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Liability for Hyperlinks

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[Rz 1] In November 2016, the District Court (DC) of Hamburg granted a questionable injunction,[1] which led to exaggerated press reactions.[2]

[Rz 2] In this case, the opponent had set a hyperlink to a third party website displaying an (obviously[3]) altered photo, for which that third party had violated the Creative Commons license, under which the original photo had been published. The court ordered the opponent to cease linking to the website with the (copyright infringing) altered photo because[4] (i) this hyperlink qualified as unauthorised independent publication, (ii) the opponent operated a commercial website and thus responded to a higher standard of fault, and (iii) the opponent had at least fairly accepted the illegality of his hyperlink.

[Rz 3] In its order, the DC of Hamburg drew upon the rulings of the European Court of Justice (ECJ), of which two are outlined briefly:

[Rz 4] In *Svensson et al. v Retriever Sverige AB*[5], the ECJ concluded that one may, without consent of the copyright owner, redirect web users via hyperlinks to copyrighted works on another website if the same audience as foreseen by the copyright owner is targeted.[6] Hence, if the copyright owner already published the copyrighted material on its (freely accessible) website to the general public, it is legal to set a hyperlink to that website content even without a copyright license.

[Rz 5] In *GS Media BV v Sanoma Media Netherlands BV et al.*[7], the ECJ ruled that, to establish whether hyperlinking to copyrighted but freely available works without the consent of the copyright owner constitutes a «communication to the public»[8], it must be determined whether those links are provided *without the pursuit of financial gain* by a person who did *not know or could not reasonably have known* the illegal nature of the publication of those works on the linked website, or not. If the hyperlink is provided for profit, knowledge is presumed, but can be rebutted.[9]

[Rz 6] Unfortunately, the ECJ missed the opportunity to qualify the term «for profit»[10]. The DC of Hamburg has now interpreted this term broadly. Relevant is not, e.g., a per-click-profit but rather an overall commercial qualification of the website.[11] This interpretation captures potentially (too) many website providers. It also remains unclear how far the assessment and clarification regarding the third party's copyright must go. Probably not too far, as the ECJ stated that a website provider hyperlinking to another website «does *not*, as a general rule, *intervene in full knowledge of the consequences of his conduct* in order to give customers access to a work illegally posted on the internet»[12].

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1 Beschluss des LG Hamburg vom 18. November 2016 (310 O 402/16).

2 Jörg Breithut, Urteil aus Hamburg sorgt für Entsetzen im Netz, Der Spiegel online, 9. Dezember 2016, http://tinyurl.com/lnb7gyg.

3 UFOs hovering over a government building.

4 DC Hamburg order 310 O 402/16, para. 40–50.

5 ECJ C-466/12 of 13 February 2014.

6 ECJ C-466/12, para. 24–28.

7 ECJ C-160/15 of 8 September 2016.

8 Art. 3(1) of Directive 2001/29/EC.

9 ECJ C-160/15, para. 46–51 and ruling.

10 ECJ C-160/15, para. 51.

11 DC Hamburg order 310 O 402/16, para. 47.

12 ECJ C-160/15, para. 48 (own emphasis).

[Rz 7] Nonetheless, the DC of Hamburg decision is most likely not the end of hyperlinking (and consequently the Internet). The circumstances of this proceeding were *quite unique*: the opponent did not have legal representation, gave ill-advised answers,[13] and did not appeal the order. Hence, it is unlikely that this order by the DC of Hamburg will set a precedent. It seems fair to assume that under the current ECJ case law hyperlinking to copyright infringing content on third party websites will remain without legal consequences. The pre-condition is that the website provider did not know or ought not to have known about the copyright infringing content. And by the way, neither the ECJ decisions nor the order of the DC of Hamburg apply under Swiss jurisdiction.

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13 The opponent stated in court that «it had not occurred to him in his wildest dreams to verify the necessary publication rights of the third party website provider or to make further investigations relating to copyrights» (English translation).