[DE] Judicial and Legislative Developments on Internet Child Pornography

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Christian M. Bron
Institute of European Media Law (EMR), Saarbrücken/Brussels

On 15 February 2010, the *Oberlandesgericht Hamburg* (Hamburg Court of Appeal - OLG) decided that looking at Internet sites containing child pornography is a criminal offence under Art. 184b(4) of the *Strafgesetzbuch* (Criminal Code - StGB). It overturned the first instance ruling and referred the case back to be heard again (case no. 2-27/09 (REV)).

In the case concerned, the lower instance court had noted that the defendant had accessed files containing child pornography on the Internet in order to look at them. However, since the defendant had not known that the files would be automatically stored on his computer's so-called Internet cache, it had decided that he did not possess the files and was therefore not guilty of an offence under Art. 184b(4) StGB.

The OLG has now decided that the offence described in Art. 184b(4) StGB is not dependent on the user manually saving the file on his computer or being aware that it would be automatically stored on his computer's Internet cache. Rather, the concept of ownership in the provision should also be interpreted as covering immaterial objects such as files downloaded from the Internet. The concept of ownership in Art. 184b(4) StGB, which had been developed with physical objects in mind, should be interpreted more broadly in order to satisfy the purpose of the law and the intention of the legislature with regard to immaterial objects such as Internet or computer files. Moreover, pornographic written materials, as mentioned in Art. 184b StGB, also included data storage media, as could be inferred from Art. 11(3) StGB, to which Art. 184b referred. Data storage media in this sense included files that were themselves stored on data storage media (such as random access memory).

On 17 February 2010, the German President signed the controversial *Gesetz zur Erschwerung des Zugangs zu kinderpornografischen Inhalten in Kommunikationsnetzen* (Act on the obstruction of access to child pornography via communication networks - ZugErschwG). This text, which had already been published in the *Bundesgesetzblatt* (Federal Gazette), makes it possible to block Internet sites containing child pornography (see IRIS 2009-5:12 and IRIS 2009-4: Extra). Art. 2 ZugErschwG, for example, stipulates that ISPs "which offer access to information via a communication network to at least 10,000 customers or other

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beneficiaries must take suitable and reasonable technical measures to make it more difficult to access telemedia services mentioned in the list of restricted content".

It is currently unclear whether content is actually being blocked. The *Bundesministerium der Justiz* (Federal Ministry of Justice - BMJ) and the *Bundesministerium des Innern* (Federal Ministry for Home Affairs - BMI) have reportedly announced that the system is not being used. The BMI is said to have ordered the *Bundeskriminalamt* (Federal Criminal Police Office) not to draw up lists of restricted content or to transmit them to ISPs. Instead, there will be a legislative initiative to remove child pornography from the Internet.

Pressemitteilung des OLG Hamburg

http://justiz.hamburg.de/2097812/pressemeldung-2010-02-16.html

Press release of the Hamburg Court of Appeal

Gesetz zur Erschwerung des Zugangs zu kinderpornografischen Inhalten in Kommunikationsnetzen - ZugErschwG vom 17. Februar 2010

http://www2.bgbl.de/Xaver/start.xav?startbk=Bundesanzeiger_BGBl&bk=Bundesanzeiger_BGBl&start=//*[@attr_id=%27bgbl110s0078.pdf%27]

Act on the obstruction of access to child pornography via communication networks - ZugErschwG, 17 February 2010

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