

ELECTRONIC UNFAIR COMPETITION AND APPLICABLE LAW: An Open Spot in the European Jungle

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After the implementation of the E-commerce Directive,¹ the determination of the applicable law in matters of unfair competition in general and electronic unfair competition in particular has become rather difficult. Courts will have to find their way through a jungle of conflict rules and rules which are not meant as conflict rules but have the same effect as conflict rules. Taking the E-commerce Directive as a compass on a tour through this jungle of private international law and European law we will arrive at an open spot in the middle of the jungle.

1. What is electronic unfair competition?

First, we will have to distinguish electronic unfair competition from ‘traditional’ unfair competition. Of course, misleading advertising and unfair marketing are the most common types of ‘traditional’ unfair competition within the framework of electronic commerce, but the Internet also offers other possibilities that do not exist in the ‘real world’; for example, spamming, domain name grabbing, the manipulating of search engines and the misleading use of hyperlinks. Such electronic actions may qualify as unfair competition and will therefore be referred to as electronic unfair competition.

When discussing electronic unfair competition, we cannot escape the applicability of the E-commerce Directive. For the area of electronic unfair competition, the E-commerce Directive is only relevant when the actions can be qualified as ‘commercial communications’, which is understood as ‘any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organisation or person . . .’ This is not as simple as it seems. Article 2(f) specifically excludes the following from the definition of commercial communications:

- (1) information allowing direct access to the activity of the company, organisation or person, in particular a domain name or an electronic-mail address, and
- (2) communications relating to the goods, services or image of the company, organisation or person compiled in an independent manner, particularly when this is without financial consideration.

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ 2000 L 178.

In the explanation to the Commission proposal,² it is indicated that this means more specifically:

- (a) the mere ownership of a site;
- (b) information which cannot be characterised as promotion;
- (c) hyperlinks to other independent web sites; and
- (d) the mentioning of a web site- or e-mail address without any economic affiliation to the owner thereof.

Especially the considerations regarding the hyperlinks raise some questions. According to the Directive, a hyperlink in a web site linking to a dependent web site can be considered a commercial communication. But what is a *dependent* web site? The web site of a subsidiary, the web site that your company sponsors or the web site that you placed banners on and pay for? Suppose I conclude a hyperlinking agreement with the owner of another web site. Does this imply that the hyperlink can be considered as commercial communication if I have to pay for the hyperlinks and not if it is for free? How about banners? Banners as such can be considered commercial communication since it is a form of promotion. But if the banner has a hyperlink to a web site (which it usually has), then we should find out whether it links to a dependent site or not in order to determine whether the *hyperlink* (not the banner) is within the scope of the Directive. The result could be that the banner as such falls under the E-commerce Directive and the hyperlink does not. There could also be some doubt about metatags.³ At first sight, they are not within the scope of the Directive because they are only pieces of software made to facilitate the work of search engines. However, even though they cannot be seen by Internet users, they are specifically meant to draw the users' attention to that particular web site. A typical form of indirect promotion and thus to be qualified as commercial communication. It can thus be concluded that with respect to electronic unfair competition the E-commerce Directive is rather unclear and leads to uncertainty.

2. How to determine which law is applicable?

Having gone through the first part of the jungle, we now arrive at a second crossroads: how is the applicable law determined in international unfair competition cases?

In the Netherlands (and in Germany, Austria and Switzerland), the so-called market rule is the relevant conflict rule for unfair competition cases. This means that the law of the country of the market where the relations between the competitors are troubled applies. Applying the market rule to electronic unfair competition disputes is not always easy. Factors such as language of the web site, the currency in which prices are stated, general conditions of sale and disclaimers may point to a particular country, but mostly there no specific country can be discerned. In such a case, more than one national laws may be applicable.

The market rule does not apply to e-mails as they are specifically addressed to

² Explanatory memorandum to the Proposal for a European Parliament and Council Directive on certain legal aspects of electronic commerce in the internal market, 18 November 1998, COM(1998) 586 final. Commentary to the individual articles, Annex to the Commission proposal, p. 23.

³ Metatags are the key words concerning the content of a web site so that the web site can be found by search engines. Metatags can only be seen by the search engines, not by Internet users.

individuals. Therefore it seems more 'natural' that the law of the place where the e-mail is received and where it has its effect should apply. The consequence may be that if the e-mails are sent to a number of people in various countries all those laws may apply separately.

Our travel guide on this tour, the E-commerce Directive, contains the country-of-origin rule (Article 3). This means that if an Information Society service provider complies with the laws of the Member State where he is established, he is free to provide his services throughout the European Union. Article 3 refers to the coordinated field, which is an extraordinarily broad area concerning rules on the behaviour of the service provider, the quality or content of the service including those applicable to advertising and contracts and the liability of the service provider. This means in practice a very large part of the national private laws of the Member States. In the Annex to the Directive, certain areas are excluded from application of the country-of-origin principle, e.g. intellectual property rights and spamming.

The aim of the country-of-origin rule is to ensure that access to the common information society market is equal in all Member States. 'Euromarketing' should therefore be possible. Every undertaking or information society service provider should have the certainty that by acting under the laws of the Member State of its establishment, it can do business in the rest of the European Union. The aim of the country-of-origin rule has therefore a sort of 'private international law' background; the law of the 'home-country' is decisive.

However, in the Directive the country-of-origin rule is intended as a rule of national supervision, *not* as a conflict rule. Article 1 determines the scope of the Directive; paragraph 1(4) expressly mentions that the Directive '... does not establish additional rules on private international law relating to conflicts of law or jurisdiction'.

It is widely being discussed whether the country-of-origin rule in the Directive, although not intended as one, *has the effect* of a conflict rule. But whether the country-of-origin rule can be qualified as a conflict rule or not, the *result* of the application of the country-of-origin rule, once implemented in national law, is that it creates a mess in the area of electronic unfair competition when one tries to determine the law applicable.

First of all, the country-of-origin rule sets aside the market rule for those types of electronic unfair competition that fall under the E-commerce Directive, such as webvertising and certain types of hyperlinking. All the other types of electronic unfair competition that are outside the scope of the Directive fall under national rules of private international law, such as the market rule, which could determine another applicable law. The result is that we would have the country-of-origin rule for these types of electronic unfair competition that fall under the Directive and the market rule for all the types of electronic unfair competition. This means in practice a multiple of conflict rules and a shattering or splintering of applicable laws.

Suppose that a multinational established in the Netherlands starts a European advertising and marketing campaign. It places advertisements in the printed media and on its web site, it sends these advertisements by e-mail to regular and potential customers and makes a TV commercial which is broadcast in all European Member States. If there are misleading statements in the company's advertisements, the applicable laws will be, at least under Dutch law, innumerable. The market rule should be applied to the advertisements in the newspapers. If no particular country is aimed at, all European laws will in principle be applicable. Regarding the advertisement on the web site of the company, the country-of-origin rule determines that the company only has to comply with the Dutch laws as its place

of establishment is in the Netherlands. It may become difficult if the web site contains hyperlinks to dependent and independent sites. Commercial e-mails are excluded from application of the country-of-origin rule in the Annex to the Directive; here, the laws of the countries where the recipients of the commercial mails live will be applicable - which may be many in this case. For the TV commercial, only the Dutch laws are relevant because the Television Directive also contains the country-of-origin rule. The conclusion is, therefore, that determining the applicable law in a Euromarketing case becomes a complicated puzzle.

To complicate things even more, there is also the future Rome II Regulation on the law applicable to non-contractual obligations,⁴ which is currently still in draft form. The general rule of the draft Rome II Regulation is contained in Article 3, which states that the applicable law is that of the country where the loss is sustained.

Article 6, however, contains an exception rule for unfair competition matters, namely the market rule. This would mean that the market rule becomes the conflict rule for unfair competition matters. As the Regulation will be directly applicable in the Member States, it will set aside conflicting national law. The country-of-origin rule in the E-commerce Directive has been implemented in national law and may therefore be 'overruled' by Rome II. To deal with this problem, a *carve-out* has been made in Article 23 of the Regulation. This Article is intended to clarify the relationship between Rome II and other Community instruments, particularly the E-commerce Directive and provides that 'it will not prejudice . . . instruments which subject services to the laws of the country-of-origin of the services'. So what happens is that for electronic unfair competition Rome II refers to the E-commerce Directive (and its country-of-origin rule) and the E-commerce Directive states that it does not contain any conflict rules. The result is that both legal instruments are silent on the applicable law in electronic unfair competition matters; thus, there is a gap in the private international law rules with respect to electronic unfair competition. This is obviously unsatisfactory and it still does not solve the problem of the splintering of applicable national laws. At the end of our jungle tour, we find ourselves in an open spot in the middle of the jungle.

⁴ Consultation on a preliminary draft proposal for a Council Regulation on the law applicable to non-contractual obligations, 3 May 2002, published on http://europa.eu.int/comm/justice_home/unit/civil/consultation/index_en.htm.