Kluwer Copyright Blog

Bestwater: CJEU embeds decision on framed content in order

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"What has not been clarified though is the aspect of unfair competition."

On 21st of October 2014 the Court of Justice of the European Union delivered its *order* in a preliminary ruling procedure (C-348/13), which was referred to the CJEU by the German Federal Court of Justice (BGH) in May 2013. As yet, only the German and French language version of the order have been published.

The case concerned the question whether a website operator who embeds copyright protected videos in his website by framing technology infringes the copyright on these videos. Does framing constitutes a (yet unknown kind of) communication to the public pursuant to Art 3(1) InfoSoc-Directive (2001/29/EC)? Like the Svensson case (C?466/12), this case sparked attention among legal scholars and the ruling was certainly anticipated as it would also shed some light on the question how different forms of content on the internet may be connected with each other. After the judgment in the Svensson case, however, a decision that would favour the claimant's legal reasoning became unlikely.

Factual Background

The claimant, a company selling water filtration systems is the copyright holder of a short promotional video on environmental pollution and its potentially negative consequences on drinking water, entitled "Die Realität" ("The Reality"). In 2010, the video was – allegedly without the claimant's consent – uploaded to YouTube. The two defendants subsequently made the video available on their respective websites through framing, which meant that the video was not uploaded by them, but made available 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, without his consent, made publicly available within the meaning of Article 19a German Copyright Act (Art 3(1) InfoSoc-Directive) and filed proceedings before the district court of Munich. Eventually the case ended up before the Federal Court of Justice, which, due to its implications for European copyright law, was unable to take a final decision and referred the case to the CJEU (for further details please see this earlier blog).

Decision of the Court

The decision of the court is only six pages long and decided by reasoned order according to Art. 99 of the Rules of Procedure of the Court of Justice, which may be admissible where, inter alia, the answer to a question for preliminary ruling can be "clearly deduced from existing case law". To the BGH's credit one has to say that the case law on which the CJEU partly relied in this assessment (Svensson) was not decided by the time the present case was referred to the CJEU.

And thus the CJEU, in reliance on existing case law assumed that in order to establish a new communication to the public according to Art. 3(1) 2001/29/EC the copyright protected work must have been communicated by technical means, which either differ from the technical means with which the initial communication was carried out, or communicated to a new public, i.e. a public that was not taken into account by the copyright holders when they authorised the initial communication to the public.

It should be noted, however, that it was not established in the lower courts if the video was uploaded with or without the copyright holders consent. In first instance it was even considered that this question was irrelevant for the matter of making the work publicly available. For the sake of clarity it would have been good had the CJEU taken both situations (with and without consent) into account.

Neither in the Svensson case nor in the case at hand was there a change in technical means. Consequently, in order to satisfy communication to the public, the work had to be communicated to a new public. In Svensson it had already been established that *"making available the works concerned by means of a clickable link"*, did not lead to the work being communicated to a new public, because the public targeted by the initial communication consisted of all potential visitors to the website. Since access to it was not restricted, all internet users were free to visit it. Although the case at hand dealt with framing instead of hyperlinking, the court referred to the Svensson case where it was stated: *"Such a finding cannot be called in question […] when Internet users click on the link at issue, the work appears in such a way as to give the impression that it is appearing on the site on which that link is found, whereas in fact that work comes from another site"*.

Consequently – as a matter of fact, the internet community may be relieved – the court ruled that embedding a copyright protected work on a website through framing technology cannot be considered communication to the public according to Art. 3(1) 2001/29/EC as long as the copyright protected work is not communicated to a new public nor communicated by technical means that differ from the technical means of the initial communication. For the internet community, most notably private users, it certainly is a favourable decision. What has not been clarified though is the aspect of unfair competition that may still be relevant in a case where two professional sales representatives *'use'* (even if it was only through framing technology) a video

that was produced and made available by a competitor.

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