
Deep Linking: Legal Certainty in Germany While Debate Continues in the United States

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With a recent decision, the German Federal Court of Justice (BGH) (decision of July 17, 2003, file no. I ZR 259/00) finally resolved the controversy about the lawfulness of deep linking under German law. Previously, some German courts considered such practice to be lawful and others did not (see our Internet Alert of [October 3, 2002](#)). The courts which rejected this practice considered deep linking to be a violation of the data base rights of the website owner according to [Section 87 b German Copyright Act \(UrhG\)](#), which implemented the provisions of Directive 96/9/EC, the so-called [Directive on the Legal Protection of Databases](#).

In the BGH case, the plaintiff, which publishes the newspaper "Handelsblatt," the magazine "DMEuro" and online versions of those publications, sued the Internet search engine paperboy.de, which analyzes a broad range of newspaper articles and provides deep links to those articles. The plaintiff took the view that paperboy's deep linking violated its copyrights in the articles and its database, and also violated Section 1 of the [German Act against Unfair Competition \(UWG\)](#).

The Higher Regional Court Cologne dismissed the plaintiff's claim, and with its recent decision the BGH has now dismissed a further appeal by the plaintiff. According to the BGH, hyperlinking is not a use that can be reserved to the copyright or data-bank owner. Such linking is not unlawful, even if it enables the user to directly access a work product through a deep link. An owner who provides public access to a copyrighted work product on the Internet already facilitates its use by any Internet user. Even without a deep link, a user could directly get to the publicly accessible work product or data with the appropriate URL address. Thus, the deep link is just facilitating such access.

In addition, the BGH did not consider deep linking to be an unlawful exploitation of the work of the plaintiff ([Section 1 UWG](#)). Users were not misled about the origin of the newspaper and magazine articles. The fact that the owner of the Internet site may lose some advertising revenues (because the user bypasses the home page and other pages) did not create a violation of Section 1 UWG. Without deep linking, the BGH believed that it would be practically impossible to make sensible use of the overwhelming amount of information on the Internet.

The BGH has not opined about situations in which a deep link bypasses technical protection

measures intended to limit access information.

However, with the exception of these issues and other particular circumstances, deep linking is now considered to be lawful under German law.

Further Debate in the United States

While the German courts have determined, with some finality, that deep linking is permissible, courts in the United States have continued to waver on the issue. In the last several months, however, new decisions in two long-followed cases have suggested a trend toward permitting deep linking in the United States as well, at least under some circumstances.

Kelly v. Arriba Soft

In previous Internet Alerts ([February 20, 2002](#) and [October 3, 2002](#)), we have discussed the Ninth Circuit's February 6, 2002 decision in *Kelly v. Arriba Soft*. Arriba Soft operates a "visual" search engine, similar to other search engines except that it generates picture links—lower-resolution "thumbnail" versions of images found on other websites—instead of text links. Plaintiff Kelly is a photographer whose work was displayed in "thumbnail" format on Arriba Soft's search engine. If a user clicked on the thumbnail, he or she was transferred to the original, high-resolution photograph located on a deep page within Kelly's website, bypassing Kelly's home page and any content or advertising on it.

The February 2002 Ninth Circuit decision upheld the district court's holding that: (1) Arriba Soft's creation and display of the "thumbnail" images was permissible under the "fair use" exception to the Copyright Act; but (2) Arriba Soft's importation of Kelly's full-sized images into its own frames using inline linking violated Kelly's "public display" rights and did not constitute fair use (in large part because it harmed the market for Kelly's work by reducing his opportunities to sell photographs).

However, on July 7, 2003, the Ninth Circuit withdrew its February 20, 2002 decision and reissued the first part only, holding that Arriba Soft's creation and display of the thumbnail images was permissible fair use. With respect to the second part of the decision (that inline linking violated Kelly's public display rights and was not fair use), the Court withdrew it on the grounds that the parties had not raised it in their partial motions for summary judgment, and thus the district court had exceeded its authority by granting summary judgment on a claim when it had not been requested. The Ninth Circuit remanded the issue to the district court for further proceedings.

Ticketmaster v. Tickets.com

Ticketmaster and Tickets.com are competing online ticket vendors. When Ticketmaster has the exclusive rights to sell tickets to a particular event, Tickets.com uses a "spider" or "crawler" program to search Ticketmaster's website and extract the factual information about that event (date, time, location, etc.) and copy it onto the Tickets.com website, discarding the remaining data (Ticketmaster logos, advertising, etc.). Tickets.com then displays the factual information about the event, along with a deep link to an interior page of Ticketmaster's website where users can purchase tickets for the event, thus enabling users to access details about the event and purchase tickets without

viewing Ticketmaster's home page advertising.

In our [June 7, 2000](#) Internet Alert, we discussed a [March 2000 decision](#) by the U.S. District Court for the Central District of California in *Ticketmaster*, in which the Court stated that hyperlinking, itself, does not constitute copyright infringement.

On March 6, 2003, the same court granted [summary judgment](#) on Ticketmaster's copyright infringement and trespass to chattels claims, holding that:

1. Tickets.com was not liable for copyright infringement because: (a) temporarily copying Ticketmaster's web pages for the purpose of extracting non-protected factual information was "fair use;" (b) URLs (such as those Tickets.com used to link to pages deep within Ticketmaster's website) are "simply an address" and not subject to copyright protection; and (c) Tickets.com's practice of deep linking did not violate Ticketmaster's public display rights because it informed users that they were being directed to another company's website, and transferred users directly to Ticketmaster's site, which contained all of the elements of Ticketmaster's own display.
2. As to the trespass to chattels claim, the Court explicitly broke with certain other courts (which have held that the mere use of a spider, without a showing of direct harm, can be trespass) and sided with scholars and practitioners, holding that the tort of trespass cannot be established without a showing that "the use or utility of the computer (or computer network) being "spiderized" is adversely affected by the use of the spider." Since Tickets.com's "spider" caused no such harm to Ticketmaster's website, the Court granted summary judgment on this claim to Tickets.com. On this point, although inconsistent with some earlier decisions, the Court's judgment was consistent with the California's Supreme Court's recent decision in *Intel v. Hamidi*, which was discussed in our [July 30, 2003](#) Internet Alert.

Based upon these recent U.S. decisions, efforts to establish liability for deep linking will be much more difficult to prove.

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