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French court finds Google has editorial control over AdWords advertising

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On November 14 2011 the Tribunal de Grande Instance de Paris (TGI) ruled against Google France and Google Ireland, finding that their AdWords service allowed a company to use an individual's name as a keyword to trigger links to an article and photographs that infringed the individual's rights to private life.

In the court's view, Google France and Google Ireland could not rely on the exemption from liability that the E-commerce Directive (2000/31/EC) grants to hosting providers,[1] since they played an active role in relation to the Google AdWords service (eg, by establishing the order in which sponsored links were displayed) and had knowledge of the keywords and the content of the advertising.

The TGI examined the AdWords paid referencing service, which allows an economic operator to reserve one or more keywords and thereby ensure that an advertising link to its website appears if a keyword matches one or more of a user's search terms. The advertising link appears under the heading 'sponsored links', which is displayed either above or to the right of the ordinary search results.

The advertising link is accompanied by a short commercial message, written by the advertiser. Together, the link and the message constitute the advertisement displayed under the heading.

Facts

The French actor Olivier Martinez complained that when his name was typed into Google's search bar, a sponsored link appeared to the right of the ordinary search results. Its headline was: "News: Olivier Martinez – The most famous love sorrows: Olivier Martinez's story" ("News: Olivier Martinez – Les chagrins d'amour les plus célèbres: le cas Olivier Martinez").

The sponsored link directed users to the website www.gala.fr. This is the online version of Gala magazine, owned by magazine publishing company Prisma Press. The link led to an article on the website about the actor's personal life and relationships. The actor complained that the photographs illustrating the article, which related to aspects of his private life, had been posted on the website without his consent.

In June 2008 the actor sued Prisma Press, Google Ireland and Google France. He alleged that Prisma Press's use of his name as a keyword to trigger the sponsored link to the article and photographs was an infringement of his privacy and his rights in his own name and image.

Google's liability

The parties advanced different views of the decision in *Google v Louis Vuitton* in which, among other things, the European Court of Justice (ECJ) interpreted the exemption from liability for hosting providers under the directive.[2]

In the ECJ's view, the exemption applies to an internet referencing service provider where the service provider has not played an active role of a kind that would give it knowledge of, or control over, the data being stored. The ECJ held that if it has not played such a role, a service provider cannot be held liable for data stored at an advertiser's request unless, having become aware of the unlawful nature of the data or of the advertiser's activities, it failed to act expeditiously to remove (or disable access to) the data concerned.

In the present case, Google argued that it should be considered a hosting provider, as it merely provided a neutral platform for users; it was not bound by a duty to monitor the content of websites to which users were directed by the sponsored links created through the AdWords service. On this basis, Google claimed exemption from liability as a hosting provider under the directive.

Google also claimed that its defence was supported by the decision in *Google v Louis Vuitton*.

Martinez objected to Google's interpretation, arguing that the decision did not imply that Google was generally exempt from liability; rather, Google was liable in certain circumstances – namely, where it had control over the information stored.

The TGI found that Google could not benefit from the exemption from liability under the directive, since the exemption applies only to service providers whose activity is merely technical, automatic and passive. This implies that the service provider has no knowledge of, or control over, the information which is transmitted or stored.[3]

The TGI stressed that the decision in *Google v Louis Vuitton* put the onus on the relevant national court to assess whether Google's role was merely technical, automatic and passive, as the national court is best placed to understand the terms on which the service at issue in the main proceedings was supplied.[4] In this respect the TGI found that Google's provision of the AdWords service had not been merely technical, automatic and passive, since Google had had knowledge of the keywords and of the content of the advertisement, and played an active role.

The TGI opined that Google's knowledge and active role was expressly stated in the terms and conditions of the AdWords service which, among other things, provide that:

- Google may ask for the content of an advertisement to be communicated to it before publication;
- the positioning of advertisements is at Google's discretion – the order in which advertisements are displayed is determined by the maximum price per click, the number of previous clicks on the links and the quality of the advertisement as assessed by Google;
- Google reserves the right to stop publishing a sponsored link for whatever reason; and
- Google's instructions for drafting advertisements are part of the agreement with Google. In this respect, the TGI considered the ECJ's statement that "the mere fact that Google... provides general information to its clients cannot have the effect of depriving Google of the exemptions from liability provided for in Directive 2000/31". The TGI held that this finding did not apply to the case at hand, since Google's instructions for drafting the advertisements could not be considered 'general information to clients' within the meaning of the decision.

In the TGI's view, these factors demonstrated Google's editorial control over the content of the advertisements. The TGI also referred to the ECJ's statement that "the role played by Google in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords is relevant".[5]

The TGI found that both Google Ireland and Google France were liable for the AdWords service. Google France's argument that it was extraneous to the service was rejected, since it was the entity that managed the AdWords service for France.

Use of name as keyword

The TGI held that using an individual's name as a keyword to trigger links to articles or photographs that violate an individual's private life is contrary to Article 9 of the Civil Code, which safeguards an individual's right to respect for his or her private life.[6]

In particular, the TGI clarified that the mere use of a name as a keyword is not unlawful. However, it may be unlawful if the individual's name, when used as a keyword, links to an online article that is unlawful – for example, as in the present case, an article which infringes against an individual's right to a private life.

The TGI ordered Prisma Press, Google Ireland and Google France to pay the actor damages of €1,500 plus €3,000 in costs.

Comment

Since *Google v Louis Vuitton* the ECJ has, on several occasions, confirmed its judgment concerning the liability of hosting providers in relation to the AdWords service.[7]

The ECJ only interprets EU law – it requires the national courts to examine the case at issue in light of its interpretation. As far as the liability of hosting providers is concerned, national courts will assess the role played by providers in order to establish whether the role is merely technical, automatic and passive. If so, they are eligible for exemption under the directive. The exemption cannot apply if the providers play an active role in respect of the stored content. Therefore, national courts will conduct a case-by-case assessment which may involve several factors (eg, the terms and conditions of the service and the way in which the service functions).

The defendants are likely to appeal to the Paris Court of Appeal; if so, it will be interesting to see whether the TGI's decision is upheld or rejected, and the grounds on which such decision is made.

The ability to exercise control over search results – including ordinary, or ‘natural’, search results – is of growing importance. Increasingly, the pervasive influence of the Internet means that a person may find his or her life exposed online, for all the world to see.

Adwords is not the only online innovation to have sparked controversy. The “Google Suggest” feature consists of software which suggests terms that are potentially connected to a user’s search term, thereby identifying search results which may be appropriate or relevant. 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. Google was found liable for the suggestions provided by the Google Suggest function, which Google itself had created, as it was not merely storing information provided by third parties.[8]

However, 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.[9]

As these developments make all too clear, there is no consensus on the (active or passive) role played by providers and national courts may sometimes reach different conclusions.

[1] If certain requirements are met – see Section 14 of the directive. The directive was implemented in France by the Law of July 21 2004 (Loi sur la confiance dans l’économie numérique).

[2] Decision of November 23 2010, joint cases C-236/08 – 238/08 (Google France SARL, Google Inc v Louis Vuitton Malletier SA (C-236/08), Google France SARL v Viaticum SA, Luteciel SARL (C-237/08), Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL (C-238/08)).

[3] See Recital 42 of the directive and Paragraph 113 of the ECJ decision in Google v Louis Vuitton.

[4] See Paragraph 119 of the ECJ decision in Google v Louis Vuitton.

[5] See Paragraph 118 of the ECJ decision in Google v Louis Vuitton.

[6] See Section 9 of the Civil Code: “Chacun a droit au respect de sa vie privée. Les juges peuvent, sans préjudice de la réparation du dommage subi, prescrire toutes mesures, telles que séquestre, saisie et autres, propres à empêcher ou faire cesser une atteinte à l’intimité de la vie privée: ces mesures peuvent, s’il y a urgence, être ordonnées en référé”.

[7] See, for example, the ECJ decisions of March 25 2010, C-278/08 (Die BergSpechte Outdoor Reisen und Alpinschule Edi Koblmüller GmbH v Günter Guni, trekking.at Reisen GmbH); July 8 2010, C-558/08 (Portakabin Ltd, Portakabin BV v Primakabin BV); September 22 2011, C-323/09 (Interflora Inc, Interflora British Unit v Marks & Spencer plc, Flowers Direct Online Ltd). In Italy, see Court of Milan Decision 3280 of February 26 2009.

[8] See also the TGI decision of September 8 2010.

[9] Metropolitan International Schools Limited (t/a Skillstrain and/or Train2Game) v DesignTechnica Corporation (t/a DIGITAL TRENDS), Google UK Limited, Google Inc.

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