Online advertising and marketing country questions: France

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France-specific information concerning issues that need to be considered when planning an online advertising campaign.

This Q&A provides country-specific commentary on *Online advertising and marketing: international overview*, and forms part of the *Sales and Marketing International Transaction Guide*.

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Information concerning a company's business

1. What information concerning a company's business is required to be published on its website or provided in e-mails ?

Various provisions of French law require general information to be communicated to third parties in the course of business. Most of these are general provisions and do not specifically apply to online activities. However, although not specifically drafted for online activities, these provisions must be complied with in the online world in so far as they relate to all types of commercial activities. Other recently implemented provisions specifically address online communications. The scope and nature of information will vary according to the type of business and/or activities. Additional specific information may be required for specific activities.

The means for communicating the information are usually not specified in applicable law. Generally, information should be made easily available to third parties, either on the main page of the website or through clearly identifiable hyperlinks.

General information

Every individual or company registered with the Trade and Companies' Registry (RCS) must publish the following information on their advertising documents, or correspondence related to the business (including invoices):

- Their registration number, referred to as "number SIREN".
- The term "RCS", immediately followed by the place of registration.

In addition, foreign companies with registered offices located outside France must indicate:

- The company's corporate name.
- The company's corporate form.
- The address of its registered office.
- The company's place of registration and registration number.
- The fact that the company is in the process of being liquidated (if applicable).
- The fact that the business is managed by a lessee (if applicable).

(*Article R. 123-237, French Commercial Code, inserted by Decree no. 2007-750 of 9 May 2007.*)

Where the business is managed by a legal entity (as opposed to an individual), the following additional information is required and must be included in all contracts and/or documents issued by the company and intended for third parties (*see, for example, Articles L. 224-1 (public companies) and L. 223-1 (companies with limited liability), French Commercial Code*):

- The amount of the share capital.
- The company's corporate form.
- The company's corporate name.

This must be provided in connection with all types of documents made available to third parties in the course of business, including e-mail communications sent by the company.

Since 2003, any interested person, as well as public officers, can obtain a summary judgment requiring the company's legal

representative to indicate the name of the company, its activities and share capital on all the documents and deeds issued by the company (*Article L.238-3, French Commercial Code*). Failure to comply is punishable by a fine of up to EUR750, and may attract civil damages as well.

Additional information is required by Law no. 2004-575 of 21 June 2004 (LCEN) regarding "online communication services" (excluding "private communication services"). The following information must be made available to third parties by all publishers of online communication services:

- The name of the publication's director or co-director and the name of the editor-in-chief.
- The corporate name, address and telephone number of the company hosting the website.

Failure to comply is punishable by one year's imprisonment and an EUR75,000 fine for the legal representative of the corporate entity, and by a fine of up to EUR375,000 for the corporate entity.

(*Article 6 III 2, LCEN.*)

Additional specific information

Specific sets of rules may apply, depending on the type of business and/or activities. Additional compulsory information will be required in if, for example, the website is designed to promote activities in the following fields:

- Insurance (for example, in particular as far as insurance brokers are concerned).
- Real estate (for example, real estate agents' professional registration number and place of delivery, amount of the financial warranty subscribed by the agent, and so on).
- Pharmaceutical companies (for example, name of the pharmacist responsible for the companies' activities, and so on).
- Banking (for example, in particular with regard to investment companies and/or credit institutions within the meaning of the French 1984 banking law (as subsequently modified in 1994)).

General information requirements

2. What other requirements as to the provision of information apply to online advertising and marketing generally?

Consumer protection

Any online advertisement must be clearly identified as such and indicate the individual or entity on whose behalf it has been published (*Article 20, LCEN*).

Advertising communications made via electronic mail, in particular promotional offers such as discounts, premiums or gifts, and likewise competitions or promotional games, must be clearly and unequivocally identifiable upon receipt or, if this is technically impossible, in the body of the message (*Article L121-15-1, French Consumer Code*). In addition, this type of message must provide a postal or electronic contact address, which would allow the addressee to send a request to stop the communications (*Ordinance n°2011-1012 of 24 August 2011*).

The French Consumer Code also provides for specific information to be communicated to consumers before they enter into a contract. The following information must be included in online offers made to consumers:

- Information regarding the main characteristics of the goods and/or services (*article L. 111-1, French Consumer Code, modified by article 6 of Law n°2014-344 of 17 March 2014*).
- Information regarding the price and the specific terms of sale (*Article L. 113-3, French Consumer Code*).
- In the absence of an immediate performance of the contract, the date or the term by which the good/service must be delivered/performed (*Article L. 113-3, French Consumer Code*).
- The name of the seller and/or service provider, its address, and if different, the registered office address, its phone number and e-mail address (*Article L. 113-3, French Consumer Code*).
- Other specific information regarding specific products (for example, food, medicines and so on), in particular regarding the product's nature, substantial qualities, contents, quantity or origin (*Article L. 214-1, French Consumer Code*).

On 17 March 2014, Law n°2014-344 (Hamon Law) substantially modified the structure of the French Consumer Code and added several articles modifying the legal regime applicable to distance-selling contracts. The offer made before the conclusion of a distance-selling contract must indicate:

- Conditions, term and procedure for exercising the right of withdrawal, along with a model of the request form.
- Information relating to any kind of cost the consumer would have to pay when exercising its right of withdrawal (that is, when appropriate, the fact that the consumer must pay for the cost of returning the goods or the services).
- Cost for communicating online with the seller or service provider (if not standard).
- If appropriate, information relating to the existence of a "good conduct code", and other contractual clauses (litigation, termination and so on) (*Article L. 121-17, French Consumer Code*).

In the absence of any timeline defined in the contract, the seller or service provider is obliged to deliver the goods or supply the service no later than 30 days after the conclusion of the contract (*Article L. 138-1, French Consumer Code*).

Use of French language

In addition, rules regarding the use of the French language are set out in a law enacted on 4 August 1994 and a government interpretative instruction issued on 19 March 1996. The use of the French language is compulsory when relating to the designation, offer, presentation of goods, products or services as well as for any inscription or information intended for the public in France. The 1996 interpretative regulation further states that all documents intended for consumers and end-users must be translated into French. The obligation covers products and services provided to consumers and end-users located in France. Also, in its reports to the Parliament for 1997, the French language authority (*Délégation Générale de la Langue Française*) refers to the necessity of using the French language on websites aimed at consumers in the French market.

The concept of consumer must be interpreted broadly, as French case law has considered that end-users could be either individuals or business entities.

Failure to comply may result in a fine of up to EUR3,750 (for corporate entities) per officially reported violation of the law, with possible additional fines for delay in complying with the law (*Decree of 3 March 1995 issued in application of the law*).

Information requirements related to electronic communications

In addition to the above, the LCEN has implemented several provisions of the EC E-Commerce Directive 2000/31/EC and the EC Directive 2002/58/EC relating to privacy and electronic communications.

The main points of this law are:

- **Information requirements.** The provisions of the law mirror those of Directive 2000/31/EC.
- **Commercial communications:**
  - information to be provided: the provisions of the law mirror those of Directive 2000/31/EC; and
  - unsolicited commercial communications: the provisions of Article L. 34-5 of the French Post and Electronic Communications Code and Article 121-20-5 of the French Consumer Code (introduced by the LCEN) mirror those of Directives 2002/58/EC and 2000/31/EC.
- The "Country of Origin" principle is adopted by the law, subject to the following:

- the law provides that respect of the country of origin principle must not deprive French consumers of the benefit of French mandatory consumer protection rules, and that it does not contradict French formal requirements in connection with contracts creating or transferring rights in real estate; and
- under the law, government regulations will be promulgated separately to describe to what extent the principle of "free provision of e-commerce services" may be limited in the areas of public security, protection of minors, protection of public health, national security and defence, protection of consumers, and protection of investors other than "qualified investors" within the meaning of Article L. 411-2 of the French Financial and Monetary Code.

Cookies

On 24 August 2011, France transposed several European directives known as the "Telecoms Package". As part of this transposition, questions relating to the use of cookies by online advertising have been answered. A cookie is a small data file created by a visited website that is stored on the internet user's computer, either temporarily for that session only or permanently on the hard disk. Cookies provide a way for the website to recognise the internet user and keep track of his preferences.

This new French regulation creates two main obligations to lawfully install cookies on the internet user's computer:

- To inform the internet user about the installation of the cookie on his computer, the purpose and the means of this cookie.
- To enable the internet user to choose whether he will receive online advertising by means of this cookie.

This new regulation is not applicable to technical cookies and in particular to cookies that facilitate the electronic communication.

On 26 April 2012, the French authority in charge of protecting personal data (CNIL) issued a statement as to the implementation of this new regulation.

The CNIL has specifically detailed the accurate ways to collect an internet user's consent before the installation of cookies. For example (among others):

- A specific banner at the top of the webpage.
- A specific zone over the webpage for collecting the consent.
- An opt-in system.

Although the new regulation points out that the setting-up of the internet user's browser alone can reveal her consent, the CNIL has decided that this is not applicable for the moment, as current browsers lack sophistication in relation to cookies.

The entire statement of the CNIL is accessible here (only in French): Ce que le Paquet Télécom change pour les cookies - CNIL - Commission nationale de l'informatique et des libertés.

Information required for specific categories of products

Some specific information must be included in any advertisement in favour of products belonging to a specific category.

E-gaming

Any advertisement in favour of e-gaming must contain the following message:

> "*Jouer comporte des risques: endettement, dépendance… Appelez le [Numéro special].*"
>
> ("Gambling is risky: debt, addiction… Dial […].")

(*section 1, Decree no. 2010-624 of 8 June 2010.*)

French law provides other messages for the home page of e-gaming websites.

Household electrical goods

Any advertisement promoting such goods must indicate the class of energy efficiency to which the goods belong (*Decree no. 2011-1479 of 9 November 2011*).

Phytosanitary products

An advertisement in favour of such products must warn consumers with the following message:

> "*Utilisez les produits phytopharmaceutiques avec précaution. Avant toute utilisation, lisez l'étiquette et les informations concernant le produit.*"
>
> ("Use phytoparmaceutical products with caution. Prior to any use, read the label and information concerning this product.")

(*section L. 253-16, French Rural Code*.)

Consumer credit

Advertisements promoting consumer credit must notify the public as follows:

> "*Un crédit vous engage et doit être remboursé. Vérifiez vos capacités de remboursement avant de vous engager.*"
>
> ("A credit is a commitment and must be reimbursed. Check your ability to reimburse before entering it.")

(*Article L. 311-5, French Consumer Code*.)

Mobile phones

Advertisements in favour of mobile phones must contain the following message:

> "*Le DAS (débit d'absorption spécifique) des téléphones mobiles quantifie le niveau d'exposition maximal de l'utilisateur aux ondes électromagnétiques, pour une utilisation à l'oreille. La réglementation française impose que le DAS ne dépasse pas 2W/kg.*"
>
> ("The SAR (specific absorption rate) of any mobile phone quantifies the level of maximal exposure of the user to electromagnetic waves for a use at ears. French law requires SAR to be under 2W/kg.")

(*Article 2, Ministerial Order of 12 October 2010, NOR: SASP1011523A*.)

Tobacco products

3. How is the online advertising and marketing of tobacco products regulated?

The Evin Law of 10 January 1991, codified in the French Public Health Code, prohibits any direct or indirect advertising of tobacco products. The law of 31 July 2003 reinforcing the Evin Law extends this prohibition to any ingredients used for the making of tobacco products such as cigarette paper, filter, glue and ink. Certain very limited exceptions exist (notably with respect to pharmaceutical products and auto-racing events outside France). However, a law dated 9 August 2004 authorised in certain limited circumstances the advertising of tobacco products. This law authorises direct or indirect advertising of tobacco products in:

- Publications and online communication services edited by professionals (for example, producers, manufacturers and distributors of tobacco products) and reserved to distribution amongst that professional community or made accessible by professionals.
- Written publications and online communication services made available to the public by persons established in a non-EU or non-EEA country, when these publications and services are not mainly directed at the European market.

The Evin Law, as amended by the law of 31 July 2003 and by the laws of 9 August 2004, 21 July 2009, 29 December 2010, 22 March 2011 and 17 March 2014, covers any tobacco advertising or promotional offers or campaigns on the internet.

Breach of the Evin Law is a criminal offence, penalised by a minimum fine of EUR100,000, which can rise to a maximum of 50% of the total amount spent on tobacco advertising (*Article L 3512-2, French Public Health Code*).

The Court of Cassation has held that any kind of commercial communication, whatsoever its support (which includes a website), which is intended or has the effect of promoting, directly or indirectly, tobacco or a tobacco product, is prohibited (*2nd Civil Chamber of the Court of Cassation, 10 January 2008*; *Criminal Chamber of the Court of Cassation, 9 March 2010*).

The Criminal Chamber of the Court of Cassation has held that direct or indirect advertising of tobacco products constitutes a continuous infringement, even if the advertisement is published on the internet. The judges of the Supreme Court have considered that the breach continues as long as the advertisement remains accessible (*Criminal Chamber of the Court of Cassation, 17 January 2006*).

An exception to this rule relates to the first broadcasting of sport events taking place in states where the advertising of tobacco products is permitted (*Article L. 3511-5 of the French Public Health Code*). The Criminal Chamber of the Court of Cassation has specified that this

exception does not apply to the repetition of such events (*Criminal Chamber of the Court of Cassation, 14 May 2008*).

Another exemption has been pointed out by judges in the "*Marche.fr*" case. This case involved an e-commerce platform through which individuals can offer to sell various products. Some individuals sold cigarettes and an anti-tobacco association filed a criminal suit against the platform. The Court of Appeal of Paris judged that the platform must be deemed an internet hosting service. Therefore it cannot be responsible for the hosted information unless, having knowledge of the illegality, it does not react (*Court of Appeal of Paris, 24 February 2010*).

The Law of 17 March 2014 on Consumers extended the prohibition of tobacco products sales to minors to the sales of electronic cigarettes and cartridges of liquid. The prohibition of sales to minors applies to all electronic cigarettes and all cartridges designed to simulate the act of smoking, whether they contain nicotine or not.

Alcoholic drinks

4. How is the online advertising and marketing of alcoholic drinks regulated?

The Evin Law prohibits direct or indirect advertising of alcoholic products (for instance, on television, in cinemas, in stadiums and so on). However, the Evin Law makes limited exceptions to this general rule. Accordingly, direct or indirect advertising of alcoholic beverages is permitted in the press (except for publications aimed at young people), on radio (within specific time slots), on posters or notices in production areas and inside sales outlets. The law of 1 August 2003 also authorises companies dealing with alcoholic products and sponsoring cultural events to mention their name on broadcast documents.

Law No. 2009-879 of 21 July 2009 (Bachelot Law) provides the legal framework for advertising alcoholic products on the internet. This law amended some provisions of the Evin Law as codified in the French Public Health Code (*Articles L.3323-1 and seq*).

Under Article L. 3323-2-9° of the French Public Health Code (as amended by the Bachelot Law), direct or indirect advertising of alcoholic beverages is allowed via online communication services but is not permitted on websites which by their nature, their appearance or object, appear to be primarily aimed at young people and on websites published by associations, corporations, sports federations and professional leagues as defined by the French Sport Code.

As regards methods of advertising, Article L.3323-2-9° of the French Public Health Code (as amended by the Bachelot Law) provides that advertising must not be "intrusive" (for instance, a pop-up window) or "interstitial" (a message of few seconds displayed between two pages of presentation of a website).

Article L. 3323-4 of the French Public Health Code, as amended by the law of 23 February 2005, authorises, within strict limits, advertising on the qualitative characteristics of certain alcoholic products such as wine. The ad content must strictly comply with Article L.3323-4 of the French Public Health Code. Any promotional messages on the internet, whose purpose is the promotion of alcoholic beverages, must contain only the references to terms permitted by the said provisions and include the health message mentioned in such provisions. The French courts have clarified that under Article L. 3323-4 such an advertisement must be informative only, and cannot constitute an encouragement to consume alcohol (*Criminal Chamber of the Court of Cassation, 2 November 2005, La société régie publicitaire des transports parisiens Métro-bus Publicité, La société Bacardi-Martini Production; First Civil Chamber of the Court of Cassation, 22 May 2008*: pictures associating an alcoholic beverage with the attractiveness of night clubs; First Civil Chamber of the Court of Cassation, 3 July 2013: text associating an alcoholic beverage with friendly relationships on a social network).

Furthermore, the Evin Law authorises particular producers, importers and dealers to advertise for alcoholic products by sending "messages", commercial circulars, catalogues or brochures, subject to certain legal requirements. The French parliament, in debates on the Evin Law, made clear that the term "message" includes phone and *minitel* messages.

In addition, the *Autorité de Régulation Professionnelle de la Publicité* (Professional Advertising Regulation Authority, previously referred to as *Bureau de Vérification de la Publicité* (Advertising Verification Office) has issued a recommendation dated June 2010 dealing with the rules applicable to advertising alcoholic products, which applies to the internet.

Recently, the First Civil Chamber of the Court of Cassation asserted that encouragement to drink alcohol is prohibited even though the incitement does not pertain to alcohol abuse (*First Civil Chamber of Court of cassation, 20 October 2011*). This case involved an internet contest's prize consisting of a rare and valuable bottle of wine. Such a prize is deemed to be promoting alcohol by presenting its consumption as elitist.

In the "*Ricard*" case, the Court of Appeal of Paris pointed out that commercials in favour of alcoholic beverages conveyed on an internet social network are not illicit per se, to the extent that the social network does not primarily target minors. Nevertheless, these commercials were deemed illicit because they hinted that alcohol consumption facilitates relationships and social networking. The specific app designed and distributed by Ricard on the social network was also too intrusive, to the extent that downloading it triggered different messages to the friends of the initial downloader (*Court of Appeal of Paris, 23 May 2012*).

There is controversy regarding the legality of the presence in advertising of charismatic characters related to the winemaking process holding glasses of wine (*First Civil Chamber of the Court of Cassation, 23 February 2012*). According to the Court of Cassation, the

advertising did not comply with Article L. 3323-4 of the French Public Health Code and constituted an encouragement to consume alcohol. The Court of Cassation returned the case to the Court of Appeal of Versailles, which resisted this interpretation by pointing out that the characters were not consumers and were not consuming the beverage (*Third chamber of the Court of Appeal of Versailles, 3 April 2014*). A final decision of the Court of Cassation is awaited.

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In a decision dated 20 February 2014, the Court of First Instance of Paris exonerated the company Heineken for the advertising of two beer products on its Facebook page. The Court pointed out that the advertising was limited to qualitative characteristics and did not constitute an encouragement to consume alcohol (*Court of first instance of Paris, 20 February 2014*).

Voluntary regulations and codes of practice

5. What are the main areas of voluntary regulation or self-regulatory codes of practice that apply to online advertising and marketing?

Both public bodies and private associations have formulated, or are likely to formulate, guidelines or recommendations related to online advertising and marketing.

Voluntary regulation by public bodies

Commission Nationale Informatique et Libertés (CNIL).

The CNIL is an independent administrative authority, created in 1978, to exercise control over compliance with Law 78-17 of 6 January 1978 (*Informatique et Libertés* (the French Data Protection Law)). The regulatory powers of the CNIL are very limited. However, it has a significant influence on the French government and parliament. The CNIL has, in particular, the power to make recommendations, and publishes an annual report of activity. French Data Protection Law has been amended by a law of 6 August 2004 in line with Directive 95/46/EC, and these amendments have substantially increased the CNIL's powers in relation to ensuring compliance with the Data Protection Law.

In relation to online advertising and marketing, the CNIL formulated a recommendation in 1997 (*Deliberation no. 97-012 of 18 February 1997*) on databases on consumer behaviour created for commercial purposes:

- The set of questions sent to consumers to collect data must clearly mention their commercial objective.
- It must be clear to the consumer that his personal data could be transmitted to other companies unless the consumer expressly opposes it.
- The consumer must be offered the possibility of easily refusing the transmission of his data to another company.

In 1999, the CNIL also published recommendations on e-mailing and spamming practices:

- When the e-mail address is collected directly from the consumer, he must be informed of its future use and he must be able to refuse having his address transferred to a third party.
- When e-mail addresses are collected from a network, the consumer must be informed that his data has been obtained from such network services.

Most of these recommendations are in line with Directive 2002/38/EC (VAT and E-commerce Directive), and have been implemented into French law.

The CNIL recently declared two Deontological Code projects to be in compliance with French Data Protection Law. The projects were undertaken by two direct marketing professional organisations, the National Syndicate of Direct Communication (*Syndicat national de la communication directe*) (SNCD) and the French Union of Direct Marketing (*Union française du marketing direct*) (UFMD), in connection with e-mailing (*Deliberations CNIL no. 2005-47 of 22 March 2005 and no. 2005-51 of 30 March 2005*).

On 22 November 2005, the CNIL issued a specific recommendation dealing with personal data conveyed by individuals' websites as part of an exclusively personal activity such as blogging. Although the CNIL does not require this kind of database to be declared, some information must be communicated to persons to whom this data is related:

- The person who is in charge of the database.
- The purpose of this database.
- The existence of a right to access and amend the data and to refuse its collection.

(*Deliberation no. 2005-285 of 22 November 2005*.)

As to e-commerce websites, the most useful tool issued by the CNIL is called the Simplified Norm No. 48 (*Deliberation No. 2012-209 of 21 June 2012*). A simplified norm is a set of obligations and features that the person in charge of the database agrees to comply with to benefit from a simplified procedure for declaring the database. The Simplified Norm No. 48 is dedicated to databases pertaining to clients, whether online or not. It applies to certain types of data, such as the client's identity, invoices, orders and so on.

The CNIL can also impose penalties where personal data collections do not comply with Law 78-17 of 6 January 1978. The most common penalties are the following:

- Public or non-public warning.
- Public or non-public fine (up to EUR150,000 or, in case of a repeat offence, EUR300,000).
- An order to cease the database.
- Authorisation withdrawal.

An e-commerce website has been fined EUR5,000 by the CNIL for violating its confidentiality obligation concerning clients' data. This data was accessible to anybody on the internet without any security measures (*Deliberation no. 2008-053 of 21 February 2008*).

The CNIL has delivered a public warning against Yatedo, a website that combines personal data spread over different social networks on the internet to set up an internet profile of individuals (*Deliberation no. 2012-156 of 1 June 2012*). The CNIL has specifically pointed out the lack of updates carried out by Yatedo regarding this data.

The CNIL has publicly warned Fnac Direct, a well-known e-commerce website in France, to the extent that this website did not provide a sufficient level of security for clients' bank data, nor define a reasonable duration for the maintenance of this data within its database (*Deliberation no. 2012-214 of 19 July 2012*).

The CNIL has delivered a public warning against REGIME COACH, the publisher of a famous sport and dietetic coaching website, to the extent that the website did not inform clients of data processed, nor provide a sufficient level of security for their personal data (*Deliberation n°2014-261 of 26 June 2014*).

Note that the future European data protection regulation is under negotiation and will replace, probably between 2015 and 2016, Data Protection Directive 95/46/CE. This regulation will have direct and uniform applicability in the 28 EU member states and will specify and reinforce the rules of protection. It introduces some new rules, notably on data profiling, the right to be forgotten, data breaches and international transfers, and significantly increases the amount of fines (in the latest amendments: to a maximum of EUR100 million or 5% of turnover).

Voluntary regulation by private associations

- **The *Autorité de Régulation Professionnelle de la Publicité* (ARPP).** The ARPP (previously referred to as *Bureau de Vérification de la Publicité*) has members representing advertisers, media and advertising agencies as well as trade associations, and was created to promote legal, decent, honest and truthful advertising by way of self-regulatory schemes. The ARPP formulates general and specific guidelines and codes in the advertising field. It gives advice about advertisements and deals with complaints from both consumers and competitors. Where there is non-compliance with its decisions, after giving notice to the advertiser, the ARPP can ask the media concerned to cease publication of the offending advertisement.

  The ARPP adopted recommendations about online advertisements in December 1999, based on the ICC guidelines of 1998:

  - the advertiser and the advertising content of the message must be clearly identified;
  - advertisements must be honest, decent, truthful and fair;
  - advertisements must respect human dignity and the potential sensitivities of a worldwide audience;
  - advertisements must also respect privacy and applicable data protection laws (the users must be able to identify unsolicited an advertisement as such when they receive it);
  - advertisements directed at children must respect the ICC guidelines and the ARPP's recommendation about children; and

- if applicable, the user must be informed that he is required to pay for access to a message or a service and that the price would exceed the usual connection charge.

On 24 May 2005, the ARPP issued a recommendation regarding advertising on the internet.

In 2011, the ICC guidelines were amended to cover the entire interactive digital media sector. For the first time, rules on electronic behavioural targeting were adopted.

ARPP's recommendations are only enforceable against its members, who may be excluded in the case of non-compliance. However, the recommendations seem to be followed by all professionals in the sector and even by the French courts.

- **Interactive Advertising Bureau France (IAB France).** IAB France is the French arm of the Interactive Advertising Bureau, created in 1998. It draws up standards and best practices in the area of online advertising. In particular, in June 2001, IAB France issued guidelines on relationships between buyers and sellers of online advertising and recommendations on sizes of online banners. In January 2006 IAB France formulated several recommendations on video-advertising on the internet, such as the Convergence of Advertising on Internet Charter (17 April 2008).

- ***Fédération des Entreprises de Vente à Distance* (FEVAD).** FEVAD, created in 1957, is the representative French professional organisation of distance selling companies. FEVAD has promoted several codes and charters, in particular concerning databases on consumer behaviour and distance selling. FEVAD monitors compliance with these texts by its members and can impose sanctions on them.

  The main guidelines are the deontological code of e-commerce and distance selling contracts (*Code déontologique du e-commerce et de la vente à distance*), updated in 2012. FEVAD has recently adopted two important guidelines: the guide of good practice concerning the distribution of electric and electronic products on the Internet in 2011 (*Guide de bonnes pratiques relatif à la distribution de produits électriques et électroniques sur Internet*), and the guide of good practice concerning the use of advertising cookies in 2012 (*Guide de bonnes pratiques relatif à l'usage de cookies publicitaires*).

  FEVAD has also launched self-regulatory solutions. For example, the label "L@belsite" has been launched by FEVAD and the Federation of Trade Distribution Companies (FCD) to obtain consumers' confidence in relation to the certified members' advertising and marketing methods. Indeed, members who comply with 27 advertising and marketing rules formulated to protect the consumer are certified with the label. These rules are based on three basic principles:

  - providing information on the company publishing a website;
  - compliance with the regulations and the codes and practices formulated by FEVAD; and
  - transparency regarding the use of personal data, in accordance with French data protection law.

- ***Association des Fournisseurs d'Accès et de services Internet* (AFA).** The AFA, created in 1997, is the French association of internet service providers. Its purpose is to promote the development of internet services and to inform the public and professionals about access to internet services. Under guidelines formulated by the AFA on its members' practices, access providers must deploy technical means to detect the practices of unsolicited e-mails and to limit the transmission of these e-mails. Moreover, access providers may detect contents that are manifestly illegal by:

  - examining users' claims;
  - monitoring pages most frequently consulted; or
  - automatic detection of suspicious words.

  If the online content or the behaviour of the user is contrary to its general conditions of use, the access provider, after giving notice to the user, can delete the content or terminate the subscription.

- ***Association des Services Internet Communautaires* (ASIC).** The ASIC is a French association created at the end of 2007 by most of the internet's key players, such as AOL, Dailymotion, Google, Price Minister and Yahoo. Its purpose is to promote the development of Web 2.0. and guidelines of use to protect users', in particular children's, personal data and freedom of expression. Moreover, it is dedicated to fighting counterfeiting on the internet. The ASIC is also expected to contribute to the brainstorming following the decisions of the French courts regarding the liability of website hosts and editors in case of any publication of a content by a user. For example, in 2008, ASIC took part in the consultation launched by the European Commission regarding online creative content.

Linking

6. Which of the following legal remedies are or may be available in respect of unauthorised linking to a website: (i) passing

off; (ii) unfair competition; (iii) registered trade mark; (iv) copyright infringement; (v) database right infringement; (vi) breach of contract; (vii) any others?

Passing off

The French courts have created a similar remedy (*parasitisme*) to passing off, which constitutes an act of unfair competition. Persons or companies may be held liable where they seek to benefit from the goodwill attached to another's product, in order to make profit out of such goodwill. The website owner must prove its goodwill, a misrepresentation by the linker, and prejudice suffered by him as a result of the misrepresentation. The likelihood of confusion and an act of unfair competition do not need to be demonstrated (unlike in the case of unfair competition (*see below*)).

The unauthorised linking to a website through which a company can upload and use the database of a competitor has been regarded as passing off (*Court of First Instance of Paris, 8 January 2001*).

However, this decision was overturned on appeal (*Court of Appeal of Paris, 25 May 2001*).

In a decision dated 26 December 2000, the Commercial Court of Paris stated that the creation of links to attract the content of the targeted website, without reporting to the user that it is another website, constitutes an act of parasitism (*Commercial Court of Paris, 26 December 2000*).

In a decision dated 25 March 2010, the Court of First Instance of Nanterre held that, in the absence of any omission or wrongful inaccuracy, the suggestion of a link leading to a website on which software can be downloaded, without the copyright holder's authorisation, may not be regarded as an act of unfair competition nor passing off (*Court of First Instance of Nanterre, 25 March 2010*).

Unfair competition

There is no specific law in France imposing liability on those who engage in acts of unfair competition. Such liability is based upon general principles of tort law as set out by case law.

As a general rule, to establish a cause of action and bring a suit, a party injured by an act of unfair competition must prove:

- That an act of unfair competition has been committed (such as confusion with the products and services of the injured party or the discredit of a competitor).
- That the act was the proximate cause of an actual injury.
- The amount of injury suffered.

The Court of Appeal of Paris held that by creating a link on its official website to a third party's "anti-NRJ" website, the radio station Europe 2 had committed an act of unfair competition against another radio station, NRJ (*Court of Appeal of Paris, 19 September 2001, NRJ SA v. Société Europe 2 Communication*).

In a case involving the Google AdWords service, a French court ruled in May 2011 that Google was liable on the grounds of unfair competition as it "technically contributed to the confusion generated in the mind of the interested public" (*Court of appeal of Paris, Section 5, Chamber 4, 11 May 2011, Google France et Inc/Cobrason, Home Cine Solutions*). The decision was heavily criticised and overruled by the Court of Cassation, as it did not refer to the hosting exemption put in place by LCEN and Directive 2000/31 of 14 November 2011 (Commercial Chamber of the Court of Cassation, 29 January 2013: in relation to the competitor, the Court of Cassation underlined that the Court of Appeal failed to demonstrate the risk of confusion).

Another more recent decision found that Google was liable to damages, and explicitly stated that they could not avail themselves of the hosting exemption (*Court of first instance of Paris, Chamber 17, 14 November 2011, Olivier M. / Prisma Presse, Google*). These cases do not follow the ECJ position in its decision of 23 March 2010.

The French Supreme Court has not yet examined the applicability of the hosting exemption to Google, therefore the significance of these precedents remains uncertain.

In relation to unfair competition, there are a few rulings dealing with deceptive practices on the internet. The Commercial Chamber of the Court of Cassation has recently pointed out that the adequate test for showing deceptive practices consists of demonstrating substantial modification of consumers' economic behaviour as a result of the practices (*Commercial Chamber of the Court of Cassation, 29 November 2011*). The deceptive practice in this case involved a comparison-shopping website that failed to provide complete and updated information on the referred offers.

In a similar set of facts, the Commercial Chamber of the Court of Cassation ruled that a comparison-shopping website must present itself as an advertising content provider, to the extent that its indexation is in favour of websites that have subscribed to this service (*Commercial Chamber of the Court of Cassation, 4 December 2012*). Such a practice is also likely to be deemed deceptive.

Registered trade mark infringement

A person infringes a registered trade mark if he uses or reproduces a trade mark for products or services identical to those listed in the registration. Trade mark infringement also exists if there is a likelihood of confusion in the mind of the public, through either:

- The use of identical trade marks for products or services similar to those listed in the registration.
- The use of an imitated trade mark for products or services identical or similar to those listed in the registration.

(*Articles L-713-2 and L-713-3, French Intellectual Property Code*).

The reproduction of the registered trade mark of the website owner in a link constitutes a trade mark infringement. The infringer may be condemned to criminal sanctions (a fine up to EUR300,000 and imprisonment up to three years) and civil damages.

In the various cases involving the Google AdWords service, Google has been held liable by several French decisions on the basis of trade mark infringement, misleading advertising or civil liability. The Court of Appeal of Paris held on 1 February 2008 that the use of trade marks by Google amounts to an infringement (*Court of Appeal of Paris, 1 February 2008*).

In cases where the courts decided that Google's activity did not infringe trade marks, they have condemned Google on the basis of its civil liability, considering that Google had the obligation to check whether the advertisers were entitled to use a registered trade mark as a key word, or to provide the advertisers with specific tools to verify their right to use such trade mark.

On 20 May 2008, the Supreme Court did not confirm or reject the main position of the Courts of Appeal (*Commercial Chamber, Court of Cassation, 20 May 2008, three decisions*). The judges asked three preliminary questions to the European Court of Justice (ECJ) states, which are required to provide member states with a unique legal interpretation of trade mark owners' rights.

In its decision of 23 March 2010, concerning Google Adwords, the ECJ held that Google was not liable for trade mark infringement.

According to the ECJ, an internet referencing service provider which stores, as a key word, a sign identical to a trade mark and organises the display of ads on the basis of this key word, does not commit an act of infringement (*ECJ, 23 March 2010, Google France SARL and Google Inc. v. Louis Vuitton Malletier SA*).

On 13 July 2010, the French Supreme Court, following the interpretation given by the ECJ, held that a search engine does not commit an act of infringement when it simply stores, as a key word, a sign identical to a trade mark and organises the display of ads (*Cour de cassation, 13 July 2010*).

On 11 February 2010, the Court of First Instance of Paris held that the use of the terms "Viton, Louis Viton, Wuiton, Witton, LouisViton, Vuton and Viuton" as keywords by the company eBay international AG to generate sponsored links pointing towards the website www.ebay.fr, without the prior approval of the company Louis Vuitton Malletier (owner of the trade marks "Louis Vuitton"," Vuitton" and "LV"), constituted a trade mark infringement as well as a passing off (*Court of First Instance of Paris, 11 February 2010*).

The Commercial Chamber of the Court of Cassation has recently applied the ECJ ruling in a typical online keyword advertising case (Commercial Chamber of the Cour de Cassation, 25 September 2012). It asserted that no trademark infringement can be claimed in a case where:

- The sponsored link is triggered in a column that is separated from the organic results.
- The ad content does not make any explicit or implied reference to the trademark.

Copyright infringement

The linker may infringe the intellectual property rights of a website editor if the link copies material protected by copyright (*droit d'auteur*) from the linked website. Indeed, infringement of copyright consists of a reproduction, representation, dissemination, translation, adaptation or transformation that does not qualify as a legal exception of a literary, artistic or musical work without the author's consent. The infringer may be subject to criminal penalties (a fine up to EUR300,000 and imprisonment up to three years, or a fine of up to EUR500,000 and imprisonment up to five years for infringements committed by a group) and civil damages. (For sanctions applicable to companies, see Articles 131-38 and 131-39 of the French Criminal Code.)

On 19 January 2010, the Court of First Instance of Evry found a manager of a website that listed peer-to-peer hyperlinks not guilty. The manager was acquitted because no evidence of any illegal downloading had been reported (*Court of First Instance of Evry, 19 January 2010*).

On 12 July 2012, the Court of Cassation overruled a Court of Appeal's decision that rejected the request for removal by Google Suggestions of key word suggestions leading to counterfeit copyrighted works. The Court of Appeal based its decision on the ground that those suggestions did not constitute infringement of these copyrighted works. But the Court of Cassation justified the request for removal by stating that, if the suggestions should not be regarded as copyright infringement, they constituted the means of infringement (*First Civil Chamber of the Court of Cassation, 12 July 2012*).

The ECJ, in a decision dated 13 February 2014, held that a website leading to copyrighted works that can be openly accessed on

another website, without the authorisation of the rights holder but directed to the same public, does not constitute an act of communication to the public, and so does not infringe those rights (*Fourth Chamber of the ECJ, 13 February 2014, C-466/12*).

Database right infringement

If the link allows extraction of a substantial part of the protected database, the author of the link may be condemned to criminal sanctions (a fine of up to EUR300,000 and imprisonment up to three years, or a fine of up to EUR500,000 and imprisonment up to five years for infringements committed by a group) and civil damages (*Article L 343-4 et. seq., French Intellectual Property Code*, *as modified by Law no. 2007-1544 of 29 October 2007 relating to the fight against counterfeiting*). (For sanctions applicable to companies, see Articles 131-38 and 131-39 of the French Criminal Code.)

The Court of First Instance of Paris held that the commercialisation of software whose purpose is to extract information from an online directory is a database right infringement (*Court of First Instance of Paris, 3 November 2009*).

The Court of Appeal of Paris held that a search engine did not undertake a substantial extraction from a real estate ads database and did not infringe on the investment made to constitute the database by automatically indexing those ads (*Second Chamber of the Court of Appeal of Paris, 7 June 2013*).

Breach of contract

Breach of contract can be claimed if the terms and conditions of the linked site contain an express prohibition on linking without the website owner's permission.

Other remedies

Unauthorised linking to a website may also create liability under rules governing comparative advertising.

Framing

7. Which of the following legal remedies are or may be available in respect of unauthorised framing of contents on another website: (i) passing off (ii) unfair competition; (iii) registered trade mark infringement; (iv) copyright infringement; (v) database right infringement; (vi) breach of contract; or (vii) any others ?

Passing off

See *Question 6*. The fact that webpages of the linked website owner appear in the frame of another website may create confusion in the public's mind.

Unfair competition

See *Question 6*. The practice of deeplinking combined with framing might be considered to be an act of unfair competition (*Court of First Instance of Paris, 25th June 2009*).

Registered trade mark infringement

See *Question 6*. The practice of framing supposes the use of a temporary copy of webpages from the linked website. The reproduction as well as the use of the registered trade mark of the website owner is an infringement. The infringer may be subject to criminal sanctions (a fine up to EUR300,000 and imprisonment up to three years for individuals, and a fine up to EUR1.5 million for corporate entities) and civil damages.

On 30 January 2004, the Court of First Instance of Paris (*Esso v. Greenpeace*) judged that a metatag using the plaintiff's trade mark was not an infringement, since the reproduced trade mark was not used to designate products or services identical or similar to those listed in the trade mark registration, and since such use could not create any risk of confusion.

Copyright infringement

According to the French Intellectual Property Code, the reproduction or representation of copyright material (that is, protected by *droit d'auteur*) may be an infringement of the patrimonial right of the author and even of his moral right (he may invoke misrepresentation of his work). The infringer may be subject to criminal penalties (a fine up to EUR300,000 and imprisonment up to three years, or a fine of EUR500,000 and imprisonment up to five years for infringements committed by a group) and civil damages. Companies may be fined (up to five times the amount of the fines applicable to individuals); in addition, a company may be permanently prohibited from running a

business, or may be dissolved.

On 25 June 2009, the Court of First Instance of Paris ruled that the representation of the website Voyanet.com by Pressvoyages.com, without the prior approval of the copyright holder of the website Voyanet.com, constituted a copyright infringement as well as an act of unfair competition (*Court of First Instance of Paris, 25 June 2009*).

In three decisions dated 12 July 2012, the First Civil Chamber of the Court of Cassation put an end to the obligation established by jurisprudence providing that website hosts must ensure that, after a first LCEN notification and the withdrawal of infringing content, such content should not be published again. As a result, each time infringing content is published by a third party on a website host's site, a new notification is required; without such notification the website host will not be held liable.

On 21 October 2014, the ECJ ruled that linking to freely available content was not communication to a "new public" ("that is to say, a public that was not taken into account by the copyright holders when they authorised the initial communication to the public"). Therefore, framing cannot be considered *per se* to be an infringement of copyright (*European Court of Justice, 21 October 2014*).

Database right infringement

According to the French Intellectual Property Code, if the reproduced web page's content is a substantial extraction from a protected database, the website editor may be subject to criminal penalties (the same as for copyright infringement (*see above*)) and civil damages.

Investment made in creating content and processing formal verifications of the data is not relevant to gaining producer status of a database.

Breach of contract

If the terms and conditions of the linked site contain an express prohibition on framing without the website owner's permission, an action for breach of contract may exist.

Other remedies

Unauthorised framing from a linked website may also create liability under rules governing comparative advertising.

Metatags

8. Which of the following remedies are or may be available in respect of the unauthorised use of another party's registered or unregistered trade mark, logo or other material in metatags or the hidden text of a website: (i) registered trade mark infringement; (ii) passing off; (iii) unfair competition; (iv) copyright infringement; or (v) any others? (Please indicate whether the position will be different if a registered or unregistered trade mark is used in this way for a legitimate purpose rather than for the sole purpose of increasing traffic flow to the website owner's site.)

Registered trade mark infringement

See *Question 6*. For example, in the *Distrimart* case (*Court of First Instance of Paris, 4 August 1997 and 16 November 1999*) it was held that a metatag using the plaintiff's trade mark constitutes trade mark infringement on the ground that this use created a likelihood of confusion. According to French case law trade mark infringement by using a third party's trade mark will not arise if:

- The use of the trade mark is a necessary reference. Indispensable referencing arises, for example, where a manufacturer of accessory products uses the trade mark of the principal product for promotional purposes.
- The use does not create the likelihood of any confusion, from a consumer standpoint, as to the origin of the products or services provided on the website.
- The use of the trade mark is not the cause of any injury to the owner of the trade mark. French courts also seem to tolerate metatags using third party trade marks for information purposes only and in a non-competition context.

French case law held that the use of a trade mark as a metatag amounts to an infringement under Article L. 713-2 of the French Intellectual Property Code (*Court of First Instance of Paris, 3rd Chamber, 14 March 2008 and Court of Appeal of Paris, 19 March 2008*).

However, in a recent decision it was held that metatags cannot be seen as serving the same function as a trade mark, to guarantee the origin of a product. Indeed, since metatags are invisible to internet users, the use of a trade mark as a metatag does not qualify as trade mark infringement (*Court of First Instance of Paris, 3rd Chamber, 29 October 2010*). This decision has not yet been tested in a higher court, therefore its significance remains uncertain.

Passing off

See *Question 6*. A decision has held that the use of the trade mark "Tryba" by a competitor company as a metatag amounts to a passing off, even though it does not amount to a trade mark infringement in this case (*Court of First Instance of Strasbourg, 20 July 2007*).

Unfair competition

See *Question 6*. The copying of the keywords and metatags of a competitor's website into the source code of an individual's website has been held to constitute an act of unfair competition (*Court of Appeal of Paris, 12 January 2005, Kaligona v. Dreamnex*).

On 19 March 2014, however, the Court of Appeal of Paris ruled that the copying of a trademark under the form of a metatag into the source code was not to be held as an act of unfair competition for "identical reproduction", given that the websites did not share any visual similarities. Rather, the Court considered it to be a trademark infringement.

Copyright infringement

Copyright infringement occurs if metatags make unauthorised use of any creation protected by copyright (*droit d'auteur*) or if the website owner includes metatags in its website, which are protected by copyright, without having the authorisation to modify the website from the web designer. The infringer can be liable to criminal sanctions (a fine of up to EUR300,000 and up to three years' imprisonment, or a fine of EUR500,000 and up to five years' imprisonment for infringements committed by a group) and civil damages. Companies can be fined (up to five times the amount of the fines applicable to individuals); in addition a company can be permanently prohibited from running a business, or be dissolved.

Other remedies

Other types of action may lie in, for example, violation of a person's right over his image.

In addition, if the website includes metatags using a registered corporate name there may be an infringement of registered corporate name. In a decision of the Court of Appeal of Paris (*SFOB v. Notter GmbH, judgment of 13 March 2002*), the defendant included in its metatags the registered corporate name of a direct competitor and was forced by injunction to remove the litigious metatags. The Court of First Instance of Paris held on 14 March 2008 that the use of the registered corporate name "Citadines" by a competitor was not an act of unfair competition. However, it has been considered to be a trade mark infringement (*Court of First Instance of Paris, 14 March 2008*).

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