#EXPOSED: Twitter forced to disclose identity of hate tweeters

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While Twitter accounts are commonplace, abuse of freedom of expression on this platform can be difficult to prevent and pursue. Twitter's parent company is located in the United States, the complaint process is labyrinthine and the company has shown an apparent lack of interest in claims originating from foreign jurisdictions. This is often enough to discourage litigants.

Following a wave of offensive, racist and anti-Semitic messages posted on several Twitter accounts, representative associations – including the Union of French Jewish Students, J'accuse, International Action for Justice, the Movement Against Racism and for Friendship Among Peoples and SOS Racisme – submitted claims to the Paris *Tribunal de grande instance*(1) for disclosure of the identities of the individuals who had posted these messages. The claims were based primarily on Article 6-II of the Digital Economy Law(2) and secondarily on Article 145 of the Code of Civil Procedure.

The court granted an interim order on the second ground, citing just cause attached to the measures contained therein.

The request for information, which would permit identification of the authors of the tweets, was contrary to several elements of Article 6.II of the Digital Economy Law, including the division of roles between Twitter Inc and Twitter France. Twitter's hosted content is initially stored on servers in the United States and it is the US company that is authorised to receive alerts related to content. Twitter France's sole role is as a commercial agent with respect to marketing.

Twitter Inc claimed to be under obligation to withhold the data, observing – correctly – that Article 4 of Decree 2011-219,(3) which implemented the Digital Economy Law, excludes processes whose controller is established outside France or which draw on processing systems located outside France. The applicant associations counterclaimed that the processing methods were still located in the French territory (excluding those used only for transit purposes), and that "the 'group of Article 29' considers personal computers, terminals, servers, but also the use of cookies and similar software as such". This argument failed because Twitter does not use cookies and stores user identification data on its servers in the United States.

Also rejected was the draft General Data Protection Regulation, which was proposed by the European Commission on July 25 2012. Even if the regulation envisaged an extension of the regulations applicable to the processing of personal data to controllers which are not established in the European Union for data relating to EU nationals, the judge refused to promote it to a higher normative tier and regard it as being part of applicable law at this stage.

As the associations could not demonstrate that Twitter Inc is based in France or that it uses, in conservation of the data in question, the equipment or human resources of Twitter France or other entities located in the French territory (other than for transit purposes), the judge considered there to be insufficient evidence to grant the relief sought under Article 6.II.

The exclusion of the Digital Economy Law led the judge to consider the request under Article 145 of the Code of Civil Procedure, which provides that:

> "*If there is a legitimate reason to preserve or establish before any trial evidence of facts on which the outcome of a case might depend, legally enforceable orders may be made at the request of any interested party on application or in interim proceedings*".

In referring to Court of Cassation case law, the interlocutory judge stated that in an international dispute, the implementation of such measures is subject to French law. He noted that Twitter's rules state that:

- users must accept all "local laws regarding online conduct and acceptable content";
- users are subject to French criminal law when content is published in the French territory;
- Twitter will not challenge the jurisdiction of the French interlocutory judge or the unlawfulness of messages once a court grants a request for deletion; and
- Twitter recognises that it can hold identification data without affecting the legitimacy of the grounds cited by those who request its disclosure.

These factors proved sufficient to characterise a legitimate ground for disclosure of the identification data. Even where there is no urgency or serious dispute, such disclosure is designed to ensure the conservation, establishment and collection of evidence before any trial, from the moment that the trial arises and its basis is adequately determined, and where the gathering of evidence does not improperly infringe the fundamental rights and freedoms of others.

The judge eventually received a request for the establishment of a system for reporting unlawful content. The judge noted that Twitter had not implemented a sufficiently accessible and visible means to allow anyone to bring such content to its attention. As a result, the judge ordered Twitter Inc to establish a simpler, more accessible system, involving – at a minimum – a tab accessible from the active page.

Following this decision, Twitter appealed. It changed its reporting mechanism, but refused to disclose the identification data, arguing that this irreversible disclosure would prevent a second level of appeal.

As the order was enforceable by law, the associations which had brought the action submitted pleadings to the first president of the Paris Court of Appeal(4) for a declaration that Twitter had failed to comply with or execute the two measures contained in the interim order issued by the *Tribunal de grande instance*; thus, the associations sought to dismiss the appeal under Article 526 of the Code of Civil Procedure.

The court of appeal held that the system set up by Twitter to report unlawful content failed to comply with the injunction because of the number of clicks required. Even if users were accustomed to clicking, they still needed to be able to locate easily where on the site unlawful content could be reported. However, in order to report, it was necessary to go to the 'Help' section, where the lettering was small, and the visibility and content was potentially unclear when considered not solely as a technical aide, but also as a forum where users could ask questions about Twitter. A reference to abusive behaviour could be found only on the following page, and not on a single page linked to directly from the page featuring the disputed content.

The changes addressed the reporting of contentious material concerning, but did not make it easy for such tweets to be reported. The court noted that the information relating to contentious tweets fell into the category of 'offensive content', and that a person who reported such a message to Twitter risked their identity being exposed in the report that Twitter would provide to the party which tweeted the unlawful message.

Accordingly, the court considered that the arrangements put in place to bring unlawful tweets to Twitter's attention – especially those condoning crimes against humanity and incitement to racial hatred – were not sufficiently accessible and visible. It therefore held Twitter to have failed to demonstrate that it had implemented the first measure ordered by the interlocutory judge.

Twitter objected to the disclosure of information on the basis that such disclosure should be carried out only under certain conditions because of its irreversibility, which would preclude a second level of appeal. The court rejected this ground by deeming it not serious. It stated that there was no manifestly excessive consequence justifying the refusal by Twitter to execute the decision.

The court further noted that the disclosure of data, even if it is irreversible, does not prevent the disclosing party from obtaining an order for payment of damages from the party which sought the order if the decision is overturned on appeal.

The court also noted that in the case at hand, under the defamation provisions of the Law on the Freedom of the Press,(5) the associations had to take legal action within a three-month limitation period. This further justified the measures ordered. Even if proceedings were brought in the United States, Twitter would be unable to claim compensation for the damage sustained as owner and the associations could lose the opportunity to act because of the limitation period.

Given its reluctance to implement the measures, Twitter will not have the opportunity to challenge or appeal the order.

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Endnotes

(1) Interim order, January 24 2013, *Twitter v The Union of French Jewish Students*.

(2) June 21 2004.

(3) February 25 2011.

(4) Division 1, Ch 5, Ord June12 2013, RG 13/06106, *Twitter v The Union of French Jewish Students*.

(5) July 29 1881.