

FINDINGS AND RULINGS ON APPEAL¹**16 September 2015****City of Moscow**

Judicial Collegium for Civil Cases of the Moscow City Court, composed of the Presiding Judge, M. V. Strogonov,
Judges M. M. Morgasova and M. A. Federyakina,

In the presence of Secretary S. Sh. Samedov,

Having heard in an open court hearing, pursuant to the report of Judge M. V. Strogonov, the civil case on appeal and supplemental appeal of A. L. Burkov from the judgment of the Zamoskvoretsk District Court of 21 April 2015, adjudging as follows:

The complaint of A. L. Burkov vs. Google LLC² seeking to vindicate his Privilege-right to personal privacy and privacy of correspondence and award of compensation for moral harm, is denied.

the judicial collegium

RULES:

A. L. Burkov submitted a complaint in court against Google LLC requesting that the Defendant be enjoined from reading his personal correspondence and be assessed compensation for moral damage in the amount of _____ Rubles. As grounds for his claims, the plaintiff alleged that he is a user of an electronic mail box under the address “ ****@gmail.com”, and, while reading his personal correspondence on 21.02.2014, discovered that the advertisements embedded in a message correspond to the content of the Plaintiff’s electronic correspondence, which violates his constitutional right to personal privacy and privacy of correspondence.

Plaintiff A. L. Burkov appeared before the court of the first instance and submitted full support for his claims, demonstrating that the actions of the Defendant in scanning personal correspondence and placement of advertisements on the basis that correspondence are unlawful and violate the Plaintiff’s rights.

The representative of Defendant Google LLC, A.A. Zagorodnaya, denied the claims in the court of first instance, arguing that they were groundless. In her written

¹ Translated by Natasha Lisman from the text posted on the Russian Court’s website, <http://www.mos-gorsud.ru/inf/infa/ga/>.

² Translator’s note: Google LLC is a Russian limited liability company, called in Russian ООО «Гугл».

objections, Defendant's representative asserted that Google LLC is not a proper defendant in the dispute because the owner of the domain name and the electronic mail service is *****³, thus it is that entity that is the party providing the services at issue in accordance with the Conditions of the use of Google. At the hearing Defendant's representative also explained that Defendant Google LLC engages in advertising activity and provides services for the sale of advertising space on web sites and placement of advertisements on the basis of contractual agreements.

The court rendered the above-quoted judgment, which the Plaintiff A. L. Burkov seeks to be vacated on the grounds presented in his appeal and the supplementations to his appeal.

Having reviewed the case record and heard the arguments of Plaintiff A. L. Burkov and objections of Defendant Google LLC's representatives under a power of attorney, V. B. Naumov and A. A. Zagorodnaya, and having considered the arguments presented in the appeal of Plaintiff A. L. Burkov and the supplementations to his appeal, the judicial collegium concludes that the decision of the court of first instance must be vacated and a new decision entered in accordance with part 1 of Article 330 of the Civil Procedural Code of the Russian Federation because the court of first instance incorrectly determined the circumstances relevant to the case and its conclusions are not in accordance with the circumstances of the case.

As was explained by the Plenum of the Supreme Court of the Russian Federation in point 2 of the Decision of 19.12.2003 No. 23 "On judicial decisions," a decision is lawful only if it is rendered with exact observance of the standards of procedural law and in full accordance with the standards of the substantive law that are applicable to a particular legal relationship, or, where necessary, is based on the application of analogy to a statute or the law (part 1 of Article 1, part 3 of Article 11 of the Civil Procedural Code of the Russian Federation).

However, the decision of the court of first instance does not meet the above-stated requirements.

Thus, the court of first instance found that on 21 February 2014, while reading his electronic mail in the mail box under the address ****@gmail.com, A. L. Burkov discovered that the advertising slogans embedded in the text of a letter correspond to the content of the correspondence. This fact was undisputed by the parties.

According to the print-out of a page from the service Whois, the owner of the domain name "gmail.com" is company *****. The free electronic mail service Gmail is offered by the American company ***** on the basis of an agreement – Conditions for the use of Google. The rights to the informational system AdWords ("service AdWords"), which secures the possibility of placing advertisements on the sites of

³ Translator's note: This name of this entity is redacted with asterisks in the original Russian text, and the entity is identified later in the text as "company *****" and as an American company.

company ***** and its partners, belong to company *****. This system is likewise managed by company *****.

Moreover, it is established that Google LLC is an independent juridical person created under the laws of the Russian Federation, one of whose areas of activity is advertising activity.

According to the explanations presented by Defendant's representative to the court of first instance, Google LLC enters into agreements in its own name with clients in Russia to provide advertising services. On the basis of such an agreement, the Defendant secures the placement of a client's advertisements utilizing the program AdWords. Moreover, society has no influence over the criteria for the display of advertising because the technical settings of the system AdWords are determined by company *****. Utilizing appropriate user settings, the client independently selects where to place advertising in the Google search system, the Gmail.com mail boxes, etc.

Resolving the dispute, the court of first instance came to the conclusion on the basis of the evidence presented in the case that Plaintiff's claims must be denied.

The court of first instance derived this conclusion from its view that by virtue of Article 56 of the Civil Code of the Russian Federation, the Plaintiff did not present to the court any proof that the Defendant engages in either securing the functioning of the mail service Gmail utilizing the domain name "gmail.com" belonging to company ***** , or in viewing personal correspondence in the mail service Gmail.

However, these conclusions of the court of first instance do not accord with the circumstances of the case.

The judicial collegium established that the free electronic mail service Gmail is provided by an American company on the basis of an agreement – Conditions for the use of the product Google.

In order to develop the market and promote its commercial product of Google in the territory of the Russian Federation, as well as to adapt this product for acceptance by local users, on 14 December 2005, ***** registered in accordance with the law of the Russian Federation Google LLC, whose founder at the present time is "*****", with a 100 % share of the authorized capital.

In addition, information contained on the official site of the commercial product Google indicates that the headquarters of ***** is located at the address ***** , while one of its worldwide affiliates is located in the Russian Federation, Google LLC ***** , which, in turn, is the named Defendant in the present complaint.

Moreover, Defendant Google LLC uses the logotype of the **product Google**, as well the technical tool set, which includes software belonging to *****; and, in addition,

carries out all of its activities in accordance with corporate policies of *****, which in turn is confirmed by the conditions for the provision of advertising services posted in the public domain on the site of the product Google.

Pursuant to Par. 3, point 1 of Article 2 of the Civil Code of the Russian Federation, “entrepreneurial activity” is recognized as independent activity conducted at one’s own risk, directed to systematic gain of profit from the use of property, sale of goods, execution of works or provision of services by persons registered in that capacity under a procedure established by law.

According to the information contained in the single state registry of juridical persons, Google LLC’s main area of activity is advertising. Besides this, again according to the information in the registry, the Defendant also performs additional activities, such as: consulting on matters of commercial activity and management, which in turn evidences the adoption of decisions for the promotion of the commercial product belonging to ***** and its adaptation for users in the Russian Federation based on their demands and clients’ needs; as well as investigation of market conditions, namely: systematic and objective gathering and analysis of data conducted on the territorial bases by Google LLC concerning the market segment under the control of the interests of *****, and concerning competitors and the entrepreneurial climate as a whole, all with the goal of achieving deeper understanding.

Google LLC enters into agreements in its own name with clients in the Russian Federation for the provision of advertising services, in accordance with the conditions for the provision of advertising services. On the basis of such an agreement, the Defendant secures the placement of a client’s advertisements utilizing one of the AdWords programs.

According to the policy of the confidentiality of the Google product posted on the official site in the section entitled “How we use the data we gather”: “... Our systems automatically analyze your content (including electronic messages) in order to offer functions useful to you. These can be results of searches selected for you, relevant advertisements, identification of spam and malicious programs”

On 21 February 2014, while reading his electronic mail in the mail box under the address *****@gmail.com, A. L. Burkov discovered that the advertising slogans are based on the text of a letter; in addition, the screenshot submitted by him shows that the advertisements, like the letter, are composed in the national language and the Cyrillic alphabet. This fact was not disputed by the Defendant.

Thus, the judicial collegium concludes that, in connection with performing its obligations to third persons under agreements for the placement of advertising and its effective dissemination in its segment of the Google product, Defendant Google LLC conducts monitoring, including of electronic mail, and implements the placement, including in the personal correspondence of the users in the Russian Federation availing

themselves of the Google product, on the basis of the results of its monitoring of specific users of the product.

The argument that Defendant Google LLC does not influence the criteria for the display of advertising because the technical settings of the system AdWords are determined by company ***** is without merit because, as an independent juridical person created under the law of the Russian Federation, the Defendant incurs independent risks, knowing that the software it uses violates the constitutional rights of the citizens of the Russian Federation to the privacy of private correspondence. This argument does not relieve the Defendant from liability for the violation of these rights.

The judicial collegium likewise finds meritless the Defendant's representative's evidence that the owner of the domain name "gmail.com" is company *****. The free electronic mail Gmail service is provided by the American company *****, in which connection Google LLC is not⁴ the proper defendant, because the object of the complaint is not the issue of the physical place where information is kept and the resources used for keeping it, but, rather, the issue of the infringement of the privacy of electronic correspondence by means of appropriate software, in this case by Google LLC.

Part 2 of Article 23 of the Constitution of the Russian Federation guarantees that everyone has the right to the privacy of correspondence, telephone conversations, and postal, telegraphic and other messages. Infringement of this right is permitted only on the basis of court order.

As every citizen is guaranteed the privacy of both correspondence and telephone conversations and other communications, therefore, monitoring of electronic correspondence may be deemed an encroachment on the constitutional rights of citizens.

Based on the aforesaid, the judicial collegium concludes that the Defendant placed advertising in the Plaintiff's message utilizing the results of the monitoring of the plaintiff's electronic correspondence and thereby violated the Plaintiff's privacy of correspondence. Proof to the contrary was not presented to the judicial collegium by the Defendant.

Since A. L. Burkov's right secured by part 2 of Article 23 of the Constitution of the Russian Federation to privacy of correspondence by means of electronic mail of the product Google was violated by the actions of Google LLC, the judicial collegium finds A. L. Burkov's claims to compel Defendant Google LLC to cease and desist from this violation in relation to the Plaintiff well grounded and deserving of satisfaction.

Plaintiff A. L. Burkov also seeks an assessment of compensation for moral damage in the sum of **** Rubles for violation by the Defendant of a personal non-economic right, namely the right to privacy of correspondence.

⁴ Translator's note: it appears from the context of the appellate decision as a whole that the word "not" is a typographical error, because the thrust of the decision is that Google LLC *is* the proper defendant. The translator is informed that the plaintiff will petition for clarification of this point.

According to par. 1 of Article 151 of the Civil Code of the Russian Federation, if a citizen suffers moral harm (physical or moral suffering) caused by acts in violation of his personal non-economic rights, or encroaching on non-economic privileges belonging to him, as well as in other cases provided by law, the court may impose on the violator an obligation of monetary compensation for the harm at issue.

Under Article 1101 of the Civil Code of the Russian Federation, compensation for moral harm is provided in monetary form. The size of the compensation is determined by the court on the basis of the character of the physical and moral suffering caused to the victim, as well the degree of the culpability of the one causing the harm in cases where culpability is a basis for the compensation for harm. In determining the size of the compensation, the requirements of reasonableness and justice must be taken into consideration. In assessing the character of physical and moral suffering, the court takes into consideration factual circumstances under which moral harm was caused, and the individual features of the victim.

Based on the aforesaid, the judicial collegium concludes that A. L. Burkov's claim for compensation for moral harm in connection with established fact of the Defendant's violation of the Plaintiff's constitutional right to privacy of correspondence should be granted. Taking into account the factual circumstances of the case, the violation of the Plaintiff's rights committed by the Defendant, the requirements of reasonableness and justice, the judicial collegium finds that the Plaintiff is entitled to compensation for moral harm in the amount of ***** Rubles.

The plaintiff is also entitled to reimbursement for costs for the payment of government fees in the amount *** Rubles.

In vacating the decision of the court of first instance, the judicial collegium considers it necessary, on the basis of point 2 of Article 328 of the Civil Procedural Code of the Russian Federation, to enter a new decision in which the aforesaid claims will be granted.

Pursuant to Articles 328 - 330 of the Civil Procedural Code of the Russian Federation, the judicial collegium

ORDERS:

The judgment of Zamoskvoretskii District Court of the City of Moscow of 21 April 2015 is vacated.

A new judgment is entered, by which:

A. L. Burkov's complaint against Google LLC is granted,

Google LLC is enjoined from reading A. L. Burkov's personal correspondence,

Compensation for moral harm is awarded to A. L. Burkov and against Google LLC in the amount of ***** Rubles and costs for the payment of government fees in the amount of ***** Rubles.