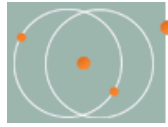


The Internet Rights Forum



www.foruminternet.org

RECOMMENDATION REPORT

WHAT KIND OF RESPONSIBILITY FOR WEB DISCUSSION FORUM MANAGERS?

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The development of discussion forums has been one of the Internet's greatest innovations, benefiting freedom of expression and of communication. However, they have also been used to publish illicit (racist, revisionist) content and defamatory material injurious to private individuals.

How can we strike a balance between freedom of expression and law? First and foremost, clear standards of responsibility need to be established for participants and managers of discussion forums on the Web, including independent webmasters, online publishers and Internet service providers¹.

This is not only a legal or a political issue. Under difficult economic conditions, all Internet service providers, online publishers and independent webmasters seek equal legal treatment as they exercise similar activities.

Under these conditions, the Internet Rights Forum is affirming that the application of a specific legal regime must be appreciated on the basis of the activities concerned (hosting, editing) and not legal status (individuals, access providers or press companies).

Emerging from many exchanges between the actors and the consensus they reached, the recommendations below take this complex situation into account. They are bound to evolve in the future.

These recommendations are intended for judges and forum managers.

To judges, the Forum reminds that discussion forum management involves a great variety of situations, for which the application of a single liability regime appears inappropriate. The appropriate regime should rather be determined as the case may be: some discussion forums may be answerable as hosts when managers keep some degree of editorial distance as regards contents; other forums may be answerable under the regime of press administrators when managers alter the contents or appropriate them.

Besides, the Internet Rights Forum wishes to limit the undesirable effects on the exercise of moderation of the criteria of the responsibility of publishing managers contained in article 93 of the July 29, 1982 Law on Audiovisual Communication. Indeed, forum managers who take it upon themselves to monitor the contents of messages before putting them online may be subjected to the "editorial" liability of publishing managers. This situation may discourage responsible behaviours. To solve this paradox, we recommend that judges do not apply the regime of editorial responsibility to the forum managers who do not make editorial use of the contents, but who use an *a priori* form of moderation in order to suppress inappropriate messages (messages outside the topic, redundant or illicit messages).

As far as forum managers are concerned, the Internet Rights Forum wishes to encourage responsible behaviours and the use of clear and exhaustive members' charters.

A. Outline for judges in case of litigation

1) The liability of content authors and moderators

According to the Forum the following individuals may be held liable under the circumstances below:

¹ This recommendation addresses participants to asynchronous discussion forums, and not synchronous discussion chat rooms, weblogs or online ads services, though some of the proposals below may apply to them also.

- the author of a message or any person taking part in the creation of the message's content;
- moderators modifying the content of a message so that it becomes illicit or injurious, while it originally was not.

2) The liability of discussion forum managers

According to the Internet Rights Forum, it is unnecessary to privilege the application of a specific liability regime. Discussion forum management involves a variety of situations, each of them calling for the application of a fitted regime.

Forum administration may be considered as a hosting activity, requiring the application of article 43-8 of the September 30, 1986 law, or a publishing activity, subjected to article 93-3 of the July 29, 1982 Law on Audiovisual Communication, or else another activity, in which case civil law applies to it.

The application of the appropriate liability regime must be considered in light of the activities exercised by forum managers and not their status. For example, hosting providers will not systematically be answerable under the liability regime of hosts when their activities in managing discussion forums are comparable to publishing. Likewise, editorial responsibility should not apply to press companies managing discussion forums akin to hosting activities.

The Internet Rights Forum proposes the following outline for judges, according to which the actual activities of forum managers should be taken into account, and favouring the application of the liability regime appropriate to the circumstances below:

a) The application of editorial responsibility

The Internet Rights Forum recommends that judges privilege the application of article 93-3 of the July 29, 1982 to press offences on discussion forums when forum managers **make editorial use of the contents of the posted messages**. In this case, managers will be answerable under the liability regime of publishing managers or producers.

The editorial use of the contents of the messages may be established according to the following criteria:

- substantial modifications and appreciations of the content of a message by the editorial staff;
- the arbitrary selection of published messages regardless of the topics of discussion or law;
- forum administrators' notifying in their sites or in their messages that they are the owners² or act as the copyright owners of these messages (for example by re-redistributing the messages or using the messages for purposes unnecessary to the discussion forum services or else refusing to suppress a message in spite of the author's request³).

² That is to say, that administrators notify that they are entitled to use the messages for publishing. This criterion does not concern the administrators' notifying that they are entitled to store the messages, at the discussion forum users' request, in order to communicate them in the forum.

³ If the software or the platform of a discussion forum does not allow authors of messages to suppress them directly, they should be provided with an email address enabling them to request the suppression of the messages.

Besides, the Internet Rights Forum recommends that judges hold forum managers answerable under editorial responsibility when they choose topics or subjects of discussion that are clearly illicit or incitements to illicit speech as regards the offences defined in the 1881 Law on Freedom of the Press.

However, the Internet Rights Forum recommends that when discussion forum managers exercise *a priori* moderation, judges do not consider because of it that an incriminated message might have been suspended before being published, involving the liability of publishing managers or co-managers referred to in article 93-3 of the July 29, 1982 law.

Of course, this exception concerns only forms of moderation devoid of any editorial use of the contents (see the criteria listed above).

b) The application of civil liability

The Internet Rights Forum recommends that judges privilege the application of civil law to discussion forum managers outside the criteria listed above but who choose:

- to initiate discussions on highly sensitive subjects or targeting persons under 18

A subject may be considered sensitive when:

- it leads to systematic and predictable abuses or;
- it rouses recurrent complaints.

Explanations: subjects of discussion are not neutral, and forum managers cannot be considered as technical providers only. On the basis of civil law, it is therefore necessary to subject them at least to an obligation of diligence according to which they must prevent or rapidly put an end to offences committed (*a priori* or *a posteriori* moderation).

It should be noted that the application of civil law involves compensations for a number of offences, including image rights offences, defamation, counterfeit or unfair competition⁴.

All the more so, the Internet Rights Forum recommends that judges hold forum managers answerable for civil charges when they choose a topic or a subject of discussion openly illicit from the legal viewpoint or inciting to civil offences.

or

- not to collect information to identify the authors of messages⁵

In conformity with French law, discussion forum managers must make sure that participants cannot remain anonymous in case of litigation. Managers who do not provide for the collecting and storing of such information as may identify users prevent the authorities from locating offenders and are answerable, at least indirectly, to the victims of offences. In this case, it seems natural that managers should at least be obliged to monitor the contents exchanged through their services.

⁴ On the other hand, press offences defined in the July 29, 1881 Law on Freedom of the Press (insult, libel, incitement to racial hatred...) cannot be compensated on the basis of civil law liability. The plenary assembly of the French Court of Cassation has stated that « *the abuses of freedom of expression provided for in the July 29, 1881 law cannot be compensated on the basis of article 1382 of the Civil Code* ». See Cass., Ass. Plénière, July 12, 2000, Bull. 2000 A P n° 8, p. 13.

⁵ This obligation, deriving from article 43-9 of the September 30, 1986 Law on Freedom of Communication, will not be efficiently implemented until the French Council of State issues further decrees defining the exact nature of the information to be stored and how it is to be stored.

c) The application of hosting liability

The Internet Rights Forum recommends that judges apply article 43-8 of the September 30, 1986 law to discussion forum managers whose only service is the storage of contents furnished by users at their requests, that is to say when:

- the activity exercised by discussion forum managers cannot be considered as editorial use in reference to the criteria listed above (a). Otherwise, discussion forum managers will be held answerable for the presse offences committed through their services according to article 93-3 of the July 29, 1982 law.
- discussion forum managers do not open a discussion on a highly sensitive or targeting persons under 18 and provide for the collecting of data to identify the authors of messages. Otherwise, discussion forum managers will be considered legally liable.

3) Concerning compensations

In order to estimate injuries and their compensations after the publication of injurious messages on forums, the Internet Rights Forum recommends that judges take the following factors into account:

- (a) authors and managers are generally not information professionals;
- (b) the audience of a message must be appreciated in light of the general number of visitors to the forum but also of the number of participants who answered to the message itself;
- (c) usually, the style used in forums is halfway between spoken and written discourse, which often leads to excessive forms of speech;
- (d) regular participants know the assertions in such messages are not to be taken for granted, especially when their authors do not make their identities clear;
- (e) the persons targeted by the messages may easily answer to them.

It is also important to take into account the efforts made by discussion forum managers to regulate the contents of their services (through the exercise of moderation for example).

B. Recommendations to discussion forum managers

The Internet Rights Forum recommends that discussion forum managers:

- 1) adopt and post clear members' charters, defending the respect of current laws, persons' reputations and common courtesy (see annex);
- 2) moderate their forums or have them moderated, especially when they propose sensitive topics and subjects of discussion or target a more vulnerable audience (especially persons under 18)⁶;
- 3) indicate how moderation is exercised (before or after the publication of the message or else at the manager's discretion), the criteria according to which it is exercised, how users may appeal against a decision afterwards;

⁶ According to article 15 of the June 8, 2000 directive on e-commerce, no general monitoring obligation can be imposed on forum managers who are assimilated to those concerned by article 43-8 of the September 30, 1986 on freedom of communication. Therefore this recommendation by the Internet Rights Forum is by no means compulsory for them.

- 4) allow a short delay for reactions in the case of a *posteriori* moderation, especially after notifying abuses;
- 5) do not consider themselves the owners of the posted messages, which belong to their authors only;
- 6) indicate whether they have provided for the contents of the forum to be referred to by search engines;
- 7) keep or store, or cause to keep or store by their hosting providers the data necessary to identify any person contributing to the contents posted through their services⁷;
- 8) allow the author of a message to suppress it at any time⁸;
- 9) do their best to store the original messages and their various modifications or the notifications of their suppressions and keep a chronological archive off public access;
- 10) do not communicate the identification data and the content of their private archives of messages to anyone but legal or administrative authorities (securities' regulators, customs) at their requests.

However, private archives of messages should be allowed to be communicated to persons willing to use them for scientific or university research, provided their anonymity is preserved;

- 11) set up techniques (software/script) facilitating or allowing the application of the recommendations defined in points 7), 8) and 9) and allowing authors of messages to refuse to have them referred to by search engines;
- 12) declare their online discussion forum activities to the National Commission on Computers and Liberties (CNIL).

N.B. points 7) 10) al 1 and 12) are obligations explicitly provided for by law.

⁷ The nature of the data and the time during which it is to be stored will be established in a decree by the French Council of State for the persons concerned by article 43-8 of the September 30, 1986 Law on Freedom of Communication.

⁸ If the software or the platform of a discussion forum does not allow authors of messages to suppress them directly, they should be provided with an email address enabling them to request the suppression of the messages.

ANNEX : MEMBERS' CHARTER ADVICE AND EXAMPLE

The advice below is for the elaboration of charters for any type of forum.

The charters of discussion forums must provide information on the following points:

- 1) The topic or topics of discussion and the language or languages used in the forum.
- 2) The means of access and registration to the forum.
- 3) The rights and the duties of participants as contributors and readers.
- 4) Exercising moderation.

Provide information on:

- the use of moderation and the exercised strategy (*a priori*, *a posteriori* or *depending on the circumstances*)
- the average delay for a message to be published in case of *a priori* moderation or the frequency of controls in case of *a posteriori* moderation
- the criteria of moderation: the kind of material that will not be posted or will be suppressed
- how participants may request the moderation of a message already published

5) Content referral: indicate whether published messages may be referred to automatically by most search engines or if the forum is blocking such referrals.

6) The suppression of a message by its author: indicate clearly how the author of a message should proceed to have it suppressed.

7) The destination of collected information: identification data and stored messages.

8) Legal mention on rights of access, modification, rectification and suppression of members' data.

EXAMPLE OF A DISCUSSION FORUM'S MEMBERS' CHARTER

The charter below is an example. It needs to be adapted and fitted to the proper features of different forums, the general state of mind that managers wish to develop in them and the type de moderation they choose.

> Topic of discussion

This discussion forum deals with environmental issues: sustainable development, renewable energies, environmental taxes, etc.

> Access and registration

This forum may be read by anyone. If you wish to contribute to it, you will be asked to register, give your name or choose a username (by which you will be known to other participants) and a password and type in an email address.

Registering allows:

- other participants to recognise your various contributions, making debates more personal, yet without revealing your real identity,
- other participants to contact you personally without revealing your email address, through a form mail system (optional),
- you to suppress your own contributions.

The save option of your username and password on the forums requires the use of a persistent cookie (stored on your computer's hard drive). The only function of this file is to simplify your access to forums, as you won't have to type in your username and password every time. However we recommend that you do not allow this cookie if you are accessing the forums from a public access computer.

> Rights and duties of readers

All readers of this forum must respect the authors' copyrights. They should not copy or make use of the contributions published in this forum in other forums or any other media without their authors' agreement.

However all readers may copy the contents of this forum for private consultation or copy and make use of short extracts of messages for the purpose of information or research, by quoting the names of the forum and the authors of the messages (real names or usernames).

> Rights and duties of contributors

All contributors are owners of their messages and their copyrights.

The contents of the messages published in this forum are your responsibility. Therefore, you must respect the current laws and rules and the rights of persons. For example, you must not publish messages that are violent, abusive, defamatory, racist, revisionist, vindicating war crimes, paedophilic, inciting to murder or suicide, inciting to discrimination or hatred, or the contents of which are unauthorized copies of works protected by copyright (press articles, message of a third party).

Besides, make sure you respect the courtesy necessary for constructive debating.

> Moderation

This forum uses a priori moderation, that is to say that all messages are read before they are published. The delay before a message is published is between a few hours and two days.

The moderator makes sure your messages are relevant to the topic of debate of the forum, respect current laws and rules and allow for constructive debating. The moderator may refuse to let messages be published when they are redundant, of advertising or promotional nature, against public order or decency, violent, racist, revisionist, vindicating war crimes, abusive or rude, contrary to copyright, data bank or trademark law, to image rights and the respect of private life or that break any other current legislative measure or rule.

All published messages remain the responsibility of their authors.

Readers may request the verification of any litigious message posted in this forum by emailing the moderator at: moderator@forum-environment.org

> Message referral

All contributions published in this forum may be referred to by search engines and therefore consulted by an audience outside the forum.

> Destination of the collected data and the stored messages

The forum stores the data necessary to identify the authors of messages and keeps a private archive of the posted messages. This information can be communicated only to legal authorities at their requests.

The contents of the messages may be communicated, exceptionally and after they have been made anonymous, to a scientific or university research body.

> Modification and suppression of the messages

At any time you can request from us the modification or the suppression of your messages at: moderator@forum-environment.org. Make sure you indicate the following elements: title and date of publication of the message, username and URL.

Protection of personal data

In conformity with article 34 of the January 6, 1978 law on "Computers and Liberties", you have the right to access, modify, rectify and suppress your personal data.

You can exercise this right by sending a message to: contact@forum-environment.org
or writing to:
Association for Environmental Defense
6 Factory Street
99200 VILLAGE-FRANCE

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