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Google Suggest, a tool that can lead internet users to the path of the infringement

In a decision dated July 12, 2012[1], the First Civil Chamber of the *Cour de Cassation* (French Supreme Court) held that the Google Suggest tool, that guides Internet users to sites proposing the illegal downloading of works protected by copyright, "*provided the means to infringe copyright and related rights*".

Google's search engine does not simply guide Internet users. It anticipates, predicts and suggests.

When the Internet user types words in the search box, Google's tool, using an algorithm, displays similar queries based on the most common searches made by other Internet users. If the Internet user is connected to its Google account, similar queries previously made by that user will also be displayed.

For example, the Internet user wishing to access to Google map can only type the letter "g" in Google search box and the auto-complete feature of the search engine will automatically suggest key words like Google maps, Google translation, etc. This feature makes searches more convenient and efficient by keeping the Internet user from having to type the entire words or reformulate his/her queries in the event the typed word is misspelled.

The Google Suggest feature also offers additional search criteria associated with the typed word to which the Internet user may not have spontaneously thought of.

As such, the Internet user searching information on President Obama who types the words "Barack Obama" in Google's search box will be proposed to make the "Barack Obama twitter" query allowing him/her to access to President Obama's twitter account.

This is on this last feature that the *Cour de Cassation* was asked to rule in order to sanction certain excesses.

The French *Syndicat national de l'édition phonographique* ("SNEP") is an inter- professional organization which protects the interests of the French record industry. Members include phonogram producers and assignees of rights of artist-performers.

The SNEP had a process-server officially record that the Google Suggest feature automatically suggested the keywords "Torrent," "Megaupload," or "Rapidshare" when Internet users made queries containing the names of artists or bands. The first is a file sharing (so-called P2P) website and the two others are file-hosting websites that contain music files made available to and downloadable by the public.

The SNEP requested the trial judges to order Google to remove the terms "Torrent", "Megaupload" and "Rapidshare" from the list of suggestions displayed by the search engine and, in the alternative, to forbid it to propose on its search engine suggestions associating these terms with names of artists and/or titles of albums and songs.

The SNEP relied on Article L.336-1 of the French Intellectual Property Code ("FIPC"), introduced by the so-called Hadopi I Law of June 12, 2009, that stipulates : "*In the event of* ***copyright infringement or infringement of a related right occasioned by a public online communications service****, the First Instance Court, ruling in summary proceedings as the case may be, may order, at the request of the owners of the protected works and objects, (...) or professional defense organizations referred to in Article L. 331-1 of said Code, that* ***any necessary measures be taken to prevent or put an end to such copyright infringement or infringement of related right, and may order any person likely to contribute to remedying the situation to take such measures***".

In a judgment dated May 3, 2011[2], the Paris Court of Appeals dismissed SNEP's claims on the following grounds:

- The suggested websites themselves were not illegal insofar as **the files they hosted were not necessarily intended to be illegally downloaded**;
- The automatic suggestion of these websites could only result in a copyright infringement or an infringement of a related right if the Internet user clicked through the suggested websites and downloaded a protected phonogram, which represents **a willful action on the part of the Internet user** for which Google companies cannot be held liable;
- **The deletion of the relevant words makes the search more difficult** but is not likely to prevent illegal downloading of works protected by copyright or related right.

The *Cour de Cassation* overturned this judgment and held that:

"*Google companies' public online communications service (...)* ***provided the means to infringe copyright and related rights*** *and (...) the required measures tended to prevent or put an end to such infringement through the discontinuation of the automatic association of keywords with terms contained in the queries by Google companies that could thus contribute to remedy the situation by making it more difficult to find the relevant websites, even though such measures are not expected to be fully efficient".*

A service that provides the means to infringe copyright and related rights:

The main interest of the commented decision lies with the use of the concept of "means" by the *Cour de Cassation*.

Pursuant to the Hadopi I Law referred to by the SNEP, the initiation of legal proceedings is justified if the

"copyright infringement or infringement of a related right (is) occasioned by a public online communications service".

The *Cour de Cassation* considers that the online service that "*provided the means*" to infringe in fact occasioned such infringement.

In its opinion, the verb "to occasion" is to be understood as "to give the occasion to" or "to provide the means of", which allows to soften the causality link between the content of the public online communications service and the copyright infringement.

This comparison remains quite bold however, as only the illegal downloading by the Internet user truly causes the infringement.

The requested measures tend to prevent or put an end to the copyright infringement or to the infringement of related rights, even though they are not expected to be fully efficient:

Ruling on the constitutionality of Article L.336-1 of the FIPC, the French constitutional Council had considered that:

"By allowing holders of copyright and related rights (…) to request the First Instance Court to order, following an adversarial procedure during which all parties are heard, the measures necessary to prevent or halt infringement of their rights, the legislator has not infringed the freedom of expression and communication; that it will be up to the Court to order, in accordance with this freedom, solely the measures strictly necessary to preserve the relevant rights ; that, with that proviso, Article 10 is not contrary to the Constitution"[3].

The measures requested by the SNEP under Article L.336-1 of the FIPC may thus be ordered only if they are strictly necessary to preserve the relevant rights.

Even though it was fully aware of the limited effectiveness of the requested measures, the *Cour de Cassation* did not rule out the implementation of such measures as it considered that they tended to prevent infringements by making it more difficult to search for the websites in question.

The *Cour de Cassation* made an extensive interpretation of Article L.336-1 of the FIPC that authorized the courts to order *"any measures necessary to prevent or put an end to a copyright infringement of an infringement of related rights"*.

Yet, is the deletion of the automatic association of keywords truly likely to prevent the illegal downloading of works protected by copyright?

Undoubtedly, the Internet user wishing to illegally download files does not really need Google's suggestions to

achieve this objective.

Lastly, it should be noted that the measure ordered by the *Cour de Cassation* concerns the deletion of the automatic association of keywords with terms contained in the queries (title of an album, name of an artist or title of a song), not the deletion of the terms "Torrent", "Megaupload" and "Rapidshare" from the list of suggestions displayed by Google's search engine – whereas this was precisely SNEP's main request.

Indeed, imposing the deletion of the terms in question from the list suggestions displayed by Google would be contrary to the proportionality principle recalled on the same day by the *Cour de Cassation* in another decision concerning *Google image* search engine[4].

In this last decision, the *Cour de Cassation* recalled that Google companies could not be imposed a "*general obligation to monitor the images that they store and to seek illicit uploads (that would consist in) obliging them to implement a blocking mechanism with no limitation in time, which would be disproportionate to the pursued aim*".

Google is therefore strongly suggested to stop leading Internet users to the path of infringement – when not directly requested by the users themselves – without however being imposed a general obligation to monitor.

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[1] First Civil Chamber of the Cour de Cassation, July 12, 2012, n°11-20358

[2] Paris Court of Appeals, May 3, 2011, n°10/19845, Gaz. Pal., October 15, 2011, p. 35

[3] Constitutional Council, June 10, 2009, n°2009-580

[4] 1st Civil Chamber of the *Cour de Cassation*, July 12, 2012, n°11-15165