

The German Bundesgerichtshof applies the latest CJEU case law on liability for linking to search engines

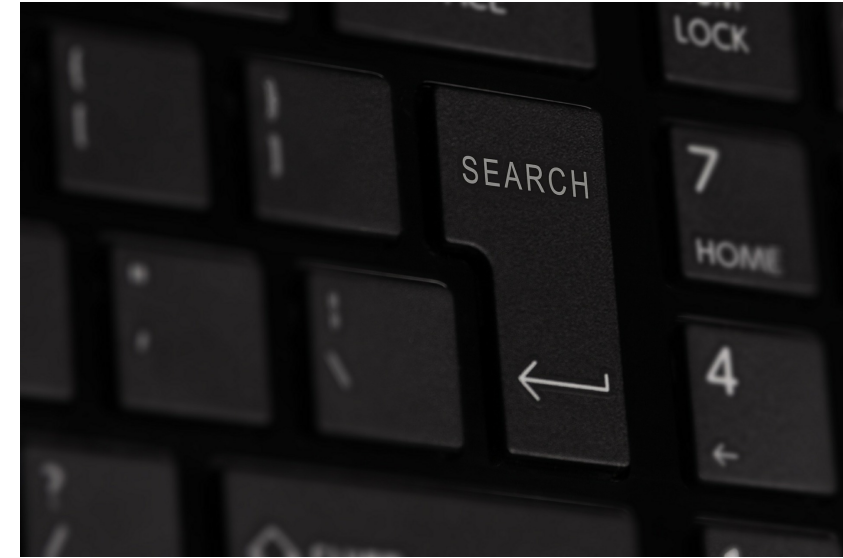
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Decision of the German Bundesgerichtshof of September 21, 2017, file no. I ZR 11/16: "Vorschaubilder III" ("Thumbnails III").

In this decision, the Bundesgerichtshof ("BGH") applies the latest CJEU case law on liability for linking, namely *Svensson* (C-466/12), *GS Media* (C-160/15), *Filmpeleer* (C-527/15) and *BREIN/Ziggo* (C-610/15) to search engines and in particular to Google's picture search. The CJEU established full liability for linkers in cases where they knew or ought to have known that the link went to copyright protected content illegally communicated to the public (CJEU *GS Media* C-160/15, para. 49). The BGH interprets the requirement of "knew or ought to have known" for infringement of the right of communication to the public as a flexible model of duties of care.



Background

The case concerns a claim by the exclusive owner of rights to certain erotic photos against a web service providing a picture search. This picture search was not provided with own tools, but through a mere link to Google's picture search. The pictures at trial could be found on Google's picture search and thus also via the defending internet service. It was in dispute between the parties whether the pictures at trial were freely accessible on the website of the claimant or if they were only available with access restrictions. The results on Google's picture search came from websites, where the pictures were illegally communicated to the public.

The BGH Decision

The BGH applies the latest CJEU case law on full liability for linking, in particular *Svensson*, *GS Media*, *Filmpeleer* and *BREIN/Ziggo*, to search engines and in particular to Google's search services. In this line of cases, the CJEU had developed the requirements for full liability of linkers, in cases where their link went to copyright protected content illegally communicated to the public. According to the BGH, the scenario at trial is within the scope of the fully harmonised right of communication to the public pursuant to Art. 3 (1) Copyright Directive 2001/29 (para. 25 et seq.).

The link by the defending internet service to Google's picture search would be a "communication" within the meaning of the aforementioned CJEU case law (para. 31). Therefore, the BGH had to assess whether the communication was also "to the public". Here, the BGH relied on *GS Media* and *Filmpeleer* to conclude that the communication was "to the public" where the linker "knew or ought to have known" that the link went to works illegally published on the internet (see e.g. CJEU *GS Media* C-160/15, para. 49).

The CJEU also established a rebuttable presumption that for profit linkers knew that the link went to such illegal content. The BGH applied this rebuttable presumption as well (para. 46). Commercial search engines were held to be for profit linkers. Consequently, the burden of proof was on the defendant to establish that the pictures at trial had been published on the claimant's website without any access restrictions. The BGH confirmed that if this were the case (making available without access restrictions) no communication to the public, even through illegal offers on third party websites, could have been established. But such a scenario would be an exception to the rule that every communication to the public needs the consent of the right holder (para. 48). With the burden of proof on the defendant (to prove that the pictures at trial were freely accessible on the claimant's website), the BGH came to the conclusion that there was insufficient proof from the defendant for this. Therefore, the defendant could not rely on the argument that no new public was reached, because the photos at trial were freely made publicly available on the claimant's own website.

Nevertheless, the BGH did not find the defendant to be communicating to the public in the sense of Art. 3 (1) Copyright Directive, read together with the case law from the CJEU. The BGH came to the decision that the defendant did not know and should not have known that the link to Google's search services led to illegal photos. The defendant was not in a position to know or have reasonably known about the infringement (paras. 53 et seq.). Here, the court used a model of balancing of interests and in particular took into account the fundamental right of freedom of speech and freedom of information pursuant to Art. 11 EU Charter. Without search services, a sensible use of the internet would not be possible in practice (para. 56). The Court emphasised the role and function of search services. No general obligation to check all indexed content could be imposed on search engines, as they could not handle such a general monitoring duty (para. 61 et seq.). Rather, the standard for a search engine would have to be as follows: "For a search engine, it would have to be positively confirmed that the search engine knew or ought to have known about a missing consent from the rightholder" (para. 63). Only after knowledge about the illegality, would the search engine provider have a duty in good faith to stop providing its services (para. 67).

It is also interesting to note the specific duties that the BGH applied to search engines after notification and gaining knowledge:

- (1) Word filters could be a suitable tool even if the infringing activity could not be stopped entirely (para. 69).
- (2) Picture recognition was held by the BGH not to be a proportionate tool, as the claimant did not fulfill its burden of proof to substantiate the technical possibility for search engines to use such picture recognition technology (para. 70).
- (3) The take down of the pictures after notification had deleted all use of the pictures from Google's picture search. The claimant had not sufficiently proven that further pictures appeared in the picture search after the notification and Google's take down (para. 71).

At the end of the decision (para. 72 et seq.) the BGH assesses whether *Stoererhaftung* applies and concludes that it does not. *Stoererhaftung* is a German legal tool to find secondary liability for an injunction only. Generally speaking, *Stoererhaftung* requires a causal contribution and a breach of duty of care. The BGH found that no breach of duty of care could be seen; here, the BGH refers to its arguments with respect to the full liability for infringement of the right of communication to the public. Obviously, the BGH thinks that both duties (to find full liability and to find *Stoererhaftung*) run parallel.

Comment and Outlook

The CJEU's case law in *GS Media*, *Filmpeleer* and *BREIN/Ziggo* establishes full liability for linkers that knew or ought to have known that the link went to content illegally communicated to the public. The BGH seems to be of the opinion that the CJEU case law in *GS Media*, *Filmpeleer* and *BREIN/Ziggo* also applies to search engines.

The BGH decision shows that German courts will be ready to apply this knowledge requirement of *GS Media*, *BREIN/Ziggo* and *Filmpeleer* within a flexible model of duties of care for linkers.

However, for search engines, more generous duties apply than for ordinary linkers. This is due to recognition of the role of search engines for the fundamental rights of internet users. Search engines need to be aware of a rights infringement before they have a duty to act. After notification they will have to use a word filter. The threshold for content recognition filters seem to be higher; here, the burden of proof is on the rightholder to substantiate the possibility of using such content recognition filters.

It remains open from the judgment whether duties can go as far as delisting, in particular in cases where a rogue website is notified to a search engine which merely produces links to illegal content. A lot speaks in favour of such a duty following the BGH decision, as the BGH emphasised duties in good faith by the search engine. As a result, it seems to be worth considering using the BGH case law to request from Google the delisting of rogue websites from its ordinary text search.