Court of Justice of the European Union: Embedding Hyperlinks to Legal Content Does Not Constitute Copyright Infringement

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On 21 October 2014, the Court of Justice of the European Union (CJEU) issued a decision in Case C-348/13 (BestWater v. Mebes), following a request for a preliminary ruling from the German Federal Court of Justice (Bundesgerichtshof). The case arose when a water filtering company's marketing video was made available on YouTube and a competitor decided to embed this video on their own website. The filtering company brought an action for damages in the German courts over the embedding of their video.

The question referred to the CJEU was whether "embedding, within one's own website, of another person's work made available to the public on a third-party website", constitutes communication to the public within the meaning of Article 3(1) of the Copyright Directive 2001/29/EC, "even where that other person's work is not thereby communicated to a new public and the communication of the work does not use a specific technical means, which differs from that used of the original communication".

Under Article 3(1) of the Copyright Directive, Member States have to provide authors of works the exclusive right to authorise or prohibit any communication to the public of their works. In other words, the question from the Bundesgerichtshof addressed the issue of whether a person embedding a video from another website without authorisation of the author constituted a communication to the public and thus infringed copyright.

Notably, the Court chose to issue its decision in the form of an order under Article 99 of the Court's rules of procedure. According to Article 99, the Court can issue an order "[w]here a question referred to the Court for a preliminary ruling is identical to a question on which the Court has already ruled, where the reply to such a question may be clearly deduced from existing case-law or where the answer to the question referred for a preliminary ruling admits of no reasonable doubt".

The issue of an order thus makes clear that the CJEU is of the opinion that the pre-existing case law, particularly the Svensson case (see IRIS 2014-4/3), already answered the question for a preliminary ruling by the Bundesgerichtshof. This

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implies that embedding, as long as the same technical means are used for the communication, does not constitute a communication to the public where the communication does not reach a new public. Thus, embedding lawful content which was previously made available online, does not constitute a communication to the public and is therefore exempted from the consent requirement by the copyright holder.

The plaintiff company maintained before the German courts that the video was uploaded to YouTube "without its consent," but the German courts did not rule on this point and therefore the question referred to the CJEU did not address the situation where a video is uploaded without permission. Moreover, due to the fact that the CJEU issued its decision in the form of an order, it did not address the issue of whether embedding unlawful content constitutes copyright infringement. The pending case C-279/13 (C More Entertainment) before the CJEU may clarify this issue.

Beschluss des Gerichtshofs (Neunte Kammer) in der Rechtssache C348/13 BestWater gegen Mebes, 21. Oktober 2014

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30ddad16a67622ca4db48c6fbc5fe08e1f6d.e34KaxiLc3qMb40Rch0SaxuPahz0?text=&docid=159023&pageIndex=0&doclang=DE&mode=lst&dir=&occ=first&part=1&cid=130013

Order of the Court (Ninth Chamber) in Case C-348/13, Bestwater v. Mebes, CJEU 21 October 2014

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