

# Google versus the Law

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*Google's legal adventures and their impact to the evolution of European information law.*

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## Introduction

On May 25th, Google announced its plan to launch a TV channel (the so called Google TV channel). This spectacular decision is the last demonstration of the leading company's will to expand its activities to a wide scale of products and services<sup>1</sup>. Google has ceased to be a simple search engine; the company's multiple investments reflect a clear business strategy: to be present and even to dominate various branches of the IT industry.

Google's activities often appear to be highly controversial from a legal standpoint since Google seems to try to impose its ambitious business model without taking seriously into account restrictions established by law. Therefore, it is not surprising that Google's activity gave birth to a great number of litigations and to rich case law all over the world.

Google's business model is marked by the popular and misleading dogma that everything is permitted in Internet. This radical view is often expressed by the imposition of opt -out business models as regards the exercise of rights of third parties which are affected by Google's activities. The focal question that is raised is whether Google's multiple judicial adventures promote an evolution to law that reflects Google's business strategy or whether the IT giant will have to fully respect the European legal framework and legal culture and, as a result, to adapt its business model to constraints provided by law.

This paper will try to give an overview of the major legal questions which emerge from Google's dynamic presence in the Web. It is divided in four parts. The first part deals with the privacy implications which are born by Google's various activities, primarily by its main function as a search engine, but also by more sophisticated tools, such as the Google Street View service. The second part presents the basic copyright and trademark issues which have been raised by Google's services, such as the popular Google Library project, the Google news aggregator and its principal source of income the Google Adwords service. The third and the fourth part focus on two relatively new fields of litigation: the eventual liability of Google for civil tort due to its Google's Suggest auto-completion

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<sup>1</sup> For a quasi exhaustive description of Google's products and services, see: <http://www.webrankinfo.com/google/products.php>.

search tool and competition law issues, such as the problematic of potential abuse of Google's dominant position in the European market of search engine providers for the low ranking of the Websites of its competitors.

## **I. Google's leading business model and its privacy complications**

Since Google's services depend on the collection and storage of a great mass of data, Google's technological breakthroughs are often considered as a threat for privacy. In February 2003, Google Watch nominated Google for a Big Brother Award, describing Google as a "privacy time bomb"<sup>2</sup>.

Privacy implications of Google's activities have occupied several times the European privacy authorities. Indeed, the Article 29 Data Working party<sup>3</sup> in a number of occasions firmly expressed the view that the processing and the retention of personal data by Google in its primary function as a search engine but also in its ancillary activities raise a bundle of significant privacy concerns for European citizens. As it is going to be demonstrated in the following paragraphs, the European data protection legal framework seems to have influenced Google's privacy threatening tactics. The Article 29 Data Working Party has repeatedly marked the significant privacy implications of various Google's services and put some limits to the company's strategy to link its commercial success with an extended and often opaque processing of personal data.

### **a) The Google's search engine under privacy scrutiny**

The retention period of the search queries and their anonymization in the server logs was one of the first issues which were pinpointed as privacy concerning by the Article 29 Working Party<sup>4</sup>. In its Opinion 1/2008 on data protection issues related to the search engines<sup>5</sup>, the Working Party

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<sup>2</sup> Sherman, Chris. Google power: unleash the full potential of Google. p.415, <http://books.google.com/books?id=SRadJluhVjAC&dq=Google+Power;+Unleash+the+Full+Potential+of+Google&q=Daniel+Brandt#v=snippet&q=Daniel%20Brandt&f=false>.

<sup>3</sup> Article 29 of the Data Protection EU Directive 95/46 (Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, *Official Journal L 281, 23/11/1995 P. 0031 – 0050*) establishes a "Working Party on the Protection of Individuals with regard to the processing of Personal Data". It is generally known as the "Article 29 Working Party". It is made up of a representative from the data protection authority of each EU Member State, the European Data Protection Supervisor and the EU Commission.

<sup>4</sup> Letter addressed to Google Inc., dated May, 16<sup>th</sup> 2007, D (2007) 6016.

<sup>5</sup> Opinion on Search engines (WP148, 4 April 2008). See also: International Working Group on Data Protection in Telecommunications, Common Position on Privacy protection and search engines on 15 April 1998, revised on 6-7 April 2006 ([http://www.datenschutz-berlin.de/doc/int/iwgdpt/search\\_engines\\_en.pdf](http://www.datenschutz-berlin.de/doc/int/iwgdpt/search_engines_en.pdf)). 28th

distinguishes two different roles played by search engine providers with regard to personal data. First, in their role as service providers to the users, search engines collect and process vast amounts of user data, including, such as log files, IP addresses and cookies. Second, in their role as content providers, by retrieving and grouping widespread information of various types about a single person, search engines can create a new picture, with a much higher risk to the data subject than if each item of data posted on the internet remained separate.

According to the Opinion 1/2008, the Data Protection Directive 95/46 generally applies to the processing of personal data by search engines, even when their headquarters are outside the EEA, such as Google. Consequently, Google has to comply with the stringent data protection regime which is set up by the Directive in case it can be considered not as a simple intermediary but as a data controller<sup>6</sup>. The storage and processing of data has to respect the principle of lawfulness of the processing (article 6 of the Directive) and therefore search engines have to specify explicit and legitimate purposes for which they process personal data. While the process of personal data could be made on the grounds of the user's consent or on the grounds that it is necessary for the performance of a contract, such as in case of registered services (e.g. a creation of a Gmail account), it is more delicate to evaluate when the processing is necessary for the purposes of a legitimate interest pursued by the search engine<sup>7</sup>. Legitimate purposes, such as services improvement, system security, fraud prevention or law enforcement have to be cautiously scrutinized in order to guarantee that the processing of users data is necessary and adequate and that the period of their retention is not excessive<sup>8</sup>. Moreover, the onus is on search engines in this position to clarify their role in the European Economic Area and the scope of their responsibilities under the Directive.

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International Data Protection and Privacy Commissioners' Conference, Resolution on Privacy Protection and Search Engines, London, 2 – 3 November, 2006  
<http://www.privacyconference2006.co.uk/index.asp?PageID=3>).

<sup>6</sup> Search engine providers do not act as simple intermediaries in case they perform value-added operations linked to characteristics or types of personal data on the information they process. In such cases the search engine provider is fully responsible under data protection laws for the resulting content related to the processing of personal data. The same responsibility applies to a search engine that sells advertisement triggered by personal data – such as the name of a person. Search engine providers do not act as simple intermediaries also as regards their caching functionality and any caching period of personal data contained in indexed websites beyond this necessity of technical availability of the website, should be considered an independent republication. See: Opinion on Search engines (WP148, 4 April 2008), op.cit., p. 14-15.

<sup>7</sup> See article 7 (f) of the Data Protection Directive.

<sup>8</sup> See pages 17-18 of the Opinion 1/2008, op.cit..

On the other hand, the e-Privacy Directive 2002/58<sup>9</sup> and the Data Retention Directive 2006/24/EC<sup>10</sup> are clearly highlighted as in general not applicable to search engine providers, because they fall outside of the scope of the definition of electronic communication services provided by the Framework Directive 2002/21/EC<sup>11</sup>. However, Directives 2002/58 and 2006/24 could still apply for additional services provided by search engines, such as the “Gmail” email service. Moreover, certain provisions of the e-Privacy Directive such as Article 5(3)(cookies and spyware) and Article 13 (unsolicited communications) are general provisions which are applicable not only to the electronic communication services but also to any other services when these techniques are used<sup>12</sup>.

At this point it is worth mentioning that recently Google’s social networking service “Buzz”, which is part of Google's Gmail service, has been accused for privacy and consumer law violations in the U.S. The feature that attracted the biggest outcry was one which automatically gave users a ready-made circle of friends to follow based on the people they emailed the most. That meant the list of contacts was open for all to see and could have had serious privacy implications. After the protestations of privacy advocates, such as the Electronic Privacy Information Centre (EPIC), Google’s engineers have now replaced the auto-follow feature with one that suggests who to follow but EPIC said that still leaves the "user with the burden to block those unwanted followers"<sup>13</sup>.

In response to the Article 29 Working Party’s Opinion, Google publicly announced its will to “anonymize” IP addresses in its server logs after 9 months<sup>14</sup>. Nevertheless, in its letter dated May 26, 2010, the Article 29 Working Party considered as insufficient the measure of deleting the last octet of the IP-addresses in order to guarantee adequate anonymisation and insisted that the data retention

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<sup>9</sup> Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), Official Journal L 201 , 31/07/2002 P. 0037 – 0047.

<sup>10</sup> Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, OJ L 105, 13.4.2006, p. 54–63.

<sup>11</sup> Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive), OJ L 108/33, 24.4.2002.

<sup>12</sup> Opinion 1/2008, op.cit., p. 12.

<sup>13</sup> Maggie Shiels, Google Buzz 'breaks privacy laws' says watchdog, <http://news.bbc.co.uk/2/hi/8519314.stm>.

<sup>14</sup> See: Google Blog “Another step to protect user privacy” (8 September 2008), URL: <http://googleblog.blogspot.com/2008/09/another-step-to-protect-user-privacy.html>.

period should be further reduced to 6 months. Additionally, the Working Party urged Google to adopt supplementary measures in order to comply with the European data protection legal framework. These measures include a reduction of the possibility to identify users in the search logs and the creation of an external audit process to reassure users that Google delivers on its privacy promises, i.e. by involving an independent and external auditing entity.

#### ***b) The “Google Street View” privacy threat***

Another delicate privacy concerning subject on EU privacy authorities is the potential risks posed by "panoramic street-level view services, such as the famous and successful Google's Street View. Street View was launched as part of Google Maps in May 2007 in San Francisco and has expanded rapidly since. What makes Street View truly unprecedented is the amount and density of consistent, geo-positioned imagery it makes available to users<sup>15</sup>.

According to a press release issued by the Article 29 Working Party<sup>16</sup>, Google Street View raises serious privacy and data protection concerns. Even if Google blurs faces, car plates and other features that could allow the identification of people, problems could still arise from the storage and the eventual correlation of the vast amount of pictures required to enable the service and which Google has already collected. At this point, it is noteworthy to mention that in 2009 Google Street view was prohibited by the Greek Data Protection Authority<sup>17</sup>.

In February 2010, the Article 29 Data Working Party sent a letter to Google where it expressed its deep concerns about Google street view's practice to retain unblurred copies of the images for one year and asked Google to alert residence in advance about the arrival of their Street View camera

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<sup>15</sup> A. Frome/G. Cheung/ A. Abdulkader/ M. Zennaro/, B. Wu/A. Bissacco/H. Adam/ H. Neven/ L.Vincent, Large-scale Privacy Protection in Google Street View. Available on line at: [http://static.googleusercontent.com/external\\_content/untrusted\\_dlcp/research.google.com/el//archive/papers/cbprivacy\\_iccv09.pdf](http://static.googleusercontent.com/external_content/untrusted_dlcp/research.google.com/el//archive/papers/cbprivacy_iccv09.pdf).

<sup>16</sup> Article 29 Data Protection Working Party, Press release, Brussels, December 10, 2008 . Available on line at: [http://ec.europa.eu/justice\\_home/fsj/privacy/news/docs/pr\\_10\\_12\\_08\\_en.pdf](http://ec.europa.eu/justice_home/fsj/privacy/news/docs/pr_10_12_08_en.pdf)

<sup>17</sup> See “ΓΝ/ΕΞ/374/14-04-2009” document of the Greek Data Protection Authority. Recently the Greek Data Protection Authority issued a decision about the processing of personal data by the service “kapou.gr” whose function is identical to the Google street view service (Decision 91/2009). In this decision, the Data Protection Authority makes an express reference to its former Google street view decision and states that the same measures should be adopted for both services. The decision examines thoroughly all the stages of data processing by panoramic street - level view services. After having evaluated all the privacy protection measures taken by the service “kapou.gr” pursuant to its prior recommendations, the Data Authority authorizes the service to operate in Greece.

car. Apart the eventual identification of persons and private houses<sup>18</sup> whose images have been captured by Google cars, other privacy complications comprise the capture of images in places which are “sensitive” from a data protection view (such as churches, hospitals, prostitution houses etc), the application of the principle of proportionality to the retention period of unblurred images and the guarantee of the proper and effective exercise of the rights of the data subject, such as the right of information or the opposition right.

Another Google major privacy “sin” directly linked to its famous Street view service has been revealed recently. In May 2010, Google admitted in an official blog post that since 2006 it had mistakenly been collecting personal data from non-password protected Wi-Fi networks in more than 30 countries with its Street View cars. Indeed, Google collected about 600 gigabytes of data from users of public Wifi stations (which are not owned by Google) during 2006-2010, including snippets of emails<sup>19</sup>. Google issued a public apology and declared that it plans to delete all the data as soon as it gains clearance from government authorities.

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<sup>18</sup> Indeed, privacy infringement due to the processing of images of houses instead of persons is more difficult to establish because the picture of a person’s residence is a form of indirect identification which has to be combined with other elements, such as the address, in order to reveal the person’s identity. In the USA, the District Court of Pennsylvania dismissed the claim of a couple that sued Google over an alleged privacy violation (more specifically invasion of privacy, trespass, injunctive relief, negligence, and conversion) after a Street View image of their property was posted to the web. The couple sought compensatory, incidental, and consequential damages in excess of \$25,000 for each claim, plus punitive damages. On February 17, 2009, the District Court granted Google’s motion to dismiss as to all of the couple’s claims. The Court dismissed the invasion of privacy claim because the claimants were unable to show that Google’s conduct was highly offensive to a person of ordinary sensibilities. See: *Boring v. Google, Inc.*, 598 F. Supp. 2d 695, 699-700 (W.D. Pa.2009). On January 25, 2010, the U.S. Court of appeals (3<sup>rd</sup> circ., no 09-2350) affirmed the District Court’s grant of Google’s motion to dismiss the Borings’ claims for invasion of privacy, unjust enrichment, injunctive relief, and punitive damages, but reversed with respect to the trespass claim and remanded with instructions that the District Court permit that claim to go forward. See: <http://www.ca3.uscourts.gov/opinarch/092350np.pdf>.

<sup>19</sup> See: [http://en.wikipedia.org/wiki/Criticism\\_of\\_Google](http://en.wikipedia.org/wiki/Criticism_of_Google). Google equipped its vehicles with antenna as well as cameras so it could create a database with the names of Wi-Fi networks and the coding of Wi-Fi routers. However, some experimental software was being used in the Street View project, and that programming picked up the Web surfing on publicly accessible Wi-Fi networks if the company's vehicles were within range of the signal. However, Google only gathered small bits of information because its vehicles were on the move and its tracking equipment switched channels five times a second. See: [http://www.pe.com/business/local/stories/PE\\_Biz\\_D\\_google15.40fde5c.html](http://www.pe.com/business/local/stories/PE_Biz_D_google15.40fde5c.html).

## II. Google in the vortex of intellectual property law

Google's ambition to become a leading information provider often appears to push European intellectual property law boundaries to their edges. This is demonstrated by a series of significant cases where the legitimacy of Google's innovative services such as Google news, Google cache, Google books and the major source of the company's income Google Adwords was thoroughly examined by European courts. While in the field of European copyright law, the underlying tendency is to strictly ascertain copyright infringement even in cases where in the US the fair use defense could have been applied, concerning the thorny question of trademark infringement the recent decision of the ECJ has been clearly marked by a more liberal approach which at least prima facie seems to comfort Google's leading advertising business model.

### A) The Belgian "Google news" case

Google's plan to conquer the Internet information market has been seriously tested in front of Belgian courts in the famous "Google News" case. In 2006 Google launched its Google News service, which is an automated news aggregator. The service covers news articles appearing within the past 30 days on various news websites. Its front page provides roughly the first 200 characters of the article and a link to its larger content<sup>20</sup>. When an article is still on line on the Website of its original source, Google redirects directly the user via the mechanism of deep links towards the page of the news website where the article is posted. Nonetheless, as soon as an article is no longer available in the news website, it is still possible to access its contents via a "cached" link which provides access to the contents of the article that Google are stored in the Google's system cache<sup>21</sup>.

The Belgian press editors collecting society Copiepresse sought a prohibitory injunction against Google in 2006 for having stored, reproduced, extracted and reused without permission from the Belgian press editors the Belgian newspapers contents in its "Google News" daily press review. Copiepresse contested the legality of Google news service on the grounds of Belgian copyright law

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<sup>20</sup> [http://en.wikipedia.org/wiki/Google\\_News](http://en.wikipedia.org/wiki/Google_News).

<sup>21</sup> There are billions of Web pages accessible on the Internet. It would be impossible for Google to locate and index or catalog them manually. Accordingly, Google, like other search engines, uses an automated program (called the "Googlebot") to continuously crawl across the Internet, to locate and analyze available Web pages, and to catalog those Web pages into Google's searchable Web index. As part of this process, Google makes and analyzes a copy of each Web page that it finds, and stores the HTML code from those pages in a temporary repository called a cache. Once Google indexes and stores a Web page in the cache, it can include that page, as appropriate, in the search results it displays to users in response to their queries. When clicked, the "Cached" link directs an Internet user to the archival copy of a Web page stored in Google's system cache, rather than to the original Web site for that page. By clicking on the "Cached" link for a page, a user can view the "snapshot" of that page, as it appeared the last time the site was visited and analyzed by the Googlebot. For this description, see: *Field v. Google Inc.*, No. CV-S-04-0412-RCJ-LRL, United States District Court District of Nevada (2006).

and of the database sui generis right<sup>22</sup>. Especially as regards the “Google cache” function, Copiepresse argued that the use of the “Google cache” makes it possible to circumvent the registration required by the press editor and, as a result, to elude the payment of the press article. Indeed, “caching” would make it possible to reach content that, the day after the event, is otherwise locked by the newspapers and subject to access fees<sup>23</sup>.

The President of the Brussels First Instance Court firstly concluded that “Google news” does not function as a simple search engine but as an on line information portal and that the use of “Google News” circumvented advertising on the websites of the newspapers which receive important revenues from advertising inserts. The President of the Court further noticed that the information was extracted from the press web servers without permission, and held that Google could not exercise any exception provided in the laws relating to copyright and neighbouring rights (Act of 1994) and in the law on database right (Act of 1998).<sup>24</sup>

The Court condemned Google for both copyright and database sui generis right infringement in September 5<sup>th</sup>, 2006<sup>25</sup>. On February 13rd, 2007 the Belgian Court reaffirmed its original decision at least on the part that concerned copyright infringement<sup>26</sup>. Nevertheless, the question copyright infringement due to the unauthorized reproduction of copyright protected works by Google’s cached links seems to be still open in Europe. At this point, of major importance is the decision of September

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<sup>22</sup> The quasi proprietary database sui generis right is established by the Directive 96/9/EC : Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Official Journal L 077, 27/03/1996 P. 0020 – 0028.

<sup>23</sup> Ph. Laurent, Case Note, Google News banned by Brussels High Court – Copiepresse SCRL v. Google Inc. – Prohibitory injunction of the President of the High Court of Brussels, 5 September 2006, Computer Law & Security Report 23, 2007, p. 84.

<sup>24</sup> Ph. Laurent, op.cit., p. 83. However, as the author remarks, it is noticeable that in the USA the District Court in Nevada has recently ruled that serving a webpage from Google cache does not constitute direct infringement and is, in any case, fair use. See: Field v. Google Inc., No. CV-S-04-0412-RCJ-LRL, United States District Court District of Nevada (2006).

<sup>25</sup> TPI Bruxelles, 5 septembre 2006. Available on line at : <http://www.droit-technologie.org>. Also see : *Van den Bulck P./Wery E./Bellefroid M.*, Google News sur la sellette, Le triomphe de David sur Goliath ?, <http://www.droit-technologie.org>.

<sup>26</sup> TPI Bruxelles, 13 février 2007. See : *Van den Bulck P.*, Copiepresse contre Google : les limites du « caching » ?, *Revue Lamy Droit de l’Immatériel*, avril 2007, 67.



17<sup>th</sup>, 2008 of the Provincial Court Barcelona (Audiencia Provincial Barcelona)<sup>27</sup>. The Court found that neither the unauthorized reproduction and display of fragments of web pages contents under the links that result from the Google search engine, nor the unauthorized reproduction and making available of the whole contents of web pages under the “Google Cache service” (different from the temporary copies made for proxy caching purposes<sup>28</sup>) constitute a copyright infringement. The Court grounded the exemption of Google cache on a flexible application of the three-step test<sup>29</sup> by using interpretative criteria comparable to the terms of the US fair use defense<sup>30</sup>.

## B) The “Google books” challenge

Another legal battlefield for Google has proved to be its famous Library Project. Under the Library project Google plans to scan into its search database materials from major research libraries all over the world. In response to search queries, users will be able to browse the full text of public domain materials, but only a few sentences of text around the search term in books still covered by copyright. The process is divided into two stages: Google first scans and stores the entire book in its

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<sup>27</sup> See: <http://www.kluweripcases.com/>. For the US see the See: *Field v. Google Inc.* case, op.cit.

<sup>28</sup> These fall within the perimeter of art. 31 I of the Ley de Propiedad Intelectual.

<sup>29</sup> For the interpretation of the three step test, see: A. Lucas, Lucas A./Lucas H.J., "Traité de la propriété littéraire et artistique", 3e édition ; Lexis Nexis, Litec, 2006, p. 269 · M. Senftleben, Copyright, Limitations and the Three-Step Test - An Analysis of the Three-Step Test in International and EC Copyright Law, Kluwer Law International, The Hague 2004 · Ginsburg, J. C. (2001), "Toward Supranational Copyright Law? The WTO Panel Decision and the “Three-Step Test” for Copyright Exceptions”, Working Paper No. 181 of the Columbia Law School - For *Revue Internationale du Droit d’Auteur*, pp. 1- 16 · M. Ficsor, "How much of what? The three-step test and its application in two recent WTO dispute settlement cases", *RIDA* 2002, n°192, p. 145 · also M. Ficsor, "EBU Copyright Symposium, Quo vadis, Copyright", Barcelona, March 31, 2006, "How did we arrive here? The evolution of copyright legislation (The end of ~ ?)", [www.ebu.ch](http://www.ebu.ch), p. 6 · Chr. Geiger, "The role of the three-step-test in the adaptation of copyright law to the information society" e-Copyright bulletin, January-March 2007. Available on line at: [http://portal.unesco.org/culture/en/files/34481/11883823381test\\_trois\\_etapes\\_en.pdf/test\\_trois\\_etapes\\_en.pdf](http://portal.unesco.org/culture/en/files/34481/11883823381test_trois_etapes_en.pdf/test_trois_etapes_en.pdf) · Gervais, D. (2005), "Towards a New Core International Copyright Norm: The Reverse Three-Step Test", *Marquette Intellectual Property Law Review*, vol. 9, no. 1, p.1 · Gautier P.Y., "L’élargissement des exceptions aux droits exclusifs, contrebalancés par le «test des trois étapes» ", *Communication-Commerce Électronique*, novembre 2006, p.11 · T. Sinodinou, *Voyages des sources du test des trois étapes aux sources du droit d’auteur*, *Revue Lamy Droit de l’immatériel*, août /septembre 2007, p. 74. Also see: Declaration, A balanced interpretation of the three-step test in copyright law, p. 4. Available on line at: [http://www.ip-institute.org.uk/pdfs/Jonathan\\_Griffiths\\_Declaration.pdf](http://www.ip-institute.org.uk/pdfs/Jonathan_Griffiths_Declaration.pdf), IIC (39) 2008, p.707 · Huaiwen H., *Seeking a Balanced Interpretation of the Three-Step Test - An Adjusted Structure in View of Divergent Approaches*, IIC (40) 2009, p. 274.

<sup>30</sup> Raquel Xalabarder , Case summary and Annotation of the September 17<sup>th</sup>, 2008 decision of the Provincial Court Barcelona (Audiencia Provincial Barcelona), <http://www.kluweripcases.com/>.

own servers. Then, in response to a specific request by a specific user Google then displays short excerpts (“snippets”) of the work via its web site<sup>31</sup>. The Google’s Library project is part of the company’s general strategy to make the entire world’s information available at the click of a mouse, including books and other forms of offline content.

The future and the amplitude of the Google’s Library project directly depends on the application of copyright legislations, since the great majority of the contents which are digitalized and made available to the public by Google are still protected by copyright. The situation seems to be different in the U.S., Australia and Canada and in Europe, with the exclusion of U.K.

Since November 14<sup>th</sup>, 2009 works included in the collections of libraries can be processed by Google’s Library Project under the terms of the revised Google Book Settlement on the condition that they had been registered with the US Copyright Office by January 2009, or had been published in Australia, Canada, or the UK. An initial Settlement was reached in 2008 between Google and the Authors Guild and the Association of American Publishers pursuant to a copyright infringement lawsuit that the latter filed against the Mountain View California Company in 2005. The lawsuit was provisionally certified as a class action on behalf of all authors and publishers anywhere in the world whose works were scanned by Google. Pursuant to several objections from publishers in France and Germany, and opposition from major companies, including Amazon, the initial Settlement had to be modified in various points.

However, rival search companies are worried that having a lead role in the digitization of books could help Google to dominate another aspect of online advertising, to the possible financial detriment of its competitors<sup>32</sup>. Also troubling to critics is the fact that the revised settlement circumvents traditional copyright provisions by allowing Google to digitize orphan works on the basis of an opt-out model, thus without first getting rights holder permission, while any Google competitors are blocked from doing so barring legislation granting them licensing rights<sup>33</sup>. This is a clear reversion of the classic copyright dogma that dictates that every person who wishes to exercise any right which enters in the scope of copyright protection must obtain the specific prior consent of the right holder. The solution might seem attractive from as social profit standpoint and beneficial for the public for

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<sup>31</sup> Band, J. (2006). The Google Library Project: Both Sides of the Story. *Plagiarism: Cross-Disciplinary Studies in Plagiarism, Fabrication, and Falsification*, 1 (2): 1-17.

<sup>32</sup> Chris Lefkow (AFP), Last-minute objections filed to Google book settlement, January 28, 2010, [http://www.google.com/hostednews/afp/article/ALeqM5gi8ydpIQIS04Qe\\_zy6vnmdCrQkMQ](http://www.google.com/hostednews/afp/article/ALeqM5gi8ydpIQIS04Qe_zy6vnmdCrQkMQ).

<sup>33</sup> [http://news.cnet.com/8301-1023\\_3-10398995-93.html](http://news.cnet.com/8301-1023_3-10398995-93.html).

the moment since Google does not charge for giving access to the digitalized works, but in the future the Settlement could potentially help Google to establish a de facto monopoly over the great volume of orphan works.

Apart this controversy over the possible anti-competitive effects of the Google Book Settlement, the Google Book Search Library Program also raises a bundle of core copyright issues, which are not the same under US and European copyright law. In the United States, the discussion focuses on whether Google's use of copyrighted works falls into the fair use defense<sup>34</sup> and especially whether there is a transformative one, whether the scanning of the books is an incidental copying, and whether the profit derived from advertisement revenues undermines a fair use defense<sup>35</sup>.

In Europe, the scanning of the works necessarily prerequisites the consent of the right holders and none of the library exceptions provided by the Information Society Directive<sup>36</sup> could be applied to this stage. Nonetheless, the issue of displaying small segments of a copyrighted work to the specific user who made the relevant request is more controversial. Since European legislations and the Directive 2001/29/EC do not provide a general fair use defense as in US copyright law, the act of displaying of snippets to users has to be evaluated under the light of the specific copyright exceptions which are established by national copyright legislations. The question was examined by the First Instance Paris Court. The Court ruled on December 18<sup>th</sup>, 2009<sup>37</sup> that Google violates French copyright law,- which was found applicable both to the stages of scanning of the works and of

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<sup>34</sup> According to section 107 of the title 17 of the US Copyright Code, "Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work. The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors".

<sup>35</sup> Agnes-Lucas Schloetter, Digital libraries and copyright issues Digitization of contents and the economic rights of the authors, in: Iglezakis/Kapidakis/Synodinou, "E-Publishing and Digital Libraries: Legal and Organizational Issues", IGI Global, 2010 (under publication).

<sup>36</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p. 10.

<sup>37</sup> Tribunal de grande Instance de Paris, December 18, 2009. Available on line at: <http://juriscom.net/documents/tgiparis20091218.pdf>.

displaying the snippets<sup>38</sup>, and firmly rejected the argument of Google that displaying a limited number of short extracts from books is covered by the exception of quotation<sup>39</sup>. Indeed, the Court indirectly accepted that the search of the content of digitalized books via keywords and the provision of snippets substitute the need to access the full text of the book, since they enable the users to find the information they seek<sup>40</sup>. Google appealed the decision.

The Google Library project adversity in France seems to be continued. On April 2010, the chief executive of major French publisher Gallimard, told AFP at Paris's annual book fair that French publishers will launch a second lawsuit against Internet giant Google for digitally scanning their books for its vast online library<sup>41</sup>.

### C) The Google “Adwords” saga

One of the hottest IP questions that lead to a rich litigation in several EU Member States has been the involvement of Google’s advertisement system “Adwords” in trademark infringement. Through

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<sup>38</sup> The determination of private international law was one of the more delicate issues of the case. Google argued that U.S. copyright law had to be applied on the grounds of article 5 par. 2 of the Berne Convention, since the infringing acts or reproduction and representation took place in the U.S. For an analysis of these points, see: F.M. Piriou, *La numérisation des livres sans autorisation constitue un délit de contrefaçon*, Communication-Commerce Electronique, mai 2010, p.16. U.S. copyright law was found applicable in another copyright case against Google in France, the so – called “Google Images” case where Google was relaxed thanks to the application of U.S. law. See: TGI Paris, 3e ch., sect. B, 20 mai 2010, SAIF c/Google France, Jurisdata n° 2008-362899, Communication-Commerce Electronique, 2008, Etude 22, Y. Gaubiac.

<sup>39</sup> As Lucas-Schloetter points out, since Google does not really make copyrighted works available, but only searchable, it may therefore be argued that the limited amount of the copyrighted work made accessible to the users of Google’s search engine is the key issue in assessing the lawfulness of Google Book Search Library Program under European copyright legislation. Nonetheless, the French exception for quotation is considered as narrow, since it only allows the making of analysis and short quotations justified by the critical, polemical, educational, scientific or information character of the work into which they are incorporated (art. L. 122-5 3° (a) of the French CPI). See: Agnes-Lucas Schloetter, *Digital libraries and copyright issues Digitization of contents and the economic rights of the authors*, op.cit. The exception for quotation which is provided by the Directive 2001/29 is wider as it does not set a strict limit concerning the extent of the quotation and does not presuppose that the quotation has to be incorporated in another work. However, it requires that the quotation must be in accordance with fair practice and it must be done for a specific purpose. See: Bechtold, in Dreier/Hugenholtz, *Concise European Copyright Law*, Kluwer Law International, 2006, p. 379.

<sup>40</sup> F.M. Piriou, *La numérisation des livres sans autorisation constitue un délit de contrefaçon*, op.cit., p. 17.

<sup>41</sup> See : <http://www.smh.com.au/technology/technology-news/google-faces-new-bookscanning-lawsuit-20100401-rg0b.html>.

“AdWords”, Google allows advertisers to select keywords so that their ads are displayed to Internet users in response to the entry of those keywords in Google’s search engine. At issue has been the legality of the use of keywords which correspond to trade marks.

French jurisprudence is particularly representative of the legal uncertainty prevailing in this area. French case law has been manifestly shown undetermined on the determination of the legal grounds of the liability of Google acting as a provider of commercial links<sup>42</sup>. Courts explored a variety of legal grounds either opting for the common legal regime of civil liability<sup>43</sup> or for the more specific grounds of trademark infringement or misleading advertising. French courts also have seemed to be divided as regards the more specific issue of trademark infringement. While at the beginning, the dominant tendency was to ascertain trademark infringement<sup>44</sup>, more recent decisions have exonerated Google’s liability due to its pure automatic and technical role in the choice of keywords or due to the application of the so-called principle of specialty<sup>45</sup>. According to the principle of specialty, under French law, trademark protection only extends to registration or use of identical or similar goods or services. As a corollary of this principle, trademark owners cannot prevent third parties from using their marks on dissimilar goods and services. Therefore, since Google does not provide products or services concerned by the trademark registration, it cannot be held liable for trademark infringement. Nonetheless, this finding could lead to the following result: if the registered trademark which has been suggested by Google and used as a keyword had been registered also for advertisement services, -thus services similar or identical to these provided by Google-, Google’s

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<sup>42</sup> Féral-Schuhl Chr., Fournisseurs de liens commerciaux, une jurisprudence encore indéfinie..., *Revue Lamy Droit de l’Immatériel*, n°36, mars 2008, p. 47.

<sup>43</sup> See for example: Trib.com. Paris, 15<sup>e</sup> ch., 24 novembre 2006, *Sté One tel c./ Stés Google et Olfo*, RLDI 2007/24, n°776. For a commentary of this case, see: Tardieu-Guigues E., *Liens commerciaux : condamnation de Google en dehors du droit des marques*, RLDI, mars 2007, n°25, p. 9.

<sup>44</sup> CA Versailles, 23 mars 2006, *Sté Google France c./Sté CNRRH et autre*, n°05/00342, RLDI 2006/16, n°470, obs. Costes ·TGI Nanterre, 2<sup>e</sup> Ch., 14 décembre 2004, *CNRRH, Pierre Alexis T c./ Google France et a., Propriétés Industrielles*, 2005, n°4, p. 23-24 · TGI Nanterre, 2 mars 2006, *Hôtels Méridien c./ Google France*. Available on line at : <http://www.legalis.net> · CA Paris, 4<sup>e</sup> ch., sect.A, 28 juin 2006, *Google France c./Louis Vuitton Malletier*. Available on line at : <http://www.legalis.net>.

<sup>45</sup> TGI Paris, 8 décembre 2005, *Kertel c./ Google*. Available on line at : <http://www.legalis.net> · TGI Paris, 12 juillet 2006, *Gifaml c./Google*, RLDI 2006/20, n°605 · TGI Nice, 7 février 2006, *TVD Industries c./Google*. Available on line at : <http://www.legalis.net> · TGI Paris, ord., 11 octobre 2006, *Citadines c./Google*. Available on line at : <http://www.legalis.net> · TGI Paris, 13 février 2007, *Laurent c./Google*. Available on line at : <http://www.legalis.net> · TGI Strasbourg, 20 juillet 2007, RLDI 2007/30, n°966. Google was also found not liable for trademark infringement in Germany: Landgericht Munich, 12 dec. 2003, Az. 33 O 21461/03, X v. Google, voy. See: F. HOFER, *Legal problems of search engine marketing*, April 2004, p. 10, available on line at: <http://www.hltlaw.it>

liability could be declared<sup>46</sup>. Another issue, which was inextricably linked to the question of Google's liability was the legal determination of the role of Google as a provider of a paid referencing service, and more precisely the possible application of the liability exemption for hosting providers of article 14 of Directive 2000/31/EC<sup>47</sup>.

The jurisprudential disparity of the French lower courts led the French Supreme Court to make three preliminary references to the European Court of Justice (ECJ) when it was called upon to settle the above issues. The facts of the three cases were quite similar. Google Adwords was found liable by French lower courts for allowing the selection of keywords corresponding to registered trade marks and for advertising Web sites offering counterfeit products or competitor sites offering similar products which did not infringe the trade marks at question.

The three references from the French "Cour de cassation" posed the following basic question: does the use by Google, in its AdWords advertising system, of keywords corresponding to trade marks constitute an infringement of those trade marks? Although the references are formulated somewhat differently, they all ask for an interpretation of Article 5(1) of Directive 89/104 and therefore concern that basic question of whether Google has committed a trade mark infringement.<sup>48</sup> The second

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<sup>46</sup> Glaize F., Liens publicitaires : suggérer est-ce contrefaire ?, RLDI, mars 2008, n°36, p.53.

<sup>47</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), *Official Journal L 178*, 17/07/2000 P. 0001 – 0016. According to this article 14 par. 1 of the e-Commerce Directive "Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that: (a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information".

<sup>48</sup> According to this provision, "The registered trade mark shall confer on the proprietor exclusive rights therein. The proprietor shall be entitled to prevent all third parties not having his consent from using in the course of trade: (a) any sign which is identical with the trade mark in relation to goods or services which are identical with those for which the trade mark is registered; (b) any sign where, because of its identity with, or similarity to, the trade mark and the identity or similarity of the goods or services covered by the trade mark and the sign, there exists a likelihood of confusion on the part of the public, which includes the likelihood of association between the sign and the trade mark". The concept of in the "course of trade" has been interpreted broadly by the ECJ in the Arsenal/Reed Case (C-206/01), 12 November 2002, Arsenal Football Club v. Matthew Reed: "In those circumstances, as the national court stated, the use of the sign identical to the mark is indeed use in the course of trade, since it takes place in the context of commercial activity with a view to economic advantage and not as a private matter" (point 40 of the decision).

crucial question referred to the ECJ was whether Google could be exempted from liability on the grounds of article 14 of the E-commerce Directive<sup>49</sup> in case it was not held liable for trademark infringement. On March 23rd, the hotly anticipated judgments of the ECJ were published<sup>50</sup>.

As regards the first question the Court concluded that while Google was acting in the course of trade, it was not using the trademarks for its own advertising service and therefore it could not be held liable for trademark infringement. More precisely, the Court found that the selection by an economic operator, by means of an agreement on paid internet referencing, of a keyword which will trigger the display of a link for the purposes of offering for sale goods or services, and which reproduces or imitates a trade mark registered by a third party does not constitute in itself trademark infringement.

As regards the second major issue, the Court considered that article 14 of the E-commerce Directive must be interpreted as meaning that the rule laid down therein applies to an Internet referencing service provider in the case where that service provider has not played an active role of such a kind as to give it knowledge of, or control over, the data stored. If it has not played such a role, that service provider cannot be held liable for the data which it has stored at the request of an advertiser, 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.

Hence, while Google has been clearly exonerated for liability for trademark infringement, it is still possible to be held liable on the grounds of general civil tort provisions, if it fails to comply with the obligations provided by article 14 of the E-commerce Directive. National courts will, therefore, have to evaluate the role played by Google in the course of the creation of the advertisement and more precisely to examine whether its role is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores<sup>51</sup>. And the major question that has to be asked is whether Google's role is really technical. Indeed, as it is pointed out in the decision, it is apparent that, with the help of software which has developed, Google processes the data entered by advertisers and the resulting display of the ads is

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<sup>49</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services

<sup>50</sup> Judgment of the Court (Grand Chamber) of 23 March 2010 (reference for a preliminary ruling from the Cour de cassation — France) — *Google France, Google, Inc. v Louis Vuitton Malletier* (C-236/08), *Viaticum SA, Luteciel SARL* (C-237/08), *Centre national de recherche en relations humaines (CNRRH) SARL, Pierre-Alexis Thonet, Bruno Raboin, Tiger SARL* (C-238/08), (Joined Cases C-236/08 to C-238/08).

<sup>51</sup> See point 114 of the decision.

made under conditions which Google controls. In fact, Google determines the order of display according to, inter alia, the remuneration paid by the advertisers<sup>52</sup>.

### **III. Google Suggest and the civil tort of denigration**

Google's primary function as a search engine is often accompanied by supplementary utilities whose purpose is to facilitate user's searches. This is often achieved by complementary tools based on special algorithms whose purpose is to propose to users keywords, such as the Google Adwords utility, or search terms. This is also the case of the Google suggest utility. Google Suggest is a search auto-completion tool. The utility offers search suggestions below the text which complete what the user has typed so far with a list of real time suggestions based on popular searches by other users.

One major legal question which derives from the wide use of these tools is, -as it has already been remarked in the "Google Adwords" litigations-, the eventual liability of Google as provider of the content which is proposed by these automated tools. The main issue is whether Google could be held liable as a content provider for infringements which might result from the content, namely the keywords or the search terms, that Google sells or proposes to its users, in spite the fact that this "content" is not generated by Google's employees but it is produced automatically by Google's software on the basis of statistical data about the queries of Google's users. Despite the general acceptance that Google does not effectuate choices of the eventual harmful content knowingly or on purpose, the debate is controversial because it has been proved that Google in certain occasions filters particular kind of contents, such as pornographic content or politically sensitive content or it ranks content according to its own ranking criteria.

Indeed, despite its obvious usefulness, Google Suggest has soon become a target of serious criticism for its mostly unfiltered suggestions, since the suggestions proposed by the tool can be proved to be injurious for the reputation of natural or legal persons due to their insulting or depreciating content.

Two interesting and pioneer cases in France have clearly demonstrated the eventual negative implications which could emanate from the unfiltered suggestions of "Google suggest". The first case was brought before the Commercial Court of Paris in 2009. The electricity company "Direct energie" sought injunctive relief against Google for having suggested via its Google suggest utility to users the

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<sup>52</sup> See point 115 of the decision. See also: L. Thoumyre, Impact de l'arrêt Google Adwords de la CJUE sur la responsabilité des services 2.0. Available on line at : <http://www.juriscom.net> · L. Grynbaum, Google Adwords: l'hébergeur, un prestataire nécessairement passif, *Revue Lamy Droit de l'immatériel*, mai 2010, p. 38.



word “fraud” after they have typed into the search box the company’s name. “Direct energie” argued that Google committed a civil tort through its Google’s suggestion tool on the grounds of article 1382 of the French Civil Code<sup>53</sup>, since the association of the company’s name to the word “fraud”, namely an illegal act, manifestly harmed its image and its reputation.

Google insisted on the automatic and statistic character of the suggestions proposed by Google suggest. It also argued that the suggestions are not illegal but obviously legitimate and useful for the whole of the community of Internet users, because they constitute the objective reflection of the researches which are statistically the most frequently carried out by the users. Nevertheless, the Court declared Google liable for having involuntarily participated to a campaign of denigration against “Direct Energie”<sup>54</sup>. The decision was confirmed a few months later by the Paris Court of appeals<sup>55</sup>. The latter has partially reformulated the justification of Google’s infringing activity, since it estimates that the prejudice caused to “Direct Energie” derives from the lack of information about the criteria used by Google for the determination of the order of the display of the suggestions. Accordingly, the Court invites Google to transparency and orders Google to provide an explicatory notice about the way the suggestions are generated<sup>56</sup>.

The outcome was analogous in another litigation against Google suggest in France. The facts are quite similar to the “Direct energie” case. Google was accused by the Centre National Privé de Formation a Distance (CNFDI) in a suit which claimed the search engine's 'Suggest' feature linked the organization to the word 'fraud' on the grounds of article 29 of French Law of 29<sup>th</sup> July of 1881 about freedom of press (*Loi du 29 juillet 1881 sur la liberté de la presse*)<sup>57</sup>. While the initial claim for injunctive relief filed by CNFDI resulted in a favourable ruling for Google<sup>58</sup>, at the decision on the

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<sup>53</sup> “Direct energie” founded its claim on articles 1382 of the French Civil Code and 873 of the French Code of Civil Procedure. According to article 1382 of the French Civil Code any act whatever of man, which causes damage to another, obliges the one by whose fault it occurred to compensate it.

<sup>54</sup> Tribunal de commerce de Paris Ordonnance de référé 7 mai 2009, *Direct Energie / Google Inc.* Available on line at : <http://www.legalis.net>.

<sup>55</sup> Cour d’appel de Paris Pôle 1, 2ème chambre Arrêt du 9 décembre 2009, *Google Inc/ Direct Energie.* Available on line at : <http://www.legalis.net>.

<sup>56</sup> See : A. Debet, comment on Cour d’appel de Paris Pôle 1, 2ème chambre Arrêt du 9 décembre 2009, *Google Inc/ Direct Energie*, Communication-Commerce Electronique, mai 2010, p. 31.

<sup>57</sup> According to this article, “*Toute expression outrageante, termes de mépris ou invective qui ne renferme l'imputation d'aucun fait est une injure*”.

<sup>58</sup> TGI Paris, réf., 10 juillet 2009, n°9/55969, Centre National Privé de Formation à Distance (CNFDI) c/Sté Google Inc. Available on line at : <http://www.legalis.net>.

merits the Paris First Instance Court<sup>59</sup> condemned Google for denigration. In this case also the Court rejected Google's argument of lack of human involvement in the course of creation of the suggestions as it found out that Google has a certain control over the content of the suggestions since it invites users to report on offensive or erroneous suggestions, and ones "that could offend", particularly "rude words, and words to incite hatred or violence. A highly decisive factor that has been taken into consideration by the Court is that the CNFDI before bringing the case in front of the court has notified three times Google for the injurious content of the suggestions, but Google did not react.

Both cases indirectly accept that Google has been acting as a content provider or at least as a negligent host provider. The possibility of control over the content of the suggestions eradicates Google's argument concerning the automatic character of the suggestions. This element has also been proven to be critical for the acceptance of Google's involuntary participation to the denigration of the claimant in the first case and of Google' intention to harm the claimant in the second case. Despite the evasive justification of the Courts on this issue, it can be deducted that the generation of the suggestions on the basis of popular search queries via an automatic process does not preclude the existence of a fault and more precisely Google's willful or negligent participation to the denigration. The cases also reaffirm the classic rule of media law that a person can be held liable for defamation and injury to reputation even if she simply repeats the offensive content which has been originally created or published by another person<sup>60</sup>.

#### **IV. Google's ranking tactics and European competition law**

"Googling" has become an autonomous concept and an independent form of leisure activity, similar to "zapping" through television channels. Anybody who cannot be found via Google does not exist: "To exist is to be indexed by a search".<sup>61</sup> This is highly important for every person or entity who has a presence in the World Wide Web, but even more crucial for other search engines which compete Google in the information market.

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<sup>59</sup> Tribunal de grande instance de Paris, 17<sup>ème</sup> chambre, Jugement du 4 décembre 2009, JPL-CNFDI / Google Inc. Available on line at : <http://www.legalis.net/>.

<sup>60</sup> A. Cousin, « Google Suggestions » : injure sans intention de nuire ou dénigrement involontaire ?, Revue Lamy Droit de l'immatériel, aout/septembre 2009, p. 28.

<sup>61</sup> Nico van Eijk, Search Engines: Seek and Ye Shall Find? The Position of Search Engines in Law, IRIS, Strasbourg January 2006, p. 2.

Google's ranking tactics concerning its competitors have been officially contested by three European Internet companies before the European antitrust authorities. The inquiry, disclosed on February 2010, appears to focus largely on complaints that Google unfairly ranks the sites of the Internet competitors, in effect lowering their rank in search results that appear on Google sites. In that way it penalizes potential competitors and keeps advertising prices artificially high<sup>62</sup>. Moreover, Google has been accused for abusing its dominant position in the market of search engines in order to promote its own service. Especially, Shivaun Raff, the chief executive of one of the companies which filed the complaints, the UK company Foundem, told BBC Radio 4's *Today* program, in the last couple of years Google has started to use its search results as a marketing channel for its own services: "When a user typed in a query about a specific item they wished to buy or research, she said, "You would find near the top 'shopping results' and that is Google's own price comparison service inserted. And you will also see 'video results', and that is Google's own video service"<sup>63</sup>.

The legal ground of the claims is the abuse of Google's dominant position in order to demote the Web sites of Google's competitors. The complaints against Google come at a time of heightened scrutiny of Google in Europe, where the company has an even more dominant position in search advertising than it does in the U.S. As the case is still at an early, fact-finding stage and there is not any official information about the legal arguments and the exact content of the complaints, an analysis of these cases is not possible. However, it is very interesting to follow closely these cases, since apart from privacy law, intellectual property law and tort law Google's legal adventures seem to extend also in the field of European competition law.

Except for the eventual anticompetitive activities of Google concerning the exclusion or depreciation of its competitors for the profit of its own services, the ranking of businesses upon a payment and the sale of keywords could also raise significant competition issues for third parties which use Google's services. Indeed, the appropriation of keywords by certain companies on several major search engines, such as Google that dominates the market of search engines in Europe, could possibly prevent the companies of the same sector to be visible on Internet and, as a result, to almost completely exclude them from this market<sup>64</sup>. This interesting hypothesis has been examined

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<sup>62</sup> [http://business.timesonline.co.uk/tol/business/industry\\_sectors/technology/article7038845.ece](http://business.timesonline.co.uk/tol/business/industry_sectors/technology/article7038845.ece).

<sup>63</sup> [http://business.timesonline.co.uk/tol/business/industry\\_sectors/technology/article7038845.ece?token=null&offset=0&page=1](http://business.timesonline.co.uk/tol/business/industry_sectors/technology/article7038845.ece?token=null&offset=0&page=1).

<sup>64</sup> S. Pirlot de Corbion, La responsabilité des fournisseurs d'outils de recherche sur Internet, DA/OR, 2004/72, p. 29. Available on line at : <http://www.droit-technologie.org>.

by the French Competition Authority in 2000<sup>65</sup>. At this time, the Competition Authority concluded that competition law rules could not justify any obligation of the t search engines to index and rank information in an exhaustive or objective way. Nevertheless, it was not excluded that, according to the context, an agreement between a search engine and a commercial Website for a priority or exclusive referencing via the reservation of keywords could be considered as anti-competitive.

## Conclusion

Google is one of the most characteristic examples of how a private company can force law to advance and explore its limits. Indeed, Google's leading activities in various information technology sectors have undoubtedly been the source of new legal challenges. European information law had to deal with multiple legal issues in the fields of data protection law, intellectual property law, tort law and recently competition law. In the majority of cases, European jurisdictions applied firmly the European legal principles and EU legislation and obliged Google to reconsider its business strategy at least in Europe. Nonetheless, Google's various European litigations have created a rich case law that constitutes by itself a significant evolution of European information law. Since Google continues to expand its activities constantly, the emergence of new legal questions is just a matter of time.

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<sup>65</sup> Conseil français de la concurrence, décision no 00-D-32 du 9 juin 2000 relative a une saisine au fond et une demande de mesures conservatoires présentées par la société Concurrence. Available on line at : <http://www.conseilconcurrence.fr>.