The hyperlink problem

ECJ expropriates image authors

In the coming year the EU Commission will engage intensively with the issue of copyright. Existing rules are to be updated on the one hand, while new answers for the questions of our age will be sought on the other. Last month we took the opportunity to outline an approach to the responsibility of platform operators. This time we want to address the problem of links from a copyright aspect.

The statutory parameters for the use of copyrighted works are a good 15 years old, stemming as they do from a time when no one could have imagined the technical possibilities available today. It was a time when a concentration of internet presences in the hands of just a few international groups could not have been foreseen. Even social media, Facebook, Twitter and others were still in their infancy. That is why the regulations on legal responsibility for content have since become problematic; whereas then it was about preventing Telekom and other cable providers from having to control every piece of content even though technically they only transmitted them, now Facebook, Google and Amazon are also appealing to these liability privileges.

Above all, case law of the ECJ has enormously weakened the position of authors by interpreting the pertinent directions of the European Commission based on solely technical aspects. Image authors have been particularly affected by the Svensson (simple linking) and Best Water decisions, in which framing was declared generally permissible. In framing, the content of another website is displayed in such a way on the framer’s website that the user is unable to identify that it is third-party content. The ECJ’s reasons for permitting framing are certainly straightforward: anyone making their works accessible on the internet without technical protection is addressing themselves to the entire internet public; a new website does not constitute a further public and is therefore irrelevant for copyright purposes.

However, the consequence of this case law, which obviously has a free internet in its sights, will be that professional authors, photographers and visual artists will have to consider very carefully whether and in what circumstances they themselves or licensed users can present their works on the internet. Without technical safeguards, they would de facto be giving up their rights, which would lapse at the time of first use if every further user could acquire them by framing and hence save themselves the costs of a separate licence. In that case, then, the first licensed user would also have to compensate the author for the fact that the author was no longer able to license the licensed work – and that would be expensive.

Nobody would think of simply publishing a photograph in another newspaper just because it had already been printed once. On the internet, though, that is to be possible. The consequence will not be that more works are displayed, but rather that the interesting content would have to be protected by access barriers. The internet will not become richer, it will become poorer.

This will also have an impact on culture: as a result of ECJ case law, a few weeks ago the contract finally negotiated between the Deutsche Digitale Bibliothek (German Digital Library) and Bild-Kunst on the presentation of digitised images from collections and archives collapsed – the technical safeguards were too expensive and, as trustee for the rights of members and image authors, Bild-Kunst is unable to grant approval without technical safeguards. So there are no protected images in the Deutsche Digitale Bibliothek. Is that what you really want, Ms Reda? The EU Commission is now looking to change this – and already the supposed friends of a free internet are gearing themselves up for the next campaign. Yet this discussion should be conducted in a fairer and more differentiated manner than the summer indignation about an alleged ban on selfies.

That is because there are various forms of linking that ought to be considered separately – not every link is equal. The traditional form of link is simply a reference to another source on the internet; the URL is provided to facilitate location, but to get to the content you need to leave the linking page. This type of linking is entirely unproblematic in terms of copyright if it leads to the home page of the other website – it is simply the digital equivalent of the traditional footnote. If, though, the link is to content to which the web user would first have to click through the alley up the site by themselves, the picture may be very different. That would be the case if the content provider restricted access to their content, e.g. by requiring registration or a password. Does the provider really have to tolerate anyone being able to get behind their access barrier by means of a link? Can they be expected to install technical bypass protection if the law does not want to protect them? This scenario certainly merits further discussion.

From the point of view of the authors, however, the worst form of link, namely framing, is the most serious interference with their rights, because only if a page has actually been technically protected against framing can the framer, according to ECJ case law, be brought to account.

The question of the admissibility of hyperlinks, therefore, is closely tied up with the fundamental question of what sort of internet we actually want: is interesting content now only really only to be available for display with technical safeguards? Do we only want to be informed of self-filmed cat videos and a few holiday photographs, or do we not much rather want an internet that informs comprehensively and can also (freely) display material that the content provider has not itself created? The traditional information media, newspapers, magazines, radio and television would be inconceivable if they could not access works that the publisher had not created itself, or could not illustrate articles with photographs that the authors themselves had not taken. The necessary rights will be acquired for this third-party material. It is true that this also applies for the new forms of digital media; even a blogger must have acquired the right to use third-party works (through statutory exception or by agreement with the author) – but they must protect their blog by technical means. Do we actually want to restrict this new way of exchanging information and ideas in such a way?

On the question of responsibility on the internet, European legislators would do well to focus not on a technical consideration of the use, but rather on what impression any use makes: if framed content is presented as proprietary content, then it must also be treated as proprietary content – and the provider must be able to demonstrate that it has the right to use the work. In the face of these questions, German case law has developed the criterion of “adopting” content as one’s own and assumed full legal responsibility for content that someone adopts as their own. This is irrelevant according to ECJ case law, however, because it has chosen to take a purely technical viewpoint. We will do what we can to ensure that the “adoption” of third-party content leads to legal responsibility for this content. A solely technical consideration cannot provide legal certainty, though, because technology changes far too quickly for this.

If we want a free, interesting and informative internet, we need rules that protect the authors so that they feel confident and are happy to see their works distributed on the internet. Even if that means framing is no longer possible. This should be borne in mind when the wave of protests against statutory rules on linking is about to break.