

Intellectual property / ITC / Media

Topic of the month - LOPPSI 2: the prevention of cyber crime

In May 27, 2009 in the Council of Ministers, the Minister for Home Affairs at that time, Mrs. Michèle Alliot-Marie, presented the draft bill of the "LOPPSI 2" framework law "On Planning for the Performance of Homeland Security". However, Mr. Brice Hortefeux, the new Minister for Home Affairs, has now suspended the review of the law until 2010 as

he intends to revise its text, already a source of controversy, to give more emphasis to its prevention side.

Following in the footsteps of the DADVSI law and the much decried "Creation and the Internet" law, one of LOPPSI 2's aims is to strengthen the rules applying to the Internet by introducing measures to fight against cyber crime.

■ Creation of the offence of Internet identity theft

Article 2 of the draft bill would introduce a new criminal offence: identity theft specific to electronic communication networks. According to this article, the sanction for assuming another person's identity or using another person's personal data on the Internet, to disturb such person's peace or impair his honour or consideration, would now be up to one year of imprisonment and a 15,000 euro fine, as is the case for malicious telephone calls.

Although at present according to Article 423-23 of the Criminal Code, identity theft means assuming a third person's name in circumstances which could lead to a criminal prosecution (theft, breach of trust, false pretences, etc.), from now on, with the new offence of Internet identity theft, just assuming a third person's name could be qualified as a criminal offence. In fact, and this is where the specificity of this measure lies, apart from compensating any financial damage, the moral harm (disturbance of peace, impairment of honour or consideration) would also be taken into account, which would cast a much wider net to catch many new victims.

This measure is probably aimed at practices frequently encountered on blogs and social networks, particularly when third persons open Facebook or Twitter accounts assuming the names of personalities in politics, finance or the arts, to create confusion and cause harm to the actual owners of the assumed identities. The offence of Internet identity theft could make use of the PHAROS platform (Platform for search of Audiovisual Resources across Online Spaces), where cyber crime can be reported on-line to the police forces.

The French Senate published a report on the subject on June 20, 2009 entitled "Privacy in the digital memory age" which highlighted the increasing risk of identity theft, helped by the ever-expanding social networking phenomenon.

■ Introducing content filtering on child pornography sites

At the moment French law allows the judicial authorities to demand that a hosting provider remove content containing child pornography or close a child pornography site, but Article 4 of LOPPSI 2 is more

radical since it authorises the systematic blocking of access to such content or sites.

The system would work as follows: the Minister of the Interior would draw up a list of unlawful content and sites, a "blacklist", which he would provide to the Internet Service Providers (ISP). They would then have an obligation to prevent access to this content and these sites from any computer in France. As this would be an obligation to achieve a specific result, the ISP would be sanctioned by a fine of 75,000 euros if they failed to do so, although each ISP would be free to choose how it blocks such access. Note that the ISP would not have to assume the costs incurred to implement the blocking devices.

Even though this system already exists in several EU countries (UK, Spain, Italy, Germany, Denmark, Sweden, Norway) and is recommended by the French "Internet Rights Forum", reservations about Article 4 have been expressed by campaigners against LOPPSI 2. The criticisms made are in fact reminiscent of those raised by the "Creation and the Internet" law: fear of abuse as a result of the use of filtering in view of the principle of the neutrality of the network and freedom of expression and communication. A particular complaint is that the authority drawing up the blacklist is not a jurisdictional authority.

■ Authorising the remote collection of data

In line with the measure planned to be introduced for end 2009, resulting in an increase in the number of investigators assigned to the prevention of crimes and offences in connection with new technologies, Article 23 of LOPPSI 2 would authorise the use of a new means of investigation: the remote collection of digital data.

Devices would be installed on Internet users' computers without their knowledge, which would be able to collect, record, save and transmit a user's keystrokes and the content displayed on the user's computer screen. The actual collection of the data would be strictly regulated: prior authorisation of the examining magistrate, issue of letters rogatory, limited duration (four months renewable once). In addition, the data could only be collected as part of an investigation into serious offences or crimes by organised crime (terrorism, paedophilia, murder, torture, arms dealing, drug trafficking, abduction). This "spy", or "Trojan horse" as it is otherwise known, would be installed on the computer, even outside the legal hours, or via an electronic communication network, and could be used on any computer system. However, certain professionals, such as doctors, members of the legal professions, the press and members of parliament, would be exempted from this measure, which in essence is the transposition of the classical phone-tapping device to the digital network.

In an opinion dated April 16, 2009, the CNIL expressed its concerns about how the collected data would be kept and recalled the principle of proportionality deriving from the Data Protection and Liberties Law of January 6, 1978.

LATEST NEWS

■ **Bayard Presse v/ Youtube: the video-sharing site's liability is incurred as a hosting provider.**

There is no longer any doubt that the on-line video-sharing platform Youtube is qualified as a hosting provider. But although this status allows Youtube to circumvent the restrictive legal rules applying to content publishers, it can still be held liable for the content it makes available on-line on its site.

In this case the Paris TGI judgment of July 10, 2009 ordered the American company Youtube to pay damages for copyright infringement in respect of Bayard Presse on the one hand and for infringement of the registered trademark "Petit Ours Brun" on the other. It is a decision which clarifies the strict conditions under which hosting providers can be exempted from liability.

Youtube's liability must be appreciated in light of Article 6-I-2 of the LCEN, in which a hosting provider's liability can be incurred for the content it stores only if it had actually known that the content was unlawful or if, when it became aware of the unlawfulness, it did not take action promptly to remove the content. Article 6-I-5 of the LCEN also introduces a presumption of knowledge that the content was unlawful, once the hosting provider has been given the necessary information placing the obligation on it to remove the content. In the present case, Bayard Presse, the copyright holder of the character "Petit Ours Brun", had not given Youtube the appropriate information in the form required by the law.

However, the TGI ruled that on the date of the formal notice, Youtube actually knew that the content was unlawful as it was able to identify the content by "*just entering the term "Petit Ours Brun" into its site's search engine*", after being informed of the name of the holder of the copyright and trademark of the character "Petit Ours Brun" and of the presence on its site of videos portraying and naming this character.

As a result of this decision, the information to be given to hosting providers about the unlawfulness of content so that it can be removed apparently does not necessarily need to contain the elements and be in the form set out in Article 6-I-5 of the LCEN: formal notice is valid proof that the hosting provider knew of the unlawful content, as it is then able to identify the content and can remove it.

■ **Google Suggest: a dispute in its early stages**

It has only taken a year to see the appearance of the first disputes about the tool used by Google to make suggestions to Internet users when they are conducting a search. On May 7 and July 10, 2009, two summary orders were rendered dealing with similar facts: companies were complaining about the way the Google Suggest tool was associating their names with offensive terms when their names were entered into its search engine.

The first order accepted the "Direct Energie" claim, whose name was associated with the word "scam", whereas the second judge refused to accept the "CNFDI" claim, even though its name was associated with the same term. This contradiction can be explained by the different legal grounds relied on by the respective claimants: fault within the meaning of the law on civil liability on one side and defamation on the other.

In the first decision, the Paris Commercial Court took note that the expression "direct energie scam" was positioned at the top of the list of suggestions, even though it was not the first by number of searches or the first in alphabetical order. The Court found that Google was a party to libel against this company and ordered it to remove the expression from the suggestions proposed by Google Suggest. No account was taken of the fact that the process is automatic, as argued by Google to justify showing the "direct

energie scam" in first place. Note however that the claimant was not awarded any damages. In the second decision, the judge considered that the expression "cnfdi scam" suggested by the search engine tool was not defamatory as no evidence had been produced of Google's intent to harm the company. In addition, ordering Google to remove the expression would be an infringement of the "*free movement of information on the network*".

In the chaotic context of the review of the "Creation and the Internet" law, the Paris TGI seems in this case to have come to its decision in light of the Constitutional Council decision of the same day about such law, which reconfirms the supremacy of the principle of freedom of expression, particularly on the Internet.

These first cases implicating the Google Suggest tool are reminiscent of the many lawsuits about Google's Adwords service, a dispute in which the question of Google's liability is currently pending before the ECJ. To be continued...

■ **RSS feed aggregator: a content publisher or a hosting provider?**

In February 2008, a well-known film director had an RSS feed aggregator, in its capacity as a content publisher, sanctioned for invading his privacy. March 2008 saw the same solution in the Martinez v/ Fuss.fr case involving the privacy of a famous actor. The Paris TGI's grounds were founded on the role played by aggregators in the organisation of the various feeds and in subscribing for these feeds. Thus so far, these summary judgments led to sanctions against RSS feed aggregators in their capacity as content publishers. A first reversal occurred in November 2008, since Fuss.fr's appeal against Olivier Martinez was successful: the Court of Appeal acknowledged that the site could be qualified as a hosting provider. More recently, on June 25, 2009, the Nanterre TGI hearing the merits in a case involving the same film director confirmed this position when it opted to qualify the RSS feed aggregator as a hosting provider.

In this case, the judge first of all upheld that the RSS feed concerned was transmitted "*automatically*" without the aggregator's intervention. He then recalled that the content was extracted from publishers' RSS feeds without any modification. Finally, he noted that the RSS feeds are organised automatically.

As a result the TGI found that the RSS feed aggregator could not be qualified as a publisher, but was governed by the rules on liability applying to hosting providers, within the meaning of the LCEN. Therefore, as invasions of privacy are not obviously unlawful content within the meaning of Article 6-I-7 of the LCEN, and as the claimant did not ask the RSS feed aggregator to remove the content concerned, the aggregator could not be held liable for the invasion of the claimant's privacy.

P.D.G.B Société d'Avocats

174, avenue Victor Hugo
75116 Paris

Tél. : 00 (33) 01.44.05.21.21

www.pdgb.com

Julie JACOB - Benjamin JACOB
Sandy HERVE - Sarah de GOUYON MATIGNON