

2001

Unfair Competition Online and the European Electronic Commerce Directive

Marika Vermeer

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/annlsurvey>



Part of the [International Trade Law Commons](#)

Recommended Citation

Vermeer, Marika (2001) "Unfair Competition Online and the European Electronic Commerce Directive," *Annual Survey of International & Comparative Law*: Vol. 7: Iss. 1, Article 7.

Available at: <http://digitalcommons.law.ggu.edu/annlsurvey/vol7/iss1/7>

This Article is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Annual Survey of International & Comparative Law by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

UNFAIR COMPETITION ONLINE AND THE EUROPEAN ELECTRONIC COMMERCE DIRECTIVE

MARIKE VERMEER*

I. INTRODUCTION

The Internet offers companies, including small businesses, the chance to operate in a worldwide market. Recognition of the Internet as a commercial communication medium has stimulated many companies to experiment with new ways of marketing through web sites and e-mail.

Let us take as a sample case a small Italian olive oil company selling its olive oil through the Internet to the entire world, and let us assume that this company is called Carbonara Olive Oil SpA. This article discusses how Carbonara can use the Internet in its search for new customers, and how that use might constitute an act of unfair competition in some jurisdictions. In such a situation, how will the problems of private international law affect the resulting litigation? This article focuses on the question of the applicable law, and does so solely from a European point of view. The reasons for this viewpoint are the company is established in Italy, the recent European Directive for electronic commerce,¹ and the author's background is European. The article also considers whether the European Directive brings about the necessary solutions or creates further uncertainty.

* Research Fellow at the University of Utrecht's Molengraaff Institute for Private Law, The Netherlands.

1. Council Directive 2000/31 on Certain Legal Aspects of Electronic Commerce in the Internal Market, 2000 O.J. (L 178/1).

II. UNFAIR USE OF THE INTERNET?

By using the Internet as a marketing instrument, our small Italian olive oil company may not only find new markets to sell its olive oil, it may also encounter new competitors and new rules with which to comply. Both online advertising and marketing can give rise to questions with respect to unfair competition. The traditional forms of unfair competition, such as misleading advertising, disparagement, and causing confusion, may of course also be conducted on the Internet. Companies may make misleading statements on their web sites. But the Internet also offers other possibilities for unfair use which cannot be conducted in the "real world," namely, the use of hyperlinks and metatags.

Let us begin with e-mail. Carbonara may send advertisements to its customers by e-mail. It can do so by compiling a mailing list that includes the e-mail addresses of its customers, by means of which Carbonara can inform them about special offers. The mailing list can contain many people. An acceptable method of sending commercial e-mails may be the so-called "opt-in e-mail," which is the sending of commercial e-mails to Internet users who have previously indicated they do not object to any future commercial e-mails on a certain subject. But Carbonara can also use the services of companies specializing in direct marketing activities that sell complete mailing lists. In this way Carbonara can also reach potential customers with its advertisements without much effort and without entailing considerable cost. Sending such unsolicited e-mails containing advertisements to Internet users is usually called "spamming." The use of e-mail for spamming activities is generally considered to be an undesirable practice against the rules of "netiquette," and may even disrupt the smooth functioning of interactive networks.

Most commercial developments, however, take place on the World Wide Web, and webvertising is a booming business. Therefore, Carbonara will want to advertise its products on the Web. It may do so in two ways. First, it may advertise on its own web site. The web site may thereby serve as a product catalogue or an interactive medium between company and client. Second, Carbonara may advertise on the sites of others by using the so-called banners (the bars or buttons usually at the top corners of a web site). Banners serve as a signboard for the actual web site of the company. In banners usually only the name or logo of the company or a very brief message is displayed whereby a hyperlink is created to the site of the company itself.

This brings us to hyperlinks. Hyperlinks make it possible to “surf” from one web site to another by merely clicking on an underlined word or icon. Carbonara may include hyperlinks in its web site linking it to the sites of others, or others may link their web sites to Carbonara’s. The general conviction among Internet users is that no consent is needed for making a hyperlink from one web site to another. Although no consent is needed, it often happens that web site owners may conclude a linking agreement to avoid any problems. Unfair competition could be such a problem.

In general, there are three categories of consequences of hyperlinking that might have unfair competition aspects. The first is unwelcome association. Carbonara would not be very pleased to learn that its web site is linked to a web site containing, for example, pornographic material, or to a web page including information about the use of child labor in olive groves. Carbonara’s reputation could be harmed by such an association. The second consequence of hyperlinking is that an unfair use of the content of the linked site may be made. For example, Carbonara’s direct competitor, the Spanish company Castagnetta Oil, advertises its olive oil on its web site, thereby stating the price and including the sentence “elsewhere more expensive,” whereby the word elsewhere is underlined and forms a hyperlink to the web site of Carbonara. This is a form of comparative advertising, and is only allowed under very strict rules within the European Union.²

The third possible unfair competition aspect of hyperlinking is a scenario in which a hyperlink to another web site suggests a certain -- economic or administrative -- affiliation between the owners of the sites. For example, a Dutch olive oil company called Olijfje BV, which produces an olive oil of inferior quality because of the lack of sunshine in the Netherlands, which refers in its web site to Carbonara and creates a hyperlink thereto, would suggest that Olijfje and Carbonara are somehow affiliated. Olijfje can do this, for example, by having a similar sort of web site as Carbonara, using the same background colors, fonts, and other such similarities.

Aside from having a web site, Carbonara also wants to be found quickly on the WWW. It does not want to rely on people typing in their exact addresses, but also wishes to be found by search engines. In order to facilitate the search by a search engine, Carbonara’s web site contains so-

2. Council Directive 97/55 Amending Directive 84/450/EEC Concerning Misleading Advertising so as to Include Comparative Advertising, 1997 O.J. (L 290/18).

called "metatags," specific pieces of information about the web site and its content which are invisible to the viewer but visible to search engines. The owners of web sites are free to choose the amount and type of keywords to be included in the metatags. Carbonara could therefore opt for words like "olive," "oil," "foodstuffs," or "Italy." Yet in order to be found by even more people, it can also include words like "sex," which is currently the word most often used in metatags, or any other word that has nothing to do with olive oil. Carbonara can also include the name of Castagnetta in its metatags, so that people who are looking for its competitor will also see the web site of Carbonara in the hit list of the search engine.

As often occurs, well-known trademarks are used in metatags. A claim based on trademark law will in most cases be the most appropriate way to prohibit such use. However, aside from the pure trademark issues, aspects of unfair competition may also arise. Castagnetta could argue that the manner in which Carbonara takes advantage of its goodwill or reputation is improper and therefore unlawful. This may be even more so when the mark or name is used as a metatag for sites of a questionable nature, when it creates unnecessary confusion, or when potential customers of a web site are systematically drawn away from the competitor's site.

III. THE EUROPEAN DIRECTIVE

Since Carbonara is an Italian company, it will most likely come across the European Electronic Commerce Directive, which has recently been adopted by the European Parliament and includes rules for online marketing and advertising.

A proposal for a Directive was made by the Commission in December of 1998. The Directive was adopted on May 4, 2000, which means that the decision-making process with respect to this piece of legislation has taken place with unprecedented haste. The Directive has to be implemented into national legislation in each of the EU member states before January 17, 2002. The national laws of the member states will then be harmonized on this subject, but national law will still govern.

The objective of the European Electronic Commerce Directive is to ensure the proper functioning of the internal market, particularly the free

movement of “Information Society services”³ between the Member States of the European Union. The Directive aims to harmonize some general information requirements for service providers, the rules on commercial communications, the concluding of electronic contracts, and the liability of Internet intermediaries. The explanatory memorandum to the Commission Proposal states:

. . . national rules on unfair competition may have a very restrictive effect as their interpretation may result in prohibitions or restrictions on certain commercial practices, such as promotional offers or rebates and discounts. The effect is particularly serious in the case of new and innovative marketing practices and in view of the need to employ them on the Internet to make the business stand out among the other services available.

The Directive harmonizes some rules in the field of unfair competition, namely the rules on commercial communication. This is a step further in the harmonization process of unfair competition law in Europe, which has proved to be quite a struggle. Only the laws on misleading and comparative advertising⁴ have been harmonized thus far. Although the rules on commercial communications in the Directive are meant for electronic commerce purposes, they are in some cases worded so generally that they may also be applied in “off-line” situations. The Directive defines commercial communications in Article 2(f) as:

any form of communication designed to promote, directly or indirectly, the goods, services or image of a company, organization or person pursuing a commercial, industrial or craft activity or exercising a regulated profession.

3. Defined in article 2 of the Directive as: “Information Society services within the meaning of article 1(2) of Directive 98/34/EC of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations as amended by Directive 98/48/EC of 20 July 1998.” Information Society services are defined in Directive 98/34/EC, 1998 OJ (L 217/18) as: “any Information Society service, that is to say, any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.” In recital (18) of the Common Position it is stated that Information Society services are not solely restricted to services giving rise to on-line contracting but extends also to services such as online information or commercial communications.

4. Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising, 1984 O.J. (L 250/17), 19.9.1984; Directive 97/55/EC of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising, 1997 O.J. (L 290/18), 23.10.1997.

Article 2(f) specifically excludes the following from the definition of commercial communications: (1) information allowing direct access to the activity of the company, organization or person, in particular a domain name or an e-mail address, and (2) communications relating to the goods, services or image of the company, organization or person compiled in an independent manner, in particular without financial consideration.⁵ In the commentary to the individual articles, as attached to the Commission Proposal, it is more concretely indicated that the following cases are not considered as commercial communications within the meaning of the Directive: (a) the mere ownership of a site, (b) the provision of information which cannot be characterized 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.⁶ Domain name grabbing, hyperlinking (except for hyperlinks to financially related web sites) and metatagging do not therefore fall within the scope of the Directive. Webvertising and spamming can be considered as forms of commercial communication within the meaning of the Directive.

Article 6 of the Directive includes the rules for electronic advertising in general and refers to the Distance Selling Directive.⁷ Anyone making electronic advertisements to promote its products or services must make clear that it concerns a commercial communication. This rule is specifically meant for commercial statements hidden in articles on web sites or web sites that are entirely sponsored by a certain company.⁸ This rule is very general and not a typical "electronic commerce rule." It is applied to traditional media as well.⁹ Another requirement of Article 6 is that it should be clear who is making the commercial communication (or on behalf of whom). This also seems to be a rule which is not specifically meant for an electronic environment. But in the commentary on the individual articles, as attached to the Commission Proposal, the use of banners and hyperlinks, which are tools used exclusively on the Internet, are mentioned. A banner, indicating the name of the person making the communication, on a web site is regarded as sufficient to meet this requirement. According to the commentary on the individual

5. See also the follow-up to the Green Paper on Commercial Communications in the Internal Market, COM(98)121 final, 4.3.1998.

6. Commentary to the individual articles, Annex to the Commission Proposal, p. 23.

7. Directive 97/7/EC of the European Parliament and the Council on the protection of consumers in respect of distance contracts, 1997 O.J. (L 144/19).

8. See explanatory notes to the Commission Proposal, p. 25.

9. Compare article 10 of the Dutch Advertising Code which includes the rule that advertisements should be recognizable as such by lay-out, presentation content or otherwise.

articles it is not strictly necessary to mention the name in the banner itself. A hyperlink in the banner linking to information containing the identification of the person making the commercial communication would also be sufficient. Hyperlinks can also be used in case a web site is sponsored by a company. It is mentioned in the commentary notes that an icon or logo with a hyperlink to a page containing the information who is financing the site and which is visible on all the site's pages would be sufficient.¹⁰

The last two sections of Article 6 include rules on promotional offers, such as discounts, premiums and gifts (para. c) and promotional competition and games (para. d). These promotional activities, where allowed by the Member State in which the company is established, should be clearly identifiable as such and the conditions should be easily accessible and be presented accurately and unequivocally. This means that such promotional actions are allowed as long as they are allowed under the law of the place of the establishment of the company *and* if they are clearly identifiable as such.

Article 7 of the Directive states that unsolicited commercial communications by electronic mail must be clearly and unambiguously identifiable as such as soon as they are received by the recipient. This could mean that the sender of such mail must indicate in the mail itself or in the header of the mail that it concerns an advertisement. Member States would also be obliged to ensure that "service providers undertaking unsolicited commercial communications by e-mail consult regularly and respect the opt-out registers in which natural persons not wishing to receive such commercial communications can register themselves." This article, however, leaves unconsidered the often applied practice that the sender of the spam mail does not identify himself, or leaves a fake return address, so that recipients cannot complain by sending a return mail.¹¹

One of the most discussed articles of the Directive is article 3, which contains the so-called "country of origin rule." This Article states that: "services provided by an information provider will have to comply with the national provisions applicable in the member state of establishment of the information provider." This means that the Member State where

10. Commentary to the individual articles, Annex to the Commission Proposal, p. 25.

11. Compare article 2 of the ICC Revised Guidelines on Advertising and Marketing on the Internet, 2 April 1998 (visited July 23, 1999) <www.iccwbo.org/Commissions/Marketing/Internet_Guidelines.html>, whereby such identity disclosure is prescribed.

the information provider is established should supervise its activities. The web site and the electronic services of Carbonara will therefore have to comply with Italian law. Castagnetta's web site and electronic services will have to comply with Spanish law. Member States are not allowed to impose restrictions on the freedom to provide information services originating in another Member State. Exemptions from this prohibition are provided, and refer to national rules of public policy, health and security, and consumer protection. The Directive also includes rules on electronic contracts, the liability of intermediaries, the principle of establishment and information requirements, and cooperation between Member States.

IV. ISSUES OF PRIVATE INTERNATIONAL LAW

Use of the Internet may lead to disputes regarding unfair competition, and the Directive is a first step toward harmonizing rules in this area. However, the Directive also creates confusion in the areas of private international law and conflict of laws, which will be discussed in more detail below.

Let me first say something general about private international law issues of unfair competition on the Internet. Considering the global character of the Internet, it will often be the case that in a dispute resulting from the commercial use of the Internet, the parties are established in different countries, as in the two Carbonara disputes mentioned above. The effects of actions occurring through the Internet may be felt in multiple countries. For example, Castagnetta makes defamatory statements about Carbonara on its web site. In such international situations, the following questions of private international law or conflict of laws will arise: (a) which court is competent to decide the case, (b) which law should be applied in the particular case, and (c) how can the judgment be enforced in other countries? Although the first and last questions also pose many problems for the Internet, I will only discuss the question of the applicable law here.

Since unfair competition is a species of tort law in many countries, many national conflict rules will point to the *lex loci delicti*, the place of the wrong. This principle is applied in most of Europe. In several European countries, such as Germany, Austria, Switzerland, and the Netherlands, the so-called "market rule" is applied as a conflict rule in unfair competition matters. The market rule means that the law of the country

of the market where the relations between the competitors are affected applies.

Problems may arise from applying conflict rules such as the *lex loci delicti* and the market rule to disputes resulting from the Internet. The place of the wrong or the relevant market may not often be clear in matters of unfair competition conducted through the Internet since there is no geographical connection. A web site may be viewed by users all over the world, and e-mails may be sent to anyone in the world. Statements on web sites or sent through e-mail may therefore confuse consumers all over the world or harm the reputation of the competitor in different countries. It might therefore be difficult to establish which market is influenced by relations between the competitors, or what is the exact place of the wrong. This is the classic example of the choice-of-law problem in multistate torts, which has always been a very difficult issue. The result is often that multiple national laws require application in a single case. The Internet makes it even more likely that such multistate torts will occur, and that an undesirable number of national laws should be applied in a single case.

Let us take a closer look at the market rule. The criteria from Dutch and German cross-border advertising case law which determines relevant law could also be applied to web sites. Factors like language, currency of prices, conditions of sale, and disclaimers may point to a certain country. If Carbonara's web site is in Italian, it may be aimed primarily at Italy and Switzerland. However, use of English on the Carbonara web site does not necessarily imply that English or American law is applicable. The same applies to the currency used in the web site. The use of the Italian lira may generally refer to Italy, but the fact that prices are stated in US dollars does not necessarily refer only to the United States. The introduction of the Euro as a common European currency will also diminish the effect of this connecting factor. The nature of the offered goods or services may also be relevant. It is obvious that the web site of a Chinese takeaway, a bakery, or a bicycle repair shop are aimed at the country, or even the city of their establishment.

However, although these criteria may serve as guidelines, it is undeniable that the majority of the web sites on the WWW are not aimed at a specific country, are in the English language, state their prices in US dollars, and deliver their goods or services either online or throughout the world. Examples are books sold through amazon.com or the information on cnn.com. If all competitors are serving a worldwide market, it may be almost impossible to determine the applicable law.

E-mail presents a different story. E-mails are specifically addressed to individuals. The company itself approaches the recipient, perhaps with a reference to its web site. 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. It may follow that if the e-mails are sent to a number of people in various countries, all those laws may apply separately.

One way or another, the result of the application of the market rule is that in some situations too many national laws require application. The conclusion is thus that the market rule is not an effective conflict rule for Internet issues. The market rule is not the only problem. Other jurisdictions applying other conflict rules (like the *lex loci delicti*, the application of the interest analysis method, or the method of the closest connection) have difficulties in determining the relevant law in multistate tort issues. Therefore, other conflict rules may become relevant for application in Internet unfair competition matters. At this stage, it is not possible to assess which conflict rule will provide the best alternative to the market rule in Internet matters. Further research is required to reveal the most efficient international "Internet conflict rule" for unfair competition matters. It is not possible to elaborate here on all potential alternative conflict rules, but I will mention a few.

One possibility is the application of the *lex fori*, meaning the law of the competent court. As it becomes more and more difficult to determine the relevant law, this may seem an easy option. But the other side of the coin is that this alternative may stimulate forum shopping, as the plaintiff may choose the court in the state which has the law most favorable to him.

Another possibility is the application of alternative connecting factors such as the place of establishment of the service provider or the location of the server. However, such solutions would stimulate the creation of Internet free havens, as persons trying to circumvent certain rules will use an Internet service provider in countries with less strict rules, or use a server located in such a country.

Then there is the country-of-origin rule. This rule is basically a conflict rule since it determines the applicable law as the law of the country where the products, services or, in an Internet context, the information originates. In an Internet context this could mean two things: (a) the place of origin is the place of establishment of the provider, or (b) the place of "upload," meaning where the information is put on the Internet.

The country-of-origin principle, as mentioned above, is included in article 3 of the European Directive for electronic commerce. The Directive has chosen the place of establishment of the information provider. However, in the Directive the country-of-origin rule is intended as a rule of national supervision and NOT as a conflict rule. Recital 7 of the Commission Proposal¹² states that the Directive “. . . does not aim to establish specific rules on private international law relating to conflicts of law or jurisdiction and is not a substitute for the relevant international conventions.” This recital is complemented in the text of the Common Position¹³ which adds that “. . . the provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide Information Society services as established in this Directive.”

The private international law issue was clearly a major problem for the drafters of the Directive. This is demonstrated by the fact that article 1 of the Directive, which determines its objective and scope, now includes in paragraph 4 the rule that the Directive “does not aim to establish additional rules on private international law nor does it deal with the jurisdiction of the Courts.” The intent of this paragraph was to eliminate the private international law question and to clarify that the country-of-origin rule is only intended as a rule of domestic supervision and not as a conflict rule.

But is it really as simple as that? It may be questioned whether the country-of-origin rule in the Directive, although not intended as such, practically *works* as a conflict rule. In this respect, the following example may illustrate whether the country-of-origin rule works as a conflict rule in the area of unfair competition. When a provider of information services complies with the rules of the country where he is established, he cannot be prevented from providing services under the rules of the country where his service is carried out or made use of, i.e. the country of reception. This means that the rules of the country of reception do not apply, but that the rules of the country of origin apply (with the exception of public policy rules as provided for in article 3, paragraph. 4 of the draft Directive). Let us say that company A, established in the Netherlands, has a web site which complies with Dutch law but is clearly aimed at the German market, and causes damage to a German competitor of company A. The German plaintiff may sue the Dutch defendant before the Dutch court on the basis of Article 2 of the

12. Commission Proposal, 1999 O.J. (C 30/4).

13. Council Common Position, 2000 O.J. (C 128/32).

Brussels Convention. The Dutch court should then apply its own national private international law rules and will, according to the market rule, apply German law. It should then be determined whether the actions of company A are lawful under German unfair competition law. If not, then there is a problem, because if the web site was already complying with Dutch law, it would be against the rules of the Directive and European law in general to determine that the web site is not allowed under foreign law. Application of foreign law would hinder the free movement of information services. The market rule would therefore become useless, because the web site in question already complies with the laws of the country of origin and cannot be affected by the laws of other member states.

Moreover, recital 23 of the draft Directive states that “. . . the provisions of the applicable law designated by the rules of private international law must not restrict the freedom to provide Information Society services.” Although foreign rules do not restrict the freedom to provide Information Society services as such, they have that effect because the national rules on unfair competition of the EU Member States differ considerably. Thus, there will always be differences in the determination of what kind of online advertising or online marketing can be considered unfair competition.

Also relevant is the fact that recital 22 mentions that “. . . Information Society services should be supervised at the source of the activity, in order to ensure an effective protection of public interests.” But the same recital also mentions that such Information Society services should in principle be subject to the law of the member state in which the information provider is established. Does this not imply that the country-of-origin rule means that the law of the member state of establishment is applicable? It follows that the private international law rules of the country of establishment of the provider of services, in this case the market rule, may conflict with the country-of-origin rule. The country-of-origin rule is not a “minimum rule,” whereby the providers need to comply with *at least* the laws of the country in which they are established. Rather, the Directive’s country-of-origin rule means that the laws of countries other than the country of establishment do not apply at all. It may be concluded that the country-of-origin rule *works* as a conflict rule since it determines the applicable law. This means that the market rule and the *lex loci delicti* will become meaningless as far as they concern webvertising and spamming, but that they can be applied to hyperlinking, metatagging, and domain grabbing issues, since these actions do not fall under the scope of the Directive.

Today, the *lex loci delicti* and the market rule are being applied by national courts to determine the relevant law in unfair competition disputes resulting from use of the Internet. It is clear that these conflict rules are ineffective in Internet disputes to determine the applicable law. On the basis of article 3 of the European Electronic Commerce Directive, the country-of-origin rule can be considered as an alternative conflict rule in Internet disputes. However, the question whether these national conflict rules will be or should be replaced by the country-of-origin rule remains unanswered.

