

Online advertising and marketing country questions: France

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France-specific information concerning issues that need to be considered when planning an online advertising campaign.

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Information concerning a company's business

1. What information concerning a company's business is required to be published on its website or provided in e-mails ?

Various provisions of French law require general information to be communicated to third parties in the course of business. Most of these are general provisions and do not specifically apply to online activities. However, although not specifically drafted for online activities, these provisions must be complied with in the online world in so far as they relate to all types of commercial activities. Other recently implemented provisions specifically address online communications. The scope and nature of information will vary according to the type of business and/or activities. Additional specific information may be required for specific activities.

The means for communicating the information are usually not specified in applicable law. Generally, information should be made easily available to third parties, either on the main page of the website or through clearly identifiable hyperlinks.

General information

Every individual or company registered with the Trade and Companies' Registry (RCS) must publish the following information on their advertising documents, or correspondence related to the business (including invoices):

- Their registration number, referred to as "number SIREN".
- The term "RCS", immediately followed by the place of registration.

In addition, foreign companies with registered offices located outside France must indicate:

- The company's corporate name.
- The company's corporate form.
- The address of its registered office.

- The company's place of registration and registration number.
- The fact that the company is in the process of being liquidated (if applicable).
- The fact that the business is managed by a lessee (if applicable).

(Article R. 123-237 of the French Commercial Code inserted by Decree no. 2007-750 of 9 May 2007.)

Where the business is managed by a legal entity (as opposed to an individual) additional information is required and must be included in all contracts and/or documents issued by the company and intended for third parties (*see, for example, Articles L. 224-1 (public companies) and L. 223-1 (companies with limited liability), French Commercial Code*):

- The amount of the share capital.
- The company's corporate form.
- The company's corporate name.

This must be provided in connection with all types of documents made available to third parties in the course of business, including e-mail communications sent by the company.

Since 2003, any interested person, as well as public officers, can obtain a summary judgment requiring the company's legal representative to indicate the name of the company, its activities and share capital on all the documents and deeds issued by the company (*Article L.238-3, French Commercial Code*). Failure to comply is punishable by a fine of up to EUR750 (as at 30 January 2012, EUR1 was about US\$0.7), and may attract civil damages as well.

Additional information is required by Law no. 2004-575 of 21 June 2004 (LCEN) regarding "online communication services" (excluding "private communication services"). The following information must be made available to third parties by all publishers of online communication services:

- The name of the publication's director or co-director and the name of the editor-in-chief.
- The corporate name, address and telephone number of the company hosting the website.

Failure to comply is punishable by one year's imprisonment and an EUR75,000 fine for the legal representative of the corporate entity, and by a fine of up to EUR375,000 for the corporate entity.

(Article 6 III 2 of the LCEN.)

Additional specific information

Specific sets of rules may apply, depending on the type of business and/or activities. Additional compulsory information will be required in the event that, for example, the website is designed to promote activities in the following fields:

- Insurance (for example, in particular as far as insurance brokers are concerned).

- Real estate (for example, real estate agents' professional registration number and place of delivery, amount of the financial warranty subscribed by the agent, and so on).
- Pharmaceutical companies (for example, name of the pharmacist responsible for the companies activities, and so on).
- Banking (for example, in particular with regard to investment companies and/or credit institutions in the meaning of the French 1984 banking law (as subsequently modified in 1994)).

General information requirements

2. What other requirements as to the provision of information apply to online advertising and marketing generally?

Consumer protection

Any online advertisement must be clearly identified as such and indicate the individual or entity on whose behalf it has been published (*Chapter II of the LCEN*).

Advertising communications made via electronic mail, in particular promotional offers such as discounts, premiums or gifts, and likewise competitions or promotional games, must be clearly and unequivocally identifiable upon receipt or, if this is technically impossible, in the body of the message (*Article L121-15-1 of the French Consumer Code*). In addition, this type of message must provide a postal or electronic contact address, which would allow the addressee to send a request to stop the communications (*Ordinance n°2011-1012 of 24 August 2011*).

The French Consumer Code also provides for specific information to be communicated to consumers before they enter into a contract. The following information must be included in online offers made to consumers:

- Information regarding the main characteristics of the goods and/or services (*Article L. 111-1, French Consumer Code*).
- Information regarding the price, any limitations of contractual liability, and the specific terms of sale (*Article L. 113-3, French Consumer Code*).
- Other specific information regarding specific products (for example, food, medicines and so on), in particular regarding the product's nature, substantial qualities, contents, quantity or origin (*Article L. 214-1, French Consumer Code*).

On 23 August 2001, Ordinance no. 2001-741 of the French Government (the Ordinance) added several articles to the French Consumer Code, substantially modifying the legal regime applicable to distance-selling contracts, and thereby affecting the rules to be applied to distance selling via the internet.

On 3 January 2008, Law no. 2008-3 regarding the development of competition for the service of consumers (Chatel Law) added and modified several articles to the French Consumer Code. The main provisions of the law especially modified the legal regime applicable to electronic

communications contracts.

Under the provisions of the new Article L. 121-18 of the French Consumer Code (as modified by the Chatel Law), the offer made before the conclusion of a distance-selling contract must indicate:

- The name of the seller and/or service provider, its address (or location of the registered office), a phone number to make contact with it effectively, and the address of the branch responsible for the offer if different from the address of the registered office.
- Cost of delivery.
- Payment and delivery terms.
- Existence of a period during which the consumer can rescind the sale of the product or the sale of the service (rescission period) any restriction to this rescission period or, if the rescission right is not applicable, the absence of any rescission right.
- Conditions of the offer and duration of the offer regarding the price.
- Cost for communicating online with the seller or service provider (if not standard).
- Minimum length of the proposed agreement (if applicable).

The commercial nature of the above information must be clearly indicated.

Under the provisions of Article L. 121-19 of the French Consumer Code (as modified by the Chatel Law), the consumer must also be provided, in writing or via any other tangible medium, at the latest on the date of delivery (or on the date on which the service is provided), with the following information:

- Confirmation of all information communicated before the conclusion of the online agreement unless already communicated.
- Conditions and procedures for taking advantage of the rescission period.
- Contact for consumer claims.
- Information related to any post-sale support centre and contractual warranties.
- Procedures for cancelling the agreement in the event the agreement is concluded for more than one year or for an indefinite period.

The new Article L. 121-19 states that customers must bear no cost additional to that of a national call to follow up their orders, exercise their right of withdrawal or exercise their warranties.

Under Article L. 121-20-3 of the French Consumer Code (as inserted by the Chatel Law), the consumer must also be informed of the final date for delivery. Any entity which does not comply with this provision is assumed as having delivered the product or the service at the date of the conclusion of the contract.

Law no. 2008-776 of 4 August 2008 regarding the modernisation of competition added several

articles to the French Consumer Code, especially Article L. 121-1-1 listing the practices deemed deceiving, for example, providing consumers with any information that is false or likely to mislead. Failure to comply is punishable by two years' imprisonment and a fine up to EUR37,500.

Use of French language

In addition, rules regarding the use of the French language are set out in a law enacted on 4 August 1994 and a government interpretative instruction issued on 19 March 1996. The use of the French language is compulsory when relating to the designation, offer, presentation of goods, products or services as well as for any inscription or information intended for the public in France. The 1996 interpretative regulation further states that all documents intended for consumers and end-users must be translated into French. The obligation covers products and services provided to consumers and end-users located in France. Also, in its reports to the Parliament for 1997, the French language authority (*Délégation Générale de la Langue Française*) refers to the necessity of using the French language on websites aimed at consumers in the French market.

The concept of consumer must be interpreted broadly, as French case law has considered that end-users could be either individuals or business entities.

Failure to comply may result in a fine of up to EUR3,750 (for corporate entities) per officially reported violation of the law, with possible additional fines for delay in complying with the law (*Decree of 3 March 1995 issued in application of the law*).

Information requirements related to electronic communications

In addition to the above, the LCEN has implemented several provisions of the EC E-Commerce Directive 2000/31/EC and the EC Directive 2002/58/EC relating to privacy and electronic communications.

The main points of this law are:

- **Information requirements.** The provisions of the law mirror those of the Directive 2000/31/EC.
- **Commercial communications:**
 - information to be provided: the provisions of the law mirror those of the Directive 2000/31/EC; and
 - unsolicited commercial communications: the provisions of Article L. 34-5 of the French Post and Electronic Communications Code and Article 121-20-5 of the French Consumer Code (introduced by the LCEN) mirror those of Directives 2002/58/EC and 2000/31/EC.
- The "Country of Origin" principle is adopted by the law, subject to the following:
 - the law provides that respect of the country of origin principle must not deprive French consumers of the benefit of French mandatory consumer protection rules, and that it does not contradict French formal requirements in connection with contracts creating or transferring rights in real estate; and
 - under the law, government regulations will be promulgated separately to describe to what extent the principle of "free provision of e-commerce services" may be limited in the areas of

public security, protection of minors, protection of public health, national security and defence, protection of consumers, and protection of investors other than "qualified investors" within the meaning of Article L. 411-2 of the French Financial and Monetary Code.

Tobacco products

3. How is the online advertising and marketing of tobacco products regulated?

The Evin Law of 10 January 1991, codified in the French Public Health Code, prohibits any direct or indirect advertising of tobacco products. The law of 31 July 2003 reinforcing the Evin Law extends such prohibition to any ingredients used for the making of tobacco products such as cigarette paper, filter, glue and ink. Certain very limited exceptions exist (notably with respect to auto-racing events outside France). However, a law dated 9 August 2004 authorised in certain limited circumstances the advertising of tobacco products. This law authorises direct or indirect advertising of tobacco products in:

- Publications and online communication services edited by professionals (for example, producers, manufacturers and distributors of tobacco products) and reserved to distribution amongst that professional community or made accessible by professionals.
- Written publications and online communication services made available to the public by persons established in a non-EU or non-EEA country, when these publications and services are not mainly directed at the European market.

The Evin Law, as amended by the law of 31 July 2003 and by the law of 9 August 2004, covers any tobacco advertising or promotional offers or campaigns on the internet.

Breach of the Evin Law is a criminal offence, sanctioned by a minimum fine of EUR100,000, but which can rise to a maximum of 50% of the total amount spent on tobacco advertising (*Article L. 3512-2, French Public Health Code*).

The Court of Cassation has held that any kind of commercial communication, whatsoever its support (which includes a website), which is intended or has the effect of promoting, directly or indirectly, tobacco or a tobacco product, is prohibited (*2nd Civil Chamber of the Court of Cassation, 10 January 2008*).

The Criminal Chamber of the Court of Cassation has held that direct or indirect advertising of tobacco products constitutes a continuous infringement, even if the advertisement is published on the internet. The judges of the Supreme Court have considered that the breach continues as long as the advertisement remains accessible (*Criminal Chamber of the Court of Cassation, 17 January 2006*).

An exception to this rule relates to the first broadcasting of sport events taking place in states where the advertising of tobacco products is permitted (*Article L. 3511-5 of the French Public Health Code*). The Criminal Chamber of the Court of Cassation has specified that this exception does not apply to the repetition of such events (*Criminal Chamber of the Court of Cassation, 14 May 2008*).

Alcoholic drinks

4. How is the online advertising and marketing of alcoholic drinks regulated?

The Evin Law prohibits direct or indirect advertising of alcoholic products (for instance, on television, in cinemas, in stadiums and so on). However, the Evin Law makes limited exceptions to this general rule. Accordingly, direct or indirect advertising of alcoholic beverages is permitted in the press (except for publications aimed at young people), on radio (within specific time slots), on posters or notices in production areas and inside sales outlets. The law of 1 August 2003 also authorises companies dealing with alcoholic products and sponsoring cultural events to mention their name on broadcast documents.

The Law No. 2009-879 of 21 July 2009 (Bachelot Law) provides the legal framework for advertising alcoholic products on the internet. This law amended some provisions of the Evin Law as codified in French Public Health Code (*Articles L.3323-1 and seq.*).

Under Article L. 3323-2-9° of the French Public Health Code (as amended by the Bachelot Law), direct or indirect advertising of alcoholic beverages is authorised in the online communication services but is not permitted on websites which by their nature, their appearance or object, appear to be primarily aimed at young people and on websites published by associations, corporations, sports federations and professional leagues as defined by the French Sport Code.

As regards the methods of advertising, Article L.3323-2-9° of the French Public Health Code (as amended by the Bachelot Law) provides that advertising must not be "intrusive" (for instance, a pop-up window) or "interstitial" (a message of few seconds displayed between two pages of presentation of a website).

Article L. 3323-4 of the French Public Health Code, as amended by the law of 23 February 2005, authorises, within strict limits, advertising on the qualitative characteristics of certain alcoholic products such as wine. The ad content must strictly comply with Article L.3323-4 of the French Public Health Code. Any promotional messages on the internet, whose purpose is the promotion of alcoholic beverages, must contain only the references to terms permitted by the said provisions and include the health message mentioned in such provisions. The French courts have clarified that under Article L. 3323-4 such an advertisement must be informative only, and cannot constitute an encouragement to consume alcohol (*Criminal Chamber of the Court of Cassation, 2 November 2005, La société régie publicitaire des transports parisiens Métro-bus Publicité, La société Bacardi-Martini Production; First Civil Chamber of the Court of Cassation, 22 May 2008*).

Furthermore, the Evin Law authorises particular producers, importers and dealers to advertise for alcoholic products by sending "messages", commercial circulars, catalogues or brochures, subject to certain legal requirements. The French parliament, in debates on the Evin Law, made clear that the term "message" includes phone and *minitel* messages.

In addition, the *Autorité de Régulation Professionnelle de la Publicité* (Professional Advertising Regulation Authority, previously referred to as *Bureau de Vérification de la Publicité* (Advertising Verification Office) has issued a recommendation dated June 2010 dealing with the rules applicable to advertising alcoholic products, which applies to the internet.

Voluntary regulations and codes of practice

5. What are the main areas of voluntary regulation or self-regulatory codes of practice that apply to online advertising and marketing?

Both public bodies and private associations have formulated, or are likely to formulate, guidelines or

recommendations related to online advertising and marketing.

Voluntary regulation by public bodies

■ *Commission Nationale Informatique et Libertés (CNIL).*

The CNIL is an independent administrative authority, created in 1978, to exercise control over compliance with Law 78-17 of 6 January 1978 (*Informatique et Libertés* (the French Data Protection Law)). The regulatory powers of the CNIL are very limited. However, it has a significant influence on the French government and parliament. The CNIL has, in particular, the power to make recommendations, and publishes an annual report of activity. French Data Protection Law has been amended by a law of 6 August 2004 in line with Directive 95/46/EC, and these amendments have substantially increased the CNIL's powers in relation to ensuring compliance with the Data Protection Law.

In relation to online advertising and marketing, the CNIL formulated a recommendation in 1997 (*Deliberation no. 97-012 of 18 February 1997*) on databases on consumer behaviour created for commercial purposes:

- the set of questions sent to consumers in order to collect data must clearly mention their commercial objective;
- it must be clear to the consumer that his personal data could be transmitted to other companies unless the consumer expressly opposes it; and
- the consumer must be offered the possibility of easily refusing the transmission of his data to another company.

In 1999, the CNIL also published recommendations on e-mailing and spamming practices:

- when the e-mail address is collected directly from the consumer, he must be informed of its future use and he must be able to refuse having his address transferred to a third party; and
- when e-mail addresses are collected from a network, the consumer must be informed that his data has been obtained from such network services.

Most of such recommendations are in line with Directive 2002/38/EC (VAT and E-commerce Directive), and have been implemented into French law.

The CNIL recently declared two Deontological Code projects in compliance with French Data Protection Law. The projects were undertaken by two direct marketing professional organisations, the National Syndicate of Direct Communication (*Syndicat national de la communication directe*) (SNCD) and the French Union of Direct Marketing (*Union française du marketing direct*) (UFMD), in connection with e-mailing (*Deliberations CNIL no. 2005-47 of 22 March 2005 and no. 2005-51 of 30 March 2005*).

■ The forum of rights on the internet (*forum des droits sur l'internet*).

The French government created the forum in 2001 as a permanent organisation for dialogue, exchange of information and consultation between public institutions, private professionals and users about legal and social issues related to the web and electronic networks. The forum was

able to suggest specific uses and practices or promote a code of best practice. It also had power to make recommendations, on the basis of the debates it organised, to private professionals calling for self-regulation.

The forum formulated a number of recommendations in the field of online marketing, such as Electronic commerce between individuals (7 November 2005), Commercial links, compiled by the workgroup Online advertising (26 July 2005), Adware and Spyware (11 July 2006) and Consumer Law applicable to Electronic commerce (31 August 2007). In addition, the forum founded an Observatory dedicated to the study of cyber-consumption. The Observatory issued a first report in March 2004 on new trends in cyber-consumption, and another one in May 2005, on payments over the internet.

The forum was dissolved on 7 December 2010.

Voluntary regulation by private associations

- **The *Autorité de Régulation Professionnelle de la Publicité (ARPP)*.** The ARPP (previously referred to as *Bureau de Vérification de la Publicité*) has members representing advertisers, media and advertising agencies as well as trade associations, and was created to promote legal, decent, honest and truthful advertising by way of self-regulatory schemes. The ARPP formulates general and specific guidelines and codes in the advertising field. It gives advice about advertisements and deals with complaints from both consumers and competitors. In case of non-compliance with its decisions, after giving notice to the advertiser, the ARPP can ask the media concerned to cease publication of the offending advertisement.

The ARPP adopted recommendations about online advertisements in December 1999, based on the ICC guidelines of 1998:

- the advertiser and the advertising content of the message must be clearly identified;
- advertisements must be honest, decent, truthful and fair;
- advertisements must respect human dignity and the potential sensitivities of a worldwide audience;
- advertisements must also respect privacy and applicable data protection laws (the users must be able to identify unsolicited advertisement as such when they receive it);
- advertisements directed at children must respect the ICC guidelines and the ARPP's recommendation about children; and
- if applicable, the user must be informed that he is required to pay for access to a message or a service and that the price would exceed the usual connection charge.

On 24 May 2005 ARPP issued a recommendation regarding advertising on the internet.

ARPP's recommendations are only enforceable against its members, who may be excluded in case of non-compliance. However, the recommendations seem to be followed by all professionals of the sector and even by the French courts.

■ **Interactive Advertising Bureau France (IAB France).** IAB France is the French arm of the Interactive Advertising Bureau, created in 1998. It draws up standards and best practices in the area of online advertising. In particular, in June 2001, IAB France issued guidelines on relationships between buyers and sellers of online advertising and recommendations on sizes of online banners. In January 2006 IAB France formulated several recommendations on video-advertising on the internet, such as the Convergence of Advertising on Internet Charter (17 April 2008).

■ **Fédération des Entreprises de Vente à Distance (FEVAD).** FEVAD, created in 1957, is the representative French professional organisation of distance selling companies. FEVAD has promoted several codes and charters, in particular concerning databases on consumer behaviour and distance selling. FEVAD monitors compliance with these texts by its members and can inflict sanctions on them.

FEVAD has also launched self-regulatory solutions. For example, the label "L@belsite" has been launched by FEVAD and the Federation of Trade Distribution Companies (FCD) to obtain consumers' confidence in relation to the certified members' advertising and marketing methods. Indeed, members who comply with 27 advertising and marketing rules formulated to protect the consumer are certified with the label. These rules are based on three basic principles:

- providing information on the company publishing a website;
- compliance with the regulations and the codes and practices formulated by FEVAD; and
- transparency regarding the use of personal data, in accordance with French Data Protection Law.

■ **Association des Fournisseurs d'Accès et de services Internet (AFA).** The AFA, created in 1997, is the French association of internet service providers. Its purpose is to promote the development of internet services and to inform the public and professionals about access to internet services. Under guidelines formulated by the AFA on its members' practices, access providers must deploy technical means to detect the practices of unsolicited e-mails and to limit the transmission of these e-mails. Moreover, access providers may detect contents which are manifestly illegal by:

- examining users' claims;
- monitoring pages most frequently consulted; or
- automatic detection of suspicious words.

If the online content or the behaviour of the user is contrary to its general conditions of use, the access provider, after giving notice to the user, may delete the content or terminate the subscription.

■ **Association des Services Internet Communautaires (ASIC).** The ASIC is a French association created at the end of 2007 by most of the internet's key players, such as AOL, Dailymotion, Google, Price Minister and Yahoo. Its purpose is to promote the development of Web 2.0. and guidelines of use to protect users', in particular children's, personal data and

freedom of expression. Moreover, it is dedicated to fighting against counterfeiting on the internet. The ASIC is also expected to contribute to the brainstorming following the decisions of the French courts regarding the liability of website hosts and editors in case of any publication of a content by a user. For example, in 2008, ASIC took part in the consultation launched by the European Commission regarding online creative contents.

Linking

6. Which of the following legal remedies are or may be available in respect of unauthorised linking to a website: (i) passing off; (ii) unfair competition; (iii) registered trade mark; (iv) copyright infringement; (v) database right infringement; (vi) breach of contract; (vii) any others?

Passing off

The French courts have created a similar remedy (*parasitisme*) to passing off, which constitutes an act of unfair competition. Persons or companies may be held liable where they seek to benefit from the goodwill attached to another's product, in order to make profit out of such goodwill. The website owner must prove its goodwill, a misrepresentation by the linker, and a prejudice for him from such misrepresentation. The likelihood of confusion and an act of unfair competition do not need to be demonstrated (unlike in the case of unfair competition (*see below*)).

The unauthorised linking to a website through which a company can upload and use the database of a competitor has been regarded as passing off (*Court of First Instance of Paris, 8 January 2001*).

In a decision dated 25 March 2010, the Court of First Instance of Nanterre held that, in the absence of any omission or wrongful inaccuracy, the suggestion of a link leading to a website on which a software can be downloaded, without the copyright holder's authorisation, may not be regarded as an act of unfair competition nor a passing off (*Court of First Instance of Nanterre, 25 March 2010*).

Unfair competition

There is no specific law in France imposing liability on those who engage in acts of unfair competition. Such liability is based upon general principles of tort law as set out by case law.

As a general rule, in order to establish a cause of action and bring a suit, a party injured by an act of unfair competition must prove:

- That an act of unfair competition has been committed (such as confusion with the products and services of the injured party or a discredit of the competitor).
- That the act was the proximate cause of an actual injury.
- The amount of injury suffered.

The Court of Appeal of Paris held that by creating a link on its official website to a third party's "anti-NRJ" website, the radio station Europe 2 had committed an act of unfair competition against another radio station, NRJ (*Court of Appeal of Paris, 19 September 2001, NRJ SA v. Société Europe*

2 Communication).

In a case involving the Google AdWords service, a French court ruled in May 2011 that Google was liable on the grounds of unfair competition since it “technically contributed to the confusion generated in the mind of the interested public” (*Court of appeal of Paris, Section 5, Chamber 4, 11 May 2011, Google France et Inc/Cobrason, Home Cine Solutions*). The decision was heavily criticised as it did not refer to the hosting exemption put in place by LCEN and Directive 2000/31 of 14 November 2011. Another more recent decision found that Google was liable to damages, and explicitly stated that they could not avail themselves of the hosting exemption (*Court of first instance of Paris, Chamber 17, 14 November 2011, Olivier M. / Prisma Presse, Google*). These cases do not follow the ECJ position in its decision of 23 March 2010.

The French Supreme Court has not yet examined the applicability of the hosting exemption to Google, therefore the significance of these precedents remains uncertain.

Registered trade mark infringement

A person infringes a registered trade mark if he uses or reproduces a trade mark for products or services identical to those listed in the registration. Trade mark infringement also exists if there is a likelihood of confusion in the mind of the public, through:

- The use of identical trade marks for products or services similar to those listed in the registration; or
- The use of an imitated trade mark for products or services identical or similar to those listed in the registration.

(*Articles L-713-2 and L-713-3, French Intellectual Property Code*).

The reproduction of the registered trade mark of the website owner in a link constitutes a trade mark infringement. The infringer may be condemned to criminal sanctions (a fine up to EUR300,000 and imprisonment up to three years) and civil damages.

In the various cases involving the Google AdWords service, Google has been held liable by several French decisions on the basis of trade mark infringement, misleading advertising or civil liability. The Court of Appeal of Paris held on 1 February 2008 that the use of trade marks by Google amounts to an infringement (*Court of Appeal of Paris, 1 February 2008*).

In cases where the courts decided that Google's activity did not infringe trade marks, they have condemned Google on the basis of its civil liability, considering that Google had the obligation to check whether the advertisers were entitled to use a registered trade mark as a key word, or to provide the advertisers with specific tools to verify their right to use such trade mark.

On 20 May 2008, the Supreme Court did not confirm or reject the main position of the Courts of Appeal (*Commercial Chamber, Court of Cassation, 20 May 2008, three decisions*). The judges asked three preliminary questions to the European Court of Justice (ECJ) states, which are supposed to provide member states with a unique legal interpretation of trade mark owner's rights.

In its decision of 23 March 2010, concerning Google Adwords, the ECJ held that Google was not liable for trade mark infringement.

According to the ECJ, an internet referencing service provider which stores, as a key word, a sign identical to a trade mark and organises the display of ads on the basis of this key word, does not

commit an act of infringement (*ECJ, 23 March 2010, Google France SARL and Google Inc. v. Louis Vuitton Malletier SA*).

On 13 July 2010, the French Supreme Court, following the interpretation given by the ECJ, held that a search engine does not commit an act of infringement when it simply stores, as a key word, a sign identical to a trade mark and organises the display of ads (*Cour de cassation, 13 July 2010*).

On 11 February 2010, the Court of First Instance of Paris held that the use of the terms "Viton, Louis Viton, Wuiton, Witton, LouisViton, Vuton and Viuton" as keywords by the company eBay international AG to generate sponsored links pointing towards the website www.ebay.fr, without the prior approval of the company Louis Vuitton Malletier (owner of the trade marks "Louis Vuitton", "Vuitton" and "LV"), constitutes a trade mark infringement as well as a passing off (*Court of First Instance of Paris, 11 February 2010*).

Copyright infringement

The linker may infringe the intellectual property rights of a website editor if the link copies material protected by copyright (*droit d'auteur*) from the linked website. Indeed, infringement of copyright consists of a reproduction, representation, dissemination, translation, adaptation or transformation that does not qualify as a legal exception of a literary, artistic or musical work without the author's consent. The infringer may be condemned to criminal sanctions (a fine up to EUR300,000 and imprisonment up to three years, or a fine of up to EUR500,000 and imprisonment up to five years for infringements committed by a group) and civil damages. (For sanctions applicable to companies, see Articles 131-38 and 131-39 of the French Criminal Code.)

On 19 January 2010, the Court of First Instance of Evry found not guilty a manager of a website listing peer-to-peer hyperlinks. The manager was acquitted because no evidence of any illegal downloading has been reported (*Court of First Instance of Evry, 19 January 2010*).

Database right infringement

If the link allows extraction of a substantial part of the protected database, the author of the link may be condemned to criminal sanctions (a fine of up to EUR300,000 and imprisonment up to three years, or a fine of up to EUR500,000 and imprisonment up to five years for infringements committed by a group) and civil damages (*Article L 343-4 et. seq., French Intellectual Property Code, as modified by Law no. 2007-1544 of 29 October 2007 relating to the fight against counterfeiting*). (For sanctions applicable to companies, see Articles 131-38 and 131-39 of the French Criminal Code.)

The Court of First Instance of Paris held that the commercialisation of software whose purpose is to extract information from an online directory is a database right infringement (*Court of First Instance of Paris, 3 November 2009*).

Breach of contract

Breach of contract can be claimed if the terms and conditions of the linked site contain an express prohibition on linking without the website owner's permission.

Other remedies

The unauthorised link to a website may also create liability under rules governing comparative

advertising.

Framing

7. Which of the following legal remedies are or may be available in respect of unauthorised framing of contents on another website: (i) passing off (ii) unfair competition; (iii) registered trade mark infringement; (iv) copyright infringement; (v) database right infringement; (vi) breach of contract; or (vii) any others ?

Passing off

See *Question 6*. The fact that webpages of the linked website owner appear in the frame of another website may create confusion in the public's mind.

Unfair competition

See *Question 6*. The practice of deeplinking combined with framing might be considered as an act of unfair competition (Court of First Instance of Paris 25th June 2009).

Registered trade mark infringement

See *Question 6*. The practice of framing supposes the use of a temporary copy of webpages from the linked website. The reproduction as well as the use of the registered trade mark of the website owner is an infringement. The infringer may be subject to criminal sanctions (a fine up to EUR300,000 and imprisonment up to three years for individuals, and a fine up to EUR1.5 million for corporate entities) and civil damages.

On 30 January 2004, the Court of First Instance of Paris (*Esso v. Greenpeace*) judged that a metatag using the plaintiff's trade mark was not an infringement, since the reproduced trade mark was not used to designate products or services identical or similar to those listed in the trade mark registration, and since such use could not create any risk of confusion.

Copyright infringement

According to the French Intellectual Property Code, the reproduction or representation of copyright material (that is, protected by *droit d'auteur*) may be an infringement of the patrimonial right of the author and even of his moral right (he may invoke misrepresentation of his work). The infringer may be condemned to criminal sanctions (a fine up to EUR300,000 and imprisonment up to three years, or a fine of EUR500,000 and imprisonment up to five years for infringements committed by a group) and civil damages. Companies may be fined (up to five times the amount of the fines applicable to individuals); in addition, a company may be permanently prohibited from running a business, or may be dissolved.

On 25 June 2009, the Court of First Instance of Paris ruled that the representation of the website Voyanet.com by Pressvoyages.com, without the prior approval of the copyright holder of the website Voyanet.com, constitutes a copyright infringement and as well as an act of unfair competition (*Court of First Instance of Paris, 25 June 2009*).

Database right infringement

According to the French Intellectual Property Code, if the reproduced web pages content is a substantial extraction from a protected database, the website editor may be condemned to criminal sanctions (the same as for the copyright infringement, see above) and civil damages.

Breach of contract

If the terms and conditions of the linked site contain an express prohibition on framing without the website owner's permission an action for breach of contract may lie.

Other remedies

The unauthorised framing from a linked website may also create liability under rules governing comparative advertising.

Metatags

8. Which of the following remedies are or may be available in respect of the unauthorised use of another party's registered or unregistered trade mark, logo or other material in metatags or the hidden text of a website: (i) registered trade mark infringement; (ii) passing off; (iii) unfair competition; (iv) copyright infringement; or (v) any others? (Please indicate whether the position will be different if a registered or unregistered trade mark is used in this way for a legitimate purpose rather than for the sole purpose of increasing traffic flow to the website owner's site.)

Registered trade mark infringement

See Question 6. For example, in the *Distrimart* case (*Court of First Instance of Paris, 4 August 1997 and 16 November 1999*) it was held that a metatag using the plaintiff's trade mark constitutes an infringement of trade mark on the ground that this use created a likelihood of confusion. According to French case law an infringement of trade mark by using a third party's trade mark will not arise if:

- The use of the trade mark is a necessary reference. Indispensable referencing arises, for example, where a manufacturer of accessory products uses the trade mark of the principal product for promotional purposes.
- The use does not create the likelihood of any confusion, from a consumer standpoint, as to the origin of the products or services provided on the website.
- The use of the trade mark is not the cause of any injury to the owner of the trade mark. French courts also seem to tolerate metatags using third party trade marks for information purposes only and in a non-competition context.

French case law held that the use of a trade mark as metatag amounts to an infringement under Article L. 713-2 of the French Intellectual Property Code (*Court of First Instance of Paris, 3rd Chamber, 14 March 2008 and Court of Appeal of Paris, 19 March 2008*).

However, in a recent decision it was held that metatags cannot be seen as serving the same the function as a trade mark, to guarantee the origin of a product. Indeed, since metatags are invisible to internet users, the use of a trade mark as a metatag does not qualify as trade mark infringement (*Court of First Instance of Paris, 3rd Chamber, 29 October 2010*). This decision has not yet been tested in a higher court, therefore its significance remains uncertain.

Passing off

See *Question 6*. A decision has held that the use of the trade mark "Tryba" by a competitor company as metatag amounts to a passing off, even though it does not amount to a trade mark infringement in this case (*Court of First Instance of Strasbourg, 20 July 2007*).

Unfair competition

See *Question 6*. The copying of the keywords and metatags of a competitor's website into the source code of an individual's website has been held to constitute an act of unfair competition (*Court of Appeal of Paris, 12 January 2005, Kaligona v. Dreamnex*).

Copyright infringement

If the metatags make unauthorised use of any creation protected by copyright (*droit d'auteur*) or if the website owner includes metatags in its website, which is protected by copyright without having the authorisation to modify the website from the web designer. The infringer can be liable to criminal sanctions (a fine of up to EUR300,000 and up to three years' imprisonment, or a fine of EUR500,000 and up to five years' imprisonment for infringements committed by a group) and civil damages. Companies can be fined (up to five times the amount of the fines applicable to individuals); in addition a company can be permanently prohibited from running a business, or be dissolved.

Other remedies

Other types of action may lie, for example, for violation of a person's right over his image.

Also if the website includes metatags using a registered corporate name there may be an infringement of registered corporate name. In a decision of the Court of Appeal of Paris (*SFOB v. Notter GmbH, judgment of 13 March 2002*), the defendant included in its metatags the registered corporate name of a direct competitor and was forced by injunction to remove the litigious metatags. The Court of First Instance of Paris held on 14 March 2008 that the use of the registered corporate name "Citadines" by a competitor was not an act of unfair competition. However, it has been considered as a trade mark infringement (*Court of First Instance of Paris, 14 March 2008*).

Resource information

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