Web 2.0: Nothing Changes... but Everything is Different

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Web 2.0: Nothing Changes …but Everything is Different

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Abstract: For some, Web 2.0 is a "simple" evolution of the current web; for others, Web 2.0 is a real revolution. Web 2.0 is, in fact, a "revolutionary evolution." Technically speaking, Web 2.0 is a "simple" evolution because it is not a technical "breakthrough," as it is essentially based on an aggregation of existing technologies. However, the impact of Web 2.0 is such that it can actually be described as an evolution that will shake our sociological, economic and legal bases. This paper addresses the legal aspects of Web 2.0 and tries to explain that while Web 2.0 is not a lawless domain, it is highly likely to create a legal tsunami.
Key words: Web 2.0, regulation, law, case law, blogs, liability, intellectual property, personal data, knowledge management, collaborative space and employment law.

For some, Web 2.0 is only an evolution of the current web that will not dramatically change it, whether technically or legally; for others, Web 2.0 is much more than an evolution, it is a technical and behavioural revolution that will necessarily have major legal implications.

As always, the truth lies halfway between these two viewpoints: Web 2.0 is changing nothing and everything at the same time…

Web 2.0 is only a technical evolution of the current web and, as such, it is changing nothing, yet it is giving rise to important modifications including the creation of new services, modifications to business models, new behaviour patterns on the part of internet users and the sheer scale of these modifications constitutes a revolution of the legal certainties acquired under Web 1.0.

Technically speaking, Web 2.0 is only an "evolution" because it is not a technical "breakthrough" *versus* Web 1.0. The "2.0" terminology hints at software versioning that designates products by their names followed by their version number – and here it clearly speaks for itself.

Web 2.0, which aims at creating a truly interactive Web, is based on a variety of technologies (AJAX, BitTorrent, RSS and Wiki). It is also an important behavioural evolution insofar as it may be considered as a return to the basics of the original internet. Originally, the internet was indeed designed to favour collaborative and social exchanges. It has, however, rapidly been sidetracked from its original purpose by the irruption of the commercial web. In fact, what was supposed to be a "Global Village" has become a "super global market" in just a few years.

Web 2.0 may be considered as a back-to-basics web, with its social and community features perfectly illustrated by the unprecedented development of wikipedia.com, which is generally agreed to be as - if not more - reliable than the best printed encyclopaedias. It is only a "partial" return to the internet's roots, though, because the commercial web is and will remain a linchpin of Web 2.0. Web 2.0 is admittedly a collaborative and social web, but it remains a commercial web, whether directly or indirectly. Lots of Web 2.0 services are directly (sale of services or payment of a fee) or indirectly (sale of advertising spaces and/or customer data) commercial activities.

Legally speaking, Web 2.0 is not a "no laws land," but it radically modifies our approach to law and the few certainties acquired with Web 1.0. Given that it is subject to legislation, Web 2.0 changes nothing, but its impact on our law as it now stands is such that we can consider it to change everything from our perception of intellectual property law (1), to freedom of speech (2), liability law (3), labour law (4), privacy law (5) and property law in general (6). Furthermore, this list is far from encompassing all of the consequence that the Web 2.0 "legal tsunami" will have in the years to come.

■ Web 2.0 and intellectual property

Web 2.0 revisits intellectual property law as it now stands for at least two major reasons.

The "community" nature of Web 2.0 seems to fly in the face of intellectual property or at least of its conception that seems at odds with the fact that an authors may intentionally decide to share (most of the time for free) their creations with the rest of the world, let alone to waive their rights for the benefit of the community.

Indeed the notion of "free software" and now of "free content" seems at first glance to be in complete contradiction with traditional copyright laws. It is, however, obvious that the "free" world, and particularly free software, has won its bet by demonstrating that there was no risk, at least from a legal point of view, in using software components or free software.

It is probably in France, a country that has always shown great respect for copyright, that attitudes have been the slowest to change. However, with the recent adoption of CeCILL, a standard model of free license, reservations seem to have been definitively overcome.

With Web 2.0 it is not only the software that is "free", but also all forms of works and contents and from this point of view the dazzling success of Creative commons shows that a revolution has begun.

The Creative Commons association offers a package of standard "licenses" that reverse copyright logic. Copyright usually stipulates that any use of a work, even a free one – except for a limited number of exceptions - should be subject to an appropriate transfer of rights. With Creative Commons, the logic is turned upside down since, on principle, authors accept that their work may be exploited without giving express authorization, but subject to the limits of one of the standard licenses proposed.

These standard licenses are based on four cornerstone elements:
- "attribution", i.e. the work must be attributed to its author, this obligation is symbolized by the icon
- "non-commercial", i.e. the work may not be used for commercial purposes, symbolized by the icon
- "no derivative works", i.e. the work may not be modified, symbolized by the icon
- "share alike", i.e. the work may be shared only under conditions identical to those of the initial license, symbolized by the icon

The work subject to a "creative commons" license, symbolized by the icon SOME RIGHTS RESERVED, can thus be exploited by users without them having to request any transfer or confirmation of the license elements first.

The legal logic is, in any case, respected since only authors decide the manner in which their work is exploited. Accordingly, Creative Commons licenses only facilitate the conditions for obtaining authorization. This system is primarily used by authors who wish to gain visibility or by individuals who accept that their one-time personal creations (such as holiday photographs)

may be used by others. On the other hand, authors who no longer need to build up a reputation are hostile, to say the least, to this system and would like to stick to the current model.

The "free" model, perfectly tailored to software, will undoubtedly be a success for all the other contents whether via Creative commons or another system. This, however, does not come without certain difficulties such as the possibility for the authors to go back on their choice, which is a fundamental principle, at least under French law.

It is worth noting that authors who used the "free" formats usually stop using this system once they are well-known and are even tempted to reconsider their previous choices (the "right to reconsider" is a key element of copyright à la française).

In addition, it is not always easy to understand the Creative Commons licenses or other licenses, specifically because of the current absence of transposition into French law. The first disputes over of the "commercial exploitation" notion proved that it is not always easy to grasp.

Legally speaking, this form of right management necessarily imposes a greater clarity of the Intellectual Property Code and therefore a "redefinition" of the notion of "right assignment" in order to take on board the two models that coexist today and even overlap: assignment from the author to the licensee at the request of the latter (traditional model that may be considered as a "passive assignment") or assignment from the author to the licensee upon unilateral decision of the author without any request from the licensee (new assignment model that may be considered as an "active assignment").

Web 2.0 also changes traditional copyright by rejuvenating the notion of collective work, a concept existing under French law, as well as in all legislations inspired by the latter.

Collective work is defined by Article L 113-2 of the French Intellectual Property Code as "a work created at the initiative of a natural or legal person who edits, publishes and discloses it under his/her direction and name and in which the personal contributions of the various authors who participated in its production are merged in the overall work for which they were conceived, without it being possible to attribute to each author a separate right in the work as created." Such work "shall be the property, unless proved otherwise, of the natural or legal person under whose name it has been disclosed."

This kind of work has been created to take into account exceptional situations where the participation of the authors is so intertwined that it is impossible to know, *in fine*, who is the author of what in the final work. At the time, the legislator exclusively targeted encyclopaedias and dictionaries where drafting is necessarily "collective." Some already wanted to refresh the collective work of multimedia products, but the realization of a multimedia product is frankly closer to an audiovisual product than to the realization of an encyclopaedia.

Web 2.0 lies at the very heart of the notion of collective work, as demonstrated by the works created via wiki(s) in which everybody may participate and whose final result is the fruit of the reflection of a collective of internet users and on which it is impossible to assign any form of attribution to anybody. Collective work sprang from print encyclopaedias and is coming to life again today with electronic encyclopaedias… the wheel has turned full circle. The issue of the attribution of Web 2.0-created works will undoubtedly be an important element of the legal debate in the years to come.

■ Web 2.0 and freedom of speech

Within a few years the web has become the world's leading communication tool. Web 2.0 will unmistakably reinforce this leadership. With forums and chats, internet users have learnt to communicate with each other and exchange views on common interests, with the blog –spearhead of Web 2.0, all bets are off.

A blog is yet another form of communication that enables somebody, the blogger, to create a "personal space" where visitors can post their comments. Strictly speaking, a blog is not a "community" like a forum or a chat, but rather a new form of dialogue between internet users.

This new space of freedom is to be hailed as a tool permitting everybody to express himself or herself and favouring participatory democracy (political blog, trade union blog etc.), or even cyber-dissident in countries where the freedom of expression is muzzled.

Yet blogs also have their shortcomings and internet users are not very familiar with the limits of freedom of expression. There are, however, many limits: privacy, defamation, abuse, provocation to commit offences, posting of racist, revisionist, homophobe material, counterfeiting, unfair competition

etc. New case law is being established on this subject that, in principle, is founded on longstanding legal bases, but is now being "reshaped" by Web 2.0 standards.

Defamation is the archetype illustrating that Web 2.0 changes nothing and everything at the same time. Whatever the media used, defamation is defamation, and the fact that defamation occurs on a blog changes nothing under the French defamation rules enshrined in the Act on the Freedom of the Press of 1881. By that yardstick, Web 2.0 changes nothing. The first court decisions issued on this subject in France nonetheless show a remarkable evolution of the notion of internet defamation. For a long time, defamation was essentially defeated by the truth defence. With blogs, the "good faith" or "bad faith" of the blogger have become the standard defence against defamation.

In a landmark decision dated March 13th, 2006 [1], regarding the blog monputeaux.com the Court of first instance of Paris held as follows:

> "Although he is a journalist by trade, the accused responsible for the litigious site for private and not-for-profit purposes was not obliged to realize the most complete and objective investigation on the facts he related. He could therefore, in a section dedicated to a press review, cite extracts from an article relating to a dispute between the city hall of Puteaux published in the regional daily *Le Parisien* provided that, as in the case at hand, he precisely specified his source and did not distort it, without having to check the merits of the information he was reproducing.
>
> He could also freely, as a citizen and local taxpayer, read in that article the confirmation of his opinion on the excessive cost of the expenditures incurred by his town, without having, in this respect, to demonstrate the merits of that point of view by, for example, conducting a rigorous comparative analysis of the cost of the litigious operation with the sums incurred by other municipalities for similar services, provided that he demonstrated, with the production of documents already mentioned, that said operation did take place and gave rise to expenses of the kind he mentioned.
>
> He did that by using a real prudence in his expression without drawing final conclusions, but by contenting himself with wondering whether the article he cited was not 'a beginning of an answer' to the questions he had on the cost, abnormal in his opinion, of the event organized by the municipality."

[1] Judgment of the court of first instance of Paris (TGI), March 17th, 2006, Christophe G. *versus* Commune de Puteaux.

Conversely, in a judgment dated October 16th, 2006, a former employee who criticized her employer Nissan Europe could not demonstrate her good faith [2].

It thus seems that the courts are less demanding with bloggers than with any other person who expresses himself or herself otherwise.

■ Web 2.0 and editorial liability

Web 2.0 technologies and services are on the verge of radically modifying the current approach of liability law to the internet. The liability regime of the internet players, based on the adoption of the Electronic Commerce Directive dated June 8th, 2000, hinges on the basic axiom whereby the internet world is composed of three players: the publisher – the hosting provider and the access provider. The same triptych is found in all the countries of the European Union and even beyond.

Web 2.0 destroys this segmentation by:
- blurring the frontiers between hosting providers, publishers and even access providers;
- creating new players who do not fit into any of the three categories mentioned above.

The frontiers between hosting providers and publishers have effectively become totally blurred as exemplified by blogs. Who hosts what and who publishes what? is *the* question every internet lawyer is asking today. Unlike a traditional website, even a personal site, where the hosting provider (technical hosting provider) the publisher (the owner of the site) are clearly identified, a blog implies four types of stakeholders: the hosting provider, technically speaking, of the blog service, the blogger, the "guests" and the service that publishes the blog itself.

Not surprisingly, the blogger is the publisher of his or her own contents and the technical provider, who ensures the hosting of the blog service, is a "hosting provider" according to the June 8th, 2000 Directive. But how should the "guests" of the blog and the publishers of the blog services be treated?

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[2] Judgment of the court of first instance of Paris (TGI), October 16th, 2006, Nissan Europe *v.* Stéphanie G.

The question is not trivial since it determines the applicable civil and criminal liability rules. It follows that the question of the liability of the publisher of the blog service must necessarily be settled. If the publisher of the blog service is considered as a "publisher", s/he will then be liable for all the blogs to which s/he gives access. If the publisher of a blog service is a hosting provider s/he cannot be held liable unless s/he has not suppressed a blog after having received notification from a third party to that end. If s/he is none of the above, s/he will be subject to the classic liability regime (liability for fault, negligence, aiding and abetting etc.).

By the same token, if the blogger is positively the publisher – and accordingly the person responsible for his or her contents – what about his or her liability towards the third parties who post contents on the blog in question? Does s/he have to be considered as assuming editorial responsibility for these third parties or as the "hosting provider" of the contents posted by "guests"? In the first case, the blogger will be responsible for everything, in the second case, the blogger will not be obliged to proactively control the contents posted and can limit him or herself to taking action further to requests for the removal of contents posted.

Web 2.0 has generated new jobs, new players and intermediaries who are not yet addressed by any text, such as search engines [3], content aggregators, registrars, publishers of community spaces (forums, chat, blog, …) or advertisers and master advertisers in the context of affiliation programs [4].

Unlike publishers, hosting providers and access providers, the liability of these new players is not laid down by any special rule and is assessed by the courts in the light of the traditional bases of fault-based liability or liability for negligence. This is obviously a very complex and uncomfortable situation for these players.

The issue of the liability of Web 2.0 service publishers is already in the limelight in the United States, where the online service MySpace is being sued for "negligence, recklessness and fraud" by the parents of minors who are the victims of sexual assault committed by attackers who used MySpace to invite their "victims".

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[3] Court of appeal of Paris June 28th, 2006 (Google) – Court of appeal of Versailles November 2nd, 2006 (Overture)

[4] Court of first instance of Strasbourg (TGI) May 19th, 2005.

Technically speaking, the BitTorrent protocol is also symptomatic of the fact that Web 2.0 challenges the established rules, since any internet user, whose computer is turn into an internet server, also becomes a hosting provider.

■ Web 2.0 and labour law

Web 2.0 permeates everything and the professional environment is no exception. Today, many companies are considering the possibility of creating collaborative spaces.

Collaborative space is based on digital technology, the availability of a number of tools and the prior definition of working methods permitting a (open or closed) community of people to work together towards the success of a project. Collaborative work or "groupware" poses new challenges to corporations. Who is the owner of the results? Who is responsible for a mistake made in a collaborative space? How should the security of such a space be controlled? Who controls the space? Such are new questions that were not necessarily a problem in the web 1.0 environment. Because the law, and particularly the Labour Code, are silent on this new phenomenon, corporations willing to implement such types of services must organize them around two key elements: firstly, the definition of a specific "protocol" and secondly, the implementation of a "moderation" or "administration" mechanism.

With the "protocol", the rules of the game of the collaborative space will be precisely defined. It is no user manual, but a legal organization rule whose consequences may go as far as the exclusion and/or sanction of the member of the space. The "protocol" should not be confused as, or compete with, the terms of use of the information technology and communications tools adopted by many companies to organize the rules to be respected by their employees to access the corporate computer and internet resources. The "protocol" is specifically dedicated to the collaborative space itself and nothing else.

Besides the "protocol", the collaborative space requires the designation of a "moderator" or "administrator." The "moderator", in an interventionist vision, will be in charge of ensuring that all community members comply with the "protocol" and, if not, the moderator will not only have the power, but also the obligation, to take any appropriate measures. The administrator is a

diminished mode of "moderation" because it consists of designating a person whose mission, as a member of the collaborative space, will not be to moderate proactively, but to react to any requests and questions on the "protocol" submitted by the other collaborative space members.

Other issues also cropped up with Web 2.0, in particular with the boom of corporate, trade union or employee blogs: in France, in the Nissan case, a former employee of the car manufacturer was punished for defamation and insult for having opened a blog where she shared with the Internet community the vision of the professional relations she had with her ex-employer. The point here is not to repeat the legal analysis on the "new" form of defamation and insult emerging on the Web, but simply to note that the question has already been addressed by the judicial world, and this undoubtedly demonstrates the importance of this question.

Businesses are also embarking on the deployment of new services based on wiki or RSS technologies, the former to build internal collaborative databases and the latter to set up more efficient alert or watch systems. Again, it is too soon to anticipate the repercussions that the application of these technologies in the working environment will have in the long run.

■ Web 2.0 and privacy

Privacy, or its respect, is also a paramount issue of Web 2.0 because many services are fuelled by the will of internet users to share their lives and/or tastes with the rest of the community, create communities of friends or meet people. All these services imply the initial creation of a "profile" that often provides an accurate reflection of the personality of individual internet users, and which is very rarely controlled.

It thus seems surprising that services such as "personal" blogs – which are the quintessential example of sensitive spaces with respect to sensitive data – are considered as spaces that do not fall within the purview of data protection laws in France and many other European countries, and are not subject to any formalities for prior notification or otherwise (individual rights, access right, security etc.) The freedom to speak of one's private life online sometimes has unsuspected consequences: the private "freedom" of a school principal, who spoke of his sexual preferences on his blog, was judged inconsistent with the requirements of his profession.

With Web 2.0 the "private" and "professional" worlds clash violently; for some Web 2.0 services the distinction between "personal" and "professional" no longer even has any meaning. Much like creative commons, the choice to post information and/or personal elements must be made after mature reflection, since it is often irremediable.

Lastly, within Web 2.0 services, and although most commit themselves to respect the necessary protection of their members' personal data, the anomalies are such (for example, spamming campaigns) that the relevance of these commitments and the protection of personal data can be questioned. The recent account hijacking on www.myspace.com or the thefts of accounts on some C-to-C platforms have unfortunately become common practices. In its last report on cybercrime, the Clusif (Club de la sécurité des systèmes d'information français) voiced its concerns about the theft of personal data.

■ Web 2.0 and property

Beyond intellectual property, "property" in the broadest sense of the term will also have to adapt to Web 2.0. The property of a virtual business has long-since raised many questions regarding commercial activities realized exclusively online; but with Web 2.0, the questions raised today move to another level. Now, it is time to focus on the property of purely and simply intangible elements. Such is the case with the ownership of "avatars" or "pseudos," for example.

This issue reaches its paroxysm with services such as www.secondlife.com, where it is possible to sell houses, buildings, plots of land, stores, etc. that are intangible - if not inexistent. While the law will, in all likelihood, evolve to eventually take into account these new realities, and in particular the pressing necessity to protect digital identity, to date it does not allow satisfactory treatment of this issue because the very notion of property has always been based on a tangible model. The solution for the time being is consequently based on a contractual framework on the one hand, and the judicial framework on the other.

The avatars and/or intangible property of Second Life (www.secondlife.com) are "objects" that rare totally legal (except for certain reported abuses). In fact, nothing prohibits theses elements from being sold, transferred, rented, etc.

The terms of service of Second Life are precisely focused on the possibility of realizing economic transactions, and secondlife.com even has its own currency - Linden Dollars [L$] – with which transactions may be made on the site, but which can also be converted into "real" money. Although the rules of the Second Life game and contract law enable this type of operation, other questions such as the taxation to be applied to these transactions, especially when they take place between two non professional internet users with two different nationalities, remain open, amounting to a real headache for lawyers. As for case law, it does or will specify the do's and dont's.

Second Life is also a dazzling confirmation that Web 2.0, although an evolution of the internet, is actually a real return to basics. Today, Second Life is assuredly the current star of Web 2.0 – however long before its creation in 1997 there was a "deuxième monde" [5] in France that only internet "paleontologists" like myself can remember and which was hugely successful and aroused considerable interest at the time. The comparison between Second Life and the second world alone shows that Web 2.0 really represents a return to internet basics.

■ A tentative conclusion

Other legal domains will also ultimately have to be reshaped by Web 2.0. One thing is for sure: Web 2.0 imposes a rethink and adaptation of current legal bases. It should put an end to the artificial segmentation between publisher – hosting provider – internet access providers by building another legal liability environment free from ever-evolving technical realities.

Copyright law should also be changed to legitimate "active assignments" and "passive assignments" and confer on the "free" world a real legal status.

Other ideas, such as the distinction between "professional" *versus* "non professional" or "personal" *versus* "professional" on which many current laws and regulations are based, must be challenged, as they do not provide a solid enough base for Web 2.0.

5 " Second World".

It will undoubtedly also prove necessary to imagine new rules to ensure that the digital world does not escape the law, and cover inter alia the digital creations, digital business, digital identity or virtual domiciles that are created every day on www.secondlife.com.

Lastly, in terms of freedom of expression, and to the extent that internet users become a set of publishers among others, it will soon appear necessary to reshape current law and break with a technological law that treats the press, radio and television differently and does not cover the internet. The merger of various media imposes a merger of "communication" law.

We are, however, a long, long way away from a law 2.0. For all that, the web 2.0 revolution is underway and the players who have taken this technological plunge must themselves accomplish the transition from a stillborn law 1.0 to an inexistent law 2.0. Contractual organization, self-regulation and moderation seem the best ways to cope with the legal risks associated with the implementation of Web 2.0 services. This "Web 2.0 first aid kit" will be quickly completed by novelty-driven courts.

Ironically, Web 2.0 follows the same legal evolution as that prevailing for Web 1.0. Let's bet that it can enjoy the latter's advantages and avoid its mistakes.