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Linking to illegal content unlawful under copyright law, according to the German BGH

Jan Bernd Nordemann (NORDEMANN) · Wednesday, February 10th, 2016

Decision of the German Bundesgerichtshof ("BGH") of July 9, 2015, file no. I ZR 46/12 ("Die Realitaet II")

The CJEU confirmed in *Svensson* that linking to content may be a public communication where it reaches a new public. Some issues, however, remained unresolved. One open question is whether linking to illegal content always reaches a new public and thus would in itself be an unlawful public communication. The Dutch Hoge Raad has referred this question to the CJEU (C-160/15 in the case *GS Media BV/SANOMA Media Netherlands BV*).

Interestingly, although this issue has not yet been ruled on by the CJEU, the German Bundesgerichtshof ("BGH") has already answered this question. In a judgment of 9 July 2015, in a continuation of the Bestwater case previously ruled on by the CJEU, it confirmed that linking to illegal content is an unlawful public communication. The key points of the BGH judgment are summarised below:

1. Where a link goes to a copy of a work illegally made available on the Internet, this would be an illegal public communication (para 34).

It is somewhat surprising, however, that the BGH does not see the publication of the link as illegally publicly making available, but as an illegal public communication in the sense of Article 3(1) Copyright Directive 2001/29, "unnamed" in the German Copyright Act (*unbenanntes Verwertungsrecht der oeffentlichen Wiedergabe*); see http://www.gesetze-im-internet.de/englisch_urhg/index.html

This is interesting, as obviously the BGH does not see the link itself as an act of publicly making available under German copyright law. This is probably because the BGH said in an older decision ("*Paperboy*" of July 17, 2003, I ZR 259/00) that linking could not constitute making available. In practice, however, it will make no legal difference for infringement actions in Germany, whether linking to illegal content breaches the making available right or breaches an "unnamed" right of public communication.

2. According to the BGH, the illegality of the link does not depend on whether the work linked to is LEGALLY published on the internet elsewhere (para 34). The BGH says: "Where the copyright owner has not consented to the initial public communication, he could consequently not envisage a

public to which this communication is directed. In such a case, every communication of the work by a third party is directed to a new public in the sense of the case law of the CJEU" *("Hat der Urheberrechtsinhaber die urspruengliche oeffentliche Wiedergabe nicht erlaubt, konnte er dabei zwangslaeufig nicht an ein Publikum denken, an das sich diese Wiedergabe richtet. In einem solchen Fall richtet sich daher jede Wiedergabe des Werkes durch einen Dritten an ein neues Publikum im Sinne der Rechtsprechung des Gerichtshofes der Europaeischen Union.")*. It is also not relevant whether or not it is obvious that the work linked to has been illegally publicly made available (para 34 at the very end).

3. The BGH then discussed whether it is possible for a copyright owner who has consented to his work being made publicly available on the internet to use "respective notifications" to limit his consent to this public communication. In such cases, where the public is notified about the limitation of the consent, a public communication through linking on another website would be directed to a new public and would require the consent of the copyright owner (para 35). The BGH considered that there is a lot in favour of allowing such limiting notifications by the copyright owner. Otherwise, the concept of "public" could mean that the public communication right would be "exhausted" with the first legal publication on the internet, which would be contrary to Article 3 (3) Copyright Directive 2001/29. But the BGH did not finally decide the issue, as in the *Bestwater* case, there was no indication that the copyright owner published such a limiting notification.

4. The BGH had already sent this case to the CJEU before the *Svensson* decision. At the CJEU, the case name was *Bestwater* (i.e. the plaintiff's name), while the German BGH uses the case name "Die Realitaet" (according to the title of the video at trial). The CJEU answered the reference from the BGH very briefly after *Svensson*, generally repeating its statements from *Svensson.* At the time of the reference by the BGH, however, the BGH did not ask a separate question about linking to illegal content, although the plaintiff in the case had always claimed that the link went to an illegal YouTube video. Therefore, the CJEU was not in a position to decide in the *Bestwater* case whether linking to illegal content always constituted an illegal public communication.

Therefore, the BGH was expected to refer the *Bestwater/Die Realitaet II* case once again to the CJEU. The BGH was of the opinion that linking to illegal content breaching the public communication right is not "acte clair" under Article 3 (1) Copyright Directive 2001/29 (paras 43 et seq). In particular, the BGH referred to the *GS Media/Sanoma* reference by the Hoge Raad, which would rule out an "acte clair" (see paras 46 et seq). But the BGH decided not to refer the *Bestwater* case to the CJEU again, or at least to stay the proceedings until the CJEU decision in *GS Media/Sanoma*. The BGH sent the case back to the Court of Appeal Munich in order to find out if the link indeed went to an illegal YouTube video (or to a legal YouTube video). According to the BGH, it was necessary for the "economics of the proceedings" ("*Prozessoekonomie*") to send the case back. But obviously, this is an invitation for the Court of Appeal to wait for the CJEU decision before they finally decide, if the Court of Appeal confirms that the link went to an illegal YouTube video.

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