

Defamatory suggestions: what liability for search engines?

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Introduction

Following a recent case involving the search engine Yahoo! Italia, another Italian court has addressed the issue of search engine liability. On March 24 2011 the Court of Milan found Google liable for defamation because its auto-complete suggestions paired the plaintiff's name with defamatory keywords. The court upheld its earlier interim injunction of January 25 2011.

The court considered that the exemptions from liability for internet service providers, as set forth by the E-commerce Decree (Legislative Decree 70/2003),[1] did not apply. Google was liable for the suggestions provided by the Google Suggest function, which Google itself created; it was not merely storing information provided by third parties.

The Google Suggest feature consists of software which suggests terms that are potentially connected to a user's search term. Its purpose is to identify search results which may be appropriate or relevant.

Facts

An entrepreneur in the financial services sector, who used the Internet to promote his business, complained that when his name was typed into Google's search bar, the auto-complete software linked his name to the words '*truffa*' and '*truffatore*' (meaning 'fraud' and 'fraudster'). The plaintiff alleged that the suggested search results were defamatory.

As Google failed to take corrective action when the problem was brought to its attention, the plaintiff asked the Court of Milan to order Google to remove the association between his name and the offensive terms. The court found the complaint to be well founded and issued an interim injunction ordering Google to remove the defamatory association.

Google challenged the injunction, arguing that:

- the auto-complete suggestions were terms entered by Google users, collated by software and suggested in order of popularity by an algorithm;
- it should be considered a hosting provider,^[2] as it merely provided a neutral platform for users. The platform might be injurious by virtue of illicit content from third parties, but this was not produced by Google itself. On this basis, Google claimed exemption from liability as a hosting provider under the E-commerce Decree.

Court order

The court confirmed the interim injunction and found Google liable for defamation.

It clarified that Google Suggest software is a piece of automatic software that works on the basis of the most frequent searches entered by users. The plaintiff did not challenge this view, but rather complained of Google's failure to remove the defamatory connection when asked to do so.

The court went on to hold that even if Google were to be considered a 'hosting

provider' within the meaning of the E-commerce Decree, the decree would not determine the case, as it applies only to the storage of information provided by third parties. The defamatory association was exclusively the result of the software created by Google. Specifically, the court opined that the software, although based on an automatic system of algorithms, is only apparently neutral; rather, such a function ceases to be neutral when it generates inappropriate search results.

The position of the court in this case differs from the approach taken in the *Yahoo!* case, in which the Ninth Circuit of the Court of Rome considered search engine Yahoo! Italia to be a caching provider^[3] – not a storer of content, but rather an entity that organises and provides access to material posted on the Internet.

The Court of Milan concluded that the association of the plaintiff's name with the words 'fraud' and 'fraudster' could lead users to doubt the plaintiff's moral integrity and to suspect him of unlawful conduct, regardless of the information about the plaintiff that users would find when they selected the search results. The association would be enough to give many users a negative impression of the entrepreneur.

The court ordered the company to pay the plaintiff's costs in the amount of €3,800.

European courts on the auto-complete/Suggest function

On September 8 2010 a Paris court – the *Tribunal de Grande Instance de Paris* – found Google liable for defamation in respect of the results produced by its Suggest function, which brought up the words 'rapist', 'Satanist' and 'prison' in response to the plaintiff's name. The plaintiff in this case had been convicted on appeal and sentenced to three years in jail for corruption of a minor – although the conviction was not yet final – when he discovered the results on entering his name into the Google search bar. The court ruled that Google had shown a lack of good faith in the matter and ordered the company to pay symbolic damages of €1, plus €5,000 towards the plaintiff's legal costs.

This was one of two such findings against Google in France in 2010. In January 2010

Google was ordered to remove the word 'arnaque' (which roughly translates as 'scam'), as a suggested term on searches for a French company. A similar case has been reported in Brazil.

However, on May 3 2011 the Paris Court of Appeal dismissed claims of copyright infringement brought against Google by the *Syndicat National de l'Édition Phonographique* (SNEP), an organization set up to protect the rights of the French recording industry.[4] SNEP claimed that the Google Suggest function was leading Internet users who were searching for online music files to illicit peer-to-peer websites with the suggestion of keywords such as 'torrent', 'Megaupload' and 'Rapidshare'. It sought an order for Google to filter out the keywords on the basis of French copyright law. In rejecting SNEP's request, the court lent particular importance to the following points:

- Google Suggest is an automatic service based on algorithms and the suggestion of keywords could not constitute copyright infringement.
- Not all the files hosted by the websites were illegal and the websites themselves were not illegal.
- The deletion of the aforementioned keywords would make it difficult to find the websites, but only for internet users who were unaware that the sites existed. It would not prevent illegal downloading by internet users who were already aware of the websites and could type the relevant names into the search bar.

In the field of defamation, on July 16 2009, the England and Wales High Court stated that Google could not be considered a publisher of defamatory statements that appeared in its search results.[5] Metropolitan International Schools Ltd, a distance-learning course provider, claimed that Google and a third-party website were publishing defamatory statements that described its products as a 'scam'. Google searches on the plaintiff's products reproduced the scam allegation as part of a snippet of text accompanying the hyperlinks. However, the judge considered Google to be a mere facilitator, as it played no role in formulating the search terms and could not prevent the snippet from appearing in response to user requests. It was concluded that the claimant "would have no reasonable prospect of success".

Conclusion

These precedents and the recent Italian cases on search engine liability show that consensus is still far distant on the question of whether search engines should amend their technical functions in order to protect a third party's rights or interests. Courts around Europe have reached different conclusions and Italy's case law on the matter is still far from conclusive.

In the field of copyright law, Advocate General Cruz Villalón has clarified – in his opinion of April 14 2011 – that a measure whereby an internet service provider is ordered to install a system for filtering and blocking electronic communications in order to protect IP rights represents, in principle, an infringement of fundamental rights. Such a measure is permissible only if adopted on a national legal basis which is accessible, clear and predictable.^[6]

[1] Decree of April 9 2003, implementing Directive 2000/31/EC of the European Parliament and of the Council of June 8 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

[2] See Section 16 of the E-commerce Decree.

[3] See Section 15 of the E-commerce Decree.

[4] *Syndicat National de L'édition Phonographique (SNEP) c. S.A.R.L. Google France, Société Google Inc.*

[5] *Metropolitan International Schools Limited (T/A Skillstrain and/or Train2Game) v DesignTechnica Corporation (T/A DIGITAL TRENDS), Google UK Limited, Google Inc.*

[6] Opinion in Case C-70/10, April 14 2011, *Scarlet Extended /Société belge des auteurs compositeurs et éditeurs.*