fieldfisher

# IP and new technologies

## New technologies, new questions

About downloading, streaming, linking,  adwording & meta-searching

# Copyright – illegal download (ACI ADAM C-435/12)

# Copyright – illegal download (ACI ADAM C-435/12)

## Exclusive right

- Communication to the public (uploading / sharing)
- Reproduction (downloading)

## Download is a crime ?

- Not so sure, exception of “private copy”
- “Fair compensation” paid on blank carriers/devices

# Copyright – illegal download (ACI ADAM C-435/12)

– Factual context

- ACI ADAM distributes blank data media
- Stichting Thuiskopie sets the “fair compensation” (=Auvibel)
- ACI Adam started proceedings against Thuiskopie because the “fair compensation” is too high as it includes compensation for illegal download
- Lost in first instance and in appeal
- Hoge Raad asked questions…

# Copyright – illegal download (ACI ADAM C-435/12)

- CJEU 10 April 2014
  - The private copying exception does not "*address expressly the lawful or unlawful nature of the source from which a reprduction of the work may be made*" (point 29)
  - The "fair compensation" may not include copies made from "counterfeited or pirated" sources
  - BECAUSE
  - The private copying exception does not apply to copies made from unlawful sources
    - As any exception, it should be interpreted "*strictly*" (point 23)
    - It would be "*detrimental to the functioning of the internal market*" (point 35)
    - It would "*encourage circulation of counterfeited and pirated works*" (point 39)
    - It would "*unreasonably prejudice copyright holders*" (point 40)

# Copyright – illegal download (ACI ADAM C-435/12)

## Consequences

- on the enforcement strategy ?
- on the Belgian fair compensation scheme (auvibel/reprobel)?
  - AG  Advocate General (AG) Cruz Villalón  in Case C-463/12 Copydan Båndkopi (yesterday)
  - Completes the edifice of C-467/08 Padawan, Case C-462/09 Thuiskopie, Case C-277/10 Luksan, Joined Case C-457/11 to C-460/11 VG Wort, Case C-521/11 Amazon
  - and... HP Belgium v. Reprobel Case C-572/13 (regarding the Royal Decree of 30 October 1997)

# Copyright – Communication to the public

## The law

- A communication of a protected work
- To the public

## Communication

- To be interpreted (very) **broadly** : any transmission of the protected works, irrespective of the technical means or process used
- (The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication – Recital 27 of Dir. 2001/29)

# Copyright – Communication to the public

## To the public

- an indeterminate number of potential listeners/viewers, and, in addition, implies a **fairly large number of persons;**
- in case of re-transmissions, the public must be **new** public : a public which was not taken into account by the authors of the protected works when they authorised their use by the communication to the original public

# Copyright – Communication to the public

## ITV Broadcasting, 7 March 2013 (C-607/11)

- TV Catchup : permits its users to receive, via the Internet :
  - The UK programmes, while they are in the UK
  - To which they are already subscribers
- Security measures in place
- Advertisement before and on top («in-skin advertising»)

# Copyright – Communication to the public

## ITV Broadcasting, 7 March 2013 (C-607/11)

- Communication ?
  - Yes, definitely
- To the public ?
  - Yes : aimed at all persons in the UK who have a TV subscription
  - Not relevant that the public is not new : No need to be new because it is not a retransmission but a new transmission (by a new method – internet v. terrestrial)
- AUTHORIZATION NEEDED  for all transmissions !

# Copyright – Communication to the public

## Svensson 13 February 2014 (C-466/12)

- Retriever Sverige: offers a list of clickable links to newsarticles available for free on the Göteborgs-Posten
- Dispute of whether it is apparent to the user that they are redirected to the newspaper's website

# Copyright – Communication to the public

## Svensson 13 February 2014 (C-466/12)

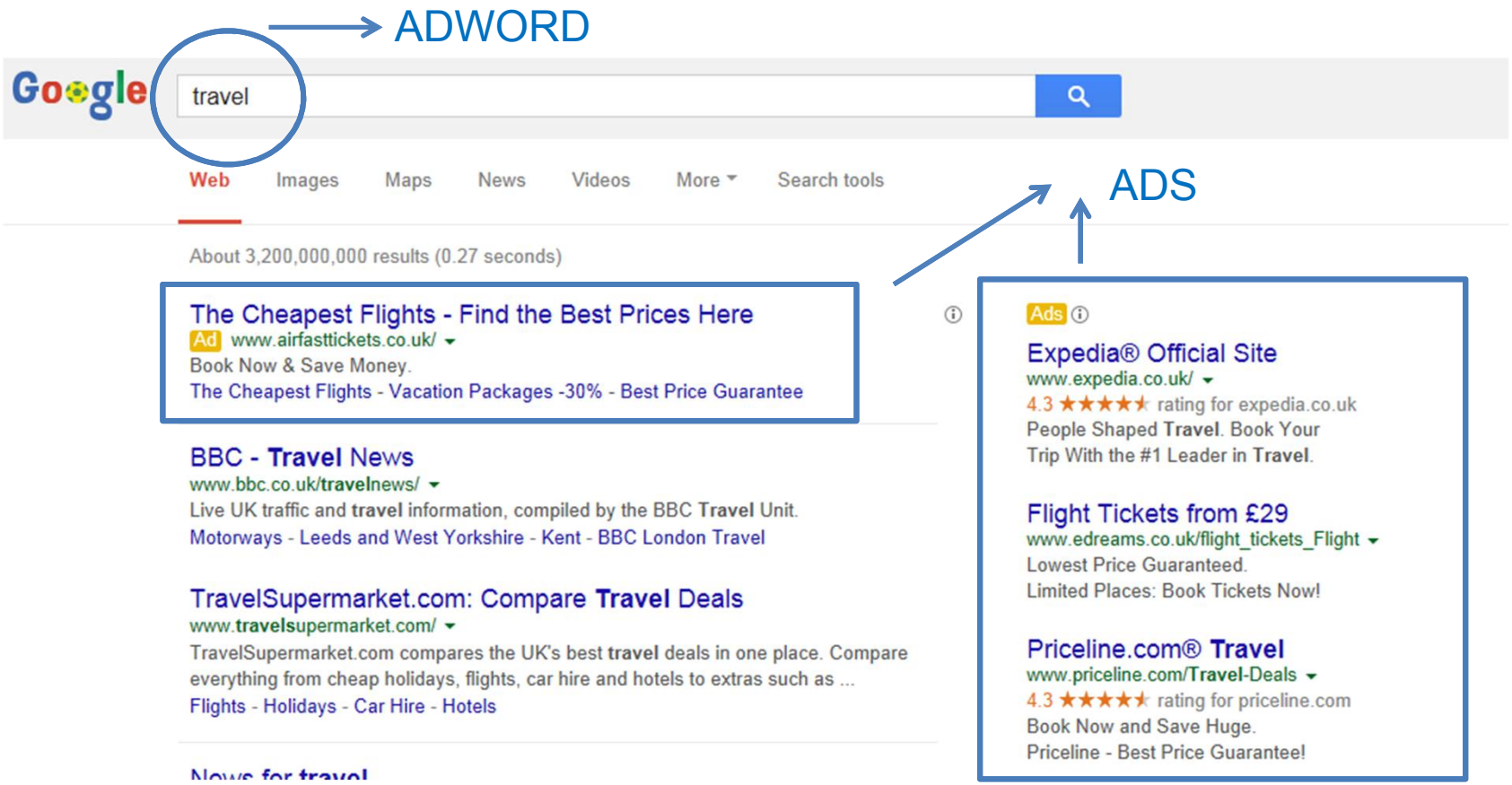
- Communication ?
  - YES (!) : because it offers users of retriever.se «direct access» to the work (point 18)
- To the public ?
  - Yes because an indeterminate and fairly large number of recepients
  - No authorization needed because it is NOT a new public («the public targeted by the initial communication consisted of all Interner users», point 26)
  - The situation would be different if the linking site appeared to circumvent restrictions (e.g. subscribers only)

# Copyright – Communication to the public

## Svensson 13 February 2014 (C-466/12)

- Strange decision to broaden the concept of communication to the public (where the link does not contain the work)
- Consequences :
- TV Catchup would have been licit if it only linked to a streaming feed…
- For those who link, linking is more risky :
    - linking to illegal content becomes an unlawful communication to the public (the public would be clearly new)
- For those who are linked to, easy to prevent linking :
    - Restrict the access to your content to a defined public (subscription)
    - Value of the terms of use ?

# Trademarks – “Adwording”



# Trademarks – “Adwording”

## The current law

- C-236/08 to C-238/08 Google, 2010-03-23
- C-278/08 Die BergSpechte, 2010-03-25
- C-558/08 Portakabin, 2010-07-08
- C-323/09 Interflora, 2011-09-22

- Google is safe :
  - Google is not using the mark
  - Google is hosting the advertisement (as long as it does not play an *active role* in the drafting of the commercial message which accompanies the advertising link or in the establishment or selection of keywords)

# Trademarks – “Adwording”

## The current law

- The advertiser must be cautious :
  - OK to use advertisements displayed on the basis of keywords corresponding to a trade mark
  - BUT the proprietor of a trade mark is entitled to prohibit the use of an Adword identical to its mark for advertising goods or services to those for which that mark is registered **if** “*the advertisement does not enable an average internet user, or enables that user only with difficulty, to ascertain whether the goods or services referred to therein originate from the proprietor of the trade mark or an undertaking economically connected to it or, on the contrary, originate from a third party*”

# Trademarks – “Adwording”

## Applying the law

- Cass Fr 25 September 2012 (Auto IES)
  - Adword = the trademarks «ies» and «autoies»
  - Identical goods
  - OK because :
  - *« que les annonces, qui sont classées sous la rubrique ‘liens commerciaux’ et qui s’affichent sur une colonne nettement séparée de celle afférente aux résultats naturels de la recherche effectuée, avec ces mots clés, sur le moteur de recherche de Google, comportent des messages qui, en eux-mêmes, se limitent à désigner le produit promu en des termes génériques ou à promettre des remises, sans référence implicite ou explicite aux marques, et sont chacune suivies de l’indication, en couleur, d’un nom de domaine ne présentant aucun rattachement avec la société Auto IES ;*
  - *que la cour d’appel, qui en a déduit que chaque annonce était suffisamment précise pour permettre à un internaute moyen de savoir que les produits ou services visés par ces annonces ne provenaient pas de la société Auto IES ou d’une entreprise qui lui était liée économiquement mais, au contraire, d’un tiers par rapport au titulaire des marques »*

# Trademarks – “Adwording”

## Applying the law

- HvB Gent 19 May 2014 (Sleutels Decabooter)
  - Adword = trade name «Sleutels Decabooter»
  - Identical goods
  - OK because :

Door de gebruikte adwords wordt geen afbreuk gedaan aan het onderscheidend karakter van de handelsbenaming van de bvba Sleutels Decabooter. Het publiek kan haar nog steeds identificeren. De adwords zelf zijn niet zichtbaar voor het publiek. Eens de zoekende potentiële klant na het intikken van de zoektermen “Decabooter Kortrijk”, “Decabooter” en/of “sleutels Decabooter” op de site van Google komt, ziet hij of zij advertenties bovenaan een lijst van sites. In de advertentie van “cyp de slotenmaker” is geen enkele referentie naar de bvba Sleutels Decabooter of haar diensten. Op het blad met referenties kan zonder meer het onderscheid gemaakt worden tussen de beide partijen en hun ondernemingen.

# Trademarks – “Adwording”

## Applying the law

- Approaches are much too relaxed
- President of the Court of The Hague, 18 April 2013 (*X B.V./Practicomfort B.V.)*
- Adword = trademark " Otolift "

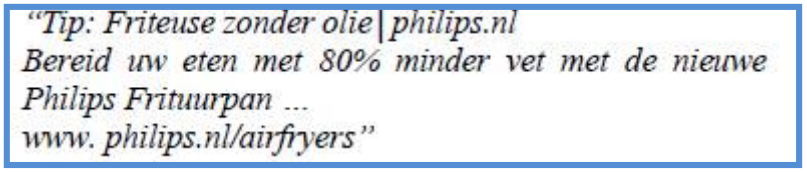
Traplift kopen – Traplift.nl
www.traplift.nl/
Tip: Tijdelijk 10% korting op alle Traplift modellen uit 2012!
Traplift Modellen – Geef mij advies – Vrijblijvende offerte – Brochure Aanvragen

4.8. X heeft er terecht op gewezen dat het voor de gemiddelde internetgebruiker onmogelijk of moeilijk is om te weten of de trapliften waarop de tweede AdWord-advertentie betrekking heeft, afkomstig zijn van X of een economisch met haar verbonden onderneming, dan wel, integendeel een derde. De tekst van de advertentie bevat immers slechts generieke aanduidingen van trapliften, die kunnen duiden op trapliften van zowel X als trapliften van derden. De advertentie maakt de internetgebruiker ook op geen enkele andere manier duidelijk dat Practicomfort geen trapliften van X verhandelt, maar daarvoor een alternatief biedt in de vorm van trapliften van derden. Door een advertentie die dermate vaag blijft over de herkomst van de aangeboden trapliften te laten verschijnen na invoering van het AdWord “otolift” zou de gemiddelde internetgebruiker kunnen menen dat de aangeboden trapliften afkomstig zijn van X of een aan haar gelieerde onderneming. Daaruit volgt dat de herkomstaanduidingsfunctie van het merk OTOLIFT in het geding is.

# Trademarks – “Adwording”

## Applying the law

- Court of first instance of The Hague, 23 January 2013 (SEB/Philips):
- Adword = "Tefal Actifry"




- *“Aangezien de normaal geïnformeerde en redelijk oplettende internetgebruiker de waren als afkomstig van een ander dan SEB c.s., i.c. Philips c.s., kan identificeren, is er sprake van het aanbieden van een alternatief en zal hij die waren niet met SEB c.s. in verband brengen, zodat er al om die reden geen afbreuk aan de merken van SEB c.s. kan worden gedaan.”*

# Databases – “Meta Search Engine”

## The law – Sui generis right (Dir. 96/9)

- The maker of a database
    - which shows that there has been qualitatively and/or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents
- may prevent
    - extraction and/or re-utilization
    - of the whole or of a substantial part, evaluated qualitatively and/or quantitatively, of the contents of that database."

# Databases – “Meta Search Engine”

## CJEU Innoweb 19 December 2013 (C-202/12)

- Innoweb offers, through www.gaspedaal.nl, a “meta search engine” for vehicles listings
- Innoweb “searches” other vehicles listings sites, including www.autotracks.nl
- The user types its search and the engine tranlates the query into the format required for autotracks.nl search engine
- Does this constitute the re-utilization of a substantial part (even if the information has not been “extracted”/copied)?

# Databases – “Meta Search Engine”

## CJEU Innoweb 19 December 2013 (C-202/12)

- YES…
  - Not just providing a link to the database
  - Not just a “consultation” of the database

  - Offers the same advantages as the database itself
  - Parasitical competiting product without copying the information
  - Risk that the database maker will lose income