

Keywords, metatags and hyperlinks – the legal position in Europe

European courts often have conflicting views on how to deal with the legal challenges posed by keywords, metatags and hyperlinks

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The appropriate protection of intellectual property rights, in particular of trademarks and other signs, is an essential prerequisite for the progress of electronic commerce on the internet. Registered trademarks and designations are important commercial instruments for suppliers of goods and services, and are of utmost significance in electronic commerce. However, on an open platform such as the internet, the owners of intellectual property rights also face a higher risk of infringement. Thus, it is indispensable to have these rights protected in order to avoid endangering the progress of electronic commerce.

At the beginning of the internet age, most trademark conflicts involved domain names. In recent years, however, this type of dispute has increasingly been replaced by a new phenomenon, namely the use of trademarks in so-called metatags and keyword advertising. In particular, the increasing complexity of the internet has led more and more internet users to carry out their searches for certain websites with the help of search engines, such as Google or Yahoo. These search engines search the internet for websites containing the entered term and compile lists in which the hits occur in a pre-arranged order depending on their relevance. It has become common for additional offers to be displayed at one side of the screen; these are not part of the actual results, but rather represent

alternative links to what was actually searched for.

The question arises as to whether and how the use of third-party trademarks in metatags or keywords, or linking from the brand owner's to a third-party's webpage, can lead to legal problems. In order to evaluate this question, it is important to have a closer look at the function and characteristics of these features.

Metatags

Metatags are instructions for web servers, browsers and search programmes of search engines. They are part of the underlying HTML programme of a website and are thus usually not visible on the user's screen. There are two types of metatag: description metatags and keyword metatags.

Description metatags contain a short description of the content of the website. In many internet search engines this description appears in the list of search results and is thus visible to the internet user. In contrast, keyword metatags consist of a series of keywords which reflect the content of a site and are not visible. As an example, a website on which cars and motorcycles are offered could have the following description metatag: "Sale of cars and motorcycles at low prices." The keyword metatag, in contrast, could contain the following words: "Motorcycles, cars, offer, low-price, BMW, Lotus." Most trademark conflicts are related to keyword metatags.

In contrast to description metatags, keyword metatags (referred to as metatags in the following) are not visible to the internet user. These metatags are used because non-intelligent programmes are not in a position to recognise the content of a website. Thus, metatags allow for it to be processed automatically; for example, to

facilitate a search for certain content or to make it possible to display automatically a short description of the content. In view of the vast amount of information on the internet, the providers of search engines have their data collected by automatic search programmes, other than the providers of manually assembled internet services. The data is usually collected by so-called robots, spiders or crawlers. These programmes automatically gather the content of websites by searching them according to specific criteria, by capturing selected parts of the website content and creating corresponding entries in databases. This is not only of advantage because large parts of the internet can be gathered very quickly, but it also allows regular updates of the data in view of the fact that internet content changes frequently. Thus, the use of automatic search programmes for capturing the content of websites has become a usual approach in commerce.

Keyword advertising

Keyword advertising is a form of online advertising in which advertisements are displayed on the result sites of internet search engines, in a column that is separate from the actual hits. Keyword advertising is closely linked to the metatag problem, as the providers of search engines use metatags for keyword advertising.

Search engines allow online advertisers to target users of search engines by paying to select specific keywords that will trigger their online advertisements. These are then presented above or alongside unsponsored or natural search results, usually labelled with headings such as Sponsored Links (Google), Sponsor Results (Yahoo!) or Sponsored Sites (Microsoft MSN).

Because search engine companies have allowed keyword advertising to include third-party trademarks, the registration and protection of those keywords have become vital, as trademark owners want to block possible competitors from drawing potential customers to their websites at the expense of the trademark owners. The practice of keyword advertising is a growing concern to many owners of product names and/or trademarks. They have questioned the legality of selling search results and advertising linked to searches based on product names and trademarks.

Hyperlinks

Links or hyperlinks are points in web pages through which internet users may click

through to other pages or other websites. The links can be embedded in the text (usually in the form of an underlined word or words, and usually referred to as text hyperlinks), or can take the form of a graphic link (usually referred to as graphic hyperlinks). Hyperlinks are indispensable basic features of internet communication because they make it possible easily to refer to or find other content and to link to various contents.

A special form of hyperlinks are deep links. Deep linking refers to a hyperlink that points to a specific page or image on another website, instead of that website's main or home page.

Legal assessment

Metatags

The legal assessment of the use of third-party trademarks or designations in metatags focuses on the question of whether it represents an infringing use in commerce. In order to illustrate the problem, consider the following (fictitious) example.

A and B are large automobile manufacturers. C is a car dealer and sells only cars manufactured by A. However, on his website, C includes the trademarks of A and B as metatags, so that users of search engines will obtain his website as a search result, although they were actually searching for vehicles manufactured by B. B considers this to be an infringement of its trademark rights.

The European courts have decided similar cases in very different ways. Most decisions also seem to be contradictory. However, particularly in the past few years, there seems to have been a strong tendency for courts in most member states of the European Union to recognise infringement through the use of registered trademarks in metatags.

These decisions are mainly based on the assumption that search engines are to be prompted to display the homepage of the infringer in the list of results when an internet user enters a certain term, although this term is protected as a trademark or business designation for a different owner. The courts argue that even if the term in the metatag is not visible to the user, the user is nevertheless made to believe that there is a relationship between the trademark and the website. According to the courts, the term embedded in a computer code can be just as confusing as a visible designation.

In general, the courts hold the view that



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the infringing use of metatags leads to an unwanted and unacceptable impairment of communication between the trademark owner and internet users. As a consequence of infringing metatagging, the consumer's justified expectations are disappointed. Considerable numbers of internet users will first assume that there is a legal or commercial relationship between the trademark owner and the website owner, because they will not have any other explanation for the fact that the corresponding website has been listed as a result of their search. Internet users who search for a specific product of a specific trademark are deliberately misled if they end up on the website of a direct competitor. Among others, this legal opinion is shared by the Supreme Courts in Italy, Scandinavia, Germany and France.

Critics of this view believe that people who use a search engine when searching for a trademark or a specific business designation are well aware of the fact that the search result will include a vast number of hits, and that not all of these will contain the trademark or the business designation searched for in the sense of a guarantee of origin.

According to these critics, the average well-informed and rational consumer is aware of the fact that it is the very nature of metatags that they contain a specific designation, and that their main purpose is to allow access to the content of the respective website by automatic search engines and other programmes. The Court of Appeal in London has rendered a decision that follows this line. It decided that the use of a registered trademark belonging to another as a metatag in a website – so as to achieve a higher ranking in search engine results – did not infringe the trademark, as website metatags are not displayed on the screen to web browsers. This invisibility led the court to conclude that registered trademarks in metatags cannot amount to a misrepresentation or create the likelihood of confusion.

Although there may be certain arguments in favour of this opinion, from a legal point of view caution is advised in using third-party trademarks or designations in one's own metatags. There is a clear tendency in European jurisprudence to consider such use as trademark infringement. If the website relates to a specific country, the case law of the country in question should be taken into account. In cases of cross-national websites, the use of registered trademarks in one's own metatags should definitely be

avoided, because otherwise one might face claims to cease and desist and/or claims for damages.

Keyword advertising

The main difference between keyword advertising and metatags from a legal perspective is probably the point of view and the expectations of internet users. For example, if you look at a typical list of results on Google, it consists of at least two parts. On the one hand there is the central part, which contains the actual results; on the other hand there is the advertising part (Sponsored Links). While the internet user can generally assume that the results displayed in the central part relate to the search term, most will not expect that this is the case with the advertising part. Most users should be aware of the fact that this part also contains advertisements from competitors offering different goods or services.

In Germany, several courts have argued that keywords and metatags should be treated equally, although findings and reasoning differ. A recent decision of the Higher Regional Court of Frankfurt denied any trademark infringement, as keyword advertising was clearly separated from the un-sponsored or natural search results. This decision states that the arguments used in metatag decisions of the German Federal Supreme Court cannot be used regarding keyword advertising as the expectations of internet users differ in each case. However, Germany is waiting for further rulings on this matter from the Federal German Supreme Court. Until then, uncertainty reigns.

There has been much discussion of the subject in most European countries, but no significant court decision has been rendered. In France, users of keyword advertisements should definitely refrain from using trademark-protected terms as keywords. French courts are mostly of the opinion that the use of trademark-protected keywords constitutes trademark infringement.

Unlike the protection of trademarks as domain names and metatags, so far courts have established no judgments that give clear guidance on whether the use of keyword advertising should constitute a trademark infringement. In most countries, additional case law is desperately needed.

Hyperlinks

The legal assessment of hyperlinks depends on various factors and can involve problems in terms of civil law and also

criminal law. On the one hand, it is important to assess what type of link is being used (eg, deep links, surface links etc). On the other hand, the content of the linked website also has to be taken into account. The installation of a link to a website with criminal content is regarded as accessory to a criminal offence by most European courts and can thus lead to criminal prosecution.

However, the subject of this article is, above all, the assessment of hyperlinks under aspects of civil law. Literature and case law in the European Union are based on the assumption that people who upload their websites onto the internet basically agree that links to their homepages may be used. The reason for this assumption is that the owner of a website is generally interested in attracting a larger public. It is also commonly acknowledged that the agreement does not refer to frames and inline links, as the website could thus appear in a context that might lead to misunderstandings or misinterpretations by the user.

But case law has not been consistent as regards the question of whether the consent also includes deep links. So far, objections have often been raised against deep links, in particular for financial reasons. In most cases, websites are financed through advertisements on the homepage and the amount to be gained by such advertisements often depends on whether the users of the website can see the advert. In view of the expected loss of advertising revenue, some national courts do not assume that the owner of a website tacitly consents to deep links. However, other courts – for example, those in Denmark and Germany – hold a different, perhaps preferable, view: that the agreement of the website owner can also be assumed as regards deep links, because it is just reasonable for the webmaster to anticipate deep links.

It is the authors' view that the creator of a website cannot prohibit surface or deep links, but may prohibit a link by means of copyright if the user of the link uses it as an instrument to include third-party works in the website in order to complete or amend it (so-called framing and inline linking). The mere fact that a website contains advertisements is not sufficient for any impartial third party to conclude that deep links are not desired. Even a declaration on the homepage according to which links are prohibited does not, according to the legal opinion of most European courts, increase the legally

defined scope of protection of the creator's works. The question of whether the website owner's request is complied with is not a legal one, but rather a question of decency. At present, the only way for website owners to defend themselves effectively against deep links might be to use technical protection measures, such as password-protected sites.

With respect to keyword advertising and hyperlinks especially, we look forward to additional case law and international harmonisation in order to have greater legal certainty when advising clients.

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