Kluwer Copyright Blog

Germany: The Federal Court of Justice and 'the reality' about embedded content

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"The BGH thus insinuates that framing may be a yet "unnamed right of exploitation" within the scope of Art. 15(2) Copyright Act."

On 16th May 2013 the first Senate of the German Federal Court of Justice (BGH), delivered its judgment in another case revolving around the issue of hyperlinking or framing. If one had hoped for a final decision to put the matter to rest, one could only be disappointed, since the BGH referred the case for a preliminary ruling to the European Court of Justice (ECJ). The reference to the ECJ concerns the question whether a website operator who embeds copyright protected videos in his website that is publicly available via another website ("framing") infringes copyright of such videos. The question is thus, whether framing constitutes (yet unknown) communication to the public pursuant to Art 3(1) InfoSoc-Directive (2001/29/EC).

Background

The claimant, a company selling water filtration systems is the copyright holder of a short promotional video entitled "Die Realität" ("The Reality"). The footage is not directly advertising the claimant's water filters, but instead deals with environmental pollution in general and how it affects our drinking water (negative effects on health). In 2010, said video was uploaded on YouTube under a different title without the claimant's consent. Subsequently, the two defendants, each of them an independent sales representative working for a competitor, made the video available on their websites through framing. This means the video was not uploaded by the defendants, but displayed in a frame in which third party content, stored on a different website could be displayed independently. In order to watch the video internet users had to click on a link which then started to play the video by retrieving it from the YouTube server. The claimant maintained that by using the frame the video was made publicly available within the meaning of Article 19a German Copyright Act (Art 3(1) InfoSoc-Directive), which meant that the defendants had infringed upon his copyright. For this reason the claimant filed proceedings before the district court of Munich after unsuccessfully having requested a cease and desist declaration from the defendants.

Procedural History

At first the district court ruled in favour of the claimant and ordered that the defendants were liable for damages. The appellate court (OLG München), however, reversed the decision and dismissed the claim, whereupon the claimant appealed to the Federal Court of Justice (BGH), seeking restoration of the first judgment. The Federal Court of Justice, however, was reluctant to issue a final ruling on the subject and decided that the answer had to be given on a European level and thus referred the case for preliminary ruling to the ECJ. According to the press release the BGH shared the appellate court's opinion, which had rightfully assumed that linking of copyright protected material that was kept available on a third party website through framing could not be construed as "making publicly available" pursuant to Article 19a Copyright Act. This was due to the fact that an owner of a third party website was still in control of such content and might decide whether the content should eventually be accessible to the public or not. But this did not mean that framing was not at all covered by copyright laws.

The BGH thus insinuates that it may be a yet "unnamed right of exploitation" within the scope of Art. 15(2) Copyright Act. Because Art. 15(2) Copyright Act is linked to Art. 3(1) InfoSoc Directive (Art. 3: Right of communication to the public of works and right of making available to the public other subject-matter: (1)" Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them", a reference to the ECJ seems only logical. Provided that the ECJ arrives at the conclusion that framing affects such right of exploitation it better be interpreted in conformity with European legislation which, at the same time, would preclude a "solo run" on national level.

It is too early to fully assess the court's motives let alone the consequences the ECJ judgment might have. A reference to the ECJ was in fact predicted by legal commentators, nevertheless one may wonder if it was bound to happen. In contrast to other areas of Cyberlaw, hyperlinking in the digital sphere was everything but neglected by the German judiciary. In the so called Paperboy Decision (I ZR 259/00) the BGH had to decide on the admissibility of hyperlinking not only discussing the legitimacy of surface links but also of deep links, which make subpages directly accessible. In this case, the BGH found hyperlinking to be legitimate. In a later decision (Session-ID, I ZR 39/08) the BGH, slightly modified its opinion and ruled that linking a website that was protected by technical measures, regardless of whether they fell within the scope of Article 95a CA, constituted "making available to the public" pursuant to Article 19a CA. This, in turn, was done without the rightholder's consent and amounted thus to copyright infringement. In two other cases the BGH dealt with thumbnail previews of Google's image search function (Vorschaubilder I, I ZR 69/08; Vorschaubilder II, I ZR 140/10).

All these cases constituted an ample basis upon which a judgment on the merits could have been founded. But things turned out differently, which may be largely due to the (im-)pending Svensson-Case judgment. But more importantly, framing does indeed vary significantly from "normal" hyperlinking cases. As a digital footnote the latter refers all internet users clicking on the link to a different internet site, whereas in the case of framing, the content is presented within the context of the referring webpage. There is not only a relation between the other content on that website and the audiovisual content in the frame, but the content is also directly perceptible in the context of that webpage, rather than in the context to which the frame refers.

The argument that a third party content provider may exercise a residue of control over the embedded content loses its compelling gravity, when used against the website provider using the

frame. Just like the third party content provider, he may exercise control over the question which content will be embedded and – even more important – which content shall be left aside, i.e. which content shall not appear in the frame. By contrast, the hyperlink is basically indiscriminate, as it refers to another webpage or subpage as a whole.

One may thus wonder why the argument of ultimate control on the side of the third party content provider should implicate that the website provider using the frame should not face any copyright related consequences whatsoever. They may depend on each other, which is equally true for second window rights as provided by Art. 20b ff. CA. Hence it is no coincidence that in recent legal literature a comparison between second window rights and the techniques of hyperlinking were drawn. Although one may seriously doubt whether such comparison is valid when applied to hyperlinks, one may at the same time wonder why this should not equally apply to audiovisual content provided in a frame.

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