

[DE] Federal Court of Justice rules on de-referencing of search listings and thumbnails by Google

IRIS 2023-7:1/28

*Christina Etteldorf
Institute of European Media Law*

In a ruling of 23 May 2023 (case no. VI ZR 476/18), the *Bundesgerichtshof* (Federal Court of Justice - BGH) decided that anyone who asks a search engine provider to de-reference the results of a general Internet search must prove that the information it contains is clearly inaccurate. However, such an obligation does not apply when images are displayed by a search engine's image search tool (in this case, the "Images" tab of the Google search engine) merely in the form of a thumbnail of the original image published on a different website, to which the search engine provides a link. Rather, such a thumbnail constitutes a separate publication by the search engine operator, the legality of which must be judged independently of its context on the other website, e.g. journalistic reporting. Therefore, if the image search result does not give any context – especially (journalistic) text – justifying the publication of a person's image, the thumbnail must be de-referenced. This applies even if the publication of the image on the other website cannot be challenged.

The decision, which follows a judgment issued by the Court of Justice of the European Union on 8 December 2022 (C-460/20), underlines once again that search engine results on the one hand, and the (possibly journalistic) content of a third party's website on the other, should be treated as two separate publications (in this case, data processing operations).

The case, which concerned an application under the data protection law for data to be deleted, in accordance with Article 17 of the General Data Protection Regulation (GDPR), is especially relevant in a journalistic context. The website of a US-based company (hereinafter: the original website) had contained articles about the plaintiffs that were critical of the investment models of individual companies in which the plaintiffs had held senior positions. They had particularly been accused of dubious business practices. The articles published on the original website had included several images showing the plaintiffs with various luxury goods, e.g. in a luxury car, in a helicopter or in front of a private jet. Whereas the original website's operators claimed that they had sought, through the articles, to help combat fraud prevention in business and in society by publishing information and promoting transparency, the plaintiffs accused them of blacklisting. They said the website operators would first publish negative reports and then offer to delete them or prevent their publication in exchange for so-called protection money.

However, rather than take legal action against the original website, the plaintiffs requested Google firstly to remove the links to the articles from the list of results of general Google searches that included the names of the plaintiffs. Secondly, they asked Google to remove and de-reference the images that were displayed as thumbnails. Google refused to comply with both requests on the grounds that it could not judge whether the claims in the linked articles were true or not and, since the matter was in doubt, would not remove them. Google used the same argument concerning the text-based search results of a general Google search and the images (thumbnails) displayed in a Google image search. The plaintiffs then brought an action before the courts based on Article 17(1) of the GDPR.

After the lower instance courts rejected the claim, the Federal Court of Justice referred the case to the CJEU. In its judgment of 8 December 2022, the CJEU noted that the applicant did not need to have taken court action against the author of the original article published on the original website in order to verify its accuracy before being entitled to lodge a de-referencing application against the search engine operator. However, a claim against the search engine operator under Article 17 GDPR was only valid if the person who submitted the de-referencing request submitted relevant and sufficient evidence capable of substantiating his or her request, i.e. furnished a certain degree of evidence of the assertions' inaccuracy. The thumbnails, on the other hand, had their own independent informative value. The lawfulness of a thumbnail could only be assessed in the context of its publication (in the image search results), not in the context of its original publication (on the original website). In other words, although Google thumbnails should be assessed taking into account any text that accompanied the Google image search results, the (journalistic) context in which they appeared on the original website was irrelevant.

Referring to the CJEU's findings, the BGH decided that the plaintiffs had no rightful claim to have the general search results de-referenced. They had failed to provide the defendant (Google) with the necessary evidence that the information contained in the linked articles was clearly inaccurate. Although previous clarification by a court was not necessary to achieve this, other evidence was needed. Regarding the photographs, on the other hand, the BGH granted the claim under Article 17 GDPR. The publication of these thumbnails constituted a considerable, independent intrusion into people's rights to privacy and protection of their personal data, which could not be justified on account of the absence of any context in the Google image search. This meant that individuals were entitled to request the deletion of images from Google's image search function without further debate unless Google changed how thumbnails were displayed (e.g. by including the original context).

Pressemitteilung Nr. 084/2023 des BGH vom 23. Mai 2023

<https://www.bundesgerichtshof.de/SharedDocs/Pressemitteilungen/DE/2023/2023084.html?nn=10690868>

Federal Court of Justice press release no. 084/2023 of 23 May 2023

Urteil des Gerichtshofs (Große Kammer) vom 8. Dezember 2022, Rechtssache C-460/20, TU, RE gegen Google LLC

<https://curia.europa.eu/juris/document/document.jsf?text=&docid=268429&pageIn dex=0&doclang=de&mode=lst&dir=&occ=first&part=1&cid=3719198>

Judgment of the Court (Grand Chamber) of 8 December 2022, case C-460/20, TU, RE v Google LLC

