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Milan Court Finds Google Executives Criminally Liable: Why the Ruling is Controversial

By Karin Retzer and Teresa Basile

On February 24, 2010, a Milan court found three senior Google executives criminally liable for data protection violations in relation to an offensive video that was posted on the Google Video site and remained available to users to view for two months. The sentencing of the executives made news headlines, in a rare case of an Internet service provider being held responsible for content uploaded onto its site by users. Below, we examine the ruling and address some of the key comments made by the judge and the President of the Garante, the Italian data protection authority, Mr. Francesco Pizzetti, in relation to the ruling.

BACKGROUND

In September 2006, a video showing three Italian boys physically and verbally bullying a child with Down syndrome was posted on the Google Video site. The video was filmed by the boy's classmates using a mobile phone with a built-in video camera. The video remained on the site until November 2006 and was allegedly viewed 5,500 times.

Vivi Down, the Italian association representing individuals with Down syndrome (the name of which had been used as an insult in the video), was informed about the video on November 7, 2006. After several unsuccessful attempts to block the video by following the instructions provided on the Google Video site, Vivi Down reported the video to the police and filed an action against Google before the Milan court. An additional action was filed by the disabled boy's family.

It was only at this point, after the intervention of the police, that Google removed the video from the site. During the ensuing court proceedings, it came to light that Google had been made aware of the video by an anonymous individual prior to the police report filed by Vivi Down, but had failed to take any action.

On February 24, 2010, the Milan judge Oscar Magi found the President of Google Italy, the Managing Director of Google Italy, and the Global Privacy Counsel of Google Inc. guilty of data protection violations and issued a six-month suspended sentence.

Google has already announced that it will contest the judgment on appeal.

Interestingly, Google's appeal may be helped by statements from Francesco Pizzetti.

In a blog linked to an Italian national newspaper, published a few days after the disclosure of the full ruling, Mr. Pizzetti stated simply that "the ruling is wrong" and went on to argue how it is not in line with Italian data protection rules. The full interview is available (in Italian) at http://zambardino.blogautore.repubblica.it/2010/04/16/il-garante-privacy-sulla-sentenza-di-milano-e-sbagliata-ma-ora-bisogna-fare-regole-non-censorie. Below, we address the specific remarks made by Judge Magi and Mr. Pizzetti.

THE COURT'S FINDINGS

No Obligation to Monitor Site

Contrary to the early press reports, Judge Magi rejected the defamation charge brought by the claimants, which held that Google had a duty to carry out controls on content. The Safe Harbor concept enshrined in Article 14 of the E-Commerce Directive 2000/31/EC, as implemented through the Italian Legislative Decree 70/2003, clearly exempts Google from such a duty. The judge confirmed that, generally, an Internet service provider ("ISP") is not liable for information uploaded by users, provided it does not have actual knowledge of the unlawfulness of the information or, upon becoming aware of such unlawfulness, it acts expeditiously to remove or disable access to the information.

In its March 23, 2010 ruling on Google ADWords, the European Court of Justice ("ECJ") also confirmed that a search engine provider may qualify for the Safe Harbor under Article 14 of the E-Commerce Directive, provided that it did not have knowledge of, or control over, the data stored, and that its actions were "merely technical, automatic and passive." The Google ADWords service allows advertisers to create ads which are displayed along with search results when someone searches Google. Ads appear under "Sponsored links" in the side column of a search page, and may also appear in additional positions above the free search results and advertisers pay only when the user clicks on these ads. The mere fact a service such as ADWords is subject to payment by the advertiser cannot deprive Google of the Safe Harbor. Likewise, a match between the keyword selected by the advertiser and the search term entered by the user is not sufficient to justify the view that Google has knowledge of, or control over, the data entered into its system by advertisers and stored in memory on its server. The ECJ concluded that it is for the national courts to decide on a case-by-case basis whether ISPs play a passive or active role vis-à-vis this type of data.

Notice Obligations

In Judge Magi's view, however, when an ISP plays a larger role than just connecting users, it becomes a "data controller" and is therefore subject to all the obligations of Italian data protection laws. The Google Video site uses Google's ADWords application to facilitate targeted advertising on the site; the judge therefore concluded that Google provided more than just a connection service and was in a position to manage, index, and organize the data uploaded onto its site.

Google was found guilty of having failed to correctly inform users about

(i) the data protection obligations imposed by the Italian Data Protection Code (including the written consent required for the processing of sensitive data, since the video revealed the health condition of the victim);

(ii) the need to comply with these obligations; and

(iii) the risks of breaching these obligations.

The notice requirements established by Section 13 of the Italian Data Protection Code include the following: the purpose and modalities of the processing; the voluntary or mandatory nature of providing the requested data; the consequence(s) in case of refusal to provide data; the rights of data subjects; the entities to which data will be communicated; and the identification of the data controller and, if appointed, of the data processor.

The ruling states that, at least in the final segment of the whole process, Google controlled the processing of the data, and therefore should have respected obligations to inform users of the legal requirements and limits of using its service.

However, in his blog Mr. Pizzetti stressed the fact that Section 13 only covers the information that the service provider, in this case Google, must provide to the users of its platforms in relation to how the provider processes personal data. It does not extend to users processing third parties' data. Mr. Pizzetti argues that it was the user(s) who processed personal data in the Google case, by making a video and then uploading it onto the Google Video site. In practice, it was the users who should have informed the boy filmed in the video, and obtained his parents' consent before the video was uploaded onto Google's site.

Despite viewing the ruling as "wrong," Mr. Pizzetti said he considers it to have an overall positive value in that it highlights the need to find alternative data protection solutions for the Internet – and not by means of imposing content checks which risk compromising the democratic importance of the Internet, or by transferring the ultimate liability for the illicit processing of third parties' data to users.

Google "Motivated by Profit"

In addition, the Judge Magi concluded that Google was "motivated by profit" to keep the video on its site. Google generated income from targeted advertising on the page where the video was displayed throughout the two months the video remained on the site. The targeted advertising displayed on the site was created by advertisers using Google's ADWords application. Advertisers pay Google on a "pay-per-click" basis each time a user clicks on an advertising link; therefore, any video increases the potential of an advertisement being displayed and its potential related profit.

The judge's perception that Google's actions were driven by financial gain was used to justify the imposition of a criminal sanction in part. However, the judge linked Google's failure to provide proper notice to users (which gives rise to an administrative sanction) to the unlawful processing of data with a view to gaining profit (which, indeed, amounts to a criminal sanction) without providing a full explanation. The ruling mentions Section 167 of the Italian Data Protection Code, which relates to the unlawful processing of data with a view to obtaining profits in breach of, *inter alia*, Sections 17, 23 and 26 (dealing with the processing of data, carrying out specific risks, and consents required for the processing of common and sensitive data, respectively) and which give rise to a criminal sanction. However, the main charges against Google are focused on Section 13 of the Code, the breach of which only results in an administrative fine.

Google's Privacy Policy

Judge Magi also accused Google of a lack of transparency in its Privacy Policy. He stressed the fact that the Privacy Policy had been "intentionally" hidden in Google's Terms of Use, and that the language was not user-friendly. In practice, even though Google Video's Terms of Use indicated that users had to guarantee that the uploaded content did not violate any third parties' rights, including privacy-related rights, the judge did not find the message to be clear enough. Although he conceded that Google did not have a general duty to monitor content, Judge Magi ruled that, as an active host provider, Google did have a duty to ensure that all users were correctly informed of their legal obligations when uploading data. The judge found that Google had not provided clear and sufficient notice to the users about their obligations towards the individuals in the video. In addition, the fact that the privacy policy had been "hidden" in the Terms of Use amounted to "pre-constitution of an alibi."

CONCLUSION

In practice, we believe that the ruling is likely to be overturned in the appeals proceedings. However, the overriding message of the Milan judge that the "Internet is not a lawless prairie" echoes the recent open letter addressed to the CEO

of Google Inc., signed by ten national data protection officials (including the Canadian, French, German, Israeli, Italian, Spanish, and UK authorities) which stated: "(*W)e are increasingly concerned that, too often, the privacy rights of the world's citizens are being forgotten as Google rolls out new technological applications. [We were disturbed by your recent rollout of the Google Buzz social networking application, which betrayed a disappointing disregard for fundamental privacy norms and laws]. Moreover, this was not the first time you have failed to take adequate account of privacy considerations when launching new services."* (http://www.priv.gc.ca/media/nr-c/2010/let_100420_e.pdf).

This is symptomatic of the strong opposition Google currently faces from many data protection authorities for its global approach, which often ignores national privacy sensitivities. The open letter, addressed to Google "as a leader in the online world," may be seen as the first common attempt by a number of data protection authorities to tackle privacy concerns relating to online companies with a coordinated, international approach.

The ruling also touches on the topic of data protection requirements in relation to information posted online with respect to third parties. Facebook is currently facing an investigation in Germany and Switzerland as to whether the posting of photos and other information online without the consent of the individuals photographed constitutes a breach. In any event, it seems wise for service providers to have very clear language online in their Privacy Policy, and possibly also displayed outside their Privacy Policy, about the users' data protection obligations for such information.

Contact:

Karin Retzer
32 2 340 7364
kretzer@mofo.com

Teresa Basile
32 2 340 7366
tbasile@mofo.com

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