JONES DAY

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TWO INTERESTING GERMAN DECISIONS ON INTERNET LAW

Over the course of the month of May, the German Federal Supreme Court rendered two important decisions in the area of internet law, shedding some light on issues that had remained unclear and widely discussed for some time. The first decision sets boundaries to the practical assistance performed by the search engine Google in making suggestions to complete the entered search term. The second decision gives a first indication on the admissibility of framing in the opinion of the German Federal Supreme Court, while the ultimate interpretation of the law is left to the Court of Justice of the European Union.

GERMAN FEDERAL SUPREME COURT PROVIDES OPPORTUNITY TO STOP DEFAMATION VIA GOOGLE AUTO-COMPLETE FUNCTION

On May 14, 2013, the German Federal Supreme Court (*Bundesgerichtshof*, hereinafter referred to as "BGH") rendered a decision on the question of Google's liability for defamatory text suggestions made by the so-called auto-complete function (docket no. VI ZR 269/12). The Court held search engines liable for defamatory content as soon as the search engines get notice of such defamatory content. This should enable private persons and companies to request deletion of such auto-complete content by way of a notice and take down procedure.

Facts and Procedural History. The plaintiffs, a German company for nutrition and cosmetics and its founder and managing director, sued Google Inc. for infringement of personality rights in Germany. The founder realized in 2010 that a search of his full name on www.google.de was auto-completed by Google with the suggested text "Scientology" and "fraud."

The plaintiffs requested Google to cease and desist from providing such suggestions to the name search of the plaintiff. The plaintiffs argued infringement of personality rights, stressing that there is no connection between the plaintiffs and Scientology and that there is no reason to link the plaintiffs to any fraudulent behavior. Besides, none of the search results contained a link between the plaintiff and Scientology or fraud. Google denied such claims.

The plaintiffs lost in first and second instance. The BGH, however, vacated the decision of the Appeal Court and ordered the Appeal Court to reconsider the matter with the following legal principles in mind:

- A search engine may use the auto-complete software without being obliged to check every suggested text option in advance;

- Once the search engine operator gets notice of suggested text options that infringe personality rights, the operator has to take all necessary and reasonable measures to stop such infringement.

Decision of the Federal Court of Justice. The BGH held that cease and desist claims of the plaintiffs against Google for infringement of their personality rights cannot be denied. The suggested text options "Scientology" and "fraud" are named in connection with the name of the plaintiffs and affect their personality rights. This is considered as an infringement of the personality rights if these options are not true and therefore constitute an unjustified act against fundamental rights of the plaintiffs.

The BGH also attributes the suggested text options to Google because Google creates these suggestions via software that is based on an algorithm taking into account the pattern of use. Therefore, the BGH imposes reasonable auditing duties on search engines with regard to possible infringements as a result of the auto-complete function.

This does not mean that the BGH considers Google liable for every suggested text option made by the auto-complete function. According to the BGH, it is not reasonable for search engines to legally assess every option in advance. However, once the search engine gets notice of suggested text options infringing the personality rights of a user, it has the duty to prevent such infringement in the future.

Summary and Prospect. The BGH thus applied the liability standards established in their former "eBay-internet-auction I and II" decisions on search engines. This means that search engines should be liable for named infringements of personal rights once they get notice of such infringement if they do not prevent further infringements. This decision should enable companies and private persons to prevent defamatory contents in auto-complete text in the future by way of a notice and take down procedure against the search engine operator.

FRAMING OF VIDEO CONTENT–UNAUTHORIZED COMMUNICATION TO THE PUBLIC?

Now it is the turn of the Court of Justice of the European Union

With its May 16, 2013 decision (docket no. I ZR 46/12), the Federal Court of Justice (*Bundesgerichtshof*) in Karlsruhe referred a question regarding the legitimacy of framing video content to the Court of Justice of the European Union ("CJEU") in Luxembourg and asked for a preliminary ruling.

In general, "framing" is defined as the juxtaposition of two separate web pages within the same web page that break the screen into multiple non-overlapping windows. In the case at hand, YouTube's option to embed video clips on other web sites is the focus of the controversy.

Facts and Procedural History. The plaintiff, BestWater International, a company based in Brandenburg, Germany that produces and sells filtration and purification systems for drinking water, had created a short promotional video about water contamination. This video was anonymously uploaded on YouTube without the plaintiff`s permission. Thereafter, a competitor of the plaintiff embedded the video on its web site in order to advertise its own water filtration system. As a consequence, in the summer 2010, visitors to the competitor's web sites were able to retrieve the plaintiff's video from the competitor's web site. Consumers could follow a link to the video in question, which was then played via the YouTube server while remaining embedded in the competitor's web site in the course of the so-called framing.

In the court proceedings, the plaintiff took the position that the defendant made its video—a copyrightable work—publicly accessible in the sense of Article 19a of the German Copyright Act without its permission and, alleging infringement, demanded damages. In the first instance, the District Court of Munich followed the legal opinion of the plaintiff

and ordered the defendant to pay damages in the amount of €1,000. The defendant successfully challenged this decision, with the Court of Appeals of Munich overruling the decision of the first instance in the appellate proceedings. The plaintiff then appealed to the Federal Court of Justice, seeking revocation of the decision of the Court of Appeals.

Decision of the Federal Court of Justice. The reasoning by the Federal Court of Justice is not yet published; however, the court states in a press release that the Court of Appeals of Munich correctly assumed that the mere linking of content available on a third-party web site by way of framing is not considered "making publicly accessible" within the meaning of Article 19a of the German Copyright Act (*Urheberrechtsgesetz*). This is supported by the argument that the owner of the third-party web site autonomously decides whether the copyrightable work remains accessible to the general public or not.

However, the court raises the question whether this type of framing may violate Article 3(1) of the Directive 2001/29/EC of the European Parliament and of the Council of May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society ("Copyright Directive") and, as a result, also violates Article 15(2) of the German Copyright Act. Article 15(2) of the German Copyright Act provides the exploitation right of the author, and this right must in itself be interpreted in light of Article 3(1) of the Copyright Directive. The wording of Article 3(1) is as follows:

> 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.

Summary and Prospect. The Federal Court of Justice has concluded that embedding copyrighted videos on other web sites in principle does not violate German copyright law. However, the court indicated that such practice may violate European copyright laws and therefore asked the CJEU whether this type of framing may be considered as "making available to the public" in the meaning of Article 3(1) of the Copyright Directive, which in return would result in an unauthorized exploitation of the copyrighted work.

An important consideration for future proceedings might be to distinguish whether the video is embedded for commercial use or for private use only. Further, it might be necessary to check whether the affected video was already uploaded on YouTube with the consent of the copyright owner.

It is now in the discretion of the CJEU to provide some guidance whether framing of videos is regarded as violation of European copyright law, and we are awaiting, as the next step, the opinion delivered by the Advocate General.

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