »). JO L 178 du 17.7.2000, p. 1. Proposition

aspects of the liability of online service providers in respect of three types of activities, namely: being a mere conduit, caching and hosting of information belonging to third parties (these providers then acting as "intermediaries"). It provides, in particular, an exemption from liability for acting as a mere conduit (Article 12), and a limitation of liability in respect of hosting activities (Article 14). In addition, the Directive prohibits Member States from imposing on intermediary service providers a general obligation to monitor (Article 15§1); these provisions apply to both civil and criminal liability.

Sections 22, 26, 36 and 37 of *An Act to establish a legal framework for information technology*, follow in the footsteps of the *European Directive on Electronic Commerce*. They implement a conditional liability exemption scheme for certain technical intermediaries. Consequently, service providers involved in the communication of documents are, subject to compliance with certain conditions, exempt from liability for the documents[13] which they hold, index or transmit. These provisions supplement and specify the application of the civil liability principles arising from the distribution of information. They are intended to avoid intermediaries incurring liability in cases where it is apparent that they are only playing a passive role in the distribution of technology-based documents.

The limitations of liability provided for in *An Act to establish a legal framework for information technology* are not based on the types of operators or intermediaries. Instead, they apply to the type of activity exercised; for instance, transmission, indexing or hosting. Consequently, when assessing the liability of intermediaries, one should not pay heed to the designation by which these entities describe themselves, but rather examine what they do or ought to have done with respect to a document or illegitimate information. The statute sets out the rules governing any service provider who finds himself in the situation described, and who takes, or fails to take, the action specified in the statute. These providers are:

- the provider offering technology-based document storage services on a communications network. The archetype of this provider is the host;
- the provider offering technology-based document referral services, such as an index, hyperlinks, directories or search tools. Certain blogs and other sites with content generated by users or third parties fall under this category;

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initiale de la Commission : JO C 30 du 5.2.1999, p. 4. Avis du CES : JO C 169 du 16.6.1999, p. 36 ; Avis du Parlement européen le 6 mai 1999 (première lecture) : JO C 279 du 1.10.1999, p. 389 ; position commune du Conseil du 28 février 2000 : JO C 128 du 8.5.2000, p. 32 ; décision du Parlement européen du 4 mai 2000 (deuxième lecture) non encore parue au Journal officiel. Directive 2000/31/CE du Parlement européen et du Conseil du 8 juin 2000 relative à certains aspects juridiques des services de la société de l'information, et notamment du commerce électronique, dans le marché intérieur (« directive sur le commerce électronique »), Journal officiel, n° L 178 du 17/07/2000 p. 0001 – 0016, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:FR:HTML > (site visité le 20 mai 2008).

13 La loi vise tous les documents. Elle comporte une définition générique de cette notion. C'est ainsi qu'un document au sens de la loi est un objet constitué d'information portée par un support. L'information y est délimitée et structurée, de façon tangible ou logique selon le support qui la porte, et elle est intelligible sous forme de mots, de sons ou d'images. L'information peut être rendue au moyen de tout mode d'écriture, y compris d'un système de symboles transcriptibles sous l'une de ces formes ou en un autre système de symboles. Voir, l'article 3 de la *Loi concernant le cadre juridique des technologies de l'information.*

- the provider supplying communications network services exclusively for the transmission of technology-based documents. We shall refer to this intermediary as a conduit;
- the intermediary who keeps documents for the sole purpose of ensuring the efficiency of the transmission. This category applies to the provider who acts as an intermediary in order to keep on a communications network technology-based documents provided to him by his client and who only retains them for the sole purpose of ensuring the efficiency of their subsequent transmission to those persons who have a right to access the information.

The limitation of liability scheme provided in respect of these intermediaries falls within the general parameters of civil liability; liability arises from the fault perpetrated. However, the statute expressly excludes certain duties and obligations incumbent upon intermediaries in order to specify the scope of what falls under wrongful behaviour on their part.

A. Exclusion of the Duty to Actively Monitor

Internet liability rules remain within the scope of laws of general application. The principles of civil liability law apply, however, the legislator adds certain conditions for liability to be incurred by the provider in question.[14] The civil liability of intermediaries, just as with any other person, when incurred, necessarily arises from wrongdoing on their part. The intermediary incurs liability when it is shown that behaviour has occurred which a prudent and diligent person would not have engaged in under similar circumstances.[15]

In keeping with the European Directive,[16] Section 27 of *An Act to establish a legal framework for information technology* excludes a duty on the part of intermediaries to actively monitor. Section 27 reads as follows:

> ***27.*** *A service provider, acting as an intermediary, who provides communication network services or who stores or transmits technology-based documents on a communication network is not required to monitor the information communicated on the network or contained in the documents or to identify circumstances indicating that documents are used for illicit activities.*

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14 Cyril ROJINSKY, « Commerce électronique et responsabilité des acteurs de l'Internet en Europe », <http://www.droit-technologie.org/dossier-21/> (site visité le 20 mai 2008).

15 Jean-Louis-BAUDOUIN et Patrice DESLAURIERS, *La responsabilité civile*, 5e édition, Cowansville, Éditions Yvon Blais, 1998, n° 154 ; Pierre TRUDEL, France ABRAN, Karim BENYEKHLEF et Sophie HEIN, *Droit du cyberespace*, Montréal, Éditions Thémis, 1997, 1296 p., c. 5.

16 L'article 15 de la Directive sur le commerce électronique se lit comme suit :
Absence d'obligation générale en matière de surveillance
1. Les États membres ne doivent pas imposer aux prestataires, pour la fourniture des services visée aux articles 12, 13 et 14, une obligation générale de surveiller les informations qu'ils transmettent ou stockent, ou une obligation générale de rechercher activement des faits ou des circonstances révélant des activités illicites.
2. Les États membres peuvent instaurer, pour les prestataires de services de la société de l'information, l'obligation d'informer promptement les autorités publiques compétentes d'activités illicites alléguées qu'exerceraient les destinataires de leurs services ou d'informations illicites alléguées que ces derniers fourniraient ou de communiquer aux autorités compétentes, à leur demande, les informations permettant d'identifier les destinataires de leurs services avec lesquels ils ont conclu un accord d'hébergement.

> *However, the service provider may not take measures to prevent the person responsible for access to documents from exercising his or her functions, in particular as regards confidentiality, or to prevent the competent authorities from exercising their functions, in accordance with the applicable legislative provisions, as regards public security or the prevention, detection, proof and prosecution of offenses.*

Section 27 outlines the duties incumbent upon a service provider acting as an intermediary in the supply of services on a communications network, or who stores or transmits technology-based documents. Several intermediaries fall within the ambit of this provision, namely: the host, the archiver and the mere conduit, but also any other intermediary supplying services on a communications network or storing or transmitting technology-based documents.

Sections 22, 36 and 37 of *An Act to establish a legal framework for information technology* set out the rules of general application for businesses operating in the province. They specify, in respect of the intermediaries in question, what represents no-fault conduct. However, even if they take action whereby they are deprived of the immunity provided, intermediaries are not automatically liable. The statute quite clearly provides that they "may" incur liability if they have not exhibited conduct enabling them to take advantage of the immunity set out in the statute. On this assumption, their acts or omissions will be scrutinized according to criteria of general application in civil liability matters.

Section 27 exempts these intermediaries from the duty to actively monitor information and documents. They are, therefore, not guilty of any wrongdoing if they have not exercised any active monitoring. These services providers are not required to monitor the information or to detect circumstances which might indicate that documents are used in the performance of illegitimate activities. However, such intermediaries are required not to take any action to prevent the person responsible for access to the documents from exercising his or her functions, in accordance with the law, especially with respect to confidentiality. Nor must they take action to prevent the competent authorities from exercising their functions, in accordance with the law, with respect to public security or the prevention, detection, proof or prosecution of offenses. It is, therefore, the legislation governing the duties of these authorities responsible for public security and crime prevention that restrict the actions which the latter may take.

The exclusion of a duty to actively monitor has as its corollary a prohibition against interfering with the person responsible for access to documents, in those cases where we are in presence of an environment where an access to documents scheme is applicable. There is also a prohibition from preventing the competent authorities from exercising their functions with respect to public safety or the prevention, detection, proof or prosecution of offenses. However, as soon as the intermediary begins to play an active role, he or she loses the benefit of the exclusion from the duty to monitor, for instance by becoming involved in the access to documents or standing between the forces of law and order and the documents.

However, the exclusion from the duty to actively monitor documents and information has some limits. Apparently, it ends once the actual illicit content has been made known to the intermediary. According to a decision of the *Tribunal de commerce de Paris*, as soon as a holder of rights has notified a host of the illicit content in a specific storage area, the latter is apparently

under a duty to monitor any new occurrence of such content, in any storage area of his, her or its site.[17]

B. Exemptions from Liability for Intermediaries

In keeping with the approach followed in the European Directive on Electronic Commerce, *An Act to establish a legal framework for information technology* implements a conditional exemption from liability scheme for certain intermediaries.[18] Section 22 deals with the liability of those offering hosting services and the third paragraph delineates the liability of the provider offering search tools. Sections 36 and 37 apply to providers acting as mere conduits.

(1) The Host, the Intermediary Acting to Offer Storage Services in respect of Technology-based Documents on a Network

Section 22 sets out the principles in Québec law which are to apply in that set of circumstances where the provider does not exercise control over the wrongful information. Section 22 reads as follows:

> ***22.*** *A service provider, acting as an intermediary, that provides document storage services on a communication network is not responsible for the activities engaged in by a service user with the use of documents stored by the service user or at the service user's request.*
>
> *However, the service provider may incur responsibility, particularly if, on becoming aware that the documents are being used for an illicit activity, or of circumstances that make such a use apparent, the service provider does not act promptly to block access to the documents or otherwise prevent the pursuit of the activity.*
>
> *Similarly, an intermediary that provides technology-based documentary referral services, such as an index, hyperlinks, directories or search tools, is not responsible for activities engaged in by a user of such services. However, the service provider may incur responsibility, particularly if, upon becoming aware that the services are being used for an illicit activity, the service provider does not act promptly to cease providing services to the persons known by the service provider to be engaging in such an activity.*

Section 22 applies to providers "acting" as intermediaries. The scheme which outlines their liability set out in Section 22 applies where they are "acting" as an intermediary. Depending on the circumstances, the same player may act in different capacities: for instance, a blogmaster may post documents which he or she has authored or allow the distribution, on his or her blog, of documents originating from third parties. The qualification applicable to the intermediary according to Section 22 is the fact that he or she or it does not carry out the activities directly

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17 Flach Film et autres / Google France, Google Inc., Tribunal de commerce de Paris, 8e chambre, Jugement du 20 février 2008, Legalis.net, < http://www.legalis.net/breves-article.php3?id_article=2223 > (site visité le.20 mai 2008).

18 André LUCAS, « La responsabilité civile des acteurs de l'Internet », (2001) 1 *Auteurs et média*, 42-52; Emmanuel JEZ et Frédéric-Jérôme PANSIER, « Responsabilité des hébergeurs à l'aune de la loi du 1er août 2000 », (JO du 2 août 2000), Gaz Pal., 9 septembre 2000, p. 9; Michel VIVANT, « La responsabilité des intermédiaires de l'Internet », JCP (G) 99 I p. 2021.

which take place using the services which he, she or it provides. The absence of liability of the intermediary applies to activities engaged in by the user of the service and on the basis of documents stored by the latter or at the request of the latter.

The first two paragraphs of Section 22 apply to the intermediary offering technology-based document storage services on a communications network. The technical host is the entity the purpose of which it is to make available to Internet users websites designed and managed by third parties. No doubt, this is the archetype of the category made up of "technology-based document storage services on a communication network". The technical host, indeed, provides functionalities ensuring the availability of services inherent in an Internet site. Concretely, it hosts the files and other information and document directories in servers over which it exercises control. While it is undeniable that the host is able to access and examine the contents of documents hosted on its technical facilities, it is also true that it finds itself in a situation virtually preventing it from examining the contents of the documents and appreciating their meaning. The editorial function is beyond its grasp: it has no right to monitor the contents of the hosted documents.

In several respects, the provider of such hosting services is akin to the owner of premises.[19] Most often, the documents that one wishes to make available to the public on the Web are entrusted to a business which stores them on servers. This is a case where the information is located on the property of a business. The owners are rarely held liable for the actions of third parties on their property. For instance, where a hotel rents a room out to a client, it is not under a duty, nor does it have the right, to monitor what the latter does in that room. Therefore, it is not liable for any illegal activities which may take place therein unbeknownst to it. The same thing goes for a provider storing documents on a network: the documents are physically located on a server or in another environment belonging to it, but it does not play an active role in the distribution of the document.

This reasoning is in line with the principle followed by the case law of several countries, according to which an owner is not, theoretically, liable for the wrongdoing of its lessees. However, a hotel which, with full knowledge of the fact, becomes the centre of illegal activities is liable for damages, just as the owner of a site would be if it were to endorse defamatory messages sent by the users thereof. Indeed, it is conceivable that an owner who would be notified of the presence of prejudicial statements on the walls of its property and who would do nothing to remove them would be deemed to be a redistributor of the statements and liable for damages to the same extent as the author of the message.[20] Similarly, an intermediary would always be under a duty to remove information that it knows to be prejudicial, under penalty of incurring

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19 Pierre TRUDEL, France ABRAN, Karim BENYEKHLEF et Sophie HEIN, *Droit du cyberespace*, Montréal, Éditions Thémis, 1997, 1296 p., p. 5-10

20 *Hellar* c. *Bianco*, 11 Cal. App. 2d 424, 244 P.2d 757, 28 ALR2d 451 (1952); *Scott* c. *Hull*, 22 Ohio App.2d 141, 259 N.E.2d 160, (1970); *Tackett* c. *General Motors Corporation*, 836 F.2d 1042 (7th Cir. 1987); *Woodling* c. *Knickerbocker*, 17 N.W. 387 (Minn. 1883).

liability as a redistributor of the statements.[21] When one applies to the host the metaphor of the owner, the condition precedent to its incurring liability is knowledge of the wrongful nature of the information found in an electronic location.[22]

The limitation of liability which the hosts may rely on does, however, have limits. It does not apply if the host has knowledge of the fact that the stored documents are used in the perpetration of an illegitimate activity or if it has knowledge of circumstances that render it apparent that such is the case or does not act promptly to block access to the documents or otherwise prevent the pursuit of such activity.

What is encompassed here is the conduct of any illegitimate activity and not only illegal activities in the strict sense of the term. Illegal activities are those which are contrary to law. Illicit activities are those, without specifically being deemed illegal by the law, may involved wrongdoing. For instance, disclosing information on a person is not necessarily illegal, but it may be illegitimate since it may represent an invasion of privacy rights, and therefore be a fault within the meaning of the *Civil Code*.

The circumstances triggering the potential liability of the host is actual knowledge or knowledge of circumstances making it obvious that the perpetration of illegitimate activities is taking place. Knowledge of the tortious nature of a document plays a similar role with respect to the provider acting as an intermediary in order to offer technology-based documentary referral services, including an index, hyperlinks, directories or search tools.

(2) Intermediary Offering Technology-Based Documentary Referral Services

The intermediary to whom the third paragraph of Section 22 of *An Act to establish a legal framework for information technology* applies is "A service provider, acting as...an intermediary, that provides technology-based documentary referral services, such as an index, hyperlinks, directories or search tools". According to the *Webster's* dictionary, the word "referral" means "An act of referring; the state of being referred". Section 22, therefore, applies to any service providing references to documents. The service provider is not liable for activities performed using these services. The potential for incurring liability may arise, in particular, from the provider's actual knowledge that the services it is providing are used for the perpetration of an illegitimate activity and if it does not promptly cease providing these services to persons which it knows to be engaged in such activities.

In light of the generic categories set out in Section 22 of *An Act to establish a legal framework for information technology*, how should one classify search tools, blogs, so-called social networking sites, wikis as well as content-sharing sites? To the extent that these sites make no determination as to the contents of the documents posted on their site, they may claim to qualify as intermediaries within the meaning of the definition in Section 22 of *An Act to establish a legal*

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21 Eric SCHLACHTER, « Cyberspace, the Free Market and the Free Marketplace of Ideas : Recognizing Legal Differences in Computer Bulletin Board Functions », (1993) 16 *Hastings Comm/Ent L.J.* 87, 118.

22 Jay R. McDANIEL, « Electronic Torts and Videotext – At the Junction of Commerce and Communications », (1992) 18 *Rutgers Comp. & Tech. L.J.* 773, 825.

framework for information technology. Obviously, in circumstances where it is shown that they are playing an active part in the distribution decision, they could be deemed to be editors.

(a) Search tools

Among the commonly-used reference services on the Internet are search tools which provide or use algorithms or indexes to find documents meeting the specifications of a request submitted to them. The concept also encompasses the structured and theme-based collection of directories resulting from a compilation of an information sector. The term "search tool" is general, and applies to search engines and search directories. In light of the widespread reach of the network and the fact that nearly all information is likely to be found therein, it appeared very early on that Internet use, in practice, was only possible if tools were provided that were able to quickly identify the information in which the Internet user was interested.[23]

A search engine is a program – in fact, several programs divide up the various tasks – which indexes the contents of various Internet resources and, more specifically, of Web sites, in order to then enable the Internet user using a Web browser to search for information according to different parameters, by using key words, and to access the information so found.[24]

A search directory is a Web site which is presented in an inventory format, whether or not it specializes in a field, and in which the reference documents are organized by categories and accessible through hyperlinks.

An index is a concept which refers to a list of keys or references to items in a dataset, such as records in a database, the words in a set of documents being, for instance, Web pages. Search engines provided on the Internet use indices in order to find documents or resources.

The third paragraph of Section 22 also applies to directories; namely data classification systems on a storage media enabling the grouping of similar data. A directory may be subdivided into subdirectories. Classification within a directory exists in order to make available the data listed therein; hence, the information may be located and examined.

As for hyperlinks, they are connexions which may be activated in a document and enabling access to a technological resource. The word "hyperlink" means the link between an item in a document provided on the Web, such as a word or an image, to another HTML page also accessible on the Internet. However, very similar hyperlinks are provided by various commercial

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23 Frank A. PASQUALE III et Oren BRACHA, *Federal Search Commission ?: Accss, Fairness and Accountability in the Law of Search*, University of Texas, School of Law, Public and Legal Theory Research Paper no. 123, July 2007, p. 4 ; Laurent CARON, « Protection des données personnelles et moteurs de recherche : quels sont les réels enjeux ? », *Légipresse*, n° 244, septembre 2007, p. 111; Jayni FOLEY, « Are Google Searches Private ? An Originalist Interpretation of the Fourth Amendment in Online Communication Cases », 22 *Berkeley Tech L.J.* 2007, 447-475; James GRIMMELMANN, « The Structure of Search Engine Law », 93 *Iowa L. Rev.* 1 (2007); Eric GOLDMAN, « Search Engine Bias and the Demise of Search Engine Utopianism », *Yale Journal of Law & Technology*, (2005-2006).

24 OFFICE DE LA LANGUE FRANÇAISE, *Terminologie d'Internet*, < http://www.olf.gouv.qc.ca/index.html > (site visité le 20 mai 2008).

products used in the preparation of technology-based documents, by commercial information systems and in many other circumstances.

The principle set out in the final paragraph of Section 22 is that the intermediary providing referral services to technology-based documents is not liable for the activities conducted using such services. It is only when it becomes aware of the illegitimate nature of the activities performed using its services that it may incur liability.

(b) Blogs

A blog is a Web site made up of a series of messages classified by default, usually in reverse chronological order (the most recent items appearing first). Blogs can be distinguished from other publication systems on the Web due to its primary authors. Each blog (also called note or article) is, akin to a logbook or a personal journal, an addition to the blog. The blogger (the person maintaining the blog) delivers content which is often textual in nature but enhanced with hyperlinks and multimedia items, in respect of which each reader can usually make comments or deliver personal opinions (secondary authors). A blog is sometimes called a "Web journal" or a "cyberjournal". The blog resembles what could be described as a logbook.[25] The person maintaining a blog, namely the blogger, periodically posts articles or notes with respect to various topics. These notes are then included on the blogger's Website, and classified from the most recent to the oldest.[26] Generally, a blog is updated regularly by a single person who has control thereof, however it is also possible that several authors will take part.[27] Several conclusions can be reached from an examination of various blogs. First of all, the readers of, and visitors to, a blog generally have the possibility of adding a comment at the end of each note, whether or not anonymously. It lies within the discretion of the blogger whether or not to moderate the opinions posted to avoid illegitimate messages finding their way onto the Website.

The nature of the blog is such that it represents both a publishing and hosting environment. Several messages originate from the blog master who has authored them or made the decision to distribute them on the site. Other messages may originate from third parties who replied to a note or added a new section. Lionel Thoumyre explains that "[TRANSLATION] the Internet user responsible for a blog will, *prima facie*, be deemed to be the editor of an online communication service with respect to content which he intentionally posts himself and as a forum organizer for the discussion threads appearing below the articles".[28].

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25 « Blogue », Office québécois de la langue française, dans *Le grand dictionnaire terminologique*, < http://www.granddictionnaire.com > (site consulté le 20 mai 2008).

26 Bernard BRUN, « Le blogue : un équilibre délicat entre communication et responsabilité », dans *Leg@l.TI, droit et technologies de l'information : devenir aujourd'hui l'avocat de demain*, Cowansville, Les Éditions Yvon Blais, 2007, à la page 73, p. 75.

27 « Blogue », Office québécois de la langue française, dans *Le grand dictionnaire terminologique*, http://www.granddictionnaire.com, (site consulté le 20 mai 2008).

28 Lionel THOUMYRE, « La responsabilité pénale et extra-contractuelle des acteurs de l'Internet », Lamy, droit des médias et de la communication, juin 2007, étude 464.

(c) Content-Sharing Sites

Content-sharing sites are Web sites where the visitors can share online files, whether they be videos, songs or even books, to name only a few. In general, these sites use streaming technology in order to distribute the content. The best-known content-sharing sites are likely YouTube[29] and Dailymotion[30]. The visitors to the site can post movies, video clips, shows, etc. to it. They can also view the content that other visitors have posted. Social networking sites are also used to share content since some myspace hosts also enable members to post online, for instance, their favourite music. These content-sharing sites generally provide visitors with the opportunity of making comments beneath the video or the song. It is also sometimes possible to rate the document by giving it a ranking, usually out of five (for instance, four stars out of five). This ratings system enables a search on the site based on the best-ranked content.

Content-sharing sites are similar in nature to hosting services with respect to documents posted by third parties. However, these sites offer an editorial structure which has, at times, led some to argue that they in fact influence the content, in particular by giving the users means or opportunities to act which they ought to have known was potentially tortious.

(d) Social Networking Sites

Social networking Websites are sites enabling people to meet and to interrelate through their social networks. The registration form usually allows for the creation of a basic profile, which may contain your name, city of residence, as well as your occupation.[31] Thereafter, it is possible to fill in information relating to the user in a more detailed fashion, by adding a photograph, a résumé or interests. This information is grouped into a personal space to take advantage of networking with other persons, it is possible to add contacts to your address book. To this end, one can search for persons who are already members of the site and send them a friend request. If one wishes to contact a person who is not a member, it is usually possible to send that person an E-mail inviting him or her to register and to make contact. Certain sites offer the possibility of importing a contact list of an already-existing E-mail address so as to be able to send invitation E-mails to all these persons. If the persons in question join the site, they, in turn, add their contacts and the network grows as a result. The various services offered by these sites vary. Some only offer a search tool to connect with other individuals. Others allow users to create a blog, to post content online in a streaming format, to post comments, etc.

It is clear that the personal myspaces of each of the users are the exclusive liability of the latter. With respect to the content added by the users of a social networking site, the Webmaster usually acts as host. However, there is somewhat of a trend to take into account the structuring role played by the social networking Webmaster in the configuration thereof and, consequently, the editorial consequences which may result therefrom. For instance, the *Tribunal de Grande Instance de Paris* ruled that the MySpace site was an editor. In an *ordonnance de référé*

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29 < http://www.youtube.com/ > (site visité le 20 mai 2008).

30 < http://www.dailymotion.com/ > (site visité le 20 mai 2008).

31 Voir, par exemple, le formulaire d'enregistrement au site LinkedIn : < https://www.linkedin.com/secure/register?trk=ghome_join > (site visité le 20 mai 2008).

(summary order) handed down on June 22, 2007, it ruled on the consequences in terms of liability and found the community portal liable for having posted online sketches by the comedian Jean-Yves Lafesse, without the latter's authorization. The Tribunal found that the functions of the MySpace Corporation went well beyond that of a host. While conceding that it was undisputable that MySpace exercised hosting functions, the Tribunal added the following:

> [TRANSLATION] *by requiring a display structure in frame format, which it obviously makes available to the hosted users and by distributing, upon each view, advertising from which it clearly drives a benefit, it has the status of an editor and must assume the liability arising therefrom.*[32]

(e) Sites Rating Persons, Property and Services

A products and services rating site generally provides the public with the possibility of evaluating, and commenting on, a service received or property purchased. Some sites also seek to rate the physical features of a person or a host of property owned by various persons, such as cars or animals. The submission of a rating is simple; one generally only needs to click on a link, sometimes called "*Rate this*", and then to fill out the form. The means for rating property or services submitted may be different from one site to the next. Some sites suggest a rating according to a scale of 1 to 10, whereas others allow the user to allocate five stars or less to the property in question. There may even be the possibility of making a comment along with the rating submitted. Ratings submitted on these sites, in most cases, cannot even be withdrawn by the author himself or herself. To have them removed, one must contact the administrators of the site and justify one's request. In addition, some sites allow for a one-time rating of a product or a person, whereas others allow for a rating an indefinite number of times.

Membership in such a ratings site may or may not be on a voluntary basis. Usually, sites rating services received are not based on a voluntary registration procedure. It is those persons who receive the service who will register on the site the name of the service received and the appreciation which they have of it. For instance, on the site RateMyProfessors.com[33], which involves an assessment of the teaching methods of certain professors, it is usually the students who add the professors to the database of the site and not the professors who do so themselves. Similarly, several E-commerce sites, such as eBay[34], incorporate into their sales service an evaluation of the products sold, of the vendors and purchasers. Registration for this ratings procedure is not voluntary, it is compulsory if one wishes to do business on the site. These ratings then enable users to know if the vendor they are interested in is appreciated by the other users of the site, or if the purchaser with whom one wishes to do business is not late when he pays for his items. On the other hand, registration on certain types of ratings sites is entirely

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32 Jean-Yves L. dit LAFESSE / Myspace, Tribunal de grande instance de Paris Ordonnance de référé 22 juin 2007, Legalis.net, < http://www.legalis.net/jurisprudence-decision.php3?id_article=1965 > (site visité le 20 mai 2008).

33 < http://www.ratemyprofessors.com/ > (site visité le 20 mai 2008).

34 < http://www.ebay.ca/ > (site visité le 20 mai 2008).

voluntary. These sites generally involve a rating of the physical features of a person[35] or property in one's possession, such as an animal or a car.[36] One need only submit a photograph, which is then posted on the site, so that the public may then rate it.

To the extent that personal information is handled without the authorization of the interested parties, sites rating persons may be held liable for possible infringements of the legislation protecting personal data. Hence, by way of an order handed down on March 3, 2008, the *Tribunal de grande instance de Paris* ordered the site note2be.com to suspend the use and handling of the personal data of professors rated by the students as well as their posting on the site, including the discussion forum. Pursuant to Section 7 of the legislation entitled *Informatique et libertés*, the handling of personal data is conditional on the consent of the person in question, except if the person responsible for the site is pursuing a legitimate interest which is not contrary to the rights and interests of the person in question. The provision shares some similarities with Article 37 of the *Civil Code of Québec*, which provides:

> *Every person who establishes a file on another person shall have a serious and legitimate reason for doing so. He may gather only information which is relevant to the stated objective of the file, and may not, without the consent of the person concerned or authorization by law, communicate such information to third persons or use it for purposes that are inconsistent with the purposes for which the file was established. In addition, he may not, when establishing or using the file, otherwise invade the privacy or damage the reputation of the person concerned.*

In the French decision, the Tribunal purported to determine if, under the circumstances, there was a legitimate interest in the treatment of personal data by this site. The Tribunal examined the site and focused on the method of rating of the professors established on the basis of a single numerical mark and six qualifiers. According to the Tribunal, this partial approach can lead to a biased appreciation, either favourable or unfavourable, and can, therefore, cause problems. The Tribunal also deemed that the site had not taken sufficient precautions to prevent the risks of slippage into controversy, in particular by organizing the moderation of its discussion forum. Nor had the site provided for the implementation of efficient procedures to enable the teachers in question to enforce their rights. Finally, the commercial nature of the site weighed on the appreciation of the Tribunal. According to it, the persons appearing on it were entitled to not have their names associated with the advertising messages appearing on the pages.

For its part, the *Commission nationale de l'informatique et des libertés* (CNIL) also ruled that the site was unlawful in terms of protection of personal data. In its press release summarizing its decision handed down on March 6, 2008, the organization observed as follows:

> [TRANSLATION] *the ratings system for teachers provided by the note2be.com corporation is pursuing a commercial activity based on visits to an Internet site which does not grant it the necessary legitimacy, within the meaning of the statute, to attribute or have attributed to teachers an individual rating which is likely to cause confusion, in the mind of the public, with an official rating scheme.*

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35 Voir, par exemple, < http://www.hotornot.com/ > (site visité le 20 mai 2008).

36 Voir, par exemple, < http://www.ratemyride.com/ > (site visité le 20 mai 2008).

Hence, the commercial purpose in which the handling of the information is supposed to take place as well as the potential confusion with an official ratings system appear to be sufficient to scuttle the legitimacy of what one might have thought was a mere expression of opinions – potentially unpleasant – with respect to the public activities of persons exercising a profession relating to the public. If the trend which the note2b decision represents were to be confirmed, there is some concern that this might restrict the scope of the right to discuss public facts and the public actions of certain persons. Nothing would prevent the acknowledgement of the right of persons to rely on data protection legislation in order to request the censorship of the information in the public domain relating to them, based on what they find unpleasant or irritating or if they rely on some risk of inconvenience.

(f) Wikis

A Wiki site is a Web site where the users can amend information contained therein. *Wiki* is a word derived from the Hawaiian expression *wikiwiki* which means "quick".[37]. Wiki sites aim at providing online information, or creating, for instance, a group novel. They are also used as platforms for group work. Contrary to blogs, which are more the fruit of the work of a single individual, Wiki sites call upon a community of users. Visitors are often called upon to intervene on the site by adding or correcting information which they deem to be inaccurate or incomplete. The most well-known example of a Wiki site is no doubt the online Wikipedia encyclopedia.[38] This encyclopedia allegedly contains more than 7 million articles in several languages.

To create a Wiki site, one must have a Wiki site management software, such as MediaWiki.[39] However, the amendment of an already-existing Wiki site requires the use of no software in particular, but rather visiting the page in question and clicking on the link "See Source Text" or "Amend". The modification of a Wiki site is slightly more difficult than the amendment of a blog. To amend a text, one must use a language akin to HTML language in a simplified version, which is called Wikitext.[40] One must then place certain words in square brackets or add expressions before the words to format the text. However, for basic functions such as bolding or italicizing a word, there are usually icons, like those that exist in a word processing software, to facilitate the work.

The articles posted on such a site are usually rights-free, since the GNU free documentation license[41] is generally used. Indeed, once online, any user may use the article and amend it as he or she wishes. However, Wiki sites usually make use of the site conditional upon observance of regulations, which generally prohibit plagiarism or infringement of a protected work or insulting statements. Some sites also restrict the parameters for amendment of articles to registered members only. For reasons of security, each amendment is retained in a database, such that, if an

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37 « Site Wiki », Office québécois de la langue française, dans *Le grand dictionnaire terminologique*, < http://www.granddictionnaire.com > (site consulté le 20 mai 2008).

38 < http://www.wikipedia.org/ > (site visité le 20 mai 2008).

39 < http://www.mediawiki.org/ > (site visité le 20 mai 2008).

40 Sébastien BLONDEEL, *Wikipédia : comprendre et participer*, coll. « Connectez-moi! », Paris, Éditions Eyrolles, 2006, p. 107.

41 < http://www.gnu.org/copyleft/fdl.html > (site visité le 20 mai 2008).

evil-minded person were to erase articles, it is possible to recover them.[42] It is possible to see the history of these amendments by clicking on the "History" link on a Wiki site.

As one can see, Wiki sites create a situation in which the functions of editor and host are more intertwined than ever. To the extent that Wiki sites are made up of content added by users, they are akin to hosting services. For instance, in an *ordonnance de référé* (summary order) dated November 29, 2007, the *Tribunal de grande instance de Paris* dismissed the claim of three plaintiffs who were suing the Wikimedia Foundation, owner of the Wikipedia Online Encyclopedia, for invasion of privacy and defamation since their sexual orientation had been disclosed in a collaborative encyclopedia article.[43] Brought before the Courts in its capacity as hosting service, the Tribunal ruled that the Wikipedia Encyclopedia was not liable for the content of the articles posted. Instead, the applicable legislation was the *Loi sur la confiance dans l'économie numérique* passed in June 2004. Pursuant to this statute, providers of hosting services may not incur liability as a result of the information which they store if they had no actual knowledge of their illegitimate nature or of facts and circumstances whereby such nature would become apparent. In addition, hosts had no general duty to monitor the information stored, or to seek out facts or circumstances showing the existence of illegitimate activities. In this matter, the plaintiffs had not followed the procedural and substantive rules set out in the statute to notify the encyclopedia of the presence on its site of contentious content, which was essential for the host to acquire knowledge of the contentious facts and be required to remove the disputed passages. Furthermore, Wikimedia had no specific duty to search for defamatory content or content invading the privacy of third parties due to the risk that its activity brings to bear on their occurrence.

Some authors believe that one must place this decision in its proper scope in light of the removal of the contentious article from the history of the site on the very day of the hearing, thereby canceling any direct damages, the fact that the parties had agree to sue Wikepedia as a hosting service, in light of the fact that this status is not obvious and, finally, that the decision in question is an *ordonnance de référé* (summary order) which only rules on the obvious.[44]

(3) Facts Giving Rise to Liability of Hosts and Those Offering Technology-Based Documentary Referral Services

The principle laid down by Section 22 is that the host is not liable for activities performed by a recipient of the services using the documents hosted by the user or at the request of the latter. This exemption holds until the host has actual knowledge of the illegitimate nature of the activities and does not take prompt action in order to block access to the documents or otherwise prevent the pursuit of this activity. This provision posits a rule of absence of liability for these

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42 Raphaële KARAYAN, « La révolution Wiki est en vue », dans *Le Journal du Net*, < http://www.journaldunet.com/0308/030811wiki.shtml > (site consulté le 20 mai 2008)

43 Marianne B. et autres/ Wikimedia Foundation, Tribunal de grande instance de Paris, Ordonnance de référé, 29 octobre 2007, disponible à legalis.net, < http://www.legalis.net/jurisprudence-decision.php3?id_article=2071 > (site visité le 20 mai 2008).

44 « Wikipédia, hébergeur sans obligation », *legalis.net*, 8 novembre 2007, < http://www.legalis.net/breves-article.php3?id_article=2073 > (site visité le 20 mai 2008).

service providers, however, this limitation of liability ceases to have effect if certain facts are established.

In several respects, the intermediary offering referral services to technology-based documents, including an index, hyperlinks, directories or search tools is akin to a librarian. It offers referral services to technology-based documents, including an index, hyperlinks, directories and search tools. Much like librarian, it does not control the content of the information it transmits or makes available to the public or to clients. Indeed, it would be unthinkable if each provider of search or retrieval tools were to be answerable for the contents of each publication which it identifies or to which it provides a hyperlink. Nor should it be required to ensure that they contain no wrongful, illegitimate or prejudicial information.

On the other hand, it makes sense that the librarian is under a duty to remove the information the tortious nature of which has been brought to its attention. If it does not do so, it may be held liable for any damages which result.[45]

When they acquire knowledge of the illegitimate nature of the activity connected with the documents which they store or to which they provide access, hosts and those who offer search engine services are under a duty to act. The factor that triggers their liability is the knowledge which they have or which they acquire of the tortious nature of the information. It is not, however, the only circumstances under which these intermediaries may incur liability. Section 22 does not represent an exhaustive list of the situations in which an intermediary to which it applies may incur liability. Paragraph 2 of Section 22 indeed provides that the service provider "may incur liability, particularly" if it has actual knowledge. The same formula is repeated in the third paragraph which applies to service providers providing search tools.

(a) Actual Knowledge

Intermediaries to whom Section 22 applies may incur liability if it is demonstrated that they had actual knowledge of the illegitimate nature of the activities conducted by the recipient of the service using technology-based documents.

Owing to the rule set out in Section 26, which excludes a duty to actively monitor information and documents, one cannot determine that they are guilty of wrongdoing due to a failure to monitor information or documents. Consequently, it is difficult to imagine that these intermediaries could be deemed to have knowledge of the contents of documents which transit through their service. They only acquire knowledge when they are made aware of the existence of an illicit activity or circumstances are brought to their attention whereby the existence of an illegitimate activity becomes apparent.

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45 D. SLEE, « Liability for Information Provision », (septembre 1992) 23 *The Law Librarian* 155; J. A. GRAY, « Personal Malpractice Liability of Reference Librarians and Information Brokers », (1988) 9(2) *Journal of Library Administration* 71; J.A. GRAY, « Strict Liability for Dissemination of Dangerous Information? », (1990) 82 *Law Library Journal* 497; D.J. LOUNDY, « E-LAW 4 : Computer Information Systems Law and System Operator Liability », (1998) 21 *Seattle University Law Review* 1075

Knowledge can be deemed under several circumstances. First, it is deemed to exist where the information originates from the person itself or the latter has indeed made the decision to distribute it. Hence, where the host stores documents which it has originated, it will be deemed to have knowledge of the contents of the latter.

Secondly, a person may have actual knowledge if it exercises a supervision, whether regular or periodic, of a site or an environment. There is not duty of supervision in order to acquire a knowledge as soon as illicit documents surface. However, if such supervision is conducted and enables an acquisition of the knowledge of the illicit nature of documents, the host may then incur liability if it does not act.

Thirdly, knowledge may be acquired following the notification by a third party. This is the case in which a person brings to the attention of the storage service provider the fact that illicit documents are stored by it.

Finally, where the illegitimate nature of the document in question is under dispute, the duty of the service provider to act only begins to run from the time when the illicit nature has been established.

(b) Knowledge of Circumstances Whereby an Illicit Activity Becomes Apparent

Knowledge may apply to circumstances whereby an illicit activity is made apparent. Such knowledge may arise from indicia of which the service provider becomes aware and which lead to the conclusion that an illicit activity is being conducted.

Furthermore, the provider of such services often does not have legitimate grounds to intervene in order to remove the potentially prejudicial information. Excluding circumstances in which the illegitimacy is absolutely clear, by what token and pursuant to which authority must one determine the wrongful nature, if any, of such and such information? Pursuant to what authority ought the host to act in the manner of a judge called upon to determine whether contents are wrongful and prejudicial or not?

(c) Degree of Knowledge Required in Order to Incur Liability

Different points of view may exist as to the degree of knowledge necessary in order for the service provider to incur liability. Strowel and Ide note that "[TRANSLATION] the issue is that of knowing how to define this knowledge threshold, which, if crossed, leads to full liability".[46] In light of the prescription that freedom of expression must be observed, the knowledge threshold beyond which the intermediary incurs liability must be more than a mere complaint or allegation. For a person to be justified in intervening with respect to a content, it must have acquired knowledge, confirmed by an independent third party, of the actually illicit nature of the document. The knowledge leading to liability is not that which results from the mere receipt of a complaint but, rather, that which exists upon it becoming obvious that there is an illegitimate

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46 Alain STROWEL et Nicolas IDE, « Responsabilités des intermédiaires : actualités législatives et jurisprudentielles », dans *Droit Nouvelles technologies*, < http://www.droit-technologie.org/dossier-26/responsabilite-des-intermediaires-actualites-legislatives-et-jurispru.html >.

nature. One can, therefore, conclude that, where the illicit nature is, patently obvious, knowledge is acquired as soon as one is made aware of its existence.

In clear cases, if any, the issue is an easy one to answer: if the illicit nature jumps out at it, the intermediary may be required to act upon receipt of a complaint. However, what is it supposed to do where the illicit nature is not obvious? For instance, assume a host receives notice to the effect that such and such a site which it hosts contains documents infringing a person's right to protect its image. One knows that there are several circumstances where the distribution of the image of a person is wholly legitimate. If it accedes to the request and removes the document, the host acts as judge and jury although it has not acted in accordance with the basic duty to hear the arguments of all the parties involved. If it does nothing, the intermediary risks incurring liability and being required to answer should it be sued by the victim. If it acts and removes the information, it risks being taken to task by the owner of the hosted or referenced information for not having taken basic precautions to weed out the specious nature of the notification. This dilemma has led the American and French legislators to intervene and impose a process in order to sift out the serious allegations from the frivolous ones.

Since the Québec legislator has specified nothing as to what appropriate action should be taken in this respect, is one to conclude that there is no duty to take precautions following the receipt of notice to the effect that a hosted or referenced site is illicit? One must answer this question in the negative. The liability of the host and of the search engine may be incurred if the latter gives effect to a notification without taking minimal precautions. A person whose documents would be removed from a site or whose documents would be banished from an indexing service could, no doubt, suffer damages as a result of an unfounded allegation to the effect that a document is illegitimate. The question will then become whether the intermediary acted with the prudence of, and taking the precautions that, a reasonable person would have taken under such circumstances. If the notification turns out to be frivolous or ill-founded, one would have removed content, infringed freedom of expression and given precedence to the wishes, if not the delusions, of a plaintiff at the expense of the prudent application of a measure which involves censorship and, therefore, by its very nature, is an extraordinary remedy.

The appropriate attitude which an intermediary should exhibit is to obtain a confirmation by a third party, such as a neutral expert, and to act in reliance upon such an assessment. Indeed, it appears obvious that actual knowledge only exists as of the time when the complaint with respect to the document is sufficiently documented to set aside any reasonable doubts as to its merits. This approach is consistent with a notion of respect for freedom of expression and of the right of the public to information. It is difficult to imagine a principle pursuant to which one would be required to assume the veracity at all times of the allegations of a person complaining of information without heeding the principle of freedom of information. Otherwise, censorship would take place without a serious examination of the allegations to the effect that a document is illegitimate. It would be surprising if the Québec legislator were to have opted for a practice so discordant with the principles of a democratic society.

Consequently, so long as the intermediary has not obtained an independent confirmation of the illegitimate nature of a document, it is under no duty to act in order to censor the information. If it does so, it risks causing injury to the person who posted the document. Hence, the intermediary only has knowledge of the illegitimate nature of the information or of the document once it has

been able to establish the merits of a complaint or of a notice. It is only as of such time that its duty to act promptly is engaged.

To conclude otherwise would mean conferring upon any person who believes that it was injured by a document a power of anticipated censorship, without the intervention of a third party who is able to sort out the allegations. One is only entitled to remove information once the merits of the complaint have been established. It would be absurd if the legislator had posited a rule of law enabling any person to secure, by way of a mere complaint, removal of information which he or she finds unpleasant or deems prejudicial. What falls within the ambit of the provision of the legislation is illicit information. For a complaint to have merit, it must show serious grounds leading one to conclude that the document in question is of an illicit nature and it must not arise from an arbitrary, vengeful or frivolous request. To determine the merits of the complaint, an intermediary who entertains any doubts in this respect must obtain an independent confirmation.

In the United States, the Congress implemented means for handling allegations of unlawfulness of material posted on the Internet. In light of the adherence of American case law to freedom of expression, it was agreed to approach the liability of intermediaries by avoiding solutions giving rise to practices of anticipated censorship. Under American law, the *Digital Millenium Copyright Act*[47] provides conditional exemptions from liability which would arise from copyright infringement for intermediaries.

In order to take advantage of the exemption from liability, intermediaries must designate an agent to receive notification from complainants to the effect that a hosted or posted document involves infringement of copyright. Any person may lay a complaint with respect to a document. The complaint must be signed and identify the infringed work, the infringing content and its location. Such a complaint must include affidavits. Once it has received a complaint which is in compliance with the substantive and procedural conditions set out by the Act, the host is under a duty to act with all due dispatch. If it does not do so, it may be liable for damages. The notification may be followed by a reply notification on the part of the person challenging the allegations set out in the complaint. The host then forwards this reply notification to the complainant and notifies him that it will repost the disputed content within ten business days. Prior to the expiry of this time limit, a complainant who wishes to avoid the reposting online of the disputed content may initiate an application for injunction. Otherwise, the host is required to repost the content no later than fourteen days following the reply notification.

The French legislation dealing with reliance on the digital economy provides for a mechanism for notification of intermediaries. Section 6.1-5 of the LCEN legislation provides that knowledge of the disputed facts is deemed to be acquired by persons set out in Section 2 where they are notified of the following:

> [TRANSLATION]
>
> * *the date of the notification;*

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47 Public Law n° 105-304, 112 Stat. 2860 (28 octobre 1998), < http://www.eff.org/ip/DMCA/hr2281_dmca_law_19981020_pl105-304.html > (site visité le 15 janvier 2002). Voir Jane GINSBURG, *News from the U.S.*, (1999) 179, RIDA, 143 à la p. 225.

> ** if the notifier is a natural person: his or her name, the first name, profession, residence, nationality, date and place of birth; if the applicant is a body corporate: its nature, corporate name, head office and the name of the body ensuring its legal representation;*
>
> ** name and address of the recipient or, in the case of a body corporate, its corporate name and head office;*
>
> ** the description of the disputed facts and their precise location;*
>
> ** the grounds based on which the content must be removed, including a reference to the legal provisions and a substantiation of the facts;*
>
> ** a copy of the correspondence sent to the author or editor of the disputed information or activities and requesting their interruption, removal or amendment or the reasons why the author or editor could not be contacted.*

Not relying on this notification procedure or ignoring its procedural requirements has led to dismissal of claims under the case law.[48]

Unless it is willing to risk being sued by the person whose document would be unjustifiably censored, an intermediary must determine the merits of the complaint. To do so, the intermediary may draw inspiration from the "notice and take down" procedure of U.S. legislation or the procedure required by French law. These illustrations of the approach under American and French law provide useful indications of the precautions to be taken by an intermediary receiving notification to the effect that hosted content or content to which it refers is unlawful.

In those circumstances where the unlawful nature of the document does not jump out at it, the service provider must seek an independent legal opinion confirming the unlawful nature of the document to which the complaint relates. Once such confirmation (which the intermediary must seek diligently) has been obtained, it must remove the document. However, if, according to the independent opinion, the complaint appears to be insufficiently grounded, it must refuse to remove the material, subject to requiring more substantial evidence. Under the latter circumstances, it could not be alleged that the service provider had knowledge of the unlawful nature. At the most, it had knowledge of unconfirmed allegations by an independent third party. This prevents an allegation that it had knowledge of the unlawful nature of the document.

Abusive complaints are sanctioned by fines. Section 6.1-4 provides that "[TRANSLATION] any person holding out to those persons referred to in Section 2 contents or an activity as being unlawful with a view to having it removed or ceasing its distribution, knowing such information to be inaccurate, is liable to imprisonment for one year and a fine of 15,000 EUR".

On the other hand, the intermediary – the host – is liable for any content that is "patently unlawful". In an interpretation commentary made to the text of the LCEN legislation, the *Conseil constitutionel* deemed that the provisions of the law "[TRANSLATION] cannot have the effect of triggering the liability of a host who did not remove information alleged to be unlawful by a

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48 Lionel THOUMYRE, « La responsabilité pénale et extra-contractuelle des acteurs de l'Internet », *Lamy droit des médias et de la communication,* juin 2007, étude 464..

third party"[49] unless "[TRANSLATION] such nature is patently obvious or if its removal has been ordered by a judge".[50]

Ultimately, it appears that the intermediary may only incur liability in the event of actual knowledge of the unlawful nature of a document. Any other reasoning would raise issues with respect to freedom of expression.

(d) Duty to Promptly Cease Providing Services to Persons Known to be Engaging in an Illicit Activity

This duty to cease promptly supplying services to persons which the service provider knows to be engaged in an illicit activity is incumbent upon the service provider once it is established that it has knowledge of the illegitimate nature of the activity. When they act to take the steps mentioned once they have acquired knowledge of the illegitimate nature of the documents or activities, the service providers to whom Section 22 applies do not incur any liability.

Once it becomes aware of the fact that persons are engaging in an unlawful activity, the search engine service provider is under a duty to promptly cease supplying its services. As for the host, it must block access to the documents or prevent the pursuit of the unlawful activity. The manner in which this duty to act promptly is to be performed is to be appreciated in light of the circumstances in which they service provider is acting.

The service provider must promptly intervene in a short time frame. The duty to act arises from its knowledge; it arises once the unlawful nature is established in a serious and independent manner. It is as of the time when the service provider becomes aware thereof that one will assess if it acted quickly. The sufficiently prompt nature of the action is appreciated according to the circumstances, the necessary means and the efforts made in order to act.

The action taken by the service provider must focus on blocking access to the documents or otherwise preventing the pursuit of the activity. It must take all possible means, in light of the resources available to it and the circumstances in which it is acting. It incurs no liability if the steps required in order to correct the situation are taken promptly.

(4) Mere Conduit

Certain actors in cyberspace assume a role of mere conduit of information. Just as a carrier, an electronic communications system sometimes only serves as a conduit to transfer information from one site to another. Mere conduits offering services to the public, so-called "common carriers", are theoretically exempt from liability for the content of statements which they transfer

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49 Lionel THOUMYRE, « La responsabilité pénale et extra-contractuelle des acteurs de l'Internet », *Lamy droit des médias et de la communication,* juin 2007, étude 464..

50 Conseil Constitutionnel, décision no. 2004-496 DC, 10 juin 2004, JO 22 juin 2004, p. 11182 ; Voi Ophélie FONDEVILLE et Anne-Sophie JOUANNON, « Le 'manifestement illicite', mystérieux point de rencontre entre la victime et l'hébergeur » Juriscom.net, 7-04-2008,< http://www.juriscom.net/pro/visu.php?ID=1051 > visité le 23 mai 2008.

on behalf of their users.[51] Contrary to editors and distributors, mere conduits are under a duty to transfer every message without discrimination whether with respect to the contents of the message or to the person sending it.[52] Section 36 of *An Act to establish a legal framework for information technology* reads as follows:

> ***36.*** *A service provider, acting as an intermediary, that provides communication network services exclusively for the transmission of technology-based documents is not responsible for acts of service users performed with the use of the documents transmitted or stored during the normal course of the transmission for the time required for the efficiency of the transmission.*
>
> *However, the service provider may incur responsibility, particularly if the service provider otherwise participates in acts performed by service users*
> *1) by being the sender of a document;*
> *2) by selecting or altering the information in a document;*
> *3) by determining who transmits, receives or has access to a document; or*
> *4) by storing a document longer than is necessary for its transmission.*

This provision delineates the liability incumbent upon an intermediary in order to supply communications network services exclusively for the transmission of technology-based documents on this network. This provision applies to intermediaries offering services exclusively connected with the transmission. For instance, an E-mail server functions as follows: the user accesses his E-mail by contacting his service provider. The user writes an E-mail, sends it over the network using the E-mail server. The messages received also transit through the E-mail server. All E-mails, both sent and received, are stored in an E-mail warehousing database and are archived under the name of the user. The E-mail service provider only intervenes to ensure the transmission of documents.

An intermediary only acting as a mere conduit is not, theoretically, liable for the actions performed by others using documents which it transmits or stores during the normal course of the transmission and during the time necessary in order to ensure the efficiency thereof. For instance, the intermediary is not liable for the illegal activities which may be contained in the messages received or sent by a client. However, if the mere conduit takes some steps, it may incur liability. Its participation in the action of third parties entails responsibility on its part. Hence, it may incur liability in the four situations referred to in Section 36.

This list is not exhaustive of all the circumstances under which an intermediary to which it applies may incur liability. Paragraph 2 of Section 36 indeed states that the mere conduit may incur liability, in particular if it otherwise participates in the actions of third parties. In addition

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51 Michael H. RYAN, *Canadian Telecommunications Law and Regulation*, Toronto, Carswell, 1995, p. 416; Lynn BECKER, « Electronic Publishing; First Amendment Issues in the Twenty-First Century », (1984-85) 13 *Fordham Urban Law Journal* 801, 857.

52 *Chastain* c. *British Columbia Hydro & Power Authority*, [1973] 2 W.W.R. 481; *Loi sur les télécommunications*, L.C. 1993, c. 38, art. 36 : « Il est interdit à l'entreprise canadienne, sauf avec l'approbation du Conseil, de régir le contenu ou d'influencer le sens ou l'objet des télécommunications qu'elle achemine pour le public ».

to the cases specifically listed there, there may be others in which the mere conduit does more than merely assume a passive role in the transmission and takes an active part in the activity of third parties. It is necessary to examine in greater detail the hypotheses expressly referred to.

(a) Service Provider Originating the Transmission of the Document

If the service provider is the source of transmission of the document, it is, to a certain extent, deemed to have itself decided to transmit it. In such a case, it is truly no longer a passive intermediary. It is playing an active role in the transmission decision, which is akin to the exercise of an editorial action.

(b) Service Provider Selecting or Amending the Information Contained in the Document

Where the service provider selects or alters information, it is exercising an editorial function. It becomes the person which makes the decision to create or to distribute a document. It is then deemed to have taken part in the decision to produce the document in its current state. As a consequence, it is liable therefor.

(c) Service Provider Selecting the Person Transmitting the Document, Receiving it or Having Access Thereto

In making a selection as to the persons who shall transmit or receive a document, the service provider is doing more than merely transmitting a document. The service provider is deciding which persons are entitled to transmit, receive or access a document. The service provider who selects the person to transmit it is itself making a decision regarding transmission: it is no longer a passive agent. The same goes if it selects the recipient or the person entitled to access it.

(d) Service Provider Storing the Document Longer than Necessary for its Transmission

Under such circumstances, the service provider finds itself in possession of the document and exercising physical control over it. For instance, this may occur if it intercepts the document. Actual physical control is then exercised by a person who, knowing that it is contributing to the distribution of a potentially prejudicial document, has the opportunity to remove the message and terminate its distribution not by exercising editorial control over its contents, but rather by removing it from distribution.

In brief, in all these situations, the service provider is doing more than merely providing communications network services exclusively for the transmission of technology-based documents on this network. The service provider is then playing an active role in the decisions with respect to the document transmitted or the actions performed by others. It then incurs liability.

(5) Intermediary Storing Documents for the Sole Purpose of Ensuring Efficiency in Transmission

Section 37 of *An Act to establish a legal framework for information technology* sets out the liability scheme for an intermediary when it stores on a communications system technology-based documents supplied to it by its client and it only stores them for the sole purpose of

ensuring the efficiency of their subsequent transmission. For instance, this could apply to a controlled access server, to a hosting service for documents intended for specifically designated persons. It may also apply to a service provider offering an intranet service. Section 37 reads as follows:

> *37. A service provider, acting as an intermediary, which, as part of transmission services provided via a communication network, maintains technology-based documents furnished by clients on that network for the sole purpose of ensuring the efficiency of their subsequent transmission to persons having a right to access the information, is not responsible for acts of service users performed with the use of those documents.*
>
> *However, the service provider may incur responsibility, particularly if the service provider otherwise participates in acts performed by service users*
> *1) as specified in the second paragraph of section 36;*
> *2) by not complying with the conditions for access to a document;*
> *3) by preventing the verification of who has access to a document;*
> *4) by failing to withdraw a document from the network or to block access to the document after becoming aware that the document has been withdrawn from its initial position on the network, that persons having the right to access the document are unable to do so or that a competent authority has ordered that the document be withdrawn from the network or that access to the document be blocked.*

Theoretically, a person storing technology-based documents supplied by its clients and which only stores them in order to ensure the efficiency of the transmission is not liable for actions perpetrated by others using such documents. Its activity is akin to that of the mere conduit.

This provision applies to a service provider receiving documents from its client and storing them exclusively in order to ensure the efficiency of the transmission. This practice may take on several forms. Hence, a network operator reserved for the use of a specific set of persons may be entrusted with documents. Caching involves the storage of aspects of a Web page in a server or a temporary computer so as to be able to more efficiently access this page. Network operators, just as users, may resort to caching. This operation may be defined as a copying a document on a server in order to facilitate access thereto by a user without it being necessary to request the document from the server upon which it is originally located. Caching may take place by using proxies, which are intermediaries between the users' browser and the Web server. These intermediaries may serve both as filters and a cache. According to Tischer and Jennrich, "[TRANSLATION] it is found everywhere where multiple users access the Web through a concentration point. Hence, several operators are able to have their clients transit through a proxy before launching them upon the Internet network".[53] These authors add the following:

> [TRANSLATION] *The principal feature of a proxy is its function as a passage required by the Web access of linked hosts. If one of the computers starts up its browser in order to access the network and one of the available servers, the request first transits through the proxy. The latter takes control of the operations, retrieves the request in its own name in order to transmit it to the server in question. When the information requested arrives,*

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[53] Michael TISCHER et Bruno JENNRICH, *La bible Internet expertise et programmation*, Paris, Micro Application, 1997, p. 1050.

> *the proxy sends it back to the requesting host, which ignores its action. In fact, since the proxy acts as the server, the host does not notice its existence.*[54]

Caching involves storing aspects of a Web page on a server or a temporary computer in order to enable more efficient access to this page. Hence, network operators may use a "proxy" server which is a buffer computer in order to improve security and speed of transfer of works to the client.

Operators place in the cache the pages that are most often accessed in order to reduce access time which clients face and reduce bottlenecks. This feature is especially significant for those who wish to access remote Web sites, which operation may entail significant communications delays. By caching remote sites often requested by their clients, operators are in a position to reduce the delays. The most frequently-accessed documents are stored on the proxy and access to the Web sites by clients is, hence, accelerated.[55] Caching may be either "blind" (automatically executed by the operator's system, according to demand or technical requirements), or based on choices made by the operator for technical or commercial reasons.

The mere conduit is theoretically exempt from liability. However, it may incur liability, especially if it otherwise participates in the actions of third parties. Among the illustrative cases leading to a conclusion of a participation in the action of third parties, there are those situations set out in Section 36, namely being the source of transmission or sender of the document; selecting or altering the information contained in a document; selecting the person transmitting, receiving or accessing the document or retaining the document longer than necessary for its transmission.

In addition, this intermediary may also incur liability by not complying with the terms of access to the document, by taking steps to prevent the verification of who has had access to the document. Its liability will also be incurred if it does not promptly remove the document from the network or does not block access to it when it has actual knowledge that such a document has been removed from the location where it was initially found on the network. The same duty applies where it becomes aware of the fact that it is impossible for persons entitled to have access thereto to access such document or as a result of a competent authority ordering the removal of the document from the network or prohibiting access thereto.

Under such circumstances, the intermediary takes an active role in the distribution of the document. It assumes an active role since it becomes a participant in the decision to distribute the document; it then adopts the role of an editor. However, exemption from liability only applies to the extent that it has a passive role in the transmission of the document. By not complying with the terms of access to the document, it finds itself in the position of determining itself the terms according to which the document will be accessible. It, therefore, takes an active role in the distribution of the document. By taking steps in order to prevent the verification of those who have had access to the document, it is intervening in the decision to distribute the document.

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54 Michael TISCHER et Bruno JENNRICH, *La bible Internet expertise et programmation*, Paris, Micro Application, 1997, p. 1050.

55 Jérôme COLOMBAIN, *Le dico du multimédia*, Paris, Éditions Milan, 1998, p. 168.

Finally, the intermediary must remove promptly from the network a document or block access thereto as soon as it has knowledge of the fact that such document was removed from its initial location on the network. It must similarly withdraw the document where it becomes aware of the fact that it is impossible for persons entitled thereto to access it or where a competent authority has ordered its removal from the network or has prohibited access thereto.

Conclusion

An Act to establish a legal framework for information technology clarifies the civil liability scheme governing technical intermediaries on a network. Drawing inspiration from the principles of the European Directive on Electronic Commerce as well as from provisions existing in American legislation, it sets out the liability of technical intermediaries taking part in the process with a view to transmitting and making available documents to the public. An analysis of the Québec provisions governing the liability of Internet intermediaries shows an attempt to strike a delicate balance between imposing excessive liability on intermediaries and immunizing the latter at the expense of those who suffer damages as a result of the distribution of information and documents in cyberspace.

We have demonstrated that effective control over the unlawful message is an essential condition for triggering the liability of the intermediary. Where they do not have control over the message, intermediaries only incur liability where they have actual knowledge of the unlawful nature of the document.

However, one must acknowledge that the emergence of Internet applications involving an intertwining of content generated by users but posted online in a format and a structure depending on the Webmaster is contributing to muddy distinctions which one must necessarily make between the person having control over the information and the person only acting as an intermediary in the transmission of the allegedly unlawful material.