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

By David Boehmert
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The latest CJEU case law on liability for linking to search engines now provides a more flexible model of duties of care. In particular, the CJEU has held that search engines can be held liable for links to illegal content if they knew or ought to have known that the link went to such content. The BGH decision shows that German courts will be ready to apply this knowledge requirement of Stoererhaftung to search engines.

The link by the defending internet service to Google’s picture search would be a “communication” within the meaning of the fundamental right of communication to the public pursuant to Art. 3 (1) EU Charter of Fundamental Rights. The BGH also established that communication to the public is not necessary for a communication to the public. Even though illegal offers on third party websites could have been established, such a scenario would be an exception to the rule that every communication to the public needs the consent of the rightholder to be an infringement of the fundamental right of communication to the public.

The CJEU also established a rebuttable presumption that for profit linkers knew that the link went to such illegal content. The CJEU applied this rebuttable presumption as well (para. 66). Conversion search engines went beyond for profit links. Consequently, the burden of proof was on the defendant to establish that the pictures at fault had been published on the claimant’s website without any access restrictions. The BGH confirmed that if this were the case (creating available without access restrictions) no communications to the public even through illegal offers on third-party websites, could have been established. 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 or that the rightholder was not aware of the use of its own content. For a search engine, it would have to show a careful search for such missing consent from the rightholder.”

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The BGH Decision

The BGH applies the latest CJEU case law on liability for linking to search engines. The CJEU case law now provides a more flexible model of duties of care. In particular, the CJEU has held that search engines can be held liable for links to illegal content if they knew or ought to have known that the link went to such illegal content. The CJEU applied this rebuttable presumption as well (para. 66). Conversion search engines went beyond for profit links. Consequently, the burden of proof was on the defendant to establish that the pictures at fault had been published on the claimant’s website without any access restrictions. The BGH confirmed that if this were the case (creating available without access restrictions) no communications to the public even through illegal offers on third-party websites, could have been established. Rather, the standard for a search engine would have to be as follows: “For a search engine, it would have to show a careful search for such missing consent from the rightholder.”

Background

The case concerns a claim by the exclusive owner of rights in certain artistic works against a web service providing a picture search. The picture search was not provided with own tools, but through a new link to Google’s picture search. The pictures at fault 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 fault were freely accessible on the website of the claimant or if they were only available with access restrictions. The claimant’s Google’s picture search came from websites, where the pictures were freely communicated to the public.

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