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BGH: Are parents liable for their children? (Germany)

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> *"It held that in the case of a normally developed 13-year old child the condition "fulfils the requirements of his duty to supervise" is met when the parents regularly advise and instruct their children on the fact that illegal activities such as file sharing shall not be permitted."*

In a very recent case (I ZR 74/12; delivered on Thursday the 15th of November 2012) the Federal Court of Justice (BGH) has delivered another judgment dealing with copyright infringement occurring in the virtual sphere, which in this particular case have been committed by a minor through the use of peer-to-peer file sharing networks. The judgment was widely anticipated and has already been labeled a precedent since it seeks to answer the question whether and to what extent the parents can be held (indirectly) liable for their child's actions.

The claimant, a music company, is the copyright holder of numerous musical works. In January 2007, a private company that was engaged by the claimant revealed that under a certain IP address 1147 musical works had been made freely and publicly available. Thereupon the claimant filed a criminal complaint with the public prosecution office.

In 2007, before the right to information was amended in Article 101 of the German Copyright Act, right holders had to report a criminal offence, in order to file a civil lawsuit against the alleged copyright infringer. This was due to the fact that the access provider was not required by law to inform copyright holder as to whom a particular dynamic IP address was assigned to at a certain time (i.e. when the copyright infringement occurred). This information had only to be released to the public prosecutor's office after criminal proceedings had been commenced. In the case at hand it was established that the copyright violations had been committed via the defendants internet connection upon which the competent court ordered that the defendant's property should be searched and important evidence should be secured. On the computer of the defendant's 13 year old son the file sharing software "Morpheus" and "Bearshare" were found. After the claimant had accessed the criminal case files, he delivered a cease and desist notice that was accepted by the defendant. The defendant however, refused to pay damages as well as attorney fees, whereupon the

claimant brought proceedings against him before the District Court of Cologne (Landgericht Köln) asserting that the defendant who was obliged to supervise his child had failed to instruct it on the dangers of the internet in general and on copyright violation and filesharing in particular. Hence, the claim is based on the question whether the defendant has breached his duty to properly supervise his son according to section 832 (1) [of the German civil code (BGB).

"A person who is obliged by operation of law to supervise a person who requires supervision because he is a minor or because of his mental or physical condition is liable to make compensation for the damage that this person unlawfully causes to a third party. Liability in damages does not apply if he fulfills the requirements of his duty to supervise or if the damage would likewise have been caused in the case of proper conduct of supervision."

The district court of Cologne sustained the claim and held that the defendant had not properly supervised his son which was in the following upheld by the Appellate Court of Cologne. The appellate court opined that proper supervision would have required the defendant not only to establish rules as to how the computer and the Internet may be used. It would also have been necessary to regularly ascertain that the child complies with such rules (e.g. by monitoring the software that is installed).

The federal court of justice now has repealed the appellate court's decision and dismissed the claim. It held that in the case of a normally developed 13-year old child the condition "fulfils the requirements of his duty to supervise" is met when the parents regularly advise and instruct their children on the fact that illegal activities such as file sharing shall not be permitted. Parents are in general not required to monitor the children's Internet usage or even deny access to the Internet. This may only be seen differently when there are specific reasons to believe that the child has committed Copyright infringements or other illegal acts on the internets. The previous court overstretches the duties that can reasonably be expected from parents when it determines that they are not only expected to establish rule of conduct and put up technical measures to ensure compliance, such a firewalls and access management, but also closely monitor their children's behavior by random spot-checks and by examining which software it has installed.

Categories: Germany, Jurisdiction, Case law, Infringement, Urheberrechtsgesetz, Filesharing

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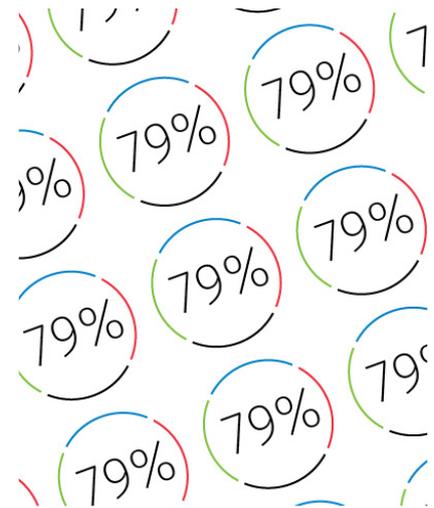
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