

CLIENT ALERT

ISP-Liability & Media Law

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In its recent ruling of 23 March 2010, the Google Adwords case, the ECJ interpreted the provisions of Directive 2000/31 setting out the conditions under which Internet service providers ("ISP's") can be held liable for infringements of intellectual property rights committed by users of their service. The Court provided guidance on these issues before referring the case back to the national court. Further guidance from the ECJ can be expected in the Sabam/Scarlet case, which the Brussels Court of Appeal referred for a preliminary ruling to the ECJ.

Court of Justice of the EU, *Google vs. Louis Vuitton*

In its recent ruling of 23 March 2010, known as the "Google Adwords case", the ECJ ruled on the question whether Google can be held liable for trademark infringements of advertisers that select trademark keywords without permission of the trademark holder.

For the ECJ, the trademark holder cannot rely, against Google, on the exclusive rights which it derives from its mark.

By contrast, the trademark holder can invoke these rights against those advertisers which, by means of a keyword corresponding to its mark, arrange for Google to display ads which make it impossible, or possible only with difficulty, for average internet users to establish from what undertaking the goods or services covered by the ad originate. The trademark holder can argue that the function of the trade mark, which is to guarantee to consumers the origin of goods or services (the trade mark's 'function of indicating origin'), is thus adversely affected.

The Court has also reiterated the restrictions laid down by European Union law on the liability of information society intermediary service providers, such as Google: If Google has not played an active role in the keywords selection of the advertisers, Google cannot be held liable for the data which it has stored at the request of the advertisers, unless, having obtained knowledge of the unlawful nature of those data or of that advertiser's activities, it failed to act expeditiously to remove or to disable access to the data concerned.

Court of Appeal Brussels, *Sabam vs. Scarlet*

On 28 January 2010 the Court of Appeal of Brussels decided to refer two preliminary questions to the ECJ in the case of internet access provider Scarlet against collecting society Sabam.

The case concerns the appeal lodged by Scarlet against the judgment of the President of the Court of First Instance of Brussels of 29 June 2007. In this judgment, the President of the Court had decided that Scarlet should make it impossible for its customers to use peer-to-peer software to exchange files that include works from SABAM.

The Court of Appeal now decided that, prior to investigating the case any further, including as to the question whether the measures imposed by the President of the Court of First Instance are technically feasible, two questions of interpretation of the EC directives on E-Commerce, copyrights in the information society, privacy and IP-enforcement should be submitted to the ECJ:

- whether the EC directives on E-Commerce, copyrights in the information society, privacy and IP-enforcement read together with the provisions of the European Convention on Human Rights allow a national judge to impose on an access provider an obligation to implement at his own expense and in respect of all his subscribers a preventive measure consisting of the filtering of electronic communications using peer-to-peer software with a view to the identification and blocking of the exchange of copyright infringing material; and
- should the answer to the first question be affirmative, whether the national courts should apply the principle of proportionality when assessing a request for an injunction against an intermediary whose services are used to commit copyright infringements.

Conclusion

Over the last decade, an increasing number of cases have dealt with the immunity from liability provided for in the E-Commerce Directive. They have raised the question how much of the operational and financial burden of the fight against piracy can be put on online intermediaries. The ECJ's recent and future rulings should help to find a new balance between i) intellectual property rights holders, ii) internet access providers, and iii) consumers (who are entitled to privacy and who have fundamental rights and freedoms).

References and links:

- [Court of Justice of the EU, 23 March 2010, Cases C-236/08 to C-238/08](#)
- Court of Appeal Brussels, 28 January 2010, 2007/AR/2424

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