

## LEGAL ASPECTS OF SOME INTERNET MARKETING INSTRUMENTS

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### Abstract

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The development of the Internet and sophisticated search engines such as e.g. Google together with the spread of social networks have introduced new marketing possibilities of addressing potential clients with offer of goods and services. Unlike most traditional marketing procedures, these instruments allow for targeting the business information directly at concrete individuals, taking into consideration their age, sex, education, hobbies. All this is based on their choice of words keyed into the search engines. This is the targeted advertising where consumer response can be accurately measured, e.i. the so called context advertising.

The purpose of this paper is to analyse the legal aspects of some of the above mentioned internet marketing instruments, as even in this sphere legal regulation clearly lags behind the dynamically developing possibilities of the Internet as a means of communication. These marketing methods being viewed from the perspective of valid laws, several problem areas may be detected, which concern the right of privacy protection of natural person, intellectual property, or legal regulation of implied or unsolicited advertising.

This paper concentrates on the summary of rules of law which regulate internet users privacy protection with respect to the Czech and Community laws, assessment of their efficiency and de lege ferenda discretion.

search engines, the right to privacy, data retention, marketing activities

Without many of its users realising it, the Internet is a medium with practically unlimited memory. Once a keyword enters the search engine, it will almost certainly remain there forever and is identified with a concrete IP computer address. Any private information, photos, videos, made

accessible over social networks, frequently remain there forever. Not only internet service providers, but also individual web pages operators are able, via so called "cookies<sup>1</sup>" to record which IP addresses connect to various web pages, how often, what kind of information they search for.<sup>2</sup>

1 In the course of advert presentation, the file cookie can be placed in the browser. Cookie is a text file composed of a series of random numbers and figures which serve as pseudoidentifiers of the given search engine, not the user. Through cookies, web signals and similar methods data can be collected on which advertisements the search engine displayed, which ones the user clicked on and what other operations on our web pages and the Google services the user undertook. Thanks to the cookie files more relevant and effective advertisements can be displayed. [quote 04/ 10/ 2011] available at <http://www.google.cz/intl/cs/privacy/ads/privacy-policy.html>.

2 To illustrate: Internet service provider or internet portal (type Google) is able to record the data about connection to the network – e.g. time, address, duration of communication, sometimes data about the user and the user accounts, IP address, transferred data volume. It is able to record data about electronic mail box access, e-mails transfer, including identification of addresses and transferred data volume. It also records data about server and other services, e.g. logged in URL addresses, data on chat usage, ICQ, IP telephoning, including the identification of the communicators, time and services used.

Data collected in this way can then be evaluated, combined with other data (e-mail boxes, blogger accounts) and an unbelievable amount of information about the user may thus be collected that is then associated with their working and private life.<sup>3</sup> „Every day, millions of users provide Google with unfettered access to their interests, needs, desires, fears, pleasures, and intentions. Many users do not realize that this information is logged and maintained in a form which can facilitate their identification“<sup>4</sup>. Most internet users have no idea about what instruments e.g. internet portals operators use, they are not aware of the facts that their every move on the Internet is being monitored, their private data is being collected and, for the time being, used first of all commercially, for offer of products and services. They are not on such an advanced user level when working on a computer so that they could hinder the accumulation of private data, making use of the instruments in the computer software. It is obvious that the disproportion in the user – internet portal relationship may result in the infringement of the natural person's right to privacy.

The right to privacy is guaranteed both in the Czech and Community legal regulations and these are the ones with the highest legal force. In the Czech Bill of Rights in Art. 7 subsection 1 the right to privacy is embodied in general terms and it is made more concrete in Art. 10 subsection 1 of the Bill, where values like human dignity, personal honour, good reputation of natural person are specified. Art. 10, subsection 2 guarantees the right to private and family life protection, protection from personal data abuse. Art. 12 of the Bill safeguards the inviolability of dwelling and Art. 13 safeguards written materials, records and reports during their transfer and in keeping. There is also a close link between the protection of privacy and Art. 15, subsection 1, where rights to freedom of thought, conscience and religion are declared. The protection of the right to privacy in various meanings of this collocation winds then through the whole Czech legal system on both the private and public levels. To mention the most important ones: Civil Code, Labour code, Law of personal data protection or Penal law.

According to the valid Civil Code, when an infringement of right to privacy occurs, the natural

person may take legal action and turn to court asking for the person, infringing their rights, to refrain from the wrongful act, to correct the wrongful state, may claim reasonable satisfaction, even financial compensation for non material injury.

From the point of view of the Community law, the right to privacy is guaranteed by the Bill of Rights of the EU. According to Art. 7, each person has the right of their private and family life, dwelling and communication to be respected. According to Art. 8 each person is entitled to protection of personal data that concern them. These data have to be processed in a fair.

Way, they have to serve precisely the given purpose and be based on consent of the person in question or on other lawful reason stated by law. Each person is entitled to access to the data collected about themselves, and to correct them.

There is an independent body surveying the adherence to these regulations. In EU it is the European surveyor of personal data protection.

It can be agreed with the statement that for many years the state has neglected the collection of information on natural persons over the Internet, and the only effective way of legal regulation is legal enactment within Community law.<sup>5</sup> The strategy of individual national legal enactments, carried out by some European states, has proved to be inefficient because the providers of electronic communication services met with varied demands as to the traffic and location data that should be stored, as well as their storage conditions and periods.

Within the Community laws it is the Directive of the European Parliament and of the Council that deals with the implementation of the right to privacy protection.<sup>6</sup> The Directive demands that the member states safeguard the rights and freedoms of individuals with regard to personal data processing, especially their right to privacy, and that free movement of such data be secured within the Community. Then it is the Directives of the European Parliament and of the Council 2002/58/EC<sup>7</sup> and 2006/24/EC<sup>8</sup> that safeguard the right to privacy, especially in the sphere of electronic communications (e.g. on the Internet). In the preamble of the Directive 2002/58/EC the continuity of protection of right to privacy

3 In more detail: KÜHN, Z., 2011: Ochrana soukromí v internetové době. Coll. *Právo na soukromí*, Masarykova univerzita, Mezinárodní politologický ústav, Brno, p. 110–118. ISBN 978-80-210-5449-3.

4 TENE, O., 2008: What Google Knows: Privacy and Internet Search Engines, *Utah Law Review*, Vol. 2008, No. 4: 1434–1492. ISSN 0042-1448.

5 KÜHN, Z., 2011: Ochrana soukromí v internetové době, Coll. *Právo na soukromí*, Masarykova univerzita. Mezinárodní politologický ústav, Brno, p. 110–118. ISBN 978-80-210-5449-3.

6 Directive of the European Parliament and of the Council 95/46/EU of October 24, 1995, on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

7 Directive of the European Parliament and of the Council 2002/58/EU of July 12, 2002 on the protection of individuals and protection of privacy even in the branch of electronic communications.

8 Directive of the European Parliament and of the Council 2006/24/EU of March 15, 2006 on the storage of data created or processed in connection with providing publicly accessible services of electronic communications or public communication networks and on a change in the Directive 2002/58/EU.

is declared, guaranteed in Article 7. and 8. of the Bill of Rights of the European Union and also in the Directive 95/46/EC. Further it is stated that the introduction of new advanced digital technologies into public communication networks is accompanied with special requirements for protection of personal data and privacy of individuals and it is necessary to adopt specific legal, regulation and technical enactment with regard to the protection of fundamental rights and freedoms of natural persons, with special regard to increasing capacity of automatic storage and processing of the data related to the users. These traffic and location data consist in detailed information about the time, place and numbers when using landline and mobile phones, faxes, electronic mail, texts, data about the Internet access. These data are further processed by the electronic communication providers.

Articles 5, 6 and 9 of the Directive 2002/58/EC set rules for the processing of traffic and location data created when using the electronic communications services, carried out by the network and service providers. As soon as the data are not necessary for the transmission of the communication, they are to be deleted or made anonymous, with the exception of the data necessary for accounts or calculating the payments for the connection (this is possible only till the end of the period when a bill can be legally challenged or a payment can be claimed). Article 5 subsection 3 ensures that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned is provided with clear and comprehensive information about the purposes of the processing, and is offered the right to refuse such processing by the data controller.<sup>9</sup>

Directive 2002/58/EU was changed by Directive 2009/136/EU<sup>10</sup> of the European Parliament and the Council. Namely Article 5 subsection 3 was changed in such a way that the use of electronic communications networks to store information or to gain access to information stored in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user granted their consent after being given clear and comprehensive information, among others about the purposes of the processing, all of this in compliance with Directive 95/46/EU. Obviously there was a change in the formulation without the directive specifying

what the above mentioned consent should involve. Should we take for granted the text of the preamble of Directive 2002/58/EU, namely recital No. 17 stating that consent of the subject of personal data protection may be given by any appropriate method enabling a freely given specific and informed indication of the user's wishes, including by ticking a box when visiting an Internet website. Or one can act according to Recital 66 of the new Directive 2009/136/EU, which on one hand says: "Third parties may wish to store information on the equipment of a user, or gain access to information already stored, for a number of purposes, ranging from the legitimate (such as certain types of cookies) to those involving unwarranted intrusion into the private sphere (such as spyware or viruses). It is therefore of paramount importance that users be provided with clear and comprehensive information when engaging in any activity which could result in such storage or gaining of access. The methods of providing information and offering the right to refuse should be as user-friendly as possible. On the other hand, it is stated: 'Where it is technically possible and effective, in accordance with the relevant provisions of Directive 95/46/EC, the user's consent to processing may be expressed by using the appropriate settings of a browser or other application,' which may be understood in such a way that the consent may be shown passively by not inhibiting implicitly authorized cookies<sup>11</sup>. Interpretation of this directive remains still unclear.

The Directive 2006/24/EU (also called the Directive on data retention) resumed the Directive 2002/58/EU and aims at harmonisation of duties of electronic communications services providers and telecommunication operators while maintaining traffic and location data generated by using electronic communications services for the detection, investigation and prosecution of serious criminal offences, especially organized crime and terrorism. The Directive defines what traffic and location data are to be retained, for what period of time (minimum of 6 months, maximum of 2 years), what authorities may have access to the data and rules for their safekeeping. The Directive was subdued to criticism from the very beginning of its existence both in this country and abroad on the grounds of representing a serious intervention into the rights to privacy of natural persons.

The Directive 2006/24/EU was implemented into the Czech law by amendment to the law

9 This rule was implemented into the Czech legal system in section § 89 subsec. 3, Act No. 127/2005 Coll., on electronic communications.

10 Directive of the European Parliament and of the Council 2009/136/EU of November 25, 2009, which changes the Directive 2002/22/EU on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EU on personal data processing and privacy protection in electronic communications and Regulation (EU) No. 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, also called „EU Cookie Directive“.

11 PETERKA, J.: Zreguluje Evropa cookies v našich browserech? [quoted on November 7, 2011] available on <http://www.lupa.cz/clanky/rok-2010/09/>.

No. 127/2005 Coll. on electronic communications and by recommended practice order No. 485/2005 Coll. on the scope of traffic and location data, the period of their retention and the form and method of their transfer to the authorities licit to their use.

However, this implementation was not very successful. Based on the findings of the Constitutional Court of March 22, 2011, file sign. Pl. ÚS 24/10 the Constitutional Court revoked § 97 subsections 3 a 4 Act No. 127/2005 Coll. as well as the recommended practice order no. 485/2005 Coll. In its findings the Constitutional Court<sup>12</sup>, resuming both its former resolutions and the resolutions of foreign courts stated that: '..... the right to privacy guarantees every individual the right to make their own decisions regarding whether and to what scope, by what method and under what circumstances facts and information about their private life are to be made accessible to other subjects. This is an aspect of the right to privacy presented in the form of right to informational self-determination, guaranteed in Art. 10 subsection 3 of the Bill. The right to informational self-determination relates not only to the content proper of the telephone communications, but also to the data about the numbers called, date and time of the communication, its duration, in case of mobile phone communication the data on the telephone base station connecting the call'. The legal regulation enabling an intervention into the right to privacy has to be clearly formulated and foreseeable in order to provide the potentially concerned individuals with enough information on the circumstances under which public authorities are entitled to intervene their privacy and thus be able to adjust their behaviour so as not to come into conflict with this legal regulation. Powers conferred upon the respective authorities, the method and rules of implementing the execution of their duties have to be strictly defined so that the individuals are protected against unwarranted intervention. The Constitutional Court came to the conclusion that the investigated legal regulation by no means conforms to these requirements of legal and constitutional conformity. The definition of duties of natural and legal persons who store the traffic and location data is vague and inexplicit, the purpose for which the data are to be provided is not clearly specified. Unlike the Directive, the challenged Czech legal regulation does not include the restriction on the use of the data only in relation to reasonable suspicion of a serious criminal offence.

The findings of the Constitutional Court are beneficial even from the point of view of investigating the privacy protection of the Internet users from uncontrollable collection of information

on natural persons by commercial subjects. The Constitutional Court<sup>13</sup> expressed their doubts about whether it is beneficial 'for the private subjects (i.e. Internet services providers and telephone and mobile communications providers, namely mobile operators business corporations providing Internet connection) to be granted the right to store all data concerning the communications provided by themselves, as well as the customers who are the recipients of the above mentioned services (that means even more data than they are bound to store according to the challenged regulation) and use them freely for debt recovery, propagation of their commercial activities and marketing'.

No valid legal documents include regulation of such activities of private commercial subjects, their rights and duties, range of stored data, period and method of storage, requirements for their safekeeping and control mechanism are not defined in any way.

In 2010 the European Committee presented a strategy on strengthening the role of EU regulations on private data protection in which it is proclaimed that the rights of individuals will be strengthened in such a way that every individual be accurately and transparently informed on how, why, who by and how long for have their personal data been collected and used. The individuals should be entitled to give wilful consent with their private data processing, e.g. while using the Internet.

In what way do the marketing companies use the data accumulated over the Internet? It is e.g. the SEO service – Search Engine Optimization (optimization of web pages for search engines), Search engine marketing, PPC campaigns, PR on the Internet and marketing on the social networks.

The starting point for a series of marketing activities in the form of targeted advertisement is the so called web analysis, which is a service that renders it possible to measure and evaluate the consumer reactions to advertising campaign, understand the behaviour of web pages visitors, test the content and function of web pages. The marketing agency operating in internet marketing, the so called SEM agency (Search engine marketing) specializes in displaying the advertisement of the advertiser right at the moment of the consumer's entering a word – keyword in the search engine when looking for a certain type of goods. It is e.g. the Google Analytics<sup>14</sup>, a statistics programme on the Google servers, that offers this service and enables the registered user (e.g. internet shop) to place measuring codes on the web pages and then check the statistic data on the access to this page. These data provide information on how the visitors

12 Decisions of the Constitutional Court file sign. Pl. CC 24/10, page 13, available in the electronic database of decisions <http://nalus.usoud.cz>.

13 Ibidem p. 24

14 Another similar service is called Coremetrics and is provided by IBM



found the web page of the registered user, what use they made of it, how they behaved after accessing the page either by clicking on the advertisement or going through the search engine and entering key words.<sup>15</sup> Thus Google Analytics helps the provider improve a particular web page to render it as attractive as possible to the visitors – potential consumers and buyers. Or they can also profit from the collected data when using another service, the so called Google AdWords, or to enhance its efficiency. Thanks to the AdWords service, when entering a keyword into the search engine, the Internet user can see not only the natural results of the search, but also paid links, accompanied by a brief advertising communication, mostly in the right hand column. The data of the Google Analytics give hints to its advertisers on how to choose keywords for advertisement communications, the advertiser may then choose a paid location on the page and if the user clicks on the link, only then is the advertiser obliged to pay for the services.<sup>16</sup>

But from the point of view of enforceable law the use of the AdWords service by some advertisers results in trademark infringement. This occurs when the keyword that the user enters in the search engine is contemporaneously a registered trademark. Then it may happen that the displayed results of the search present e.g. internet pages advertisements of a shop offering forged goods carrying the trademark of their real owner. The same situation applies to other rights of intellectual property such as author's works, commercial companies or other trademarks. All of this poses a question: who is responsible for disregard of trademark by publishing an advertisement for forged goods in the results of the search engine? A breaking decision is the decision of the Court of Justice of European Community of March 23, 2010 regarding Google France Google, Inc. versus Louis Vuitton Malletier (C-236/08), when the

Louis Vuitton Malletier company sued the Google company for the infringement of their reputable trademark in the above described way. To put it simple, The Court of Justice of European Union stated in their decision that it is the advertiser who is responsible for the trademark use, not the search engine. Articles commenting on the decision marked Google as the winner because as it is stated in the decision above mentioned, Google is not using the trademark in its trademark significance, it is the advertiser themselves who uses it in this way and bears complete responsibility for eventual breach of law. The decision of the Court of Justice of European Community has not answered many

questions connected with the issue of trademark usage in the service of AdWords<sup>17</sup>, the Court will have to deal with them in other related litigations.

## CONCLUSION

Today's search engines enable very accurate targeting of the advertisement and therefore marketing companies promise their clients to create an advertisement that results in direct purchasing by the customers. When considering statutory regulation of advertising<sup>18</sup>, this context advertisement may be considered an implied, unsolicited and disturbing advertising. Such advertising may even be considered unfair competition. My opinion, thought, is that from the legal point of view a much more pressing problem is the method of obtaining personal data that result in accurate targeting of the context advertising.

According to the legislation in force dealing with personal data protection<sup>19</sup> it is possible to process personal data if the subject in question give their consent. Most ordinary users tick the box on the web page and thus formally agree to the collection of their personal data without realising what they have agreed to. They do not realise that through a combination of data in the cyberspace, the commercial subject may pool together detailed information about their social and political placement, hobbies, weaknesses, ailments and other strictly private aspects of their existence. The ordinary Internet user is not aware of the danger to their privacy and therefore neglects the technical means at their disposal to avert such intrusions.

From the point of view of proportionality test, the interest of marketing companies in profiting from an advertisement as accurately targeted at a potential customer as possible cannot be accepted. Ethical code and voluntary declaration of personal data protection that the companies running internet search engines present on their web pages may lull somebody to sleep, but deep inside one knows that whatever is not checked upon and where there is no danger of sanctions, there is temptation to abuse.

The critical judgement of the Czech Constitutional Court, explicitly stated in the findings of March 2011 concerning the impermissibility of insufficient regulation of personal data collection by commercial subjects complies to the current effort of the European Committee to stricter regulation of data collected on Internet users and used for context advertisement propagation. The Internet users privacy protection against intrusions by the state, achieved through abrogation of the relevant clauses

15 available on <http://www.google-cz.blogspot.com/2008> [quoted October 6, 2011]

16 Used for PPC (Pay Per Click) campaigns – paid links in the search engines

17 More information in STEPHAN, O., SCHUBERT, M., 2011: It's the Ad text, stupid: cryptic answers won't establish legal certainty for online advertisers. *Journal of Intellectual Property Law and Practice*, Vol. 6, No. 1: 25–33, ISSN 1747-1532.

18 Act No. 40/1995 Coll., on advertisement regulation

19 Act No. 101/2000 Coll., on personal data protection

of Act 127/2005 Coll. on electronic communications and recommended practice order, should analogically be ensured even against infringement of right to privacy by commercial subjects. I firmly believe that only and solely through a clearly

formulated and enforceable Community legislation the two aspects of the right to privacy, that means the basic rights to 'information self-determination' and 'right to be forgotten' will be protected.

## SUMMARY

The development of the Internet and sophisticated search engines such as e.g. Google together with the spread of social networks have introduced new marketing possibilities of addressing potential clients with offer of goods and services. Unlike most traditional marketing procedures, these instruments allow for targeting the business information directly at concrete individuals, taking into consideration their age, sex, education, hobbies. All this is based on their choice of words keyed into the search engines. This is the targeted advertising where consumer response can be accurately measured, e.i. the so called context advertising.

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This paper concentrates on the summary of rules of law which regulate internet users privacy protection with respect to the Czech and Community laws, assessment of their efficiency and *de lege ferenda* discretion.

Internet service providers, but also individual web pages operators are able, via so called "cookies" to record which IP addresses connect to various web pages, how often, what kind of information they search for. Data collected in this way can then be evaluated, combined with other data (e-mail boxes, blogger accounts) and an unbelievable amount of information about the user may thus be collected that is then associated with their working and private life.

Most internet users have no idea about what instruments e.g. internet portals operators use, they are not aware of the facts that their every move on the Internet is being monitored, their private data is being collected and, for the time being, used first of all commercially, for offer of products and services. They are not on such an advanced user level when working on a computer so that they could hinder the accumulation of private data, making use of the instruments in the computer software. It is obvious that the disproportion in the user – internet portal relationship may result in the infringement of the natural person's right to privacy.

The right to privacy is guaranteed both in the Czech and Community legal regulations and these are the ones with the highest legal force – the Czech Bill of Rights and the Bill of Rights of the European Union and a series of European directives.

The critical judgement of the Czech Constitutional Court, explicitly stated in the findings of March 2011 concerning the impermissibility of insufficient regulation of personal data collection by commercial subjects complies to the current effort of the European Committee to stricter regulation of data collected on Internet users and used for context advertisement propagation. The Internet users privacy protection against intrusions by the state, achieved through abrogation of the relevant clauses of Act 127/2005 Coll. on electronic communications and recommended practice order, should analogically be ensured even against infringement of right to privacy by commercial subjects. I firmly believe that only and solely through a clearly formulated and enforceable Community legislation the two aspects of the right to privacy, that means the basic rights to 'information self-determination' and 'right to be forgotten' will be protected.

The paper also deals with the use of Google Analytics service to enhance the efficiency of Google AdWords and with disturbing legal aspects of the Google AdWords service in relation to some rights to intellectual property, such as e.g. trademarks. It mentions the breaking decision of the Court of Justice of European Community of March 23, 2010 regarding Google France Google, Inc. versus Louis Vuitton Malletier (C-236/08). The Court of Justice of European Community concluded that it is the advertiser who is responsible for the trademark use, not the search engine. Google is not using the trademark in its trademark significance, it is the advertiser themselves who uses it in this way and bears complete responsibility for the eventual breach of law.

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