

Joseph Toister v. Google Inc.

Class Action 1862-11-12, 18 september 2014

An Israeli District Court ruled in September that advertisements posted on websites as the result of the use of services provided by Google do not constitute spam according to the Israeli anti-spam law.

Do online ads that advertise various products and services, where such ads appear on the basis of research made in respect of the internet user's internet history, constitute unsolicited electronic communications that are prohibited according to the Israeli anti-spam law? Does the posting of such ads require obtaining the advance approval of the internet user prior to placing such ads on the websites that the internet user surfs?

These questions, which seem to be rather simple to answer (and reject) on the one hand, are actually less obvious after looking into the wording of the Israeli anti-spam law, on the other. Could it not be argued that these ads are actually unsolicited online communications that are presented to the internet user without obtaining his or her consent in advance - thus contravening the law, especially if we take into account the logic of such a law - to avoid bombarding people with unsolicited commercial communications? In the end, could it not be argued that online ads constitute spam?

These issues were at the core of a recent court ruling of an Israeli District Court, which was issued in respect of a motion seeking to provide a lawsuit with a status of a class action. The lawsuit itself argued that online ads that appear on websites, where such ads are provided to the internet user on the basis of his/her past internet history, constitute spam under Israeli law.

The arguments of the parties

The plaintiff referred to a service provided by Google, which allows advertisers to post online ads in a manner that targets internet users, based on internet users' preferences and past internet usage, data that are collected by Google. Thus,

Google allows advertisers to specifically target internet users and provide those internet users with ads that in most cases attempt to solicit them to purchase certain products and/or services. The plaintiff raised several arguments in respect of this service, including, *inter alia*, (i) that it amounts to an infringement of the internet user's privacy, as it allows the advertisers to 'go after' that person on the basis of their past internet history, and (ii) that it misleads internet users that are not aware of the fact that the ads they see are the result of such a service and are not a result of the advertiser's mass marketing efforts. However, due to the fact that the plaintiff sought to have his lawsuit recognised as a class action, the only relevant cause of action was the plaintiff's argument that such a service amounts to sending unsolicited commercial advertisements to internet users, i.e., spamming.

As the Israeli legislation in respect of spamming limits the prohibition to certain methods of spamming, the court reviewed the only relevant method here - whether advertising on the basis of this service falls within the prohibition regarding sending unsolicited advertisements by way of an electronic message. An electronic message is defined in the relevant legislation as (i) a coded telecommunication message, (ii) which is transferred via the internet (iii) to an addressee or a group of addressees, (iv) that is capable of being saved and retrieved in a computational manner. The court agreed that the marketing tools used by Google fulfill the first and second components of the definition, and thus the fate of the lawsuit hinged on whether the third and fourth components are fulfilled.

The plaintiff argued that ads and banners that are presented to an

internet user on the basis of the service provided by Google do meet the third and fourth components of an electronic message. The main contention of the plaintiff was that while 'regular' ads and banners that are presented to all internet users are OK, this is not the case in respect of ads and banners that are presented to internet users on the basis of this Google service; due to the fact that such ads and banners, as they are presented to a specific user, are presented specifically to that person - and hence this is a message to an addressee and not to the public at large.

The defendants (Google Inc. and Google Ireland Limited) argued that the court has to differentiate between ads sent to the internet user's private electronic area and those that are sent to the internet user's public electronic area, and that only ads sent to the first should be subject to the legal arrangement regarding spam. In this case, the defendants contended that the ads at issue were not sent to the plaintiff's private electronic area - but rather to the public electronic area, as they were placed on websites that were available to the public at large.

The Court's ruling

On 18 September 2014, the Central District Court denied the plaintiff's motion in the above mentioned manner, ruling that advertisements posted on websites as the result of the use of the services provided by Google do not constitute spam according to Israeli law.

The court started by noting that if the definition of an electronic message is taken to the extreme, then practically all online ads will be considered spam under Israeli legislation. This, the court reasoned, will bring the downfall of a major portion of internet based online business models. Therefore,

the court went on and noted that it is required to interpret the definition of an electronic message in a manner that will not bring about such a result. This requires interpreting this definition according to the legislative purpose that is at the core of the prohibition. According to the court, the legislative purpose of the anti-spam legislation was not to protect internet users from any piece of advertising, but rather save them the harassment that comes with dealing with all ads that are sent to these internet users.

The court went further and reasoned that the defining factor of the interpretation of an electronic message is not whether the relevant message is sent to a pre-defined group of internet users, and that this factor, on its own, is not sufficient for a message to be considered an electronic message; thus, the court rejected the argument put forward by the plaintiff. In parallel, the court rejected the argument of the defendants, that one has to differentiate between public and private spheres for the purpose of interpreting the definition of an electronic message, noting, *inter alia*, that this argument has no basis in the wording of the law and that it is doubtful whether such differentiation is relevant when the issue at hand is spam (the court provided an example regarding Facebook postings).

The court accepted the argument both parties raised, according to which the definition of an electronic message needs to be interpreted in a manner in which it will not apply to any advertisement appearing on a website. The basis for this is, according to the court, that rejecting this argument will cause serious harm to acceptable online business models or will lead to ignoring the anti-spam legislation. Further, setting legal

rules that could affect the manner in which the internet develops should be done cautiously, since we do not know what effect these rules will have on the internet.

So how should one interpret the definition of an electronic message? The court found that email communications lie at the core of this definition, due to the fact that an advertisement sent to an email system not only presents itself to the internet user against his or her will, but also requires him or her to suffer additional cost and effort as part of his or her email management. This additional cost, according to the court, justifies the prohibition on sending unsolicited commercial emails.

The court reasoned that posting advertisements on websites while using the services provided by Google, does not amount to sending emails; the advertisements do not impose on the internet user the burden of handling them after he or she leaves the website on which the ads appear, as they disappear when the internet user leaves that website. Therefore, according to the court, these ads do not burden the internet users in the manner in which a burden is placed on internet users that receive unsolicited commercial emails to their inboxes, and therefore these ads are not to be considered electronic messages. As such, the services provided by the defendants do not take part in spamming according to Israeli law.

In light of the above, the judge rejected the request of the plaintiff to classify the lawsuit as a class action.

Analysis

Looking into the factual and legal situation, it seems that the court found the golden path to walk on in respect of the matter at hand. The court managed to interpret the definition of an electronic message

in a manner which unravels the justification that lies at the core of this prohibition; i.e., prohibiting the communications that, once sent to internet users, burden them with additional costs that are associated with the need to 'handle' such communications. In the matter at hand, the court limited its analysis to email communications, and found that as the law is intended to prohibit sending unsolicited commercial communications to email systems, such prohibition is not applicable to online advertisements and banners that appear on various websites, even if those are presented to the internet user on the basis of an analysis of his or her past internet history.

I have no doubt that this analysis is correct, and that where the internet user suffers no cost and/or burden as a result of online communications in the form of online advertisements, the user should not be considered as receiving spam, nor should these ads be considered spam.

Nowadays, it is easy to lose track of the reasoning and justifications at the basis of legal rules that apply to the information society, especially given that technological developments outpace legislation. The bigger picture, which takes into account the development of the internet and all of the e-commerce activities that are such an important part of 21st century society, has to always be part of the interpretation and construction of the applicable legislation. This recent ruling of the District Court presents itself as an excellent example of this concept and, hopefully, will be a sign and omen for future judgments in similar matters.

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