

HÄRTING-PAPER

Top 10 Court Rulings - Internet Law

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2012 brought another series of decisions of great significance for Internet Law. We have reviewed these and summarised the most important 10 rulings with comments below.

1. German Constitutional Court on the requirement on Telecommunications Providers to transmit data to Public Authorities.

The allocation of a dynamic IP address to an internet connection constitutes an encroachment on the secrecy of telecommunications. There is currently no legal basis for such activity; it is also contrary to the Constitution. The Constitutional Court at Karlsruhe has permitted public authorities temporarily to justify the need for information on the owners of specific IP addresses using the provisions of § 113 TKG and has demanded that the Bundestag issues new, relevant guidelines by 30.6.2013.

Inquiry as well as transmission of telecommunication data requested from Telecommunication Providers by public authorities will need a legal basis in the future. A legal framework must be created that allows the authorities to retrieve data, as for now German Law only provides general ruling for data transmission in the German Telecommunications Act (TKG). The State Parliaments particularly, will have to amend the specific regulations governing when and under which conditions for example the police may access and retrieve mobile phone information.

There are currently no provisions under the German constitution that make it illegal to compile a nationwide register of IP addresses and access codes and for the authorities to obtain automatic access to such a register if § 111 TKG and § 112 TKG are taken as the legal basis. If, however, static IP addresses based on IP V 6 become standard and the register then permits decryption of all internet communication, Parliament should limit the legal basis for creating such a register.

BVerfG on 24/1/2012, 1 BvR 1299/05

2. German Constitutional Court on Google-Adwords: No trademark infringement by Broad Match

Booking a generic term as a keyword is no infringement of a trademark even if the online advertisement is also shown to a user searching by entering the generic term as well as a trademark.

Infringement of a trademark in Keyword-Advertising is basically suspended, if the advertisement appears in a field of commercial clearly separated from the organic search results, accordantly marked and including neither the trademark itself nor a reference to the owner of the trademark or the products offered under the trademark. Therefore Broad Match and the thereby possible combination of trademarks and generic terms are allowed unless the advertisement indicates a relation between the advertising company and the trademark owner.

BGH on 13/12/2012, I ZR 217/10 - MOST-Pralinen

3. ECJ (EuGH) on the Reproduction of Computer Programs

Neither the functionality of a computer program nor the programming language or file format that have been used within the scope of a computer program, are a form of expression of a computer program and therefore not protected by copyright law.

Licensed copies of a computer program can be viewed, examined and tested without the consent of the license holder, in order to explore and determine underlying ideas and principles, as long as the exclusive rights of the author are not violated. A legal replica of a program becomes illegal if parts of the source and object code of the program are recreated and used for the replica.

ECJ on 05/02/2012, C-406/10 - SAS Institute

4. Higher Regional Court at Hamm on Contractors' liability for trademark infringement through Adwords

Online retailers can be held responsible for trademark infringement in Adword advertisements on price comparison search engines. This occurs when not only the actual product sold is listed in the AdWord advertisement, but also trademarks of other products appear, which are not offered by the particular retailer. The retailer is generally held liable for infringements committed by the assigned advertiser.

OLG Hamm on 13/9/2012, I-4 U 71/12 - Liability for Adwords trademark infringement by a counterparty

5. Higher Regional Court at Munich on the Legality of the use of a Third Party Brand as a Metatag

The use of another company's brand name as a keyword in a metatag is not per se illegitimate. In specific cases, particularly criticising a brand name in a metatag is covered by the freedom of speech as long as the criticism is not abusive.

OLG on 02/09/2012, 6 U 2488/11 - Use of Third Party Brands in Metatags

6. Higher Regional Court at Munich on Double-Opt-In

In a - in our view misjudgment - the Higher Regional Court at Munich has ruled that an E-Mail in the context of a Double-Opt-In procedure is illegitimate, if a proof of consent can not be given. The Court considered that in this case even an E-Mail only confirming the order of a newsletter and asking for affirmation has to be qualified as advertising and is therefore forbidden if the addressee has not given his consent to this E-Mail in advance.

This judgment has caused new legal uncertainty and will hopefully be corrected by the Federal Court of Justice.

OLG München on 29.9.2012, 29 U 1682/12 – Double-Opt-In

7. ECJ on the Resale of Used Software

The principle of exhaustion applies equally to software that is not held on physical storage media such as a CD Rom or a DVD, but is an intangible copy, which has been downloaded from the internet with the consent of the owner. On this basis, the resale of used software is legal, provided that the reseller deletes the software completely from his computer after the sale.

Software, which is updated via the internet may also be resold. In such cases, the buyer not only purchases the software but also the permission to update the software permanently, as long as the former owner was also entitled to do so.

ECJ on 03/07/2012, C-128/11 – usedSoft

8. Federal Court of Justice on the Legality of Displaying Copyrighted Work on Search Engines

When a work is uploaded onto the internet by a third party with the consent of the copyright holder, consent also to the use of these works in image meta search hit lists is implicit. This consent extends also to sites on which the works in question have been made accessible without the consent of copyright holder. Legal consent to use a thumbnail of the work follows from the fact that the work was published on the internet with the consent of the copyright holder from the beginning .

BGH on 19/10/2011, I ZR 140/10 - Preview images II

9. Federal Court of Justice on the Liability of File Hosting Services

File hosting services can be held liable by copyright -holders for copyright infringement by users. In order to benefit from this provision, the copyright holder must inform the file hosting service that an infringement of his rights has occurred and that the file hoster did not take all “reasonable economical and technical” steps to prevent the copyrighted material from being accessed by unauthorised persons via third party servers.

With this ruling, the FCJ clearly states that it is not sufficient simply to delete the file in question from the server; the file hoster should also have put a word filter in place. Once a file hosting service has been informed by the copyright owner about an infringement of his copyright, the hosting service must install a word-filter which prevents the file from being found using a name search.

BGH on 12/07/2012, I ZR 18/11 - Alone in the Dark

10. Berlin Regional Court on Facebook “Find your Friends”

The Facebooktool which allows Facebook to send friend requests without the consent of the Facebook member thus contacted violates existing competition law and consumer protection law.

The same violation applies to terms which allow the extensive use of IP content and also to the Facebook privacy policy, which allows the use of data for commercial purposes including the exchange of information with advertising partners.

As German law was chosen as the applicable law, the dispute is governed by German data protection law; this is not precluded by § 1 V BDSG (Federal Data Protection Law) .

LG Berlin on 06/03/2012, 16 O 551/10