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German Federal Court rules on Google's Image Search

Germany - Hogan Lovells

Internet issues
Infringement

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- **A recent decision examined whether the display of preview images in search results constituted an act of making available a copyright work in the sense of the copyright law.**
- **The Federal Court of Justice's judgment is of utmost importance for the exploitation of copyright on the Internet.**
- **Interestingly, the Federal Court of Justice decided the case on its own rather than submitting some questions as to the scope of *GS Media* to the ECJ.**

On September 21 2017, the Federal Court of Justice (*Bundesgerichtshof* (BGH)) handed down a judgment of utmost importance for the exploitation of copyright on the Internet. It will become known and referred to under the name *Vorschaubilder III* (*Thumbnail III*). It is already anticipated that it will leave both experts and industry divided. From the perspective of an objective observer, the judges have done nothing but express their view on how the most recent jurisprudence of the European Court of Justice (ECJ) is to be understood and applied at national level. Still, there are aspects in the judgment that will trigger debate.

So far, only the press release has been published, but the core of the judges' reasoning can already be understood from the press release – even though some details remain unclear and vague (BGH, Case Ref.: I ZR 11/16 – *Thumbnails III*).

Background

The defendant is the operator of a website (AOL), on which image searches can be run by way of specific search terms being entered by the user. It is based on a search engine operator's image search services, more precisely, on the Google Image Search. In the list of results produced by the website, small images are displayed to the user, the so-called '*previews*' or '*thumbnails*'.

In June 2009, a total of eight photos of two models were displayed in a results list. The exclusive rights to the photos sat with the applicant. The latter claimed – which ultimately remained unproven – that the photos had been made accessible in the password-protected area of the applicant's website only, to which paying customers only had exclusive access. The applicant argued that the photos in question had been downloaded by customers in an unauthorised manner and subsequently uploaded illegally onto a free and freely accessible website. This was why Google's Image Search had been able to detect the works in the first place. The listing as a preview in the context of an image search was argued to constitute a violation of the photographer's right to make available the photos to the public as set out in Section 19a of the German Copyright Act.

At first as well as at second instance level, the case was dismissed before the courts in Hamburg. Upon secondary appeal, the German Federal Court of Justice has now also ruled in favour of the defendants.

Judgment

The court in Karlsruhe does not regard the display of the preview images as an act of making available a copyright work in the sense of the copyright law. The question of whether the content was uploaded illegally is not seen to be of relevance in this context. The judges reach this conclusion by applying the ECJ's recent case law on the legality of the use of hyperlinks.

Since the decision handed down in the *Svensson* case in 2014, it is common ground that, in principle, the use of a hyperlink is not a copyright-relevant act. It is a mere reference and should not be confused with an act of copying content. More than a year ago, the ECJ added further details to the subject by handing down its *GS Media* ruling. Insofar as the linked content – as in the present case – has been made available to the public without the rights holder's consent, the decisive factor is whether the person who placed the hyperlink onto his website knew or should have known about the illegal nature of the content he linked to. If the said hyperlink is used with the intention of acquisition of gain, i.e. in a commercial context, then the knowledge of the illegality is refutably presumed.

In the present case, the defendant clearly acted with a commercial background. This ultimately triggered the application of the criteria developed by the ECJ in *GS Media*. However, the German Federal Court of Justice in discussing those criteria reached the conclusion that applying the notion of a rebuttable presumption was not appropriate under the given circumstances. In English translation, the press release reads as follows on this aspect:

> "*This assumption does not apply to search engines and to hyperlinks leading to a search engine because of the particular importance of Internet search services for the functionality of the Internet. The provider of a search function cannot be expected to check whether the images found by the search engine in an automated process have been legally posted on the Internet in first place before listing them as thumbnails on its website*."

In consequence, since no positive knowledge and no obligation to have known had been established, the judges decided in favour of the defendant.

Comment

The decision sounds reasonable. The notion of a rebuttable presumption, as set out in *GS Media* for the commercial sector, can hardly be reconciled with the functioning and important task of search engines. It is dangerous to only look at Google in this context. In particular small and mid-size providers as well as start-ups in this field would struggle to comply with meeting the requirements set out to rebut a presumption of positive knowledge. Thresholds are high as regards the practical implementation of the required verification schemes.

Particularly noteworthy in regard to the press release are the introductory words. Read word by word they suggest a pretty far-reaching scope of the decision. For it is stated that the display of copyrighted images found by online search engines generally does not violate copyright law. This statement clearly goes beyond the question of hyperlinking to copyright-protected content.

It is also interesting that the German Federal Court of Justice decided the case on its own rather than submitting some questions as to the scope of *GS Media* to the ECJ. This certainly would have been an option. However, it may be assumed that the answer from Luxembourg would not have turned out much differently.

It may be added that the Federal Court of Justice has already dealt with thumbnail images on the Internet in the past. The judgments, called *Vorschaubilder I* and *Vorschaubilder II*, already show a sympathy for and a benevolent understanding of the need for small images forecasting the actual search result in its original size.

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